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SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON,  
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(45 Kan. 625)

FLORENCE, E. & W. V. R. Co. v. PEMBER.  
(Supreme Court of Kansas. March 7, 1891.)

EMINENT DOMAIN—COMPENSATION—ELEMENTS OF  
DAMAGE—INSTRUCTIONS.

1. "In assessing damages done to land by reason of the appropriation of a right of way through it for a railroad, the liability of teams being frightened, or that additional care by the land-owner may be necessary in the future as to such teams, by reason of the proximity of the railroad, does not of itself constitute any basis for special compensation. Such damages are speculative, and not the proper subject of inquiry and damage." Railroad Co. v. Lyon, 24 Kan. 745.

2. In an action for damages in a railroad right-of-way case, it is not error to permit the following question: "State what this land was worth just after the line was taken by the railroad as a whole tract, taking into consideration the damages the railroad done the land."

3. The instructions of the trial court are the law of the case, for the jury to obey and follow. A finding against the instructions of the court cannot constitute any portion of a judgment. Railroad Co. v. Hutchinson, 40 Kan. 51, 19 Pac. Rep. 312.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Cowley county; M. G. TROUP, Judge.

Geo. R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. McDermott & Johnson, for defendant in error.

STRANG, C. This was an appeal from right-of-way condemnation proceedings. It was tried in the district court of Cowley county before a jury, January 4, 1888, resulting in a verdict for the defendant for the sum of \$1,470. Motion for new trial was overruled, and the plaintiff brings the case here for review.

The first error complained of arose out of the action of the court in refusing to withdraw certain evidence from the jury. The plaintiff was asked the following question: "What other inconvenience arises from the cultivation of the land on the west side of the railroad? Answer. It is very inconvenient in regard to my teams; it frightens my teams to cultivate up close to the railroad." Again, a witness for the plaintiff was asked as follows: "Question. You may state what inconvenience the location of this railroad causes him in the use of his farm. Answer. Another thing, in crossing the road, if you drive your team up there, you have got these gates to open, and leave your team standing while you are doing it. His

horses are generally like mine; he cannot leave them standing safely, and get off and open the gates." The defendant moved the court to withdraw the above answers from the jury, because the matter to which they relate was not a proper subject of damage, and could not be considered in the estimate of damages in the case. This was refused by the court. The question raised on this assignment has already been settled by this court in favor of the plaintiff. Railroad Co. v. Lyon, 24 Kan. 745. But as the findings of the court determine the exact amount of damage awarded the defendant, on account of the matter raised by this evidence, it becomes the duty of the court to modify the judgment to that extent, and let the balance of the judgment, so far as this assignment is concerned, stand.

The second assignment of error relates to the admission of evidence. A witness for the plaintiff was asked the following questions: "Question. State what this land was worth just after the line was taken by the railroad as a whole tract. Answer. Taking into consideration the damages the railroad done the land? Q. Yes, sir. A. I couldn't only put my own estimate upon it. Q. What is that? (Defendant objects to this as incompetent, irrelevant, and immaterial, and calling for a conclusion of the witness, which objection was overruled, and defendant excepted.) A. \$4,500." This court is of the opinion that the question here complained of was a proper one. We think, from an examination of the evidence before and after this question, that the use of the word "worth" in the question was treated by all parties on the trial as equivalent to "value," "market value." There was no objection to its use at any time, and it seems to have been employed constantly throughout the trial.

In the third complaint, the plaintiff alleges that the jury did not obey the instructions of the court. The court instructed the jury that the plaintiff had introduced testimony tending to show that the right of way left a wedge-shaped strip of land on the east side of the railroad, and that by reason thereof the real estate was worth less, and had introduced testimony tending to show that, by reason of the taking of the right of way by the defendant through plaintiff's land, he had been damaged by having his land cut into two pieces, and having gates to open and

close that he did not have before; and then added: "But he has not introduced testimony to prove the amount of such damages. The burden of proof of damages by reason thereof is upon the plaintiff, and, in the absence of testimony as to the amount of such damages which the plaintiff has sustained by reason thereof, you will be justified in finding only nominal damages therefor." The jury should have obeyed the instructions of the court respecting this item of damage. *Railroad Co. v. Hutchinson*, 40 Kan. 51, 19 Pac. Rep. 312. This item of damage, \$60, as found by the jury, will be stricken out. We also think this item should be deducted from the amount of the judgment, because it is apparent that it was included in the amount found in the seventeenth finding by the jury. In this finding the jury return \$743 damage by reason of the railroad passing between the house of the plaintiff below and the public highway. It was this fact that rendered the gates necessary, and resulted in whatever damage was or may be suffered by reason of opening and shutting the same. It is recommended that the judgment in this case be modified by reducing the same to \$1,350, and that the costs be divided between the plaintiff and defendant, each paying one-half thereof.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 562)

#### HEIL V. REDDEN.

(*Supreme Court of Kansas. March 7, 1891.*)

#### RECORD OF DEED—INSUFFICIENT ACKNOWLEDGMENT—EVIDENCE.

Where, on the trial of an action in ejectment, the record of a deed was offered in evidence, purporting to have been made and signed by George H. Case, but the certificate of acknowledgment was to the effect that the execution of the instrument was the act of George H. Crane; and there was evidence that the original deed was not in possession or under the control of the party offering the same; and there is further evidence from the grantee named in the deed that the acknowledging officer, grantor, and attesting witness were dead; and that he was present at the time the deed was executed by George H. Case, and was cognizant of such fact,—*held*, that the record of such deed was admissible in evidence, notwithstanding the apparent error in the certificate of acknowledgment.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

H. C. Root, for plaintiff in error. A. L. Redden and H. H. Harris, for defendant in error.

GREEN, C. This was an action of ejectment brought by Joseph W. Redden, in the district court of Shawnee county, against Joseph P. Heil, to recover the N. E.  $\frac{1}{4}$  of section 11, township 13, of range 16 E. The court gave judgment in favor of the plaintiff for the E.  $\frac{1}{2}$  of the quarter section, and awarded the W.  $\frac{1}{2}$  to the defendant; and the case was brought to this court and decided, and the opinion is found in 38 Kan. 255, 16 Pac. Rep. 743. This court decided that the tax-deed which Heil held,

and under which title was claimed to the N. E. 40 acres of the quarter section, was voidable, for the reason that the whole quarter was assessed and taxed as an entirety, and taxes were paid upon one-half of the land, and then upon one-half of the residue, and the N. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  was sold by the county treasurer for the balance of the taxes unpaid. When the case was again tried in the district court, it was stipulated that the W.  $\frac{1}{2}$  and the S. E. 40 of the quarter section belonged to Heil, which left still in controversy the N. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 11, township 13, of range 16. In the last trial in the court below judgment was rendered awarding this land to Redden, upon the payment of certain taxes, and the plaintiff in error again brings this case here for review. The record discloses the same state of facts as to the tax sale and deed for the land in question as at the former trial in the district court. The plaintiff in error's claim of title is based upon a tax-deed which has been held to be defective, and two years' possession under such deed. The defendant in error claims to be the owner of the patent title, which consists of a patent from the United States to George H. Case, and a deed from Case to Benjamin Hoyt, and a quitclaim deed from Hoyt to him. It seems to be conceded that the legal title to this land is in the defendant in error, if the deed from Case to Hoyt was properly received in evidence upon the last trial of this case. This deed was not in the possession of the plaintiff below, and the record was introduced, which showed that it was made and executed by George H. Case, but, from the record of the certificate of the notary public, it appeared that George H. Crane acknowledged the execution of the instrument. The deed was executed and acknowledged on the 24th day of December, 1857, and filed for record on the 9th day of January, 1858. It was in evidence that George H. Case, John Shannon, the notary public, and A. B. Batterson, the attesting witness, were dead. Benjamin Hoyt, the grantee in this deed, testified that he formerly owned this land; that he purchased it from George H. Case, who executed and acknowledged the deed in question; that he never bought but one tract of land from Case, and did not know George H. Crane, and never had any dealings with him; and that he was present when the deed was executed. The only question in this case is whether there was any evidence offered upon the part of the plaintiff below to prove that George H. Case executed a deed to Benjamin Hoyt. The deed not being in the possession of the plaintiff below, it was competent for the court to receive the record in evidence. This record showed that the deed was made and executed by George H. Case, but it appeared from the record of the certificate of acknowledgment that George H. Crane acknowledged its execution before the notary public. This apparent error in the record is explained by the testimony of the grantee, who was present at the time the deed was executed and acknowledged. It was doubtless a clerical error in transcribing the original

deed. Now, the evidence indicated quite conclusively that the deed was not in the possession of the plaintiff below, or under the control of the grantee, Hoyt, and it was perfectly competent to prove its execution by the best obtainable evidence, which was the testimony of the grantee named in the conveyance, and from his evidence it appears that this instrument was actually executed by George H. Case. This, in our opinion, settles the question of the execution of the deed, and makes the acknowledgment immaterial. *Railway Co. v. Houseman*, 41 Kan. 300, 21 Pac. Rep. 284. The position of counsel that there was no evidence that the deed was ever delivered is not well taken; it was recorded, and that fact carries with it the presumption that there was a delivery to the grantee. 1 Devl. Deeds. § 292. The contention of counsel for plaintiff in error that parol evidence cannot be admitted to contradict what a record imports, has no application in this case. We think it fair to assume, under the existing state of facts as shown in this case, that there was simply an error upon the part of either the notary or the person recording the deed,—nothing more; and, the execution of the deed having been proven, it was immaterial what the record of the certificate of acknowledgment was. In any event, the grantee, or any person holding under him, would not be bound by the errors of a register of deeds in transcribing an instrument, and such errors might be explained. 1 Devl. Deeds, §§ 686, 687; *Poplin v. Mundell*, 27 Kan. 138; *Lee v. Birmingham*, 30 Kan. 312, 1 Pac. Rep. 73. Acknowledging officers and registers of deeds are ministerial officers; neither act in a judicial capacity; any and all mistakes made by them may be explained and corrected by proper proof, as readily as mistakes of any other ministerial officers. *Bank v. Copeland*, 18 Md. 305; 1 Devl. Deeds, § 498. We recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 533)

DEISHER v. GEHRE *et al.*

(*Supreme Court of Kansas. March 7, 1891.*)

CONVERSION—WAIVER OF TORT—RES ADJUDICATA.

1. When the plaintiff in an action has converted certain property of the defendant's to his own use, the defendant may waive the tort, and claim the value of the property converted as a counter-claim, if growing out of the same transaction, or plead it as a set-off, and recover on the implied promise.

2. A judgment in an action of forcible entry and detainer is not a bar to an after-action between the same parties, wherein the issue is not the right to the immediate possession of property, but the value of property alleged to have been converted.

(*Syllabus by Simpson, C.*)

Commissioners decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

*F. G. Hentig* and *E. A. Austin*, for plaintiff in error. *Hazen & Isenhardt*, for defendants in error.

SIMPSON, C. Delsher sued Gehre, the principal, and Klauer, the surety, before a justice of the peace, on a written undertaking that reads as follows: "State of Kansas, county of Shawnee—ss.: Know all men by these presents, that we, Adam Gehre, of the county of Shawnee, state of Kansas, as principal, and Herman A. Klauer, of the same county and state, as surety, are held and firmly bound unto J. R. Delsher, of the same county and state, his heirs and assigns. Dated this 17th day of January, A. D. 1887. The conditions of the above obligation are such that, whereas, H. S. Clark, a justice of the peace for the city of Topeka, Kansas, Shawnee county, did render a judgment in the case of J. R. Delsher v. Adam Gehre, decreeing that the possession of the following premises, to-wit, 8 by 30 feet of ground in the south-east corner of lot No. 170, on Eighth street east, in the city of Topeka, Shawnee county, Kansas, should be delivered unto the said J. R. Delsher; and, whereas, the said Gehre has applied for and obtained a writ of error to the district court of Shawnee county, Kansas, in said case, and a stay of execution therein: Now, therefore, if the above-bounden Adam Gehre and his surety shall not commit or suffer to be committed any waste thereof, and shall pay double the value of the use and occupation of the property from date of this undertaking until its delivery, and all damages and costs that may be awarded against him in case the judgment be affirmed, then this obligation to be in full force and effect; otherwise to be and remain null and void. Dated and signed this 17th day of January, 1887. A. GEHRE. HERMAN A. KLAUER." The case was tried and verdict had before the justice, and an appeal taken to the district court. A jury was waived, and the case tried by the court, who made the following written findings of fact and conclusions of law:

Findings of fact: "(1) That the undertaking on which this action is founded was duly made and filed in this court January 17, 1887. (2) That the petition in error described in plaintiff's petition was affirmed by this court January 27, 1887. (3) That the defendant retained possession of the premises in question up to and including February 25, 1887. (4) That the rental value of the premises, including land and building thereon, from January 17, 1887, to February 25, 1887, both days inclusive, was \$10 per month or for 36 days, was \$12.00. (5) That the rental value of the land without the building was \$4 per month. (6) That the rental value of the building exclusive of the land was \$6 per month for the same time. (7) That the value of the services of plaintiff's attorneys rendered in the district court in connection with the petition in error described in plaintiff's petition was \$15.00. (8) That the plaintiff, J. R. Delsher, had leased the ground described in his petition, together with other ground, from C. K. Holliday, for a term of years, and that Holliday was and is the owner of said ground. (9) That after plaintiff, J. R. Delsher, had leased the ground from Hol-

liday, Delsher entered into a contract with J. Heller, by which Delsher agreed to rent the ground described in plaintiff's petition to Heller for four years, and Heller was to pay him for the use of the ground \$4 per month, and have the privilege of putting up a shop on said ground; and Delsher agreed to pay Heller for his shop the cost price, if he, Heller, at any time wanted to quit the business there; that after Delsher and Heller had made this contract the rent was reduced by Delsher to \$3.50 per month, and when Heller sold to Gehre it was agreed between the parties that Gehre was to pay Delsher the original contract price; that they agreed to make a written lease in accordance with the above facts, but it was neglected, and never drawn up. (10) That Heller built a shop upon said ground of the value of \$125, and, after running a butcher shop there for some months, became sick, and unable to continue in the business; that Heller then sold out all his interest in said building, together with his butcher shop, to the defendant Adam Gehre, and Gehre paid the full value of said building; that Delsher was notified by Heller that he, Heller, had sold out to Gehre, and Delsher was satisfied with the sale, but said that Gehre must pay him \$4 per month for the use of the ground; that Gehre took possession of said building, and built an addition thereto of 10 feet, with the knowledge and consent of Delsher, who was doing business at the next door to Gehre. (11) That after Gehre had been doing business for about — months, and had paid \$4 per month for rent, Delsher notified him that he must pay \$15 per month, instead of \$4; that on the same day that Delsher notified Gehre that he must pay \$15 per month he served upon him a 30-days notice to quit the premises; that Delsher did not raise the rent for the purpose of having Gehre pay it, but for the purpose of driving him out; that when the month's rent became due, Gehre tendered Delsher \$4; that at the end of the second month he tendered him \$8 rent, but Delsher refused to receive it, and Gehre never did pay any further rent for the reason last stated. (12) That Delsher commenced an action January 8, 1887, before H. S. CLARK, a justice of the peace, to recover possession of said premises against Gehre, for forcible entry and detainer; that judgment was rendered for Delsher and against Gehre for possession of said premises January 14, 1887, that Gehre attempted to take the case to the district court on error, but on account of irregularity in the proceedings the judgment was affirmed January 24, 1887. (13) That during the time the case was pending, and after the affirmance of the judgment in the district court, Gehre desired and offered to remove the building from said premises, but Delsher refused to let him remove it, and he was prevented from so doing by Delsher; that, after the decision of the case in the district court, Delsher took forcible possession of said building, and immediately opened a butcher shop in it himself. (14) That Gehre has been deprived of the use of said building by Delsher; that Delsher continued to occupy said building

for a short time, when he sold said building, and has appropriated the money to his own use. (15) That the reasonable value of said building during all of the time since its completion is \$125, and it was worth that at the time Delsher took possession thereof; that the material in the building for the purpose of taking it off the premises was of the value of \$25. (16) That Delsher has never paid Gehre anything for said building, and that all of the foregoing facts occurred long prior to the expiration of four years from the time Heller made the contract with Delsher. (17) That Gehre acted in good faith at the time he bought from Heller, and Heller acted in good faith at the time he sold to Gehre, and at the time Gehre bought and went into possession of said building he believed he could stay there for the unexpired time of the four years under which Heller was occupying it; that at the time Gehre went into said building Delsher received and treated him the same as he had Heller; and the evidence in this case shows no excuse for Delsher wanting Gehre out, except to start a butcher shop in the same building himself. (18) That Delsher had no talk with Gehre, or in the presence of Gehre, prior to the sale of Heller to Gehre, and that the conditions of the lease between Delsher and Heller were not mentioned by Delsher to Gehre, nor by Heller to Gehre in Delsher's presence. (19) That an execution for the possession of the property and costs mentioned in the bond sued upon in this case was issued on said judgment by the justice of the peace February 25, 1887, and placed in the hands of the constable, and that the defendant Gehre paid said costs to the constable, but failed and neglected to give up the key to said premises. (20) That the plaintiff, Delsher, purchased a new lock for the door of said building, at an expense of \$1.25, to replace lock broken by plaintiff in making entry of the building. (21) That November 10, 1886, the plaintiff served upon the defendant the following notice, to-wit: 'A. Gehre: You are hereby notified to quit the following premises, to-wit: The east 8 by 30 feet of lot 170 on Eighth avenue east in the city of Topeka, Kansas, now held by you as my tenant thereof, thirty (30) days herefrom. Nov. 10th, 1886. J. R. DELSHER.' (22) That December 29, 1886, the plaintiff served upon the defendant the following notice, to-wit: 'To A. Gehre: You are hereby notified and required to forthwith leave the premises hereinafter described, to-wit: The 8 by 30 feet of the south-east corner of lot No. 170, on East Eighth street, in the city of Topeka, Shawnee county, Kansas, for the possession of which premises an action is about to be brought by me. Dec. 29th, 1886. J. R. DELSHER.'

Conclusions of law: "(1) That the plaintiff, J. R. Delsher, is entitled to recover from the defendant Adam Gehre, on account of the bond sued on, for rent, double the rental value of said rent as described in conclusion of fact No. 4, to-wit, \$24. (2) That, inasmuch as the action for forcible entry and detainer commenced before the justice of the peace by plaintiff against defendant, as described in conclusion of



fact No. 12, did not determine or settle any controversy between the parties, except the right of possession, and the building situated on said premises was personal property, the plaintiff is liable to the defendant Adam Gehre for the value of said building standing on the premises, to-wit, \$125; and that the amount found due to plaintiff on account of rent from Adam Gehre, to-wit, \$24, be deducted from said sum of \$125, and that the defendant Adam Gehre should have judgment against plaintiff for the balance, to-wit, \$101. (3) That the plaintiff is not entitled to recover against the defendant on account of attorney's fee for legal services described in conclusion of fact No. 7. (4) That, inasmuch as the plaintiff broke the lock in making an entry of the building, he is not entitled to recover from the defendant for the lock described in conclusion of fact No. 20."

A motion for a new trial was made and overruled, and the case is properly here for review.

1. The first complaint made by the plaintiff in error is that the evidence and finding of the court that this plaintiff in error had taken possession of a building belonging to the defendant in error and converted the same to his own use is neither a counter-claim nor a set-off under the Code, and ought not to have been proved or allowed; that it did not arise out of the contract sued on, nor was it connected with the subject of the action, and it was not therefore a counter-claim; and it did not arise out of a contract, and it was not therefore a set-off. It is every-day law that when the property of one person is taken possession of and converted to the use of another the tort can be waived, and an action brought on the implied promise; and while we believe, in this particular case, that the value of the property belonging to Gehre is a counter-claim, he, relying on the promise implied by the possession and use, might recover, if he had brought an independent action; hence we do not deem this to be a reversible error.

2. The next objection is based upon the theory that the judgment in the action for forcible entry and detention is a final determination that the plaintiff in error was entitled to the possession of the lot and building, and that therefore all the evidence and findings of the court of the circumstances under which the building was placed upon the lot were immaterial and irrelevant. We do not understand that the action of forcible entry and detainer is a bar to this defense or counter-claim. Section 160 of the Justices' Code does not seem to contemplate such a result, and the case of *Walte v. Teeters*, 38 Kan. 604, 14 Pac. Rep. 146, does not seem to warrant any such conclusion.

3. The last contention of the plaintiff in error is that, if the court is of the opinion that Gehre could waive the tort and use it as a set-off on the theory of an implied contract, then the measure of his claim was not the value of the building where it was, for Gehre had no right to keep it there, but the value of the building taken away, and under the evidence and finding this was \$25. This will not do. The court

finds that the building was placed on the lot by Heller, under contract with Deisher for four years; and at the expiration of that time, or at any time when Heller wanted to quit the business, Deisher was to pay Heller the actual cost of the building. Gehre, by purchase from Heller, with the acquiescence and recognition of Deisher, succeeded to the rights of Heller. He was entitled to the possession of the unexpired term of Heller, over three years, and actual cost. Deisher would not let Gehre remove the building. It was not removed. It remained in the possession of Deisher, and was in his daily use; and Gehre was entitled to its value as it stood on the lot at the time of trial.

4. The plaintiff in error was not entitled to recover the value of the services of his attorney in the trial of the forcible entry and detainer, either in the justice's or the district court. It is not so nominated in the bond, and we are not cited to any authority allowing it. Believing that substantial justice has been done on the facts presented in the record, we recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 576)

PIERCE v. HOME INS. CO. OF NEW YORK.

(Supreme Court of Kansas. March 7, 1891.)

INSURANCE PREMIUMS—MISTAKE IN POLICY—LIABILITIES.

An applicant for insurance and an insurance company entered into an agreement for the insurance against fire and lightning of several articles of property. The application for the insurance was drawn up by an agent of the company, and signed by the applicant; but, through a mutual mistake of the parties, some of the articles to be insured were omitted. The applicant gave two promissory notes to pay for the insurance; but through a like mistake the amounts of the notes were made sufficient only to pay for the insurance of the articles actually included in the application, and not sufficient to pay for the insurance of all the articles. Afterwards an insurance policy was issued in exact accordance with the terms of the application, and several weeks thereafter it was tendered to the applicant, who refused to receive the same, upon the ground that the aforesaid omitted articles were omitted from the policy. The agent offered to issue a new and separate policy for those omitted articles, or to insert them in the policy already issued; but the applicant refused, and the agent retained the policy. The applicant, however, never demanded or asked for a return of his notes, or for a rescission of the contract. Afterwards the notes became due, and the insurance company sued the applicant thereon. *Held*, that the action may be maintained.

(Syllabus by the Court.)

Error from district court, Clay county; E. HUTCHINSON, Judge.

C. M. Anthony, for plaintiff in error. F. B. Dawes, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Clay county by the Home Insurance Company of New York against D. C. Pierce, on two promissory notes, each for \$49. The case was tried before the court without a jury, and the court found in favor of the plaintiff, and against the defendant, and ren-

erred judgment accordingly; and the defendant, as plaintiff in error, brings the case to this court for review. The facts of the case appear to be substantially as follows: On July 1, 1886, the defendant, Pierce, agreed with an agent of the insurance company that various articles of personal property and real estate should be insured against loss by reason of cyclones, winds, and tornadoes, and that the same property, and also a windmill, pump, grinder, and fixtures thereto, should be insured against loss by reason of fire and lightning. They also agreed upon a rate as to the cost of the insurance, and that such costs should be included in two promissory notes. They attempted to draw up the papers in accordance with this agreement, but in some particulars they failed, as hereafter stated. Two applications for the insurance were drawn up by the agent of the company for the defendant to sign. One was for the said insurance against loss by reason of cyclones, winds, and tornadoes, and the other was for the insurance against loss by reason of fire and lightning. The first one was drawn strictly in accordance with the agreement; but the other, through a mutual mistake of the parties, did not include the aforesaid windmill, pump, grinder, and fixtures. It was perfectly right in all other respects. The windmill, pump, grinder, and fixtures were valued at \$200. The notes sued on were given for the insurance of the aforesaid property. They were intended to be given for the insurance of all the property, but in fact they were given for an amount which the value of the property actually included in the foregoing applications would require, and not for what the whole of the property would require. They were therefore given for too small an amount. They were in fact given as though this omitted property had not been intended to be insured at all. This mistake arose from the former mistake of the parties in not including the windmill, pump, grinder, and fixtures in the application for the insurance against fire and lightning. Both the applications were properly signed by the defendant, and became, in form, his applications for insurance; and they were then sent to the insurance company, which issued to him insurance policies thereon, precisely in accordance with the terms of the applications. These policies were then sent by the insurance company to their agent at Clay Center. Afterwards such agent tendered these policies to the defendant, but he refused to accept them upon the ground of the aforesaid omission of the windmill, pump, grinder, and fixtures from the fire and lightning insurance policy. The agent told him that another and a separate policy for this omitted property could be issued, or that the property could be inserted in the policy already issued; but the defendant still refused to accept either of the policies, or to adjust the difficulty in any other manner; and the agent retained the policies. This refusal on the part of the defendant to accept the policies or to adjust the difficulties was several weeks after the applications and

notes were signed and executed by the defendant. Afterwards the notes became due, and the insurance company commenced this present action thereon, with the result aforesaid. It is also admitted as facts in the case that the defendant never demanded or asked for a return of his notes, or for a rescission of the contract. Of course the parties might, when they discovered the irregularities in the aforesaid application for insurance, and in the insurance policy, and in the promissory notes, have waived such irregularities, and by such waiver have made all the instruments as executed valid and binding. Or they might have rectified the mistakes made in the instruments either by making new ones or correcting the old ones. The insurance company was willing to waive all irregularities or to correct the former mistakes by issuing a new policy, or by correcting the old one; but the defendant objected, and nothing was done. Probably, also, either party had a right to have the notes, application, and policy reformed in equity so as to make them correspond precisely with the original agreement. Certainly the defendant had such a right. In 11 Amer. & Eng. Enc. Law, 346, the following language is used: "A policy which does not conform to the agreement of the parties, whether by fraud or mistake, may be reformed in equity, and damages for a loss decreed in the same case. But such non-conformance must be conclusively proved, and the mistake must be either mutual, or made by one by reason of the fraud of the other." In Wood on Fire Insurance (section 479) the following language is used: "Where the terms of the contract are plain and distinct, and the actual intention of the insurer and insured is not doubtful, a policy issued either by fraud or mistake, that does not comply with the terms of the order therefor, or embody the real intention of the parties thereto, may be reformed in equity, or in those states where the court is permitted to exercise the functions of a court of law and equity, *instantly*, upon trial." In the present case the defendant had the benefit of the insurance of all his property which he desired to have insured, including the omitted property, for several weeks before the mistake was discovered; and therefore could have recovered for any loss from fire or lightning which might have occurred during those several weeks. And as he never asked to have the contract rescinded, and as it never was in fact rescinded, he really continued to have the benefit of such insurance, and could have recovered for any such loss which might have occurred at any time either before or after the discovery of the mistake. Before any loss occurred he could, by a suit in equity, have had the policy reformed so as to make it include the omitted property; and after loss, if any had occurred, he could, according to the authorities above cited, have had the policy reformed, if it needed any reformation, and have recovered for his loss in the same action. If these views are correct, and we think they are, then it follows that the notes were not given without consideration, that no failure of

consideration existed in the case, and that the plaintiff had the right to recover on the notes, as the court below found. The judgment of the court below will therefore be affirmed. All the justices concurring.

(45 Kan. 559)

GLOVER v. LAWLER *et al.*

(*Supreme Court of Kansas. March 7, 1891.*)

RECORD ON APPEAL.

Where the record brought to the supreme court does not show that it contains all the evidence upon which the findings and judgment are based, it cannot be said that they are without sufficient support.

(*Syllabus by the Court.*)

Error from district court, Neosho county; L. STILLWELL, Judge.

E. A. Barber, for plaintiff in error. G. A. Amos, for defendants in error.

JOHNSTON, J. The plaintiff recovered judgment against the defendants in the district court of Neosho county for \$241.07, but, not being satisfied with the amount of the recovery, he brings the case here, and asks a reversal. The case was tried without a jury, and the court made special findings of fact, and the only complaint now made is that the findings and judgment are not sustained by the evidence. It is perhaps unfortunate for the plaintiff that there is no statement in the case made that it contains all the evidence offered on the trial. There is a statement to that effect in the certificate attached to the case made, but this statement is without any force. *Eddy v. Weaver*, 37 Kan. 540, 15 Pac. Rep. 492; *Hill v. Bank*, 42 Kan. 364, 22 Pac. Rep. 324. As the record brought here does not show that it embraces all the evidence upon which the findings and judgment were based, we cannot say that they are without sufficient support. Judgment affirmed. All the justices concurring.

(45 Kan. 612)

ENSIGN v. ENSIGN.

(*Supreme Court of Kansas. March 7, 1891.*)

DIVORCE—AFFIDAVIT—RESIDENCE OF DEFENDANT.

The affidavit required to be made and filed by plaintiff in a divorce proceeding, under section 640 of the Civil Code, stating that the residence of the defendant is unknown and cannot be ascertained by any means within the control of plaintiff, forms no part of the constructive service, but is only intended as evidence tending to show that due service has been made; and such affidavit need not be made and filed within three days after the first publication notice is made. *Larimer v. Enyole*, 48 Kan. 388, 23 Pac. Rep. 487.

(*Syllabus by the Court.*)

Error from district court, Johnson county; J. P. HINDMAN, Judge.

A. Smith Devenney, for plaintiff in error. John T. Little, for defendant in error.

JOHNSTON, J. On August 16, 1886, Daniel Ensign instituted an action in the district court of Johnson county against Caroline C. Ensign, his wife, to obtain a divorce, the custody of their child, and to have certain property decreed to him. For the purpose of making service by publication, and on the same day that the petition

was filed, Daniel Ensign filed his affidavit, setting forth that service of summons could not be had upon the defendant within the county of Johnson or the state of Kansas. He then proceeded to make service by publication in a newspaper, and by the terms of the notice, which was duly published, the defendant was required to answer the petition on October 5, 1886. No copy of the petition nor of the publication notice was sent to the defendant at her place of residence within three days after the first publication of the notice was made. No attempt was made to take a decree at the January term, 1887, of the district court; but on January 24th the plaintiff below filed another affidavit, in which he stated that at the commencement of the action he had no knowledge of the post-office address of his wife, or of her whereabouts, and had no knowledge of her post-office address or residence within three days after the first publication of notice, and that he could not ascertain her post-office address by any means within his control, and that for three months after the first publication was made he did not know and could not ascertain the post-office address of the defendant by any means within his control; and for these reasons he could not send a copy of the petition and notice to her. On February 17, 1887, he sent a copy of the petition and publication notice, addressed to her at Seattle, Wash. T.; but the letter containing them was not called for at the Seattle office, and was returned to the sender on March 5, 1887. At the May term, 1887, the cause was tried, and a decree of divorce granted; no appearance being made by or on behalf of the defendant. On May 14, 1888, Caroline C. Ensign appeared and moved the court to vacate the judgment and decree, on the ground that it had been rendered without jurisdiction of the person of the defendant. It was contended that, as the plaintiff had not inclosed in an envelope addressed to the defendant a copy of the petition and of the publication notice within three days after the first publication was made, no jurisdiction could be acquired, unless an affidavit had been made and filed within three days after the first publication was made that her residence was unknown to him, and could not be ascertained by any means within his control. The court denied the motion, and this ruling is assigned for error. No error was committed. It is true, as contended, that the sending of a copy of the petition and of the publication notice, addressed to the defendant at her place of residence, within three days after the first publication was made, is a part of the service, where the residence is known, (*Lewis v. Lewis*, 15 Kan. 181;) but such copies cannot be mailed to the defendant where her place of residence is unknown; and the making and filing of an affidavit that such residence is unknown, and cannot be ascertained by any means within the control of the plaintiff, is no part of the service, and it is not essential that it shall be made and filed within three days after the first publication is made. This affidavit simply furnishes proof to the court that the

requirements of the statute have been complied with so far as possible, and it must be made and filed before a judgment of divorce can be granted. This question was directly determined in the recent case of Larimer v. Knoyle, 43 Kan. 238, 23 Pac. Rep. 487, and the conclusion there reached sustains the decision of the district court in this case. Following the ruling in that case, we will affirm the judgment in this.

All the justices concurring.

(45 Kan. 606)

**GALE SULKY HARROW MANUF'G CO. v.  
STARK.**

(*Supreme Court of Kansas. March 7, 1891.*)

**ACTION ON NOTE — DEFENSES — BREACH OF WARRANTY — RESCISSION OF CONTRACT.**

The plaintiff sued on a promissory note, which at the end thereof, and immediately before the signature, contained the following words, to-wit: "No promise or contract outside of this note will be recognized." The defendant answered, setting up, in substance, that the note was given for a certain farming implement sold by the plaintiff to the defendant which was warranted by the vendor to be sufficient for a particular purpose, but which was not sufficient for such purpose, and was wholly insufficient, and that the defendant offered to return the implement, and rescinded the contract. *Held*, that such a defense may be made; that the alleged warranty may be shown notwithstanding the aforesaid words in the promissory note; that as the implement sold was essentially different from what it was warranted to be, and would not answer the purpose for which it was warranted, it may be returned, and the contract rescinded; and that the evidence introduced on the trial was sufficient to sustain the verdict of the jury in favor of the defendant.

(*Syllabus by the Court.*)

Error from district court, Greenwood county; A. L. L. HAMILTON, Judge.

This was an action brought before a justice of the peace of Greenwood county on March 18, 1887, by the Gale Sulky Harrow Manufacturing Company against Isaac Stark, for the recovery of \$65 and interest, on the following promissory note, to-wit: "\$65.00. Greenwood Co., State of Kansas, August 7th, 1885. On or before the first day of October, 1886, I promise to pay Gale Sulky Harrow Manufacturing Company or order sixty-five dollars at Eureka Bank, of Eureka, Kansas, value received. If paid at maturity, interest at ten per cent. from August 1st, 1886; but if not paid when due, interest at 10 per cent. per annum from date until paid. No promise or contract outside of this note will be recognized. ISAAC STARK." The defendant answered, setting forth, in substance, that the note was given for a Gale sulky harrow and seeder, sold by the plaintiff to the defendant, and warranted to do good work, which warranty the defendant relied on; that the implement was not as warranted, and that there was a breach of the warranty; that the defendant rescinded the contract, and offered to return the implement; and that he was damaged in the sum of \$100. The plaintiff replied by filing a general denial. By consent of the parties, the case was certified to the district court, where on January 24, 1888, it was tried before the court and a jury, and the jury rendered the following verdict, and made the following findings,

to-wit: Verdict: "We, the jury in the above-entitled cause, do, upon our oaths, find for the defendant." Findings: "(1) Was the note sued on this action given in payment for a Gale sulky harrow and seeder sold by plaintiff, through its agent, to defendant? Yes. (2) Was said implement sold with a warranty? Yes. (3) If said implement was sold with a warranty, was the warranty oral or in writing? Oral. (4) Was the warranty given by an agent of plaintiff? Yes; by agent or salesman. (5) Was the agent of plaintiff authorized to give a warranty? We don't know. (6) Was plaintiff informed that its agent had sold the implement with a warranty? Yes; on or about October 4, 1886. (7) What language did plaintiff's agent use in giving the warranty? If the jury cannot give the exact language used, give the substance. 'Warranted to sow from one to four bushels of seed per acre. Could not be choked out.' (8) Did defendant see the implement before he purchased it, and, if so, what examination did he make of it? Yes; as exhibited by agent or salesman on road. (9) Did the implement comply with the warranty? If not, in what respect did it fail? No; failed to sow the required amount of seed, and would choke out. (10) Was there any defect in the implement at the time it was delivered to defendant? Yes. (11) If there was any defect in implement or in its construction at the time it was delivered to defendant, what was that defect? It failed to work as warranted. (12) If the implement sold to defendant did not do good work, was it the fault of the implement, or was it the fault of the person using it? It was the fault of the implement. (13) If the implement did not comply with the warranty, when did defendant first discover that fact? In spring of 1886. (14) Did the defendant return, or offer to return, the implement? Yes. (15) If defendant offered to return the implement, state when, and to what person, he made the offer? To H. A. Dales, about October 4, 1886. (16) What language did defendant use in offering to return the implement? If the jury cannot give exact language, give substance of language used. 'I will give you thirty-five dollars and the machine as a compromise, rather than to go into a lawsuit.' (17) What authority had the Eureka Bank or its employees from plaintiff? As collecting agents. (18) Where did defendant keep the implement, and what care did he take of it during the time it was in his possession? Outdoors, by his granary or stable. The same care he gave his other farming implements. (19) If the defendant at any time offered to return the implement to plaintiff, in what condition was the implement at that time? About the same as when received, except the wear. (20) Was the implement ever at any time returned to and received by plaintiff? No. (21) If the defendant at any time offered, through the Eureka Bank, to return implement to plaintiff, the jury may state whether such offer was made by way of compromise. State the terms of the offer. Yes; to avoid lawsuit." Upon this verdict and these findings the court rendered judgment in

favor of the defendant, and against the plaintiff, for costs; and the plaintiff, as plaintiff in error, brings the case to this court for review.

*Jones & Schultz* and *C. W. Shinn*, for plaintiff in error. *W. S. Marlin*, for defendant in error.

VALENTINE, J., (after stating the facts as above.) In this action we think the defendant had the right to prove a parol warranty of the sufficiency of the implement purchased for the purpose for which it was purchased, notwithstanding the words contained in the instrument sued on, to-wit: "No promise or contract outside of this note will be recognized. ISAAC STARK." Upon the face of the note it would seem that Stark, the promisor, the one who signed the note, would be the person who would not recognize any other promise or contract outside of the note. See, also, *Thompson v. Manufacturing Co.*, 29 Kan. 476. We think there was also sufficient evidence from which the jury might find a warranty. The implement was sold, however, by an agent of the plaintiff; but as such agent had the entire control of the property, and assumed to have the right to make the warranty, and as the defendant had no notice to the contrary, and as a warranty, at least to the extent of the price of the property, would seem to be within the scope of the agent's authority, and as the company afterwards accepted the fruits of the agent's sale, we would think that the facts would authorize a holding that the agent did have sufficient authority to make the warranty. We also think that the defendant had a right to prove a rescission of the contract of purchase and sale, and his offer to return the property to the plaintiff. Upon this question there is a conflict of authority. Some courts hold that where the title to the property has passed to the vendee, and no fraud can be shown on the part of the vendor, but only a breach of the warranty, the vendee cannot rescind the contract; but other courts hold otherwise, and this court seemingly holds otherwise. *Weybrick v. Harris*, 81 Kan. 92, 1 Pac. Rep. 271. In the case just cited it is held that the vendee has one of two remedies: *First*, he may return the property and rescind the contract; or, *second*, he may affirm the contract, and sue for damages for the breach of the warranty. In 3 Amer. & Eng. Enc. Law, 929-932, the following language is used: "A contract may be rescinded when the entering into the same has been induced by a false representation, fraudulent or otherwise, made by a party thereto, provided such representation be one of fact, (this rule does not apply to cases of actual fraud,) as distinguished from either matter of law or mere opinion or intention; that it be such as to induce the contract; and that it be made as part of the same transaction. Such a contract, however, is voidable, and not void, and cannot be rescinded if the parties cannot be put *in statu quo*, nor after third persons have for value acquired rights thereunder; and the rescission must take place within a reasonable time, notice of the election to rescind

having been communicated to the other party, though this may be done by bringing suit to have the contract set aside. Otherwise the right of rescission will be considered waived by acquiescence." We think this is a correct statement of the law, although there are some authorities to the contrary. See 1 Benj. Sales, (4 Corbin's Amer. Ed.) §§ 623-635, and especially sections 623-634. It is not necessary in this case that we should hold that in all cases of a breach of warranty in the sale of personal property the vendee may return, or offer to return, the property, and rescind the contract; but we think that such is the rule for cases like the present, where the property purchased and received is substantially different from what it was warranted to be, and will not answer the purpose for which it was warranted. It must also be remembered that in the present case nothing had been paid for the property when the contract was rescinded, but only a promissory note had been given for the purchase price thereof. Of course, an offer to return the property, where the offer is refused, answers the same purpose as an actual return, provided that the property is retained for the benefit of the vendor whenever the vendor may choose to receive it. In this case the vendee offered to return the property, and then kept it for the plaintiff, and at all times he kept it just as safely and as well as he kept his own property. The offer to return the property was on two different occasions and to two different agents of the plaintiff. On the first occasion the agent had the note sued on in his possession, and was attempting to collect the same. On the other occasion the agent was at the defendant's house attempting to collect the note; and, while the implement was present and in sight of both the agent and the defendant, the defendant offered to return the same. The plaintiff itself was a non-resident of the state of Kansas, and a resident of Detroit, Mich.; and it does not appear that the plaintiff had any resident agent in Kansas to whom the property could be returned, until about the time when the defendant offered to return the same, and the defendant offered to return the same just as soon as he could find any agent of the plaintiff to whom he could make the offer. Many objections are made by the plaintiff to the instructions given by the court to the jury, and to its refusal to give other instructions asked for by the plaintiff; but still we think the case was fairly submitted to the jury, upon proper and sufficient instructions. The principal questions involved in this case, as it was tried in the court below, were whether the implement sold by the plaintiff's agent to the defendant was warranted to be sufficient for a particular purpose or not, and whether it was in fact sufficient for such purpose, or was essentially insufficient. These questions were questions of fact, and we think they were fairly and properly submitted to the jury, and the jury found against the plaintiff, and in favor of the defendant, and the court below approved the verdict, and we do not now think that we can disturb such verdict. The agent who

sold the property to the defendant seems to have been an itinerant salesman, who could not afterwards be found by the defendant; nor could any agent of the plaintiff be found by the defendant until the note sued on was presented to him for collection, and the defendant did not even know where the place of business of the plaintiff was. We cannot say that any material error was committed by the trial court, and therefore its judgment will be affirmed. All the justices concurring.

(445 Kan. 644)

**MCLEAN V. WEBSTER.**

(*Supreme Court of Kansas. March 7, 1891.*)

**LIABILITIES OF HEIRS — SALE OF REAL ESTATE — SECONDARY EVIDENCE — COVENANT OF WARRANTY.**

1. The case of *Shoemaker v. Brown*, 10 Kan. 383, followed.

2. The district court has jurisdiction to subject real estate which the heir at law or devisee has inherited from his father, for the debt of the father, where there has been no administration of the estate, and where there are no other debts or claims against the estate.

3. A warranty in a deed for quiet and peaceable possession is broken by an eviction of the grantee under a foreclosure and sale on a prior mortgage upon the premises.

4. The records of a register of deeds may be received in evidence to prove an instrument authorized to be recorded by the statute therein, when the original thereof is not in the possession or under the control of the party desiring to use the same. If it appears that the written instrument has been executed to the adverse or opposing party, and the party desiring to use the same is not entitled to the custody thereof, the presumption is that it is not in his possession or under his control.

(*Syllabus by the Court.*)

Error from district court, Coffey county; CHARLES B. GRAVES, Judge.

On the 11th day of October, 1884, Mehit-able S. Webster commenced her action against Charles McLean, the minor child of William McLean, deceased, to recover the sum of \$1,050, and interest, and also to subject the S. W.  $\frac{1}{4}$  of section 34, township 21, in range 15, to the payment of said claim. Upon the same day she obtained an order of attachment, which was levied upon the real estate above described. Service was made by publication. S. C. Jenkins, Esq., was appointed by the court guardian *ad litem* for Charles McLean, the minor. He filed an answer, which was not verified. Subsequently amended pleadings were filed. Trial had on the 15th day of July, 1887, before the court, a jury being waived. After hearing the evidence and argument of counsel, the court took the case under advisement. On the 26th day of November, 1887, the court filed its conclusions of fact and of law, as follows: "(1) That on the 9th day of September, 1859, William McLean was the owner of the north eighty acres of the south east quarter of section twenty-five in township 21, of range fourteen, in the county of Coffey and state of Kansas, and on that day mortgaged the same to Thomas Champion, to secure the payment of one hundred and one dollars and interest; and such mortgage was recorded in the office of the register of deeds of said Coffey

county, September 9, 1859. (2) That on the 24th day of September, 1861, said William McLean executed and delivered to the plaintiff the deed set out in the petition for the sum and consideration of four hundred dollars paid by the plaintiff in money to the said William McLean at the time of the delivery of the said deed to her, and that no part of the said purchase money has ever been paid back to the plaintiff, and that the said deed was duly recorded in the office of the register of deeds of said Coffey county on the 13th day of June, 1865. (3) That on the 15th day of March, 1866, said Thomas Champion commenced his suit in the district court of Coffey county to foreclose the said mortgage to him before mentioned, and on May 30, 1866, obtained a decree, in pursuance of which the said mortgaged premises were duly sold and conveyed to said Champion on the 7th day of December, A. D. 1866. (4) The plaintiff had no actual knowledge or notice whatever of the existence of said mortgage, nor of the suit to foreclose the same, and was not a party to such suit and foreclosure, and her first knowledge of the said mortgage and suit and sale was in the year 1869, to which date she paid the taxes on said land. (5) That said land was open and unoccupied until after the commencement of this suit, several persons having claimed to own said premises since said foreclosure by virtue of conveyances from the said Thomas Champion. (6) In the spring of 1862 said William McLean left the state of Kansas, and never subsequently resided therein, or has been within said state. The plaintiff at the time of her said purchase of the said land aforesaid was, and continually ever since has been, and now is, a resident of the city of Leavenworth, state of Kansas. (7) The said William McLean died in the territory of Montana in the year 1882, leaving a will, by the terms of which he devised to his son, Charles McLean, the defendant in this suit, the land attached in this suit, to-wit, the south-west quarter of section 34, in township 21, of range 15, in the county of Coffey, state of Kansas, which said lands were and are the only property of any kind within the state of Kansas owned by the said William McLean at the time of his death. The said will was duly probated in the said territory of Montana before the commencement of this suit. (8) At the time this suit was commenced the defendant was and still is a minor, and was not then, and never has been, a resident of the state of Kansas. (9) No letters of administration on the estate of said William McLean, deceased, have been issued in the state of Kansas, nor executor of his will appointed or recognized in the said state, nor has any one offered or attempted to administer upon the estate of the said William McLean, deceased, in the state of Kansas. (10) That the lands attached in this suit are worth the sum of twenty-eight hundred dollars. (11) That there is due to the plaintiff the sum of four hundred dollars, paid to the said William McLean as the consideration for the lands described in the deed from him to the plaintiff, described in the petition

herein, with the interest thereon since September, 1861, which said sum and interest now amount to the sum of eleven hundred and thirty-two dollars and thirty-four cents, (\$1,132.34,) no part of which has been paid." Conclusions of law: "That the plaintiff is entitled to judgment against the defendant for the sum of \$1,132.34, so found due her, and interest, and costs of this suit, and that the lands attached in this suit, to-wit, the southwest quarter of section 34, in township 21, range 15, in the county of Coffey, state of Kansas, be sold according to law, and from the proceeds of such sale the costs hereof be paid, and the plaintiff be paid the sum of \$1,132.34, with interest from the date of entry of said judgment." Thereupon the defendant, by his guardian *ad litem*, filed his motion for judgment upon the findings of fact. This motion was overruled, and then the defendant, by his guardian *ad litem*, filed his motion for a new trial. This was also overruled. Judgment was rendered in favor of the plaintiff and against the defendant for \$1,136.50 and costs, taxed at \$70.35. The attached property was ordered to be sold, and the proceeds thereof applied to the payment of the judgment and costs. The defendant, by his guardian *ad litem*, excepted, and brings the case here.

*Redmond & Jenkins*, for plaintiff in error. *G. E. Manchester* and *T. A. Hurd*, for defendant in error.

HORTON, C. J., (after stating the facts as above.) The contention of the minor, Charles McLean, through his guardian *ad litem*, is that the amended petition did not state facts sufficient to give the district court jurisdiction of the subject-matter of this action, because the statutes of the state provide full and complete remedies in the probate court for the collection of all claims against the estates of deceased persons, and therefore that the probate court of Coffey county is vested with the exclusive jurisdiction of the subject-matter. William McLean, the father of Charles McLean, died in Montana in 1882, leaving a will, by the terms of which he devised to his son, Charles McLean, the land attached and ordered to be sold. No letters of administration on the estate of William McLean, deceased, have been issued in this state, and no executor of his will has been appointed or recognized in this state. By the common law, the heir at law or devisee is personally liable for the debts of his ancestor to the value of the property received from him. Rawle, Cov. pp. 514, 519, 522, §§ 309-311; 2 Greenl. Ev. §§ 356, 357; 4 Bac. Abr. 410; Gen. St. 1889, par. 2592. The original petition is essentially a bill in equity to enforce the claim and lien upon this land, and such purpose is fully shown. In *Shoenaker v. Brown*, 10 Kan. 383, it is said that "the courts in chancery always had paramount jurisdiction over the estates of deceased persons, and generally had jurisdiction over all trust-estates. Therefore, if the district courts of this state had full chancery powers in this respect, then they must have jurisdiction in cases of this kind. \* \* \*

The mere giving of jurisdiction to one

court does not show that it must be exercised exclusively by that court. The constitution gives to the supreme court original jurisdiction in *quo warranto*, *mandamus*, and *habeas corpus*, (article 3, § 3;) and also gives to the probate courts original jurisdiction in *habeas corpus*, (Id. § 3;) but still it has never been supposed that either of these courts had exclusive original jurisdiction in any of these matters, for the legislature has given such jurisdiction also to the district courts. \* \* \*

We think it could not have been intended by the legislature to limit in any respect the jurisdiction of the district courts by passing the acts conferring certain jurisdiction upon the probate courts. It was simply intended to confer such jurisdiction upon the probate courts, and to leave the other courts to exercise just such jurisdiction and powers as the other statutes had given or should give to them. The act concerning executors and administrators shows this. Sections 83 and 86 of said act show that it was not the intention of the legislature to confer upon probate courts exclusive original jurisdiction in suits against estates." This case is not like *Fox v. Van Norman*, 11 Kan. 214. In that case it was attempted to personally charge the widow of her deceased husband as an executor *de son tort* with the liabilities which attached at common law. This, it was held, could not be done under the statute. It is not shown or claimed that there were any other debts against the estate of William McLean, deceased, and the property attached is the only property of the decedent within this state. After the attachment the action was in the nature of a proceeding to subject the land of the decedent within this state to the payment of the claim stated in the petition. Therefore, in the absence of any administration, we cannot perceive any good reason for holding that the district court had no jurisdiction to hear and determine the subject-matter before it. "Generally, while the estate is in the course of settlement in the probate court, the district court will not exercise its jurisdiction, and this for the reason that the jurisdiction of the district court in such cases is equitable only, and the parties have a plain and adequate remedy in the probate court." *Gafford v. Dickinson*, 37 Kan. 290, 15 Pac. Rep. 175; *Kotham v. Markson*, 34 Kan. 550, 9 Pac. Rep. 218; *Stratton v. McCandless*, 27 Kan. 306; *Collamore v. Wilder*, 19 Kan. 67; *Johnson v. Cain*, 15 Kan. 532. The estate of William McLean, deceased, was not in the course of settlement in the probate court when this action was brought.

The next contention is that the deed from William McLean to Mehitable S. Webster is not a deed of general warranty, and, further, that plaintiff below was never evicted from the land described in the conveyance to her. The warranty in the deed is in these words: "And the said party of the first part and his heirs, the said premises, in the quiet and peaceable possession of the said party of the second part, her heirs and assigns, against the said party of the first part, his heirs and assigns, and against all and every person and persons whomsoever lawfully



claiming or to claim the same, shall and will warrant and by these presents forever defend." This is a warranty of peaceable possession, and was broken by an eviction under a paramount title. The land was sold and conveyed on the 7th day of December, 1866, under proceedings to foreclose a mortgage dated the 9th of September, 1859, which was prior to the deed from William McLean to Mehitable S. Webster of the 24th of September, 1861; therefore, the plaintiff below could not redeem, except by paying the prior mortgage lien thereon. Under this lien she was deprived of all title, and a breach of the warranty in the deed occurred.

The other contention is that the trial court erroneously received in evidence several records from the office of the register of deeds of Coffey county to prove conveyances of the land deeded by McLean. It is urged that these records ought not to have been received in evidence until it was shown that the original conveyances were not in the possession or under the control of the plaintiff below. Civil Code, §§ 372, 387a; Gen. St. 1889, pars. 1136, 1137. The deed from William McLean to Mehitable S. Webster, of the 24th of September, 1861, was a part of the amended petition, and, as the answer was a general denial only, and not verified, its execution was admitted. The other records received in evidence were written instruments authorized by the statute to be recorded in the office of the register of deeds, the originals of which did not belong to plaintiff below. They had been executed to adverse or opposing parties. The presumption is that they were not in her possession or under her control. As nothing appears in the record to the contrary, the court committed no error in permitting the copies in the office of the register of deeds to be received in evidence. Other matters are discussed in the brief, but they are unimportant, and not even prejudicial. The judgment of the district court will be affirmed.

All the justices concurring.

(15 Kan. 589)

**RICHARDSON v. SAMUELSON.**

(Supreme Court of Kansas. March 7, 1891.)

**ACTION ON CONSTABLE'S BOND—DEFECTIVE PLEADING—AIDED BY JUDGMENT.**

A petition on a constable's official bond, challenged for the first time after judgment, considered, and found sufficient to support and sustain such judgment.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Wyandotte county; O. L. MILLER, Judge.

N. Cree and D. B. Van Syckle, for plaintiff in error. Scroggs & Gibson, for defendant in error.

**GREEN, C.** This was an action on a constable's bond. The defendant answered, but, through mistake of counsel, no defense was made. Judgment was rendered in favor of the plaintiff, but no motion was made for a new trial. The case is brought by the plaintiff in error to this court, and a reversal is asked for errors going to the foundation of the action and judgment,

apparent from the record. The first objection urged against the petition is that it does not set out a cause of action, or allege title to the property taken by the constable. The petition alleges that Samuelson, the defendant in error, was in possession of certain property, by virtue of a chattel mortgage, and complaint is made that no ownership was thus alleged. This may be true, in the first part of the petition, but it is stated in another paragraph that Richardson seized and held property belonging to the plaintiff, and that, by reason of his seizure and holding of goods and property of plaintiff, a right of action accrued to him on the bond and against the sureties. This we think a sufficient allegation to uphold a petition, after judgment.

It is next contended that there was no statement of facts in the petition showing that plaintiff had a right to the possession of the mortgaged property; that the plaintiff below sued as mortgagee, and should have alleged by proper averments that he was entitled to the possession of the property levied upon. A reference to the petition discloses that it contains an allegation that Richardson, as constable, seized certain property while in the possession of the plaintiff, and by force removed it from his possession, and refused to deliver the same to him. This we think a sufficient averment of possession, and that such possession was interfered with by the constable.

The plaintiff in error further insists that the petition and judgment in this case are based upon the assumption that an extra official act of an officer constitutes a breach of the bond; that, in the face of the express recital of the judgment, the officer had no process authorizing his acts, and that what he did was without right or authority; that no judgment on the bond was legal, because the act recited was a mere trespass upon the part of the officer. The answer was a justification that the property seized was taken by virtue of a writ of attachment issued by a justice of the peace, and that it was in pursuance of such writ that the goods were levied upon. The language of the judgment is that Henry W. Richardson, constable, had no process authorizing him, as constable, to seize and take the property in controversy from the possession of the plaintiff, and not that he had no process; so that the position of counsel for plaintiff in error is not tenable upon this point.

A further objection is made that no breach of the condition of the bond was averred in the petition, and that no cause of action arises on an official bond until a breach, and the fact of a supposed breach, is distinctly stated by proper allegations. A reference to the petition is an answer to this objection. The allegation of the petition is that Henry W. Richardson, as constable, seized the property in question while in the possession of the plaintiff, and by force removed it from his possession, and still refuses to deliver the same to the plaintiff. This, we think, is all that the law requires.

It is again urged that the petition lays no foundation for any measure of dam-



age, and that the judgment gives damages not warranted by the allegations of the petition; that the petition contains no averment of value. The petition states that the goods seized and still held belonged to the plaintiff, and were of the value of \$190. This allegation, we think, is sufficiently clear and definite to support the judgment. The same answer will apply to the last objection, that there is no allegation of damages in the petition. The value being stated, and the further allegation that the plaintiff was deprived of said goods, is sufficient to support the judgment. We recommend an affirmance of the judgment of the court below.

**PER CURIAM.** It is so ordered; all the justices concurring.

(45 Kan. 592)

**HILL et al. v. BOWERS et al.**

(Supreme Court of Kansas. March 7, 1891.)

**MECHANIC'S LIEN—FENCING MATERIAL.**

To entitle a person to a lien upon land for material furnished for fencing, it must appear, not only that such material was purchased to be used for that purpose, but it must also appear that the same was in fact so used as to become a part of the realty.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Washington county; E. HUTCHINSON, Judge.

J. G. Lowe, for plaintiffs in error. Charles Brown and E. Hutchinson, for defendants in error.

**GREEN, C.** This action was commenced in the district court of Washington county, by J. C. Bowers & Sons, to foreclose a lien upon certain real estate, for iron fencing, gates, and posts furnished by them to E. C. Knowles, one of the defendants in the court below, who held the land upon which the lien was claimed under a bond for a deed from J. B. Besack. E. C. Knowles assigned his interest in the property to Edwin Knowles, and the same was afterwards assigned by him to the plaintiffs in error, who received a deed from J. B. Besack and wife, having complied with the terms of the original contract to convey. Service was made upon E. C. Knowles by publication. The other defendants answered that the material had never been used in the erection, alteration, or repairs of the fences upon the premises purchased by them; that the material for which plaintiffs claimed a lien had never been placed on said premises, or used thereon, in any manner. Judgment was rendered by the court below against the defendant E. C. Knowles for the amount due for the material, and the same was declared a lien upon the premises of the plaintiffs in error, who bring the case here. It was proven upon the trial that the material furnished was never used to build a fence on the land upon which a lien was claimed. It was piled upon the public highway in front of the premises, where it remained some time, and was afterwards taken by the sheriff of Washington county, on an execution issued against E. C.

Knowles, and sold. In the sale of the property by Knowles to the plaintiffs in error the fencing was expressly exempted, upon the ground that it had never been accepted by the purchaser. We think the court below erred in sustaining this lien. The material was never attached to and made a part of the land. The language of the statute is the same with reference to buildings as fences: "Any \* \* \* person who shall, under contract, \* \* \* furnish material for erecting \* \* \* any building." "Any \* \* \* person who shall, under contract, \* \* \* furnish material for erecting \* \* \* any fence." Section 1, c. 141, Sess. Laws 1872. This court has held that, to sustain a lien for material, it must appear, not only that the materials were purchased to be used in the building, but also that they were in fact so used. *Rice v. Hodge*, 26 Kan. 164. "At common law, the mechanic had a lien on personal property benefited by his labor, but this lien, being a mere possessory right, could not apply to real estate which is incapable of manual possession. The statutory remedy simply extends the same right to real estate by giving the mechanic a charge thereon in the nature of a mortgage lien. As the law pertains only to the realty, it follows that, to come within the intent of the statute, the structure should be so affixed to the soil as to become a part of the realty." *Kneel. Mech. Liens*, 87; *Bottomly v. Grace Church*, 2 Cal. 90; *Houghton v. Blake*, 5 Cal. 240; *Rogers v. Currier*, 13 Gray, 129; *Chapin v. Paper Co.*, 80 Conn. 461. In the latter case the court expressly held that no lien was created upon the building for which materials are expressly furnished, if they do not in fact go into the building. The fencing never having been placed upon the land, we are of the opinion that no lien attached. We recommend a reversal of the judgment.

**PER CURIAM.** It is so ordered; all the justices concurring.

(45 Kan. 560)

**BOARD OF EDUCATION OF CITY OF KANSAS CITY v. SCHOOL-DIST. NO. 7 OF WYANDOTTE COUNTY et al.**

(Supreme Court of Kansas. March 7, 1891.)

**ANNEXATION OF SCHOOL-DISTRICT—CONTROL OF SCHOOL PROPERTY.**

A school-district was divided by an extension of city limits, and the school-house being in that part of the district taken into the city by the extension, the board of education attempted to take possession of and exercise control over it. The officers of the school-district refused to allow this to be done, and a temporary injunction was allowed, restraining them from any interference with the action of the board of education; but, on motion of the school-district officers, the order of injunction was vacated. *Held*, that the trial court did not commit error in vacating such order, as it was not equitable.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Wyandotte county; O. L. MILLER, Judge.

*Hutchings & Keplinger*, for plaintiff in error. *Alden & McGrew*, for defendants in error.

**SIMPSON, C.** By an extension of the boundaries of the city of Kansas City, a part of the territory of school-district No. 7 of Wyandotte county was brought within the limits of said city, and on the portion of said school-district thus added to the city was situate a school-house belonging to district No. 7. This school-house, known as "Stewart's School-House," was built by district No. 7 on an acre of ground conveyed in fee to said district by Sarah Driver on the 26th day of September, 1867. Just how the district was divided by the extension of the city limits, and what portion was left out, and what part taken into the city, is not disclosed by the record. Enough is said, however, to show that a large number of school children were left within the original district. After the extension of the city limits, the board of education of the city of Kansas City attempted to take possession and exercise control over said school-house. The director of school-district No. 7 resisted these attempts at control of the school-house by the board of education of the city, and this action was commenced by the board of education to restrain the officers of the school-district from any interference with the control of the board over the school-house. An order of injunction was issued and served with the summons, but a motion to vacate the order was sustained; and from this ruling the case is brought here for review.

The decision of this case must be controlled by equitable considerations, for while the statutes of the state have made provisions for the disposition of the property of a school-district when the same is abolished or discontinued, and when a school-district is divided by the county superintendent, or when by his action a part of the territory of a school-district is detached and put into another or new district, no express provision is made where a school-district is divided by reason of an extension of city limits absorbing a part of it. The case of *Curtis v. Board of Education*, 43 Kan. 138, 23 Pac. Rep. 98, is not controlling, because it appears from the record in that case that school-district No. 45 conveyed the school-house property by a warranty deed to the board of education of the city of Topeka, in consideration of \$400. This, under the statute, the school-district was authorized and empowered to do by section 28, subd. 7, School Law. The general rule respecting such matters is that, where a part of the territory of a county, township, or a school-district is detached for any purpose, the original municipal corporation still retains its property rights, powers, and privileges, and remains subject to its duty and obligations, unless some express provision to the contrary be made by the act authorizing the separation. As we have said, there is no provision of the statute that provides for an adjustment of the rights of the board of education and the officers of the school-district in a case of this kind. We cannot say, as a matter of law, that the board of education or the city became the owner of the school-house by reason of its being taken into the city by an extension of its limits. There ought

to have been some adjustment of property rights between the parties, but, as the case stands, we could not reverse the judgment of the court below, except upon the theory that school-district No. 7 had been divested of its ownership of the school-house by reason of its absorption by the city by the extension, and this we cannot do. No attempt has been made to adjust the conflicting claims upon an equitable basis. On the record, and the facts presented by it, we recommend that the order vacating the temporary injunction be affirmed.

**PER CURIAM.** It is so ordered.

**HORTON, C. J., and JOHNSTON, J., concurring.**

**VALENTINE, J.** I concur in the result reached, and in affirming the order vacating the temporary injunction.

(45 Kan. 621)

**BENNINGHOFF V. CUBBISON et al.<sup>1</sup>**

(Supreme Court of Kansas. March 7, 1891.)

**DEMURRER TO EVIDENCE.**

Where an action in replevin is tried by the court without a jury, and a demurrer to the evidence is interposed, and there is some evidence tending to establish the issues made by the pleadings, such demurrer should be overruled. *Wilson v. Beck*, 44 Kan. —, 24 Pac. Rep. 957, and cases there cited, followed.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Butler county; H. W. SCHUMACHER, Judge.

A. L. Redden, for plaintiff in error. J. K. Cubbison, E. C. Ellis, and E. D. Stratford, for defendants in error.

**GREEN, C.** This was an action in replevin, brought by the plaintiff in error against the defendants in error, in the district court of Butler county, for a stock of goods kept in a store in the town of Leon, in said county. The case was tried to the court, and a demurrer to the evidence was sustained, and the plaintiff in error brings the case here, assigning error. The material facts developed on the trial were: That on the 16th day of July, 1886, F. W. Beckmeyer executed a chattel mortgage to J. Benninghoff, the plaintiff in error, upon a stock of merchandise in Leon, Butler county, to secure the payment of \$4,260.30. The mortgage was filed for record on the following day; and a renewal affidavit was made and filed on the 7th day of July, 1887. Some time in the fall of 1886 the mortgagor made a partial transfer of the stock of goods to C. L. King. On the 11th day of December, 1886, King executed a mortgage upon this same stock of merchandise to the W. B. Grimes Dry Goods Company, to secure the payment of \$300, due December 6, 1887, subject to the mortgage given by Beckmeyer to Benninghoff. This mortgage was filed for record on the same day, and a renewal affidavit was filed on the 23d day of December, 1887. F. W. Beckmeyer and C. L. King executed a chattel mortgage upon the same property the 1st day of June, 1887, to T. K. Hanna,

<sup>1</sup>Petition for rehearing pending.

surviving partner of Tootle, Hanna & Co., for \$875, payable on the 23d day of May, 1888. This last mortgage was subject to the mortgages given to Benninghoff and the W. B. Grimes Dry Goods Company, and was filed for record on the same day. The stock of goods was redelivered by King to Beckmeyer, who continued in possession until the 6th day of January, 1888, when there was a conditional sale of the goods to Henry J. Dillon. The following is a copy of the contract for the sale of the stock of goods: "Leon, Kansas, Jan. 6, 1888. Agreement between F. W. Beckmeyer and Henry J. Dillon. The parties hereto agree as follows: The said Beckmeyer agrees to sell and has sold to said Dillon the stock of general merchandise now in building known as the 'Butler Co. Store,' subject to incumbrance of \$1,800.00. And the said Dillon hereby agrees to give said Beckmeyer, in exchange or payment for said stock of goods, the following described lands, and execute good and sufficient warranty deeds for the same to J. Benninghoff, the said lands to be free and clear of all incumbrance excepting mortgage of four hundred and fifty dollars and one hundred and fifty dollars, due the government, which Dillon agrees to pay when due, and one hundred and sixty acres of land. Description of land: Lots 3 & 4 of S. half of N. W. quarter section four, township 32, range 22, 160 acres; also the N. half of the S. W. quarter, N. half of the N. W. quarter of sec. 29, town 31, range 23, 160 acres; also the S. E. quarter of S. E. quarter sec. 15; W. half of S. W. quarter of S. W. quarter sec. 14, town 32, R. 21, 160 acres,—all in Clark county, Kansas; the last-named piece or tract being subject to mortgage of \$450, and no more; and also execute to said Beckmeyer a second chattel mortgage on stock of goods for the sum of \$800.00, with 12 per cent. interest from date of mortgage, said note and chattel mortgage to run one year from its date; the said Dillon to furnish at his own cost abstract, showing said land clear of all incumbrance, as above mentioned, and execute deed as above mentioned; these goods to be delivered into his possession. The said Dillon further agrees not to remove goods from Leon, Kansas, and to pay on said first mortgage to Benninghoff at least fifty dollars per week, until the whole is paid, the said mortgage to be given to said Beckmeyer for the \$800 to cover all goods which may be added to stock of goods, and also book-account. The said Dillon hereby represents said land as being nearly all good, smooth land, and tillable, with Kansas houses on each quarter; also good wells, and 40 acres in cultivation. This trade being made upon the said Dillon's representations of said land, the said Dillon to comply with the said conditions within six days from this date, or sale is null and void. The said F. W. Beckmeyer to pay all other incumbrance on stock of goods. The said Dillon further agrees to give another note for \$130.00, with the above \$800.00 mortgage, which is to be paid Feb'y 5, 1888. [Signed] F. W. BECKMEYER. HENRY J. DILLON." Accompanying this contract, a bill of sale was ex-

ecuted by Beckmeyer, which recited the fact that the property was free from all incumbrance, except a mortgage of \$1,800. This sale seemed to have been made with the knowledge and consent of the plaintiff in error. Under this agreement and bill of sale, Dillon took charge of the store on the 8th day of January, and continued in possession until the 18th, when Benninghoff went to Dillon, and demanded possession of the stock of merchandise, who refused to deliver the key to him personally, or to turn over the stock, but consented that Beckmeyer might take charge of the store for him, and dispose of the goods for Benninghoff's benefit, and apply the proceeds of sales in paying off Benninghoff's debt. The key was handed by Dillon to Beckmeyer, in the presence of Benninghoff, who continued in charge of the store until 9 or 10 o'clock the next day, when the representatives of the defendants in error came in and demanded possession of the store, and, under threats that he would be arrested, Beckmeyer surrendered the key. Dillon was not present at the time, and Beckmeyer stated that he was holding the stock for Benninghoff. On the following day the plaintiff commenced this action. The deeds for the land mentioned in the contract were received by Benninghoff, but, on account of some defect, they were returned by mail to the parties who had executed them.

The plaintiff in error insists that the mortgage from Beckmeyer to Benninghoff was valid, and comes fairly within the rule heretofore laid down by this court, with reference to mortgages upon stocks of merchandise; that upon the trial there was some evidence to support the claim of the plaintiff in error to the title to the property in controversy; and therefore the demurrer to the evidence was improperly sustained. The contention of the defendants in error is that the evidence offered by the plaintiff below conclusively showed that, at the commencement of this action, the mortgage of the plaintiff in error was without force, and hence the demurrer to the evidence was properly sustained. We think the demurrer to the evidence should have been overruled. The mortgage under which the plaintiff in error claimed title seemed to have been given in good faith, for a sufficient consideration; and there was some evidence to indicate that there was an unpaid balance of about \$1,800 still due the plaintiff in error. All of the mortgages under which title was claimed, by both plaintiff and defendants, were given upon the same stock of goods, and such mortgages have been upheld by this court. *Frankhouser v. Ellett*, 22 Kan. 127; *Howard v. Rohlfing*, 36 Kan. 357, 13 Pac. Rep. 566. There was an express recitation in the contract between Beckmeyer and Dillon that the sale was made subject to an incumbrance of \$1,800, and in that agreement Dillon promised to pay at least \$50 a week on the first mortgage to Benninghoff, until the whole was paid. As we view the testimony, there was evidence to show that, when Dillon delivered the key of the store to Beckmeyer, it was for the benefit of Benninghoff. We are not satisfied that

the attempted sale by Beckmeyer to Dillon operated as a release of the Benninghoff mortgage. The deeds for the land were executed, but afterwards returned. If it did not, the question as to who was in possession of the store when the defendants below obtained possession through Beckmeyer is not very material. If the first mortgage was not discharged, by the making of the contract between Dillon and Beckmeyer the plaintiff in error had the undoubted right to maintain his action. We do not care to consider the evidence. That of the plaintiff alone is here, and all that we can now say is that the facts adduced before the trial court seemed to show a cause of action in favor of the plaintiff in error. Under the well-settled rule of this court, unless there has been a total failure upon the part of the plaintiff to prove a cause of action, or some material fact in issue, the demurrer should have been overruled. *Wilson v. Beck*, 44 Kan. —, 24 Pac. Rep. 957; *Railroad Co. v. Cravens*, 43 Kan. 650, 23 Pac. Rep. 1044; *Gardner v. King*, 37 Kan. 671, 15 Pac. Rep. 920; *Merket v. Smith*, 33 Kan. 66, 5 Pac. Rep. 394; *Wolf v. Washer*, 32 Kan. 533, 4 Pac. Rep. 1036; *Brown v. Railroad Co.*, 31 Kan. 1, 1 Pac. Rep. 605. We recommend reversal of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 674)

LEAVENWORTH, N. & S. RY. CO. v. WILKINS  
*et al.*

(Supreme Court of Kansas. March 7, 1891.)

PLEADING—DEMURRER—EMINENT DOMAIN—JOIN-  
DER OF ACTIONS—DAMAGES—GENERAL AND SPECIAL  
VERDICTS.

1. Each count in a petition containing more than one cause of action must contain, in and of itself, a full and complete statement of all the facts constituting the cause of action sought to be stated, except that a count subsequent to the first may be made sufficient by a proper reference to the first or some other preceding count, without a repetition of all the facts necessary to constitute the cause of action.

2. When the first cause of action in a petition contains no claim for damages, it is error to overrule a special demurrer to said cause of action, which states as a reason therefor that said count does not state facts sufficient to constitute a cause of action.

3. In the trial of an action on an appeal from the award of commissioners, in a railroad right-of-way case, a cause of action for injuries to lands owned by M. W. by reason of the appropriation of the right of way cannot be joined with an action for injuries to lands owned by M. W. and S. W. jointly. In such a case it is error to overrule a demurrer to the petition which avers the misjoinder as the reason thereof.

4. In an action for damages for injuries to lands by reason of the appropriation of a right of way for a railroad company across the same, damages must be confined to the tract of land over which the right of way is condemned, unless the owner has other lands contiguous thereto, and so situated with respect to the same that the value is appreciably augmented by their use in connection therewith as a single farm, and the appropriation of said right of way has destroyed or seriously interfered with such use.

5. When there is a discrepancy between the general and special verdicts of a jury the latter must control.

6. Where judgment is entered on the general verdict for a sum larger than is warranted

by the special verdict it is error to overrule a motion to reduce said judgment to make it correspond with the special verdict.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Atchison county; W. D. GILBERT, Judge.

*Geo. R. Peck, A. A. Hurd, and Mills & Wells*, for plaintiff in error. *Tomlinson & Eaton*, for defendants in error.

STRANG, C. This was an appeal from the report of commissioners appointed to condemn the right of way for the plaintiff's railway. The plaintiffs below filed their amended petition in the district court of Atchison county February 4, 1888. To this petition the defendant below presented a motion to require the plaintiffs to separately state and number their alleged causes of action, which motion was overruled. A demurrer was then interposed to said petition, on the grounds: (1) That the first count or cause of action in said petition did not state facts sufficient to constitute a cause of action; (2) the defendant demurred to the second count or cause of action in said petition because it did not state facts sufficient to constitute a cause of action; and (3) defendant demurs to the petition because several causes of action are improperly joined. The demurrer was overruled. May 3d the defendant filed its amended answer, and the case went to trial before the court and a jury. May 7, 1888, the jury returned a general verdict for the plaintiffs, and also a special verdict, consisting of answers to a large number of questions submitted to them by the defendant below. The general verdict was for \$2,462.09. May 10th, the defendant filed a motion to reduce the judgment, first, by \$400, upon the ground that the special verdict showed the general verdict was that much too large; also by the sum of \$170.59, for reason that the plaintiffs were not entitled to interest. This motion was overruled. Defendant then filed a motion for a new trial, which was also overruled, and the defendant comes here asking a review of the case by this court.

Counsel for plaintiff in error in their brief first call our attention to their demurrer to the amended petition filed in the court below, and contend that the first count or cause of action therein set forth does not contain facts sufficient to constitute a cause of action. An examination of the petition satisfies us that the objection to this count of the petition is good. This cause of action fails to set up any claim for damages. Each cause of action in a petition containing more than one cause of action must "contain, in and of itself, a full and complete statement of all the facts constituting the cause of action therein intended to be stated. In other words, each count should be separate and distinct from every other count, and be complete within itself," except that a count subsequent to the first may be made sufficient by a proper reference to the first or some other preceding count. *Stewart v. Balderston*, 10 Kan. 145; *Krutz v. Fisher*, 8 Kan. 96. The first count was designed to set out a cause of action for damages

to lands owned jointly by Michael and Sarah Wilkins, arising from the condemnation of the right of way of the plaintiff; but it is not complete "in and of itself." It contains no claim of damages. If it contained the necessary allegations that are wanting, so that it could stand alone as a cause of action, there would be no difficulty in the way of the plaintiffs below recovering damages to at least a portion of the land therein described. They would then have a right to recover for any damage to the S.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 10, because it is admitted that they are joint owners of that portion of section 10, and that it is the ground over which the right of way of the plaintiff was condemned, and its road-bed constructed. The demurrer to this cause of action must be sustained.

The second count, with its reference to the first, may state a cause of action in favor of Michael Wilkins; but, as there is a demurrer to the petition as a whole, upon the ground that distinct causes of action are joined therein, which cannot be united, and as the same question is raised by objections to evidence, we will examine this count in the light of these objections. This count alleges that the plaintiffs, Michael and Sarah Wilkins, are entitled to damages to the lands therein described by reason of injuries sustained thereto, growing out of the condemnation of the right of way of defendant railroad. The petition here avers that the lands therein described belong to Michael Wilkins as sole owner thereof. It follows, then, that Sarah Wilkins, who is made a co-plaintiff with Michael Wilkins in this count, has no interest whatever in any damages which might be awarded for injury to the land therein described. The question, then, is, can the second count, which, if it state a cause of action at all, states one in favor of Michael Wilkins alone, be united in the same petition with the first count, which attempts to set out a cause of action in favor of Michael Wilkins and Sarah Wilkins jointly? We think not. Paragraph 4166, Gen. St. 1889, is the provision in our Code relating to joinder of actions, the last clause of which reads as follows: "But the causes of action so united must all belong to one of these classes, and must affect all parties to the action, except to enforce mortgages or other liens." In this case the first of the two causes of action affects Michael and Sarah Wilkins jointly, while the second cause of action affects only Michael Wilkins. It cannot be said, then, that the second count affects all the parties to the action, and hence the Code forbids their joinder in the same petition. In *Palmer v. Waddell*, 22 Kan. 352, the court held that "where two or more persons have separate causes of action against the same defendant, arising from the obstruction of a natural water-course, and the injury of their lands and crops thereby, they cannot unite in the same petition to recover damages of such injuries which are plainly distinct and unconnected." *Hudson v. Atchison*, 12 Kan. 140; *Swenson v. Plow Co.*, 14 Kan. 387; *Schultz v. Winter*, 7 Nev. 803; *State v. Commission-*

*ers*, 38 Kan. 318, 16 Pac. Rep. 337; *Duren v. Pontious*, 34 Kan. 353, 8 Pac. Rep. 428; *Jeffers v. Forbes*, 28 Kan. 178. Counsel for defendants refer to the case of *Commissioners v. Labore*, 37 Kan. 480, 15 Pac. Rep. 577. In that case a father and two sons each owned a quarter-section of land, lying together in a body. They entered into a copartnership to breed and raise cattle, and by the terms of the copartnership agreement they were to use the three-quarters of land together in the business as one tract. A highway was constructed so as to affect these lands. Damages were separately awarded to two of these parties, and none to the third. Each one for himself appealed. On the trial in the district court, by the consent of parties, the three cases were consolidated and tried together. But several judgments were rendered in favor of two of the parties for damage to their several lands, and against the third party. The court also rendered judgment for damages in favor of all the parties for injury to the use of their land under their copartnership contract. This court sustained the judgment. But it must be remembered that the several actions in the name of each of the individual owners of the three-quarters of land, and the claim for damages to their joint use and occupancy of the same, were joined in the district court, and tried together by consent of the parties, and that the improper joinder of causes of action in the case was by consent, and there was at no time any objection thereto. For the same reasons the objections to the evidence concerning damages to lands in sections 15 and 9 should have been sustained. But, aside from this, we do not think the plaintiffs below, or either of them, can recover damages to lands in sections 15 and 9 by reason of the appropriation of the right of way for the railroad of the defendant below, across, and over the S.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 10. We do not think these lands are in any appreciable way damaged thereby. The general rule in relation to the assessment of damages to land for injuries thereto by reason of the appropriation of a right of way by a railroad company is that the damages shall be limited to the lot of land over and across which the right of way is condemned. Under our statutes this court has extended this rule by giving a liberal construction to the phrase "lot of land," so as to include any contiguous compact body of land used as a single farm. The warrant for this seems to be found in the language of the constitution, (section 4, art. 12,) which provides that the compensation for such right of way appropriated to the use of the company includes not only the value of the property taken, but also the loss the land-owner sustains in the value of his property by being deprived of a portion of it; and also warranted by the language of the statute, (paragraph 1395, Gen. St. 1889,) a portion of which reads as follows: "And for all other damages sustained by such person or persons by reason of such right of way so appropriated." This language not only includes damages for the right of way taken, but for all other actual damages sus-

tained; that is, the result of injury by reason of the appropriation of the right of way. But we do not think this court has ever gone so far as to say that lands situated, with respect to the right of way appropriated, like the lands described in sections 9 and 15 are, should be considered in the assessment of damages because of the appropriation of the right of way. It is true that the evidence shows that the plaintiffs pastured these lands, and to that extent used them in connection with lands in section 10. But so they might pasture the land if it was in section 36 or section 6; but we do not think that would authorize the assessment of damage there to by reason of a right of way condemned across the S. E.  $\frac{1}{4}$  of section 10. These lands are not in a compact body. The land in section 9 is a mile away from the home farm, with a whole section of land belonging to a stranger intervening. But the defendant says this land corners with the N. W.  $\frac{1}{4}$  of section 15, and that the N. W. of 15 corners with the S. E. of 10, the lot over which the right of way was condemned, and therefore all of these lands are contiguous; and, as they are used as one farm by reason of these lands in sections 15 and 9 being pastured in connection with the home farm, it is proper under the decisions of this court to take them into consideration in assessing damages to the lands of plaintiffs below on account of the right of way over the land in section 10. If this were true, then, if the plaintiffs below owned the N. W.  $\frac{1}{4}$  of 16, and it was used as a pasture by the plaintiffs in connection with the home lands, that would have to be considered in the assessment of damages, because it cornered with lands that by a succession of corners reached the home tract, affected by the right of way. It is only when other lands are so situated with respect to the tract affected by the right of way that their value consists largely in their use as a single farm in connection with the tract affected, and the appropriation of the right of way has destroyed or seriously injured that use, that they are considered in the assessment of damages. In this case it is physically impossible for the plaintiffs below to go from their lands in section 10 to their lands either in sections 15 or 9 without going upon the lands of other owners. We think they can still reach these lands by crossing the lands of others by making a new lane at small expense; and if they cannot they fail to show that they have any right of way over other lands to these lands that may not be shut off at any time. As this case goes back for a new trial, we are of the opinion that the lands in sections 9 and 15 should be dropped out of the case.

The motion to reduce the verdict in this case should have been sustained. The special verdict, which, by its terms, covers and specifies all damages that we think could possibly arise in this case, fixes the damages in the aggregate, at a sum \$400 less than the amount of the general verdict; and when there is a discrepancy between the general and special verdicts the latter controls. On the other hand, it is not error to allow interest on

the sum found as damages, and the motion to strike out the item of interest was properly refused.

There are other questions raised in this case by reason of the court's refusal to give certain instructions and to submit certain questions to the jury; but, as the case will be reversed without considering these complaints, we will not notice them. It is recommended that the judgment of the district court be reversed, and case remanded for new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 599)

NEISWANGER V. MCLELLAN.

(Supreme Court of Kansas. March 7, 1891.)

STATUTE OF FRAUDS—ASSUMPTION OF DEBT OF THIRD PERSON.

A purchaser who accepts a conveyance of real property, reciting that there is a mortgage lien thereon, which the purchaser assumes to pay, cannot avoid the payment of such lien by a claim that it was a verbal promise to pay, and void by the statutes of fraud.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Osborne county; CLARK A. SMITH, Judge.

Walrond, Mitchell & Heren and H. P. Welsh, for plaintiff in error. Hays & Pitts, for defendant in error.

SIMPSON, C. The defendant in error sued the plaintiff in error in the district court of Osborne county to recover the sum of \$381, with interest at 7 per cent. from March 1, 1887. He alleged in his petition that on the 1st day of February, 1887, he sold and conveyed to the plaintiff in error lot 6, in block 6, in the town of Bloomington, in said county, and a small stock of goods and merchandise. As a part consideration for the lot and goods so sold the plaintiff in error agreed to pay a certain note given by W. H. Snyder to S. S. Warren, secured by mortgage on lot 6, the payment of which the defendant in error had assumed and was bound to pay. That said note was past due at the time of the sale from defendant in error to plaintiff in error, and judgment had been obtained on it, and said lot ordered sold. That the plaintiff in error had paid all the purchase price of said lot and goods except the note secured by mortgage on said lot. That Warren caused said lot to be sold, but he only realized on the sale the sum of \$89, and the defendant in error was compelled to and did pay the balance of said judgment, amounting to the sum sued for. The plaintiff in error filed an answer generally denying all the allegations in the petition. Trial was had at the October term, 1887, and the material facts are recited in the following findings of the district court:

Findings of fact: "(1) On the 1st day of May, 1886, the plaintiff became the owner of lots 6 and 7, in block 6, of the town-site of Bloomington, county of Osborne, state of Kansas, by purchase of the same by deed of conveyance of same by W. H. Snyder and S. C. Snyder, his wife, A. D. Booze and L. Booze, his wife. In said

deed of conveyance it was stipulated that the plaintiff, Dorsey McClellan, should assume the payment of the mortgage of \$375, with interest from that date. That on the 26th day of February, 1887, in an action then pending in the district court of said Osborne county, a judgment of foreclosure was rendered in an action in which S. S. Warren was plaintiff and Dorsey McClellan and Ann McClellan, W. H. Snyder and wife, and A. D. Booze and wife, were defendants. Judgment of foreclosure was rendered,—judgment of \$395 and costs, and interest at 8 per cent. on the judgment,—and foreclosure sale ordered of the property mortgaged to secure said amount. Personal judgment was not rendered against Dorsey and McClellan and wife, but only a judgment of foreclosure. That the mortgage foreclosed in said action and upon which said judgment was rendered included with other property lots 6 and 7, in block 6, in the town-site of Bloomington, Osborne county, Kansas. That a short time prior to the 23d day of March, 1887, the plaintiff contracted to sell and did sell to the defendant a stock of goods and merchandise situated in building on lot 6, block 6, in said town of Bloomington, and in which he, McClellan, had a half interest; and also in the same transaction contracted to sell lots 6 and 7, block 6, in the town of Bloomington, as aforesaid, to the defendant, Hal. W. Neiswanger. That as a part of the consideration of the purchase price of said lots and stock of merchandise the defendant, Hal. W. Neiswanger, contracted to assume the payment of the judgment and costs above described. That during the entire transaction no mention had been made to the plaintiff, Dorsey McClellan, that the purchase was being made in the interest of any other person or for any other person than the defendant himself. The defendant took possession of the goods, and drew a part of them, at least, to Osborne, prior to the 23d day of March, 1887. That prior to the 23d day of March, 1887, defendant prepared a deed for the plaintiff, Dorsey McClellan, and Ann McClellan, to execute for lots 6 and 7, block 6, in the town-site of Bloomington, Osborne county, Kansas. That said deed was prepared, conveying said lots to David Neiswanger, instead of Hal. W. Neiswanger. That said deed contained the usual covenants of warranty, with the following exception: 'Except judgment of \$395, with interest at 8 per cent., and costs of \$6.80, which party of the second part assume.' That the plaintiff, Dorsey McClellan, was unable to read the deed for himself, and that the defendant, Hal. W. Neiswanger, read the deed to McClellan and wife, as running to himself, Hal. W. Neiswanger, and with the exception as above found. That the deed was signed by Dorsey McClellan and Ann McClellan on the 23d day of March, 1887, and acknowledged before Hal. W. Neiswanger, notary public, on that day. That as the deed now appears the exception in the general warranty reads: 'Except judgment of \$395, with interest at 8 per cent., and costs of \$6.80, which party of the first part assume.' That the court finds from the evi-

dence this change has been made since the execution of this deed. This action was begun by the plaintiff on the 12th day of July, A. D. 1887, and the said deed from McClellan and wife to David Neiswanger was filed for record in the office of the register of deeds of Osborne county, Kansas, on the 12th of August, 1887, at 9 o'clock A. M. That on the 8th of April, 1887, an order of sale was issued by the clerk of the district court of Osborne county for the sale of the property described in the mortgage and foreclosure in the above-mentioned action. That the same was returned, no sale being made, and that on the 6th of June, 1887, another order of sale was issued, upon which the sheriff of said county proceeded and did sell lots 6 and 7, in block 6, in the town-site of Bloomington, in said county, and that the said lot 6 was sold to W. H. Snyder for \$88, and that lot 7 was sold to Hal. W. Neiswanger for \$15. That at the date of said sale said judgment and interest amounted to \$406.67, and the costs of suit to that time, \$26.90. That by the sale of said lots was realized \$103. The judgment and costs at that time amounted to \$433.57; the amount realized from the sale of the lots, \$103; which leaves a balance of \$330.57. The interest on that amount to date is \$9.77; the total to date, \$340.34. That the sale made under said order has since been confirmed by the said district court, and deeds to said lots made by the sheriff in pursuance of said sale. That the remainder of said judgment was paid by W. H. Snyder, and that the plaintiff, Dorsey McClellan, has paid W. H. Snyder the full amount of said judgment before the beginning of this action. That the deed above mentioned, executed on the 23d day of March, 1887, from Dorsey McClellan and Ann McClellan, his wife, to David Neiswanger, was immediately delivered to Hal. W. Neiswanger, and has not since been in the possession of the plaintiff. That the change in the covenant of warranty was made without the knowledge of plaintiff; also that neither party to the suit knew of the mistake in the description of the lots until very recently, and long after the commencement of this suit." Conclusions of law: "The court finds as a matter of law that the plaintiff is entitled to recover from the defendant the sum of \$340.34, with interest from this date at 8 per cent., and costs." A motion for a new trial was filed and overruled, and the court made these additional findings: "The court finds that the deed made by Dorsey McClellan and wife to David Neiswanger was not filed for record until some time after the bringing of this action; that the plaintiff was ignorant of the fact that there was any mistake in the description of the lands intended to be conveyed, and of the fact that said deed run to David Neiswanger; that the defendant was also ignorant of the mistake in the description of the lots until a few days before the commencement of this trial; that the plaintiff had no actual knowledge of the mistake in the description, or that it run to David Neiswanger, until the commencement of this trial; that during the trial, when the fact was



made known to the court that there was a mistake in the description of the lots intended to be conveyed, the court offered to require the plaintiff to amend his petition to conform to the facts proven in this particular, and to tender a deed conveying the lots intended to be conveyed; that the defendant's attorney at that time did not demand such deed; that on the argument of the motion for a new trial the attorney of the defendant, among other things, complained that no deed had been executed or delivered conveying to the defendant or other person from the plaintiff the lands described in the plaintiff's petition. Whereupon the court required the plaintiff to bring into court a deed properly acknowledged and executed, conveying to the defendant the lots intended to be conveyed in the original deed, conveying all the right that the plaintiff had on the 23d day of March, 1887, with general covenants of warranty against all incumbrances except the judgment in question in this action; whereupon the attorney of the defendant stated at the time that the defendant did not waive any rights which he may have or which he may have had by reason of the fact that the deed was not executed and delivered before the commencement of this action; whereupon the plaintiff and wife tendered to the said defendant a deed to lots 6 and 7, in block 6, in the town of Bloomington, said deed containing a stipulation that the grantee assumes to pay said judgment; whereupon the said defendant refused to accept said deed, and stated as a reason therefor that the same did not conform to the agreement of the parties, nor the order of the court; whereupon the court directed the plaintiff to execute and deliver to the defendant a deed conveying said lots without including in said deed the aforesaid stipulation, 'that the grantee assumes to pay said judgment,' which the plaintiff accordingly did on the 28th day of October, A. D. 1887, said deed being executed and acknowledged by both plaintiff and wife to the said defendant, which deed was delivered to the defendant; whereupon the court, on the 28th day of October, 1887, overruled said motion for a new trial."

The case is brought here for review, and numerous errors are assigned, and among them it is claimed that the facts set forth in the petition are not sufficient to authorize any judgment against the plaintiff in error. The precise question with respect to this contention is that there is no allegation in the petition with whom the contract was made assuming the payment of the indebtedness to Warren. There is this allegation in the petition, following the statement, that the plaintiff below had sold to Nelswanger lots 6 and 7, in block 6, and a stock of merchandise, and that in part payment of the same "the said defendant agreed to pay and discharge a certain note given by one W. H. Snyder to one S. S. Warren, which note was for the sum of \$375 and interest, and costs due thereon, and was secured by a mortgage on said lot, and the payment of which note this plaintiff had assumed." It is plain from this statement that the

agreement was with the plaintiff, and that the allegation was sufficient to support the judgment. The next contention is that the promise to pay the mortgage was a verbal one, and not binding within the statutes of fraud. There are several very conclusive answers to this question, —one of which is that, having secured and retained the possession, use, and enjoyment of the property by virtue of the contract, he will not be heard to say now that it was not binding upon him. And another very good reason is that this court has said in the case of *Morris Center v. McQuesten*, 18 Kan. 478, that a promise made to a debtor, for a valuable consideration, to pay his debt to a third person, is not a promise to answer for the debt of another person, within the statutes of fraud, which apply only to promises made to creditors; and such a promise need not be in writing. Another good reason is that it is a part of the purchaser's money, and the vendor has a right to direct to whom it shall be paid. Another very good answer is that he accepted a conveyance from McClellan and wife, in which there was a written assumption of this particular indebtedness; for it abundantly appears, after the conveyance was reformed so as to express the real contract between the parties, that this plaintiff in error had expressly obligated himself in writing to pay this special indebtedness. The petition alleged that the plaintiff had agreed to pay the mortgage, and the defendant in error had the right to prove the agreement to pay in the manner developed at the trial; and in doing so it cannot be successfully contended that irrelevant and incompetent evidence was admitted. Again, it is said that there was not sufficient evidence to support the findings of fact made by the trial court. This objection is made upon the theory, as we gather it from the brief, that parol evidence is not admissible to contradict a writing. Counsel mean that when the deed from McClellan and wife to Nelswanger was introduced in evidence it was discovered, or rather, it was charged, that it had been changed since its execution and delivery in this respect, to-wit, when executed it read that the mortgage indebtedness on the lot was stated, and these words followed: "Which party of the *second* part assume;" but when introduced in evidence it read, "Which party of the *first* part assume." The court found upon sufficient evidence that the word "second" had been changed since the execution and delivery of the deed to "first," and this certainly was no violation of the rule. Another complaint is that the court allowed 8 per cent. interest on the amount claimed, when the petition only claimed 7 per cent. We have been through this record carefully several times, and read the evidence attentively. The evidence and the concurrence of the circumstances surrounding the transaction very strongly impresses us with the belief that substantial justice has been done between these parties by the judgment rendered in the court below, and the errors complained of are not sufficient to reverse under these circumstances. The judgment must be



modified so as to bear interest at the rate of 7 per cent., and with this modification we recommend that it be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

[45 Kan. 636]

CREAGER *et al.* v. SNYDER.

(Supreme Court of Kansas. March 7, 1891.)

CONSTITUTIONAL LAW—APPROPRIATION OF PUBLIC MONIES—ISSUANCE OF BONDS.

Chapter 236 of the Session Laws of 1887, being an act to authorize Mound City township, in Linn county, to vote bonds to reimburse citizens of the township for sums advanced to aid in the construction of a court-house, is not unconstitutional.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Linn county; C. O. FRENCH, Judge.

W. R. Biddle and Biddle & Smith, for plaintiffs in error. S. H. Allen, for defendant in error.

GREEN, C. This was an action brought in the district court of Linn county to perpetually enjoin and restrain the board of county commissioners of Linn county from levying a tax to pay the interest upon certain bonds, issued under chapter 236 of the Session Laws of 1887. It is disclosed in the record before us that, prior to the year 1885, Linn county was the owner of a tract of land in Mound City, known as the "Public Square;" that during that year, upon the application of citizens of the township in which Mound City is situated, leave was granted by the board of county commissioners of the county to build a court-house on such public square; that certain citizens procured subscriptions from other citizens of the township for the purpose of erecting a court-house; a committee of citizens then proceeded to and did erect the walls of a suitable building for a court-house, and put on a roof, but no floors were laid, and no doors or windows were put in; that after the erection of the walls of said building, and during the year 1886, the building, in its unfinished condition, was formally donated to the county, and accepted by the board of county commissioners, as a court-house, and taken possession of and completed at the expense of the county, and has since been used as a court-house and for no other purpose; and that the building and grounds belong to Linn county. The building cost, in the condition it was donated to the county by the citizens' committee, \$14,500, which had been contributed by various citizens of the township. In the year 1887 the legislature passed chapter 236, "An Act to authorize Mound City township, in Linn county, to vote bonds not to exceed seventeen thousand dollars, to reimburse citizens of said township for sums advanced by said citizens to aid in the construction of a court-house in Mound City." Subsequently an election was held in the township, and it was determined, by a vote of 240 for to 143 against, that the bonds of the township should be issued for \$14,500, and the vote

was duly canvassed by the board of county commissioners and the bonds issued, showing upon their face that they were issued under the authority of chapter 236, Sess. Laws 1887. This suit was commenced by a tax-payer of the township, and the court below granted a perpetual injunction against the defendants below, restraining them from levying a tax to pay any interest on the bonds issued under said chapter 236, holding that the same was unconstitutional. The plaintiffs in error bring the record here for review.

It is urged that the legislature had the right to authorize the township to issue its bonds for the purpose designated, notwithstanding the fact that there may have been no legal obligation resting upon the township to refund the different sums subscribed and paid by the various citizens, to be used in the construction of this court-house. The proposition involved is whether or not this law, which recognizes the right, and authorizes the municipality, upon a vote of the people, to assume and pay certain obligations of an equitable character, can be upheld. One of the canons of constitutional construction in this state is that no slight difference of opinion will authorize the judiciary to set aside the action of the law-making power, or to nullify an act of the legislature. The judicial department should not interfere with the legislative conscience, unless there be a clear violation of some provision of the constitution. *State v. Barrett*, 27 Kan. 213. Text-writers and courts of the highest legal learning and respectability have said that the fact that a claim against a municipal or public corporation is not such an one as the law recognizes as a legal obligation forms no constitutional objection to the validity of a law imposing a tax and directing its payment. 1 Dill. Mun. Corp. (4th Ed.) § 75; *U. S. v. Railroad Co.*, 17 Wall. 322; *New Orleans v. Clark*, 95 U. S. 644; *Shaw v. Dennis*, 5 Gillman, 405; *Dennis v. Maynard*, 15 Ill. 477; *Layton v. New Orleans*, 12 La. Ann. 515; *Carter v. Proprietors*, 104 Mass. 236; *Thomas v. Leland*, 24 Wend. 65; *Town of Guilford v. Supervisors*, 13 N. Y. 143; *Brewster v. City of Syracuse*, 19 N. Y. 116; *Darlington v. Mayor, etc.*, 31 N. Y. 164; *Brown v. Mayor*, 63 N. Y. 239; *Mayor, etc., v. Bank*, 111 N. Y. 446; 18 N. E. Rep. 618; *Sinton v. Ashbury*, 41 Cal. 525; *Creighton v. San Francisco*, 42 Cal. 446; *Lycoming v. Union*, 15 Pa. St. 166; *Cooley, Const. Lim.* 258.

The reasoning in the adjudicated cases cited is that the legislature may determine what moneys may be raised and expended, and what taxation for municipal purposes may be imposed; and it certainly does not exceed its constitutional authority when it compels a municipality to pay a claim which has some meritorious basis to rest upon. From the numerous authorities upon the question of legislative control over municipalities, Judge Cooley lays down the following proposition: "That the legislature has the undoubted power to compel the municipal bodies to perform their functions as local governments under their charters, and to recognize, meet, and discharge the duties and

obligations properly resting upon them as such, whether they be legal or merely equitable or moral; and for this purpose it may require them to exercise the power of taxation whenever and wherever it may be deemed necessary or expedient." Cooley, Const. Lim. 283. The court of appeals of New York recognizes the doctrine of large legislative discretion, upon the question of raising and appropriating public money, and of imposing a tax upon towns and other municipal or political divisions, whenever it will be promotive of the public welfare. The legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice, in the largest sense of these terms, or in gratitude and charity. Independent of express constitutional restrictions, it can make appropriations of money whenever the public well-being requires or will be promoted by it, and it is the judge of what is for the public good. It can, moreover, under the power to levy taxes, apportion the public burdens among all the tax-paying citizens of the state, or among those of a particular section or political division. Town of Guilford v. Supervisors, supra. In speaking upon this same subject, in the case of Booth v. Woodbury, 32 Conn. 118, Mr. Justice BUTLER said: "To make a tax law unconstitutional on this ground, it must be apparent at first blush that the community taxed can have no possible interest in the purpose to which their money is to be applied." In the case of Sinton v. Ashbury, supra, CROCKETT, J., stated the rule: "It is established by an overwhelming weight of authority, and I believe is conceded on all sides, that the legislature has the constitutional power to direct and control the affairs and property of a municipal corporation for municipal purposes, provided it does not impair the obligation of a contract, and by appropriate legislation may so control its affairs as ultimately to compel it, out of the funds in its treasury, or by taxation to be imposed for that purpose, to pay a demand, when properly established, which in good conscience it ought to pay, even though there be no legal liability to pay it." The law challenged in this case is not subject to the objections urged in the numerous cases cited. The act in question provided that the bonds of the municipality should not be issued for these assumed obligations until the question had been submitted to the people of the township, at an election called for that purpose. The notice of such election had to contain a statement of the purpose for which and the conditions under which bonds were to be issued. The legislature having said that these obligations might be paid, and a majority of the legal voters of the township having decided that it was just and equitable that such subscriptions to the court-house fund should be assumed by the municipality, we cannot see that the law is subject to any constitutional objection. Following the maxim which we regard as the true and cor-

rect rule, that there should be great caution in arriving at a conclusion adverse to the validity of a legislative act, and believing that the law in question is within the constitutional power of the legislature to pass, we recommend a reversal of the judgment of the trial court.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 565)

KANSAS, N. & D. RY. CO. v. MAHLER.

(Supreme Court of Kansas. March 7, 1891.)

EMINENT DOMAIN—LOCATION OF RAILROAD IN STREET—ABUTTING OWNERS.

To entitle an abutting lot-owner to recover damages for locating a line of railroad, under the authority of the city council, in one of the streets of a city, there must be a practical obstruction of the street in front of his premises, so as to virtually deprive him of ingress to and egress from his property. Railway Co. v. Cuykendall, 42 Kan. 234, 21 Pac. Rep. 1051, and Railway Co. v. Smith, 44 Kan. —, 25 Pac. Rep. 623, followed. (Syllabus by Green, C.)

Commissioners' decision. Error from district court, Bourbon county; C. O. FRENCH, Judge.

Ware, Biddle & Cory and Ira D. Broussor, for plaintiff in error. Hill & Chenault and Crider & Pritchard, for defendant in error.

GREEN, C. Casper Mahler brought his action against the Kansas, Nebraska & Dakota Railway Company to recover \$2,000, damages for building its line of railroad in front of two lots on Barbee street, in the city of Ft. Scott, in such a manner as to obstruct his ingress to and egress from his premises and dwelling. A verdict and judgment were obtained for \$800 against the plaintiff in error, and it now seeks a reversal of the same, and claims manifest error. The plaintiff in error had the right, under a city ordinance, to build its road in Barbee street, which was 60 feet wide, and the special findings of the jury indicated that, at the nearest point, the railroad track was 25 feet from the plaintiff's property. The measurement of the city engineer showed the space to be from 27½ to 32 feet from the line of the lot upon which the dwelling was located to the track of the plaintiff in error. The facts, as they appear in the record, bring this case within the rule laid down in Railway Co. v. Cuykendall, 42 Kan. 234, 21 Pac. Rep. 1051, and Railway Co. v. Smith, 44 Kan. —, 25 Pac. Rep. 623. The above cases settle the questions involved in this case, and, upon the authority of those cases, we recommend a reversal of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 533)

CHICAGO, K. & N. RY. CO. v. NEIMAN.

(Supreme Court of Kansas. March 7, 1891.)

EMINENT DOMAIN—COMPENSATION—OPINION EVIDENCE.

The opinion of a witness, giving in the lump the amount of damages, present and prospective, which a land-owner will sustain by the

appropriation of a right of way for a railroad through his land, is not admissible as evidence. *Railroad Co. v. Kuhn*, 88 Kan. 675, 17 Pac. Rep. 322, followed.

(*Syllabus by the Court.*)

Error from district court, Harvey county; L. HOOK, Judge.

*Ady & Henry and W. F. Evans*, for plaintiff in error. *Bowman & Bucher*, for defendant in error.

JOHNSTON, J. The Chicago, Kansas & Nebraska Railway Company instituted proceedings to condemn a right of way for its railroad through Harvey county. A strip of land through the farm of I. H. Neiman, amounting to 724-100 acres, was desired, and the commissioners who had been appointed appraised the value of the land appropriated at \$289.60, and estimated the damages for depreciation and injury to adjoining lands, not appropriated, at \$410, making a total of \$699.60. Neiman appealed to the district court, where a trial was had with a jury, and where damages were awarded in the sum of \$1,611.70. The principal complaint, and the only one that we need notice, is the admission by the court of incompetent testimony. The following question was asked and the answer given over the objections of the railroad company: "Question. How much less, in your opinion, was the farm worth after the railroad had established their track through it, irrespective of any benefit to be derived from said track, taking into consideration the damage, present and prospective, the incidental loss, inconvenience, present and prospective, which may reasonably be expected to exist from maintaining the said railroad track to be continued permanently? Answer. \$2,800 less, or \$9,200 afterwards." A substantially similar question was asked another witness, and an objection was made at the time, but the objection was overruled, and the witness answered, "About \$1,300." It is contended by the plaintiff in error that under these rules the province of the jury was invaded by allowing the witnesses to determine by their opinions the exact question that the jury was called to decide. The precise question presented was determined by this court in *Railroad Co. v. Kuhn*, 88 Kan. 675, 17 Pac. Rep. 322. The question asked and answered in that case was almost identical with the one propounded in this, and the court held that the admission of the testimony was erroneous, and that it was virtually asking the witness to decide the case for the jury, and to advise them what their verdict should be. It cannot be said that the error was an immaterial one, as the witnesses differed widely in their opinions of the values of the property and of the damages suffered. The estimates ranged all the way from \$800 up to \$2,800, and those witnesses who had assumed the functions of the jury, and lumped the damages suffered, were among those who placed the damages at the highest sum. The reasoning and cases cited in *Railroad Co. v. Kuhn*, *supra*, are equally applicable here, and must rule in the present case. We do not deem it necessary to notice the other points that have been discussed in

the case. The judgment will be reversed, and the cause remanded for a new trial. All the justices concurring.

(45 Kan. 535)

LEAVENWORTH, N. & S. RY. CO. v. HERLEY  
*et al.*

(*Supreme Court of Kansas. March 7, 1891.*)

EMINENT DOMAIN—COMPENSATION—OPINION EVIDENCE—ELEMENTS OF DAMAGE.

1. Cases with respect to witnesses testifying as to damages referred to and followed.

2. The owner of land taken and appropriated by a railroad company for railroad purposes in condemnation proceedings can recover in such proceedings only full and complete compensation for all his losses suffered by him, with respect to his entire tract of land, as a result of such appropriation and the construction and operation of the railroad in a legal and proper manner; and cannot recover in such proceedings for independent trespasses committed by the railroad company or its agents outside of the land appropriated by the railroad company. For the recovery of damages for any such independent trespasses the landowner must resort to some other action or proceeding.

(*Syllabus by the Court.*)

Error from district court, Leavenworth county; ROBERT CROZIER, Judge.

*Geo. R. Peck, A. A. Hurd, and Robert Dunlap*, for plaintiff in error. *L. B. & S. E. Wheat*, for defendants in error.

VALENTINE, J. This was a condemnation proceeding instituted by the Leavenworth, Northern & Southern Railway Company to procure a right of way through certain lands in Leavenworth county, some of which lands belonged to the present defendants in error, Mary Herley, David F. Herley, Emma Kennedy, William Herley, and Katie Herley. The commissioners awarded to the defendants in error \$317.20 as the value of the land taken, and \$475 as damages to the land not taken, making a total compensation to the defendants in error of \$792.20. The defendants in error appealed to the district court, and in that court became the plaintiffs, while the aforesaid railway company became the defendant. Two trials were had in the district court. At the second trial, which was before the court and a jury, a general verdict and judgment were rendered in favor of the plaintiffs below and against the railway company, awarding to such plaintiffs the sum of \$5,000 as damages. The value of the land taken and the damages to that not taken were not found separately by the court or jury. The railway company brings the case to this court, and ask for a reversal of the aforesaid judgment, for several reasons, among which are the following:

1. The railway company claims that the court below erroneously permitted certain witnesses for the plaintiff to testify directly as to the amount of the damages which the witnesses believed the plaintiffs sustained by reason of the defendant's procuring its right of way and constructing its railway across the plaintiffs' land, or, in other words, that the court below erred in permitting such witnesses to testify as to the amount which they believed the plaintiffs were entitled to recover as damages; and the railway company cites in

support of this claim the following cases: Railroad Co. v. Kuhn, 38 Kan. 675-677, 17 Pac. Rep. 322, and cases there cited; Railroad Co. v. Ross, 40 Kan. 605, 606, 20 Pac. Rep. 197; Railroad Co. v. Muller, 44 Kan. —, 25 Pac. Rep. 210, 211, and cases there cited. See, also, Roberts v. Commissioners, 21 Kan. 248, 253, and cases there cited; Water Co. v. Knapp, 33 Kan. 753, 756, 7 Pac. Rep. 568; Railroad Co. v. Dill, 41 Kan. 737, 21 Pac. Rep. 778; Railroad Co. v. Nelman, ante 22, (just decided.) We suppose that the railway company in the present case will admit that a witness sufficiently competent may testify as to the value of the land before the taking of the right of way and the value of the land afterwards, and indeed as to values generally, so far as the same may have application to the case; and that he may also testify in detail with regard to the situation of the land, and with regard to all things connected therewith which might tend to render the land more valuable or less valuable, or which might constitute elements of value or want of value, or that might tend to prove value or a want of value; and that the witness might also testify as to every fact which might constitute an element of damage or tend to prove damage. See the cases of Railroad Co. v. Ehret, 41 Kan. 22 et seq., 20 Pac. Rep. 538, and cases there cited; Commissioners v. Labore, 37 Kan. 480, 484, 485, 15 Pac. Rep. 577. But the railway company claims that a witness cannot testify in comprehensive terms to the amount of damages which he may think the land-owner has suffered or may suffer by reason of the appropriation of the right of way. It has been suggested in favor of a witness' giving direct testimony as to the amount of damages to be recovered, that as the amount of the damages to be recovered is the final result to be reached upon the testimony of all the witnesses, each witness should be permitted to state in direct and explicit terms just how much he thinks the damages are. The railway company answers that this cannot be done, for the simple reason that the amount of damages to be recovered is the final result to be reached in the action,—the final fact to be ascertained by the jury; and that the jury alone, and not the witness, is the proper tribunal to determine this fact, which is generally an exceedingly comprehensive and complex fact, depending upon and including innumerable details. Suppose that the plaintiff in an action for personal injuries—an action for assault and battery, for instance—should be a witness, would it be proper to ask him such questions as these: How much were you damaged? What is the amount of your damage? What amount are you entitled to recover? We do not think it is necessary to determine whether the court below committed any material error in permitting witnesses to testify directly as to damages or not, and we shall therefore pass to the next question.

2. The railway company also claims that in cases like the present the owner of the land taken can recover only full and complete compensation for all his losses suffered by him with respect to his entire

tract of land by reason of the appropriation by the railway company of its right of way and of other lands, if other lands are taken, and by reason of the construction and operation of its railway in a legal and proper manner, and cannot recover in such cases for independent trespasses committed by the railway company or its agents outside of the land appropriated by the railway company; and that for the recovery of damages for any such independent trespasses the land-owner must resort to some other action or proceeding. And the railway company cites the case of Railroad Co. v. Usher, 42 Kan. 637 et seq., 22 Pac. Rep. 734, and cases there cited. See, also, State v. Armell, 8 Kan. 288; Railway Co. v. Muhlman, 17 Kan. 224; Reisner v. Railroad Co., 27 Kan. 382, 389; Railroad Co. v. Grovier, 41 Kan. 686, 21 Pac. Rep. 779; Railroad Co. v. Willets, 45 Kan. —, 25 Pac. Rep. 576, and cases there cited. The railway company claims that the court below erred in permitting the plaintiffs below to recover for trespasses outside of the right of way, and we think so too. Evidence was first introduced, over the objections of the defendant, by the plaintiffs concerning trespasses of this character, and the court afterwards refused to instruct the jury as requested by the defendant, among other things, as follows: "That the jury should not allow any damages to the plaintiffs on account of earth or trees having been thrown outside of the right of way appropriated and onto the land of the plaintiffs in the construction of the road." On the contrary, the court gave to the jury the following, among other, instructions: "That in determining the amount of the plaintiffs' damages in this case the jury should include \* \* \* the amount of all damage to plaintiffs, if any, caused by the removal of earth from defendant's right of way in constructing its road on plaintiffs' land outside of such right of way, and placing such earth so near plaintiffs' land that from natural causes the same may have spread out over plaintiffs' land, and all damage to plaintiffs, if any, caused by the removal of stumps and trees and brush from that right of way onto plaintiffs' land outside of that right of way in constructing defendant's railroad." The railway company claims the foregoing refusal to instruct the jury, and also the giving of the foregoing instruction, constituted material error. In this kind of proceeding the judgment for compensation can be only an award of damages which cannot be enforced by execution, (Railroad Co. v. Wilder, 17 Kan. 239, 247, and cases there cited; Railway Co. v. Moore, 24 Kan. 323, 328; Water Co. v. Knapp, 33 Kan. 752, 756, 757<sup>1</sup>;) while every one knows that in a regular action for a trespass the judgment is otherwise, and can be enforced by execution. It is probably not necessary to mention any of the other claims of error on the part of the railway company. The defendants in error, who were plaintiffs below, answer the railway company's claims of error by saying that the questions are not properly brought or

<sup>1</sup> 7 Pac. Rep. 568.

presented to this court; but, after a careful consideration of the points made by the defendants in error, we are of the opinion that they are wholly untenable. The proceeding in this court is founded upon a case made in the district court for the supreme court, and in such a case thus made and brought to this court it is not necessary that the entire record of the case in the district court, or indeed any portion of the record thereof, copied literally, should be brought to the supreme court. All that is necessary is that the case made for the supreme court should include therein a statement of so much of what occurred in the case in the district court as will be necessary to present to the supreme court the errors complained of. Civil Code, § 547. The defendants in error also present another matter as a defense to the claims of error made by the railway company. It seems that when the court below rendered judgment in favor of the defendants in error and against the railway company it included in its judgment an order that the railway company, in order to be entitled to continue in the use of its right of way through the land of the plaintiffs below, should pay to such plaintiffs the aforesaid sum of \$5,000, with interest, within 30 days. This judgment was rendered November 10, 1888, and of course the 30 days given by the court within which the railway company was required to pay said \$5,000 has long ago expired. How these matters affect this proceeding in error it is difficult to understand. We suppose that the railway company has the right to institute proceedings in error in the supreme court to have the decision of the district court reviewed by the supreme court. Civil Code, § 542; Const. art. 3, §§ 1-3. We suppose also that it has the right to have a stay of proceedings in the district court while the case is pending in the supreme court. Civil Code, § 551 et seq. We suppose also that the railway company has deposited the amount awarded by the condemnation commissioners with the county treasurer, and given bond as provided by law. Act relating to corporations, § 239, (Gen. St. 1889, par. 1895.) And we also suppose that the railway company has given a sufficient bond for a stay of proceedings in the district court while the case is pending in this court. But how can this matter affect this case as it is now presented? This same kind of proceeding was referred to in the case of *Railway Co. v. Whitaker*, 42 Kan. 634, 22 Pac. Rep. 783, and a remedy was there suggested. See, also, *Railroad Co. v. Callender*, 13 Kan. 496. But counsel for the defendants in error say that these cases ought to be overruled, so far as this matter is concerned. Counsel, also, for the defendants in error, in further reply to the claims of error made by the railway company, say that all the authorities or decisions relied on by the railway company should be overruled. We think otherwise, however. For the error of the district court in permitting the plaintiffs to recover for independent trespasses its judgment will be reversed, and cause remanded for further proceedings. All the justices concurring.

## RUGGLES et al. v. CLARE.

(Supreme Court of Kansas. March 7, 1891.)

## DEED—ESTATE CONVERTED—EFFECT.

1. A deed will not be construed to create an estate upon condition, unless the language to that effect is so clear that no room is left for any other construction.

2. A warranty deed that does "hereby sell and convey unto R., to have and to hold to the said R., and to his heirs, forever," an undivided half of a tract of land, "in consideration of clearing the whole of all taxes now due, and tax claims of all kinds for which the land has been sold, or is now subject to sale," is an absolute conveyance, and on its delivery vests title in the grantee, and is not a deed upon condition precedent or subsequent. (*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Lyon county; CHARLES B. GRAVES, Judge.

*W. A. Randolph and Ed. S. Waterbury*, for plaintiffs in error. *Kellogg & Sedgwick*, for defendant in error.

SIMPSON, C. This was an action of ejectment, and for the rents, issues, and profits of the S. W.  $\frac{1}{4}$  of section 27, township 15, range 12, in Lyon county, commenced August 7, 1885, by John Clare, as plaintiff, against these plaintiffs in error and one John Bolin, as defendants. Bolin was an occupant claiming under a void tax-deed. His answer was a general denial; and the judgment which was finally rendered in the case, at the October term, 1887, was—*First*, against Bolin and in favor of Clare for the recovery of the land, but that Clare be not let into possession until he should refund the taxes which Bolin had paid, with interest as provided by the statute in such cases, and should pay the value of Bolin's improvements, less the value of the use and occupation; *second*, against Bolin, and in favor of the plaintiffs in error, for an undivided half of the land, but that they be not let into possession until they had refunded to Bolin one-half the taxes he had paid, with interest, etc., and one-half of the value of his improvement, less one-half of the value of his use and occupation; the value of the improvements and the use and occupation in both cases to be afterwards determined. The answer to the petition by the defendants Ruggles, filed August 19, 1885, consisted of two divisions or counts, the first being a special denial. The second count of their answer commences, "And for a second and further defense and cross-petition against the plaintiff, and against their said co-defendant, Fredrick Bolin," and sets up their claims to an undivided half of the land as heirs of R. M. Ruggles, deceased, under a deed therefor made by the plaintiff Clare to said R. M. Ruggles, on the 26th day of March, 1878, and in the life-time of said R. M. Ruggles, and alleges that Clare and Bolin deny their said right, and unlawfully keep them out of possession, and asks judgment for possession accordingly. To this defendant Bolin filed answer, September 5, 1885, consisting of general denial. On the 16th day of September, 1876, Clare filed a "reply to that portion of the answer of the defendants Ruggles described as a second and further defense, and numbered second;" which reply is in two divisions or counts, the first count being a denial, and the

second count commencing, "And plaintiff, further replying, says," and sets out a copy of the deed from Clare to R. M. Ruggles, under which these plaintiffs in error claim, and alleges a breach on the part of Ruggles in the conditions on which the conveyance was made, and a failure of the consideration therefor, and a forfeiture of title accordingly. To the second count of this reply of Clare the defendants Ruggles filed a reply, consisting of a general denial, but this was afterwards withdrawn by consent, and the Ruggles heirs filed a demurrer instead to the second count or division of the plaintiff's reply, upon the ground that the same did not state facts sufficient to constitute a defense to their claim, as stated in the second count of their answer. On the hearing of this demurrer, July 19, 1886, the court sustained the demurrer; and afterwards plaintiff dismissed the cause as to the defendants Ruggles, and took time in which to file an amended "reply." Clare's amended reply to the second count of the answer of the defendants Ruggles was accordingly filed on the 13th day of September, 1886, and it was word for word the same as the original reply, except that the amended reply contained these words, which were not in the original reply, to-wit: "Plaintiff further avers that the estate of R. M. Ruggles is wholly insolvent, and nothing whatever can be collected of it." This amended reply was in turn demurred to by the defendants Ruggles, upon the same ground as was the original reply, but this time the demurrer was overruled, to which due exception was taken. On the 28th day of January, 1887, the defendants Ruggles filed a reply to the amended reply of Clare, treating their answer as a cross-petition, and the amended reply of Clare as an answer to it: and thus the pleadings stood at the final trial, which took place on the 26th of October, 1887. The trial was to the court without a jury, October 26, 1887. At the conclusion of the evidence touching the question of title, the following proceeding was had: "The court having announced the intention of taking the case under advisement, it was in open court agreed by all parties that, if the judgment should be against the defendant Bolin, upon the issues of the title, the amount to be refunded and paid to him for improvements, less the value of his use and occupation of the premises, as provided by statute in such cases, if the court should adjudge him entitled thereto, should be determined and ascertained in the manner provided by statute after the final judicial determination of the question of title in the district court; or if said cause should by either party be carried for review to the supreme court within a reasonable time, then after such determination under the proceedings in the supreme court; and thereupon the [district] court took said cause under advisement."

On the 9th day of February, 1888, the court announced and made his findings of fact in writing, as follows: "(1) A patent in due form was duly issued by the government of the United States on the 1st day of August, 1860, to this plaintiff, John Clare, whereby he became the owner

of the land in question, being the land located by John Clare, as assignee of Catherine Fike, of military land warrant No. 82,162, issued under the military bounty act of congress of March 3, 1855. (2) On the 15th day of February, 1865, the county clerk of Lyon county, Kan., issued to L. D. Bailey a tax-deed purporting to convey said land to L. D. Bailey, based upon the sale of the land to him for the delinquent taxes of 1860, and payment of the subsequent taxes of 1861 and 1862, and which deed was recorded in the office of the register of deeds of said county on the 10th day of July, 1865. (3) On the 1st day of April, 1871, the county clerk of said county issued a tax-deed in due form for said land to S. H. Dodge, based on the sale of 1866, for the delinquent taxes of 1865, to L. D. Bailey, and the assignment of the sale certificate by him to Dodge, which deed was duly acknowledged, and on the 20th day of April, 1871, duly recorded in the office of the register of deeds of said Lyon county. (4) On the 26th day of March, 1873, this plaintiff, John Clare, with his wife, Susan A. Clare, duly executed and delivered a deed of the conveyance of the undivided one-half of said land to R. M. Ruggles, which deed having been on the 15th day of April, 1873, duly acknowledged, the same was, with due certificate of the acknowledgment thereof, duly recorded in the office of the register of deeds of said Lyon county, Kan., on the 19th day of April, 1873, which deed is in words and figures following, to-wit: 'Know all men, that John Clare, of the city of Covington, county of Keaton, and state of Kentucky, for and in consideration of the payment of all back taxes now due on the land herein described, and the redemption of the same from all tax claims of all kinds, and the clearance of that half of the same not hereby conveyed from all taxes now due and tax claims for which the said land may have been sold, and now due, and for which it is now subject to sale, does hereby sell and convey unto R. M. Ruggles, of Emporia, Kansas, the following real estate, to-wit: The undivided one-half of the south-west quarter of section number twenty-seven, (27,) in township fifteen, (15,) range twelve, (12,) containing one hundred and sixty (160) acres; being the land located by John Clare, January 11, 1859, upon military land warrant No. 82,162, in the name of Catherine Fike, as shown by the record in the register's office at Lecompton, Kan. Said land warrant was issued under the military bounty act of March 3, 1855. The undivided one-half is hereby conveyed to said R. M. Ruggles in consideration of clearing the whole of all taxes now due, and tax claims of all kinds for which said land has been sold, and is now subject to sale, together with the appurtenances thereto belonging, to have and to hold the same to the said R. M. Ruggles, his heirs and assigns, forever; the grantor hereby covenanting that the title so conveyed is unincumbered, and that he will warrant and defend the same against all claims whatsoever. In witness whereof the said John Clare, together with Susan A. Clare, his wife, who hereby relinquishes all right

of expectancy of dower in and to the land hereby conveyed, have hereunto set their hands and seals this 26th day of March, A. D. 1873. JOHN CLARE. SUSAN A. CLARE.

(5) That on the 15th day of April, 1873, R. M. Ruggles commenced an action in the name of John Clare, as plaintiff, against Solomon H. Dodge, as defendant, in the district court of Lyon county, state of Kansas, for the possession of the land in question. The defendant therein, S. H. Dodge, duly appeared and answered, denying the plaintiff's title, and defended therein, and upon the final trial offered in evidence the tax-deed described in paragraph numbered 2 of these findings, in connection with a subsequent deed, duly executed and acknowledged and recorded, of the conveyance of said land by L. D. Bailey to him, said Dodge, and said Dodge likewise gave in evidence and put in issue the validity of two other tax-deeds, to-wit, the deed described in paragraph numbered 3 of these findings, and a tax-deed in due form, issued and acknowledged by the county clerk of said county on the 30th day of October, 1874, and on the 31st day of October, 1874, duly recorded in the register of deeds' office of said county, of the said land to S. H. Dodge, based on the sale of said land in 1871 to him for the delinquent taxes of 1870, and payment of the subsequent tax of 1871; and it was duly admitted on said trial that said land was vacant and unoccupied, and final judgment was duly rendered therein on the

— day of May, 1876, upon the general verdict of the jury in favor of said John Clare, and against said Solomon H. Dodge, for the recovery of said land, together with his costs therein, taxed at \$37.35, and that he should not be let into possession of said land until he paid to said Dodge \$348.26 as and for the taxes which said Dodge, as the holder of the aforesaid tax-deeds, had paid on said land, and the interest, costs, and charges thereon; said sum of \$48.26 dollars constituted the back taxes on said land at the time of and mentioned in said deed from Clare to Ruggles, with the accumulated costs and interest thereon, and said judgment for back taxes remains wholly unsatisfied on the records of said court. (6) That said R. M. Ruggles was an attorney at law, and had the exclusive charge, care, and labor of the conduct of the litigation described in paragraph numbered 5 of these findings, in behalf of said Clare, from the commencement to the end; that said R. M. Ruggles died intestate on or about the 24th day of April, 1879, leaving the defendant Sue L. Ruggles, his widow, and the defendants Robert and Willie Ruggles, his children, who are his only heirs; and the claims against said R. M. Ruggles, deceased, exceeded the assets of his estate. (7) That on the 24th day of August, 1880, the county clerk of said Lyon county duly executed, acknowledged, and delivered a tax-deed of the land in question to J. M. Steele, which deed was on the same day duly recorded in the office of the register of deeds of said county, which deed is based on the sale of said land on the 7th day

of September, for the delinquent taxes of 1874, to the county for the want of bidders, and subsequent assignment of the sale certificate by the county clerk to L. A. Wood, and by him to said J. M. Steele. A copy of said tax-deed is hereto attached, marked 'Exhibit A,' and made a part hereof. The notice, and only notice, given by the county treasurer of the sale of land in the year 1875, for delinquent taxes, stated that such sale would be on the 3d day of September, and the first Tuesday of that month, in 1875, and no notice whatever was given of the meeting of the county board of equalization for the year 1874, and no meeting of said board was held in that year except upon the 11th day of July, 1874. Subsequent deeds, purporting to convey said land, and duly conveying all the interest of the respective grantors therein, have been duly executed, acknowledged, and delivered, as follows: By said J. M. Steele and his wife to S. B. Riggs, and said S. B. Riggs and his wife to Frank Edwards, and by said Frank Edwards and his wife to this defendant Fredrick Bolin, which last deed is dated on the 31st day of July, 1883, and recorded on the 13th day of December, 1883, up to which time said land had never been entered upon or actually occupied by any body, and none of these defendants except Bolin ever took actual possession of said land, the same being vacant and unoccupied up to that date, and thereupon said Fredrick Bolin took possession, and has since paid taxes and made lasting and valuable improvements thereon. The said Frederick Bolin, with his wife, did on the 4th day of October, 1886, duly execute, acknowledge, and deliver a mortgage of said land to the Kansas Lumber Company, to secure a therein recited and still subsisting indebtedness of said Fredrick Bolin of \$224.95, with 12 per cent. interest from October 4, 1886, for lumber and material used in building and improvements on the land in question, and said mortgage still subsists and is undischarged. (8) On the 13th day of July, 1885, Solomon H. Dodge, for a consideration of \$25, duly executed, acknowledged, and delivered his quitclaim deed to the land mentioned in the petition to this plaintiff, John Clare, which deed so acknowledged was, on the 1st day of August, 1885, duly filed and recorded in the office of the register of deeds of Lyon county, Kan. (9) On or about the 1st day of August, 1885, T. N. Sedgwick, acting as the attorney and agent of John Clare, requested the defendant Sue L. Ruggles to procure and deliver a quitclaim deed of herself and Robert and Willie Ruggles, defendants, of the undivided half of the land in question to said John Clare, for which he offered to pay the sum of fifty dollars. (10) On the 27th day of January, 1887, the defendants Sue L., Robert, and Willie Ruggles tendered the plaintiff, John Clare, \$29 to cover the consideration of the above-mentioned quitclaim deed from Dodge to Clare, with 7 per cent. interest from the date thereof to the date of tender, and the cost of procuring the same and recording, which sum they have brought into court to keep said tender



good, and are still ready and willing to pay. "Conclusions of law." (1) That said tax-deed to J. M. Steele is void, and the claim of title of the defendant Fredrick Bolin thereunder is invalid, but said Bolin is entitled to have his taxes paid thereunder, with charges and interest as allowed by law refunded; also the value of his lasting improvements, less damages by waste, if any, and of the rents and profits as provided by the occupying claimant's law, all to be hereafter ascertained, the same to be first applied to the discharging of said mortgage given by said Bolin on said land, and the excess to be paid to him. (2) The plaintiff ought to recover his costs as against the defendants."

At the time said deed was given to said Ruggles, Clare's title was incumbered by tax-deeds and taxes then due, and for which said land had been sold or was subject to sale, as follows: A tax-deed dated February 15, 1865, and recorded July 10, 1865, for the delinquent taxes of 1860, 1861, and 1862; a tax-deed "in due form," dated April 1, 1871, and recorded April 20, 1871, for the delinquent taxes of 1865; also a tax-sale certificate for the delinquent taxes of 1870 and 1871, upon which a deed in due form was issued on the 13th day of October, 1874, and recorded October 31, 1874,—all of which tax-deeds and claims were held and owned by one Solomon H. Dodge.

On the 15th day of April, 1873, R. M. Ruggles, as attorney for this plaintiff, commenced an action against Dodge in the district court of Lyon county for the recovery of said land. Dodge defended in said action under all the above tax-deeds; and in May, 1876, judgment was rendered in favor of Clare for possession of the land and costs, "but that he should not be let into possession until he paid to said Dodge \$348.26 as and for the taxes which said Dodge, as the holder of the aforesaid tax-deeds, had paid on said land." The court in this case found that said \$348.26 constituted the "back taxes" on the land at the time of the deed from Clare to Ruggles, the only proof of which is the inference from what has been here stated. This court also found that "said judgment for back taxes remains wholly unsatisfied on the records of said court." The clerk testified on this trial that he had examined the records and papers of that case, and found no memoranda or entry of payment or satisfaction. His testimony was the only evidence whether said sum has been paid or not, and the record contains all the evidence. Said R. M. Ruggles died intestate and insolvent, April 24, 1879, leaving these plaintiffs in error his only heirs. The land in question was always vacant and unoccupied until the 31st day of July, 1883, when Bolin took possession under a tax-deed based on the tax-sale of 1875 to his grantors, through which he claimed in this action. On the 13th day of July, 1885, Solomon H. Dodge quit-claimed this land to Clare for \$25, and the deed was duly recorded August 1, 1885. It was agreed in open court, by all the parties, "that the defendants Sue L. Ruggles,

Robert Ruggles, and Willie Ruggles tendered to the plaintiff, John Clare, twenty-nine dollars on the 27th day of January, 1887, to cover the consideration of the above last-named quitclaim deed from Solomon H. Dodge to Clare, with seven per cent. from the date thereof to the date of tender, and the cost of procuring and recording the same, which sum they have brought into court to keep said tender good, and they are still ready and willing to pay the same."

The parties complaining here are Mrs. Sue L. Ruggles and her children, Robert and Willie Ruggles. Bolin does not bring up his branch of the case. The contention on the part of the plaintiffs in error is that the warranty deed executed by Clare and wife to R. M. Ruggles during his life-time is an absolute conveyance, an executed grant, not expressing or subject to any condition, precedent or subsequent; and, if this is so, then that Clare could only pursue such remedies as were applicable to the contract relations growing out of the undertaking of Ruggles to clear the land of taxes and from clouds on the title. In this action no such remedy is pursued, but the claim of Clare for redress is based upon the supposed fact that the conditions upon which the conveyance was made have never been performed by Ruggles, and hence there was a total failure of consideration, and the deed is void. Clare's petition was an ordinary one in ejectment. The plaintiffs in error answered, setting up the conveyance by Clare and wife to R. M. Ruggles, for the undivided half of the land described in the petition of Clare. To this answer Clare replied, admitting the execution of the deed to Ruggles for an undivided half, but alleges that Ruggles failed, neglected, and refused to pay the back taxes, and to remove the tax-liens, etc., as he was required to do by the conditions of the deed, and that said deed was and is void. To this reply a demurrer was filed by the plaintiffs in error, and this demurrer was sustained by the court, and thereupon Clare dismissed the action as to these plaintiffs in error, but Clare filed an amended reply to the answer of the plaintiffs in error by leave of the court. This amended reply was a copy of the original, except that there was added an allegation that, when Clare was first apprised of the failure of Ruggles to pay all back taxes on said land to divest it of all tax-liens, he immediately rescinded the contract, and demanded from the heirs of Ruggles a reconveyance to him of the undivided half of the land. To this amended reply the plaintiffs appeared, and filed a demurrer that was overruled by the court, and to which ruling due exceptions were saved. Then the amended reply of Clare to the answer of the plaintiffs in error was considered as an answer to a cross-petition of the plaintiffs in error, and they filed a reply to this amended answer, denying generally and specifically the allegations therein, and all parties went to trial in this condition of the pleadings. We suppose that the errors really complained of by the plaintiffs in error are the ruling on



their demurrer to the reply of Clare, and the judgment for costs against them. The controlling question is whether the deed from Clare and wife to Ruggles is an absolute conveyance. We think it vested in Ruggles an absolute title to one-half of the land. In the absence of fraud, the consideration expressed in the deed cannot be impeached, contradicted, or varied for the purpose of invalidating the deed. In the case of *Johnston v. Town Co.*, 14 Kan. 391, it was sought to show, to invalidate the deed, that the instrument was not to be considered a deed until certain things were done by the grantee and other parties, and that none of the conditions had been fulfilled. The court say that such evidence is inadmissible; and the court further say "that a deed apparently fully executed and acknowledged, and delivered to the grantee to become an absolute deed upon some condition, is not in escrow, but is immediately a deed absolute."

In *Curtis v. Board*, 43 Kan. 138, 23 Pac. Rep. 98, this court say, referring to the deed in that case: "There are no words in the deed stating that the estate was or should be conveyed upon condition, or that it might be forfeited under any circumstances whatever, or that the estate might under any circumstances revert to the grantors or their heirs, or that they might, under any circumstances, ever have the right to re-enter the premises. Nor was the estate conveyed or to be continued in existence upon any such terms as 'provided' or 'if' something in the future should be done or not done, or happen or not happen. Indeed, there is nothing sufficiently strong in any part of the deed, or in the whole deed, to indicate that the estate was conveyed, or intended to be conveyed, upon any condition, either precedent or subsequent; but, taking the whole deed together, it shows that an absolute estate in fee-simple was intended to be conveyed, and was conveyed, and was to continue in the grantees forever. The authorities are uniform that estates upon condition subsequent, which after having been fully vested may be defeated by a breach of the condition, are never favored in law, and that no deed will be construed to create an estate upon condition, unless the language to that effect is so clear that no room is left for any other construction. See the case of *Packard v. Ames*, 16 Gray, 327, and other cases cited in the opinion." This ruling establishes the deed from Clare and wife to R. M. Ruggles as an absolute conveyance to him of one-half of the land in controversy. This leaves Clare to his other remedies against the estate of Ruggles. We do not think that the fact of the insolvency of the Ruggles estate, that was established on the trial, varies the rule, or makes the deed dependent on any subsequent performance by Ruggles. It follows from this that the court erred in overruling the demurrer to the reply of Clare, and that the judgment against the plaintiffs in error was wrong. It is recommended that the judgment be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 614)

## PELHAM et al. v. SERVICE.

(Supreme Court of Kansas. March 7, 1891.)

## CONTRACT—SUFFICIENCY OF CONSIDERATION.

The relinquishment of a right to a homestead entry on public land, and the dismissal and withdrawal of a written protest against the final proof of another, is a good and valid consideration in a written instrument for the payment of money.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Scott county; A. J. ABBOTT, Judge.

Ward & Meade, Collins & Cravens, and L. Nebeker, for plaintiffs in error. Morse & Hubble, for defendant in error.

SIMPSON, C. Service sued the plaintiffs in error on the following contract in writing, to-wit: "State of Kansas, county of Scott—ss: This contract witnesseth, that whereas, John C. Service, of said county and state, has made a homestead entry upon the following tract of land lying in Wichita county, Kansas, to-wit: The south half of the north-west quarter, and the north-west quarter of the north-west quarter, of section twenty-four, (24,) and the south-west quarter of the south-west quarter of section thirteen, (13,) west of the 6th P. M.,—and has a protest against the final proof of William H. Montgomery on and to said land, under which a hearing is set for August 25, 1887, at the Wakeeney land-office, Wakeeney, Kansas, to settle a question of conflict of right to same: It is agreed to and in consideration of the said Service furnishing G. C. Hardesty, or delivering at Wichita County Bank of Leoti, on or before August 25, 1887, a relinquishment of his homestead entry, and a written withdrawal and dismissal of said protest and hearing, then the subscribers hereto, as principal and security, agree to pay said Service the sum of five thousand dollars (\$5,000) on or before September 15, 1887. Dated this 4th day of August, 1887. GUE C. HARDESTY. MILTON BROWN. D. F. HALL. T. W. PELHAM. KATE PELHAM." Service alleged performance on his part, and demanded judgment. The plaintiffs in error demurred to the petition for the reason that it did not constitute a cause of action; the pith of the demurrer being that there was no consideration for the agreement, the contract itself and the petition on its face showing the fact that Service had no possessory right in the land, had nothing to sell, and could transfer nothing to the plaintiffs in error. This demurrer was overruled, and this is the first error assigned. The plaintiffs in error then filed an answer, setting up as an affirmative defense that Service confederated with one Johnson and McConville to secure the contract by falsely inaugurating a contest on the homestead entry of W. H. Montgomery to the land described in the entry, when they had no legal right to make such a contest; that Service never had any valuable interest in the land; that at the time the contract was entered into the title to the land was in the United States, and that the contract was void for that reason. Service filed a reply, and the case went to trial to the

court. The plaintiffs in error demurred to the evidence of Service; but the demurrer was overruled, and this is the second assignment of error. This raises the same question as the demurrer to the petition. Before the trial, Mrs. McConville, to whom Service had assigned a one-half interest, less \$500, in the contract, and who was joined as plaintiff, dismissed the action so far as her interest was involved; she having received payment or satisfaction of her claim. The plaintiffs in error produced their evidence, and a demurrer by Service was sustained to their evidence. This constitutes the third assignment of error. During the trial, the plaintiffs in error tried to prove that Service was never in the actual possession of the land; had never made, or caused to be made, any improvements on said land. This was overruled, and objected to. Witnesses on the stand were asked to state what settlement Service had made, if any. These questions were objected to, and sustained. A witness was asked what Service had ever done on said land, or any part thereof; and the objection to the question was sustained. The plaintiffs in error stated that they expected to prove by witnesses on the stand that Service never made any settlement on said land, never improved the same, and never had any interest in the same; but the trial court would not permit them to examine the witnesses as to these facts. All these rulings are assigned as error. The trial court found for the plaintiff below, and rendered a judgment in his favor for \$2,750 and costs. The case is here for review.

All these rulings recited go to the same subject or general objection. The demurrer to the petition; the demurrer to the evidence; and their various offers to prove that Service was never in the actual possession of the land; had never made, or caused to be made, any improvements thereon, etc.,—all raise but one question, and that is the illegality of the contract. We think that the case of *McCabe v. Caner*, 68 Mich. 182, 35 N. W. Rep. 901, is on all fours with the case at bar, and is decisive of this question, and fully establishes that the relinquishment and withdrawal of the protest was and is a good consideration for the contract sued on. That case cites, as supporting it, *Olson v. Orton*, (Minn.) 8 N. W. Rep. 878; *Thompson v. Hanson*, (Minn.) 11 N. W. Rep. 86; *Lamb v. Davenport*, 18 Wall. 307; *Myers v. Crott*, 13 Wall. 291; *Kennedy v. Shaw*, 43 Mich. 359, 2 N. W. Rep. 396; and other Michigan cases. The case finds strong support in our own reports. The cases of *Lapham v. Head*, 21 Kan. 332; *Moore v. McIntosh*, 6 Kan. 39; *Bell v. Parks*, 18 Kan. 152; *Fessler v. Haas*, 19 Kan. 216,—all affirm that contracts about the possession, improvements, and relinquishment of rights of public land, when free from fraud, can be enforced, and constitute a good consideration. This disposes of the main question in the case, and the nature of the other questions urged by the plaintiffs in error make a prolonged discussion unnecessary. A continuance rests largely in the discretion of the trial court, and we think proper diligence was not shown. There was not sufficient

proof of a conspiracy to defraud. Besides, plaintiffs in error received exactly what they contracted for; they having made the contract with open eyes, and with every opportunity to know the facts. So far as the record shows, we think substantial justice has been done. It is recommended that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 640)

MONTGOMERY v. NULTON *et al.*

(Supreme Court of Kansas. March 7, 1891.)

EJECTMENT—CROSS-PETITION—CAUSE OF ACTION.

In an action of ejectment, where M., who is not one of the original parties to the action, but becomes a party, and by leave of court files a cross-petition, showing that at a period prior to the commencement of the suit the plaintiffs were the absolute owners of the land in controversy, and at that time they sold and contracted in writing to convey the land to him for \$200 and certain other considerations, and that he has tendered the cash payment, and is performing the other considerations according to the terms of the contract, and that plaintiffs have refused to convey, the cross-petition contains a cause of action against the plaintiffs. And when, in addition to such matter, the cross-petition alleges that the defendants claim an interest in the land in controversy under a certain sheriff's deed, and also under a quitclaim deed from the plaintiffs, and avers that the sheriff's deed under which the defendants claim is void, and that their purchase from the plaintiffs, evidenced by the quitclaim deed, was subsequent to his purchase from the plaintiffs, and that the defendants had full knowledge of his prior purchase when they purchased of the plaintiffs, and took their quitclaim deed, *held*, that such cross-petition states a cause of action against the defendants.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Ellis county; S. J. OSBORNE, Judge.

*Montgomery & Harris*, for plaintiff in error. *D. Rathbone and Reeder & Reeder*, for defendants in error.

STRANG, C. Action for specific performance and possession of land. E. M. Whyler settled upon the S.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 2, township 14, range 18, in Ellis county, Kan., under the homestead laws of the United States. April 29, 1882, he obtained a patent for said land. On or about November 24, 1879, E. M. Whyler contracted a debt to Krenger & Krenger, upon which judgment was obtained, execution issued thereon, and a levy made upon the said homestead of E. M. Whyler, which was sold, and a sheriff's deed therefor executed to the purchaser, Mary A. Nulton, who, with her husband, Jonah Nulton, went into possession of the land. Afterwards, on the 1st day of October, 1887, E. M. Whyler and Ellen M. Whyler, his wife, sold and agreed to convey said land to W. P. Montgomery for \$200, and the further consideration that said Montgomery should, at his own expense, clear the title of said land from the cloud thereon arising from the sheriff's deed aforesaid. November 11, 1887, Montgomery commenced a suit in the name of E. M. Whyler and Ellen M. Whyler against Mary A. Nulton and Jonah Nulton to recover the pos-

session of the land. While this suit was pending, and before it came to trial, the defendant Mary A. Nulton purchased from plaintiffs Whyler and Whyler their interest in the land, paying them therefor \$300 and some costs, and took a quitclaim deed. Then Montgomery, by leave of court, filed a cross-petition, setting up his claim to the land under his contract with the Whylers, and alleged that Mary A. Nulton had full knowledge of said contract when she purchased the interest of E. M. Whyler and Ellen M. Whyler, and that she took said land subject to his rights under his contract, and prayed for specific performance, and for the possession of the land. May 7, 1888, E. M. Whyler and Ellen M. Whyler dismissed their action against the Nultons, and the Nultons filed a demurrer to the cross-petition of W. P. Montgomery, alleging several grounds therefor, none of which require any notice, except the fourth, which is as follows: "The cross-bill does not state facts sufficient to entitle said W. P. Montgomery to intervene herein, or to constitute a cause of action against the defendants, nor against Whyler and Whyler." The cross-petition alleges that E. M. Whyler settled upon the land in question under the homestead laws of the United States, and obtained a patent from the government therefor April 29, 1882, that on the 1st of October, 1887, and while the said E. M. Whyler and Ellen M. Whyler were the absolute owners in fee of said land, they sold, and agreed in writing to convey, the same to him, W. P. Montgomery, for the price and conditions therein named; that he had tendered the price of the land, and was performing the other conditions of his contract according to the terms thereof; that the defendants the Nultons claim an interest in the land by virtue of a certain sheriff's deed, and also under a quitclaim deed from the Whylers; that the sheriff's deed under which they claim is void because the judgment and sale upon which such deed was based were founded upon a debt contracted by E. M. Whyler before he became entitled to a patent to the land from the government; and that the quitclaim deed was obtained by the Nultons after the Whylers had sold the land to him, and with a full knowledge on their part of his contract, and his rights thereunder. He then prays for specific performance of the contract, and recovery of the possession of the land, and attaches a copy of his contract to the cross-petition.

We think the cross-petition states a cause of action, both against the plaintiffs and the Nultons, the defendants; and that the cross-petitioner may ask for specific performance and a recovery of the possession of the land in the same action. The defendants in error insist that the contract between the Whylers and Montgomery, on which Montgomery relies in this case, is champertous and void. By this contract, in consideration of the land therein described, the land in controversy in this case, Montgomery agrees to pay the Whylers the sum of \$200 in cash, and in addition thereto to commence proceedings to quiet the title to said land, and pay the expense of such proceeding. We think this

is a simple contract, as legitimate as though he had agreed to pay \$200 for a quitclaim deed, and then had instituted proceedings to quiet title to the land. Counsel ask, what was Montgomery to get if he failed to secure the title to the land? And answer by saying, nothing. Nor would he have got anything if he had taken a quitclaim, and afterwards failed in a suit to recover the land. The fact that Montgomery was a lawyer, and agreed to quiet the title at his own expense, we think was nothing more than an agreement to pay \$200, and whatever the expense of quieting the title to the land was in addition to the \$200 for the land. It is therefore recommended that the judgment of the district court be reversed, and the case remanded for further proceedings.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 650)

### LYONS V. OSBORN.

(Supreme Court of Kansas. March 7, 1891.)

LEASE—RENEWAL—WAIVER OF FORFEITURE—APPEAL—MOTION FOR NEW TRIAL.

1. Where a written lease of real estate for one year contains the following stipulation, "And the said party of the second part [the lessee] has the privilege of continuing this lease, provided he fulfills the contract, at the same rent," held, that the lessee has the privilege of having the lease renewed for another year.

2. And in such a case, where the lessee paid the rent in installments, paying the last portion thereof between one and two months after it became due, but paying the whole of it for the first year more than two months prior to the expiration of the first year, and it was received by the lessor as thus paid without objection, held, that the failure to pay the whole of it when it became due did not deprive the lessee of his right to elect to retain the property under the lease for another year.

3. Where the district court, on a petition in error from a justice of the peace, reverses the judgment of the justice, it is not necessary for the aggrieved party to file a motion for a new trial in order to have the decision of the district court reviewed in the supreme court on petition in error.

(Syllabus by the Court.)

Error from district court, Atchison county; W. D. GILBERT, Judge.

Smith & Solomon, for plaintiff in error.  
J. T. Allensworth, for defendant in error.

VALENTINE, J. This was an action of forcible detainer brought on March 12, 1888, before a justice of the peace of Atchison county by Rebecca Osborn against Charles Lyons, to recover certain real estate situated in said county. A trial was had before the justice and a jury, and judgment was rendered in favor of the defendant and against the plaintiff, and the plaintiff, as plaintiff in error, took the case to the district court on petition in error, where the judgment of the justice of the peace was reversed; and afterwards the defendant, as plaintiff in error, brought the case for review to this court on petition in error. The facts of the case, briefly stated, are substantially as follows: On September 8, 1886, Rebecca Osborn, who owned the property in controversy, leased the same by a written lease to Charles Ly-

ons for a term commencing on March 1, 1887, for which Lyons was to pay the sum of \$325 on November 1, 1887; and the lease also contained the following stipulation: "And the said party of the second part [Lyons] has the privilege of continuing this lease, provided he fulfills the contract, at the same rent." Lyons took possession of the property under the lease about March 1, 1887, and continued in the quiet and peaceable possession thereof until this suit was commenced. He paid the aforesaid rent in installments, paying the last thereof about December 19, 1887; and all was received without objection. It was always understood by the parties that Lyons was to have the possession of the property for at least one year under the lease, commencing on March 1, 1887, although the lease does not in terms state how long he should have it; and in the latter part of August, 1887, it was orally agreed and understood between the parties that Lyons should have the property for one more year, commencing on March 1, 1888, and ending on March 1, 1889. The justice of the peace gave to the jury the following among other instructions: "(2) The defendant would be entitled to a continuance of said lease for another year, provided he has substantially filled all the terms thereof for the first year, provided no new contract has been made, verbally or otherwise, to the contrary. The burden of evidence is on the plaintiff to make out her case by a preponderance of the testimony." "(5) The continuing claim in said lease would be void, and you will so consider it, unless there was an understanding between the parties that it was a definite term of one or two years, or more. If from the evidence you find there was such an understanding between the parties, then it is not void." The plaintiff below, Mrs. Osborn, who is now the defendant in error, complained in the district court, and now complains in this court, of the foregoing instructions, and also of the judgment rendered by the justice of the peace; but we do not think that any substantial error was committed by the justice of the peace. It was originally understood between the parties that Lyons was to have the property for at least one year, with the right on his part to have, if he chose, a renewal of the lease for a second year. It was also agreed between the parties in August, 1887, that he was to have the property for another year. But he had a right independent of this agreement, under the above-quoted stipulation in the written lease, to elect to retain the property for a second year if he chose; and, by remaining upon the property and in the possession thereof after the first year had expired, he presumptively, as nothing was shown to the contrary, elected to retain the property for another year, as in fact he did. In support of the views herein expressed, see 12 Amer. & Eng. Enc. Law, 1006-1009, and cases there cited; *Kolasky v. Michels*, 24 N. E. Rep. 278, (decided by the New York court of appeals, April 15, 1890.) It is further claimed by the present defendant in error that as Lyons did not pay the whole of the rent at the time it became due, which was on November 1, 1887,

but paid a portion thereof as late as December 19, 1887, he was not entitled to a renewal of the lease. But he paid the whole of the rent for the first year within less than two months after it became due, and more than two months prior to the expiration of the first year of his lease, and it was all received by Mrs. Osborn as thus paid without the slightest objection. We do not think, under the circumstances, that this failure on the part of Lyons to pay the whole of the rent when it became due deprived him of his right to elect to retain the property under the lease for another year. It is also claimed by the present defendant in error that the present plaintiff in error, who was the defendant in error in the district court and the defendant in the justice's court, is without remedy in this court, for the reason that he did not file a motion for a new trial in the district court after that court, on petition in error, reversed the decision of the justice of the peace. Such a motion was wholly unnecessary. The judgment of the district court will be reversed, and the judgment of the justice of the peace will be affirmed. Judgment of the district court reversed.

All the justices concurring.

(45 Kan. 672)

PONCELER *et ux.* v. MARSHALL, Sheriff.

(Supreme Court of Kansas. March 7, 1891.)

#### JUDGMENT IN REPLEVIN.

Where the plaintiffs obtain possession of property in an action in replevin against a sheriff for goods taken on execution, and the jury finds for the defendant, the verdict and judgment should be in the alternative for a return of the property, or the amount of the special interest of the officer in the goods, in case a return cannot be had.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Anderson county; A. W. BENSON, Judge.

*John W. Deford* and *D. J. Poncelier*, for plaintiffs in error. *H. L. Foplin*, for defendant in error.

GREEN, C. This was an action in replevin, brought by the plaintiffs in error to recover certain specific articles of personal property levied upon by the defendant in error, as sheriff, under an execution issued on a judgment in favor of M. Trendenberg against C. J. Poncelier. The defendant denied generally, and alleged ownership and title of the property in C. J. Poncelier; that the execution had been levied upon the property described in plaintiff's petition as the property of C. J. Poncelier; and that the same was subject to sale for his debts. The plaintiffs obtained possession of the property. Upon the issues joined, a trial was had, and resulted in a verdict and judgment for the defendant. A reversal of this judgment is urged upon the ground that the court below erred in rendering judgment upon the verdict returned by the jury. The verdict was: "We, the jury, find that the defendant did not wrongfully detain the property replevied in this case from the plaintiffs; and said defendant is entitled to the return of the same, or the value thereof, set out in the affidavit for replevin."

The judgment of the court upon this verdict was that the plaintiffs should return said property taken in replevin, describing the same as in the affidavit for replevin; or, in case the same could not be returned, that the defendant should receive the value thereof, being the sum of \$150. After hearing the motion for a new trial, the court directed the journal entry to be corrected by striking out of the judgment the words, "the sum of one hundred and fifty dollars." The value of the property taken in replevin was not ascertained. The affidavit was not in evidence before the jury, and is not in the record. We cannot tell how much the value of the property may have exceeded the judgment and costs upon which the execution issued. The interest of the sheriff could only be to the extent of the amount set out in the execution under which he made the levy. His interest in the property was special, and he would only be entitled to a judgment for the return of the property, or, if the same could not be had, the value of his special interest therein by virtue of the execution and levy. *Shahan v. Smith*, 88 Kan. 474, 6 Pac. Rep. 749; *Friend v. Green*, 43 Kan. 168, 23 Pac. Rep. 93. We are of the opinion that the verdict and judgment are erroneous, and recommend a reversal.

PER CURIAM. It is so ordered; all the justices concurring.

#### MILLS *et al.* v. PETTIGREW.

(*Supreme Court of Kansas. March 7, 1891.*)

RES ADJUDICATA — DISMISSAL OF BILL — WANT OF PROSECUTION.

1. The dismissal of an action in the nature of a bill in equity, for want of prosecution only, is not a final and conclusive adjudication on the merits. *Smith v. Auld*, 81 Kan. 262, 1 Pac. Rep. 626.

2. The final decision of the district court, overruling a motion to set aside a judicial sale, is not conclusive as to the ultimate rights of the party making the motion. *White Crow v. White Wing*, 8 Kan. 276; *Harrison v. Andrews*, 18 Kan. 585; *Bank v. Huntoon*, 85 Kan. 577, 587, 588, 11 Pac. Rep. 369.

(*Syllabus by the Court.*)

Error from district court, Allen county; L. STILLWELL, Judge.

This was an action brought by D. E. Pettigrew against C. K. Mills, James Mills, and others to obtain possession of certain real estate situate in Allen county. All of the defendants answered, and disclaimed any interest in the premises, except James Mills. Judgment was rendered in favor of the plaintiff for the possession of the premises, and for \$120 for rents and profits. James Mills excepted, and brings the case here. It is conceded by the parties that the title of the premises passed from the United States to the L., L. & G. Railroad Company; that D. E. Pettigrew obtained a good and sufficient title to the premises by warranty deeds from the railroad company to Henry Tidman, and from Tidman and wife to himself. James Mills contends that he has the superior title to the premises, which he claims be derived as follows: While

the L., L. & G. Railroad Company was the owner of the premises in controversy, and while the company was operating its railroad, an action was brought against it by W. J. Richards in the district court of Allen county; that a petition was filed July 21, 1875; that on the 5th of July, 1876, a verdict and judgment were rendered in said cause against the railroad company for \$7,000 damages; that subsequently execution was issued on the judgment, and the premises were levied upon by the sheriff by virtue of the execution; that at this time Charles Aldrich and 97 other persons, among whom were D. E. Pettigrew and Henry Tidman, his immediate grantor, as plaintiffs, commenced an action against W. J. Richards and John H. Walters, the then sheriff of Allen county; that this action was commenced September 3, 1881, and attempted to enjoin the sale of the premises on the judgment; that an application was made to the judge for a temporary injunction in the cause, which was denied September 7, 1881; that in the said action plaintiffs, on November 11, 1881, obtained leave to file an amended petition, but the action was finally dismissed by the court for want of prosecution. The sheriff having made sale of the premises, as well as others, on execution issued in the action of W. J. Richards vs. The L., L. & G. R. Co., a motion was filed by plaintiff in the judgment to confirm the sale, and at the same time a cross-motion was filed by D. E. Pettigrew and Henry Tidman, his immediate grantor, to set aside the sale. The motion to confirm the sale was sustained, and the sheriff ordered to make a deed to the purchaser, W. J. Richards. The court overruled the motion to set aside the sale, and Pettigrew and others, resisting confirmation of the sale, duly excepted, and took time to make a case for this court. Subsequently a deed was made by the sheriff to W. J. Richards for the premises sold at sheriff's sale, among which were the premises in controversy. W. J. Richards and wife, by deed, conveyed the lands in controversy to James Mills.

H. A. Ewing, for plaintiff in error.  
Knight & Foust, for defendant in error.

HORTON, C. J., (*after stating the facts as above.*) After the L., L. & G. Railroad Company obtained its title of the land in controversy from the United States, Henry Tidman obtained his deed from the L., L. & G. Railroad Company and B. S. Henning, the receiver of the company. The receiver was appointed March 5, 1875, in an action then pending in the United States circuit court for the state of Kansas, wherein the Farmers' Loan & Trust Company was plaintiff, and the L., L. & G. Railroad Company was defendant, to foreclose a mortgage long prior to that time executed and delivered by the L., L. & G. Railroad Company to the Farmers' Loan & Trust Company. Pettigrew holds under Tidman and wife. The judgment of W. J. Richards was rendered July 5, 1876, more than a year after the appointment of the receiver. The contention of James Mills, that his title to the premises is superior either in law or equity, cannot be

sustained. He bases his contention upon the ground that D. E. Pettigrew and his prior grantor, Henry Tidman, are stopped by their action commenced September 3, 1881, to enjoin the sale of the premises upon the judgment in favor of Richards, and also by their filing a motion to set aside the sale of the premises made by the sheriff upon an execution issued upon that judgment. The action to enjoin the sheriff's sale was dismissed for the want of prosecution only; it was not decided upon its merits, or upon any hearing. It was therefore no bar. *Smith v. Auld*, 31 Kan. 262, 1 Pac. Rep. 626, and cases there cited. The overruling of the motion to set aside the sale was not conclusive on the parties making the motion. *Benz v. Hines*, 3 Kan. 890; *White Crow v. White Wing*, Id. 276; *Rice v. Poynter*, 15 Kan. 263; *Harrison v. Andrews*, 18 Kan. 535; *Bank v. Huntton*, 35 Kan. 577, 587, 588, 11 Pac. Rep. 369. The judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 549)

**HOOPES V. BUFORD & GEORGE IMPLEMENT CO.**

(*Supreme Court of Kansas*. March 7, 1891.)

**VERIFICATION OF PLEADING—REVIEW ON APPEAL—SUFFICIENCY OF RECORD.**

1. A pleading was verified by the affidavit of the plaintiff's attorney as follows: "State of Kansas, Harper county—ss.: R. B. S., being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action; that he believes the facts stated in the foregoing answer to be true; and the reason why this affidavit is not made by the plaintiff is that said plaintiff is not a resident of, and is now absent from, the state of Kansas. R. B. S." No objection was made to this verification before the trial, nor until a large portion of the evidence was introduced on the trial, when the objection was made by the adverse party, and overruled by the court. *Held* not error.

2. When a case made or record, brought to the supreme court, does not purport to contain all the evidence introduced on the trial below, the supreme court cannot say that any finding or decision of the trial court founded upon such evidence is erroneous.

(*Syllabus by the Court*.)

Error from district court, Harper county; J. T. HERRICK, Judge.

*Love & Snelling* and *Geo. E. McMahon*, for plaintiff in error. *Shepard, Grove & Shepard*, for defendant in error.

VALENTINE, J. On July 10, 1886, an action was brought in the district court of Harper county by the Buford & George Implement Company, a corporation, against W. M. Warner and W. F. Miller, partners as Warner & Miller, to recover \$3,083.61 on certain instruments in writing. Also, at the same time, an order of attachment was procured by the plaintiff, and was levied by the sheriff upon certain property as the property of the defendants. On April 6, 1887, E. G. Hoopes, under the provisions of the General Statutes, (Gen. St. 1889, pars. 4123, 4124,) interpleaded, claiming the property under a certain deed of assignment executed to him by Warner & Miller and their wives on June 15, 1886. On January 23 and 24, 1888, a trial was

had between the plaintiff, the Buford & George Implement Company, and the interpleader, Hoopes, and afterwards, and on January 31, 1888, a judgment was rendered in favor of the plaintiff and against the interpleader, giving the property to the plaintiff, and assessing the costs against the interpleader; and to reverse this judgment the interpleader, as plaintiff in error, brings the case to this court. Extensive and elaborate briefs have been filed by counsel on both sides; but it seems to us that much of the argument made by counsel cannot be considered by this court. Two principal questions are presented by the brief of the plaintiff in error, as follows: "(1) Did the court below commit error of law at the trial by permitting the plaintiff below to introduce, over the objection and exception of the interpleader below, evidence tending to prove that the deed of assignment had not been executed and delivered as set forth in the interplea of the interpleader? (2) Was the finding of the court below unsustained by the evidence and contrary to the law?"

The first question is supposed to arise upon the following facts: The interpleader, in his pleading, set forth a claim to the property in controversy under the aforesaid deed of assignment. The plaintiff, in its reply thereto, set forth facts putting in issue the execution of such deed of assignment. This reply was verified by the affidavit of one of the attorneys of the plaintiff, as follows: "State of Kansas, Harper county—ss.: R. B. Shepard, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action; that he believes the facts stated in the foregoing answer to be true, and the reason why this affidavit is not made by the plaintiff is that said plaintiff is not a resident of, and is now absent from, the state of Kansas. R. B. SHEPARD." It is claimed by the interpleader that this verification is not sufficient, for the reason that it does not state that the facts set forth in the plaintiff's pleading were within the personal knowledge of the attorney verifying the same. This is the sole foundation for the first question presented by the interpleader. This verification was made, and the pleading thus verified was filed, on May 3, 1887. The trial did not take place until in January, 1888, as aforesaid. After the case was called for trial, and after the jury was impaneled, the counsel for the plaintiff stated its case in full to the court and jury. Then one of the counsel who appeared for both the defendants and the interpleader stated their case to the jury, setting forth in considerable detail the execution and delivery of the aforesaid deed of assignment; that the assignee, who was then the interpleader, had entered upon the discharge of his duties, had taken possession of the property, had had it appraised, etc. The plaintiff's counsel then made the following additional statement: "Gentlemen of the Jury: I will state our defense to this action of E. G. Hoopes in as few words as possible. We have about fifteen defenses to Mr. Hoopes' claim in this matter, and one of them is that Warner & Miller never executed a deed of assignment;

and another is that Hoopes never gave any bond at the time of entering into the possession of this property; and another is that this property never went into the possession of Mr. Hoopes, and the assignment was only made for the purpose of worrying and delaying the creditors of Warner & Miller; that this deed was not executed until October, 1886, and that Hoopes never filed a bond; and that therefore Mr. Hoopes has no claim or right to the possession of this property; and for these facts Buford, George & Company are entitled to recover the amount of their claim." The parties then went to trial upon all the pleadings, including the aforesaid pleading of the plaintiff's, putting in issue the execution of the aforesaid deed of assignment and the verification thereof, without interposing any objection to the verification, and as though it was perfect in every respect. The plaintiff first introduced its evidence. The interpleader then introduced his evidence, which had relation to the execution of, and included, the deed of assignment and all that was done under it, etc. The plaintiff then offered to introduce evidence in rebuttal, but the interpleader "objected because under the pleadings no evidence is necessary, the execution of the deed of assignment not being denied under oath, as required by law." The court overruled the objection, and the plaintiff then introduced further evidence, and the interpleader also introduced further evidence. It does not appear that any other or further objection was made to the aforesaid verification. We shall decide the question now presented upon the theory that, when a pleading is verified by the party's attorney, it should be stated or shown somewhere that the attorney has personal knowledge of the facts set forth or involved in the pleading; and upon this theory, did the court below commit any material error? The statutes applicable to this question are sections 108 and 114 of the Civil Code. We are inclined to think that the court below did not commit any material error. The pleading of the plaintiff gave ample notice to the interpleader that the plaintiff denied the execution of the deed of assignment, and that it intended upon the trial to rely upon such denial as a defense to the interpleader's claim; and such pleading was in fact verified, and no motion was ever made to strike it from the files, or to strike out or set aside the verification thereof. *Warner v. Warner*, 11 Kan. 121. Indeed, no objection of any kind was made to the verification before the trial. The interpleader went to trial upon this pleading and the verification thereof without objection, and did not object until after a large portion of the evidence had been introduced. The court probably then had the discretion either to overrule the objection, as it did, or to require that the verification should be amended; but, exercising a sound judicial discretion, the court probably did right in overruling the objection. The first question, therefore, presented to this court by the interpleader, (who is now the plaintiff in error,) must be decided against him.

The next question presented by the interpleader is whether the court below erred or not in its findings upon the evidence. The trial was at first commenced before the court and a jury, but before the trial was completed the court, with the consent of the parties, discharged the jury, and the trial was then carried on to its termination before the court alone. Now, the question whether the court erred or not in its findings depends entirely upon the evidence introduced on the trial, and we cannot determine that the court erred unless we have the whole of such evidence before us. We have nearly 100 pages of evidence, closely written upon a type-writer, but there is nothing in the case or record that shows that this is all the evidence: hence, according to all the decisions of this court upon the subject, we cannot say that the court below erred in its findings or decision upon the evidence. *State v. Commissioners*, 43 Kan. 195, 197, 23 Pac. Rep. 101, 102, and cases there cited; *Johnson v. Johnson*, 44 Kan. —, 24 Pac. Rep. 1099. The defendant in error (plaintiff below) raises this question directly and specifically, and objects to our consideration of the case upon the evidence for the reason that the record brought to this court does not purport to contain all the evidence; and under the foregoing decisions we think the objection is good. When a case made or record, brought to the supreme court, does not purport to contain all the evidence introduced on the trial below, the supreme court cannot say that any finding or decision of the trial court founded upon such evidence is erroneous. The judgment of the court below will be affirmed. All the justices concurring.

(45 Kan. 554)

TURNER *et al.* v. STATE *ex rel.* STEPHENSON, County Attorney.

(Supreme Court of Kansas. March 7, 1891.)

DEMURRER—WAIVER—REVIEW ON APPEAL—RECORD.

1. Where the defendant demurs to the plaintiff's petition, and such demurrer is overruled and no exception taken, and afterwards a trial is had and judgment rendered against the defendant, and the defendant brings the case to the supreme court, *held*, that the ruling of the district court on the demurrer will not be considered by the supreme court.

2. The case of *Hoopes v. Implement Co.*, ante, 84, (just decided,) with respect to alleged errors of the trial court in its findings upon the evidence, referred to and followed.

(*Syllabus by the Court.*)

Error from district court, Woodson county; L. STILLWELL, Judge.

W. H. Slavens, for plaintiffs in error.  
G. R. Stephenson, Co. Atty., and J. H. Sticher, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Woodson county by the state of Kansas, on the relation of the county attorney, against J. W. Turner, as principal, and T. W. Wilson, J. B. Fry, I. S. Jones, M. Reedy, N. F. Follett, J. H. Bayer, A. Hamilton, and August Todman, as sureties, on the official bond of J. W. Turner, former treasurer



of said county, to recover \$2,216.47, an amount alleged to be still due from Turner as treasurer, and never paid over by him to his successor in office, or accounted for in any manner. A trial was had before the court without a jury, and the court found generally in favor of the plaintiff and against the defendants, and rendered judgment against them jointly and severally for the recovery of the sum of \$2,026.40, the amount found due against the defendant Turner as county treasurer, and for costs of suit; and to reverse this judgment the defendants, as plaintiffs in error, bring the case to this court for review.

1. The first alleged error, as stated in the brief of the plaintiffs in error, is as follows: "The court erred in overruling the demurrers filed, for the reason that the petition shows an accounting and settlement between the county commissioners and J. W. Turner, the county treasurer, and no sufficient showing is made to justify going back of the settlement, particularly as against the other defendants, [plaintiffs in error,] who were his sureties." The petition is not fairly subject to the above objection, and the ruling of the court below upon the demurrers was correct; but, whether it was correct or not, it cannot be considered by this court, for the reason that no exception was taken thereto or saved in any manner. *Lott v. Railroad Co.*, 42 Kan. 293, 21 Pac. Rep. 1070.

2. The next alleged error is stated in the brief of plaintiffs in error as follows: "The court erred in overruling the motion for a new trial, there being an error in the assessment of the amount of recovery." The real objection seems to be this: that the court below, upon the evidence introduced on the trial, found and assessed too great an amount as the amount of the plaintiff's recovery. Now, we cannot say from the evidence that any such error was committed. Indeed, from the case brought to this court it cannot be ascertained that we have all the evidence that was introduced on the trial in the court below. On the contrary, the case shows affirmatively that we do not have all such evidence, and therefore it is utterly impossible for us to say whether the court below erred or not in the assessment of the amount of the plaintiff's recovery, or whether it erred or not in making any other finding of fact upon the evidence. See the case of *Hoopes v. Implement Co.*, ante, 34, (just decided.) It is our opinion that no material error was committed in the case, and therefore the judgment of the court below will be affirmed. All the justices concurring.

(45 Kan. 630)

**JOCKHECK *et al.* v. DAVIES.**

(*Supreme Court of Kansas.* March 7, 1891.)

WHO MAY BRING PARTITION.

A party owning an undivided half of an improved city lot, having acquired title to it from a person who had been exercising acts of ownership, paying taxes, building sidewalks, and receiving small sums for its use for 24 years, can maintain an action for partition of it against the owners of the other undivided half, who, at the trial, do not show that, before the commencement

of the suit, they absolutely denied or distinctly repudiated the interest of the plaintiff in the partition proceedings.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

*David Overmyer*, for plaintiffs in error.  
*Quinton & Quinton*, for defendant in error.

SIMPSON, C. B. M. Davies commenced this action in the district court of Shawnee county against Carl Jockheck and Helena Schaffer, whom he alleged were tenants in common with him for the partition of lot No. 250, Kansas avenue, city of Topeka. Joseph Erhart was also made a party for the purpose of determining whatever interest he might have in the property. Davies alleged possession in his petition. Jockheck and Schaffer filed answers denying that Davies had any interest in the lot, and claiming to be the owners. Erhart filed his answer, claiming a mortgage on the lot executed by Davies. A jury was waived, a trial had, and a judgment rendered in favor of Davies. The court found that Davies was the owner in fee-simple of an undivided one-half interest, and that Jockheck and Schaffer, as the heirs of John A. Schaffer, were the owners of the other undivided half interest, and ordered partition, if it could be made, or, if not, that the lot be sold, and the proceeds of sale be divided accordingly. From this order of partition Jockheck and Schaffer bring the case here for review. The material facts are these: The record shows that on the 7th day of November, 1862, the fee-simple title to the lot in question was in John P. Greer and Robert Walker, and all the parties to the action claim title from that source. During the year 1862, Schaffer (the father of Helena Schaffer, who died in January, 1872, and whose widow Carl Jockheck subsequently married) and Erhart were in partnership, contracting and building masonry work in the city of Topeka. John P. Greer contracted with them to do the masonry work on a building that he was erecting on Sixth street, and in payment of said work John P. Greer and wife and Walker made a deed to Erhart and Schaffer for the lot in controversy. This deed was signed and acknowledged on the 7th day of November, 1862. Whether it was ever delivered or not was one of the controverted questions of fact at the trial. This deed was not recorded until July, 1886. On the 11th day of December, 1862, J. P. Greer and wife and Walker made a deed for the lot in suit to Joseph Erhart, that was recorded in February, 1863. Erhart paid the taxes and produced the tax-receipts at the trial for the years 1863, '64, '65, '66, '67, '76, '77, '78, '79, '80, '81, '82, '83, '84, '85. During a part of these years Erhart received small sums of money for the use of the lot for exhibitions and sale of nursery trees, and by the owner of a daguerreotype wagon. Erhart also constructed the sidewalks in front of said lots. The taxes of 1867 were paid by Erhart and Schaffer. Erhart states in his evidence that he thought that, when he paid taxes, Schaffer or Jockheck paid him

<sup>1</sup> Petition for rehearing pending.



back. On the 9th day of December, 1871, Joseph Erhart made a quitclaim deed to John A. Schaffer for the one undivided half of and interest in lot No. 250, which was recorded on the 14th day of December 1871; but before the execution of this deed Erhart had recognized Schaffer's interest in the lot, and they had joined in the payment of the taxes due thereon. At the time of Schaffer's death he left a widow and one child, Helena Schaffer, surviving. The widow married Carl Jockheck, and died before the commencement of this action. After the death of Schaffer the same relations were sustained towards this lot by Erhart and Jockheck as existed between Erhart and Schaffer. They shared in the payment of taxes, and in the small rental received. On the 19th day of January, 1884, a contract was executed between Elizabeth F. Bichle, who owned lot No. 248, lying north of and immediately adjoining the lot in controversy, and Joseph Erhart and Rosa Jockheck, that recites that the parties of the second part, being Joseph Erhart and Rosa Jockheck, own lot No. 250. This agreement was about a party-wall, and is signed by Joseph Erhart and Rosa Jockheck. On the 28th day of May, 1885, an agreement was made with B. M. Davies, who owned lot No. 252, immediately south and adjoining lot 250, by Rosa Jockheck, as guardian of Helena Schaffer, and Joseph Erhart about a party-wall. On the 20th day of July, 1886, Joseph Erhart and wife sold and conveyed by warranty deed an undivided one-half of said lot No. 250 to B. M. Davies, and took a mortgage to secure the payment of the purchase money from Davies. At the trial, Howell Jones was allowed to testify, over the objection of the plaintiffs in error, that after the purchase of Davies from Erhart he had a conversation with John P. Greer, who was in possession of the deed from himself and wife to Erhart and Schaffer, of date November 7, 1862, in which Greer told him that this deed had never been delivered. The admission of this evidence is claimed as error. Joseph Erhart, while testifying at the trial, was asked if Schaffer paid him anything for conveying one-half of the lot to him, and he answered, "No, sir." Both the question and the answer were objected to, and this ruling is insisted on as error. It is also urged that as Davies alleged possession, and failed to prove it, he could not maintain this action. Finally, the contention is that the judgment is not sustained by the evidence.

Separate and apart from the special errors assigned, the trend of the material facts, and the application of legal principles, are in favor of an affirmance of the judgment. Erhart had been in possession of, and had paid taxes on, the lot for more than 20 years before his conveyance to Davies. The deed from Greer and wife and Walker to him had been of record for more than 24 years before he sold to Davies. The deed of November 7, 1862, from Greer and wife and Walker to Erhart and Schaffer was not recorded until after the sale to Davies. There is no intimation in the record from any source that Davies had either notice or knowledge of the ex-

istence of this deed before his purchase. Greer, the custodian and one of the grantors of this conveyance, declared to the agent of Davies who was seeking to make an abstract of the title to the lot, that the deed of November 7, 1862, was never delivered. Schaffer in his life-time, his wife after his death, and her heirs after her death had continuously until the commencement of this suit recognized that Erhart was a part owner of the lot. The only title shown by the heirs of Schaffer at the trial was the quitclaim deed from Erhart for an undivided half to their ancestor. The antecedent facts are harmonious with the theory that for some reason Erhart and Schaffer had determined that the title from Greer and wife and Walker should vest solely in Erhart, as shown by the deed of December 11th, rather than in them both, as was contemplated by the deed of November 7, 1862. The subsequent quitclaim of the 9th day of December, 1871, from Erhart to Schaffer, is easily explainable on this theory. That Erhart divested himself of all interest or title to the lot by that quitclaim cannot be reconciled with the subsequent action of Schaffer and his heirs with reference to the possession, payment of taxes, and reception of rents by them and Erhart conjointly. The stress of these general considerations; the strong inferences arising from the particular facts recited in the record; the irresistible construction arising from the acts of Schaffer and his heirs; the application of indisputable rules of law,—all compel us to say that the judgment rendered by the trial court is a legal sequence, produced by the concurrence of legal principles, equitable considerations, and facts proven. Had the delivery of the deed of November 7th to Erhart and Schaffer been conclusively shown, it would not have affected the general result, without knowledge of it had been brought home to Davies prior to his purchase. In the attitude of the proof on the question of delivery, Greer having at one time stated that it was not delivered, and at another time stating that it was, we could not disturb the general finding, perhaps included in the judgment, for evident reasons. Besides, the fact that it was found after the lapse of many years in Greer's possession, and never having been recorded until after the Davies purchase, very greatly increases the probabilities of non-delivery. Whether or not Greer's declaration is admissible does not become very material, in the view that we have taken. It would seem that Erhart and Davies, who claims under him, are entitled to the benefit of it. Greer testifies, on behalf of the plaintiffs in error, that the deed was delivered; and they claim certain rights by reason of its delivery. It would surely be competent for Erhart and Davies to show, in impeachment of Greer, that he had stated that it was not delivered; and, while this order in the introduction of evidence was not observed, the practical result of the conflict is the same. Again, Greer was one of the grantors in the deed, and the written instrument was in his possession. Now, in a controversy between grantees as to whether the deed had ever

been delivered, it seems that his evidence and admissions as to the fact of delivery are primary, and not dependent on his agency for either or both parties. We have grave doubts about the ruling of the trial court in permitting Erhart to state, while on the witness stand, that Schaffer paid him nothing for the quitclaim deed of date December 9, 1871, for an undivided half of the lot. But the execution and delivery of the deed is not in issue,—is in fact admitted; and the consideration, whether for \$1 or \$500, is immaterial. Entertaining a very strong conviction that the judgment rendered below is inherently right, and being in accordance with legal rules and equitable requirements, it is not necessary to consider the question of how far the plaintiffs in error may be estopped by their attorneys having received and accepted for the fees allowed them by the court in distributing the proceeds of the sale of the lot by virtue of the partition proceedings.

One question made by the plaintiffs in error we have heretofore overlooked, and that is that Davies not being in possession, he could not maintain the action of partition; or, to state it as strongly as in the brief, that the possession of Jockheck and Helena Schaffer was an adverse one, and that by reason of this the action of partition could not be sustained. Davies alleged possession in his petition: and having acquired the interest of Erhart in good faith, and without notice or knowledge that the plaintiffs in error claimed adverse possession, he succeeded to all the rights of Erhart, and, among them, Erhart's long-continued, and, so far as the record discloses, his undisputed, joint possession with Schaffer and his heirs until his conveyance to Davies. This is enough for Davies to maintain the action, because it is not shown that, prior to its commencement, there was an absolute denial or a distinct repudiation of his rights in the lot. We recommend that the judgment of the district court of Shawnee county be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 623)

*SCHADE v. THEEL et al.*

(Supreme Court of Kansas. March 7, 1891.)

LOCATION OF HIGHWAY—SUFFICIENCY OF PETITION.

Where a petition for the appointment of viewers to view, lay out, and locate a public road shows upon its face that it is signed by more than 12 householders of the county, and the prayer of the petition is granted, and the road is viewed and located, and a report of the viewers made to the county board, and the county board approves the report, and orders the road to be opened, *held*, that the petition and the proceedings following will be considered valid, although the county board did not make an express finding that the signers of the petition were householders. See, also, Laws 1885, c. 16.

(Syllabus by the Court.)

Error from district court, Wabaunsee county; R. B. SPILLMAN, Judge.

J. P. Peffer, for plaintiff in error. W. A. Doolittle, for defendants in error.

VALENTINE, J. The controversy in this case is whether or not a certain road in Wabaunsee county is a legal highway or not. It appears that on or about October 2, 1874, a petition for the appointment of viewers to view, lay out, and locate a certain public road was presented to the board of county commissioners of Wabaunsee county, and on November 7, 1874, the petition was "taken up and granted," and three viewers were appointed for the above purpose. It appears that these viewers met at the proper time and place, viewed and located the road, and made a report of their proceedings to the county board. On January 4, 1875, the report was "taken up, report approved, and roads ordered opened" by the county board. The principal objection to the legality of the road as a public highway is that it does not appear from the records of the county board that the petition for the appointment of the viewers and location of the road was signed by 12 householders, as required by law. Gen. St. 1889, par. 5474. Now, as the petition itself shows that more than 12 persons signed the same, and states that they were "residents and householders" of Wabaunsee county, and as the county board granted the petition, appointed the viewers, and afterwards approved the report of the viewers, and ordered the road to be opened, we think it may be fairly said that the records of the county board show that the petition was signed by the requisite number of householders, as required by law, and that the petition itself was a legal and valid petition. *Howell v. Redlon*, 44 Kan. —, 24 Pac. Rep. 1109. Another objection is made to the legality of the aforesaid road upon the ground that the petition asked for two separate and distinct roads. Such is not shown to be the fact, however. From the petition and the entire proceedings we would think that the supposed two roads were in fact only one road. Besides, there being no substantial irregularities in the establishment of the aforesaid road, but only slight irregularities, if irregularities at all, it must be considered that the act of the legislature approved March 7, 1885, (Laws 1885, p. 13, c. 16,) legalizing certain roads and highways of Wabaunsee county, cures all defects and renders the aforesaid road and the record thereof legal and valid in every respect. The judgment of the court below will be affirmed. All the justices concurring.

(45 Kan. 594)

*STEVENS v. MATTHEWSON.*

(Supreme Court of Kansas. March 7, 1891.)

AMENDMENT OF PLEADINGS—ACTION ON CONTRACT —FRAUDULENT REPRESENTATIONS.

1. In an action to recover a balance due on a contract for land, the defendant, in his answer, alleged that he was induced to enter into the contract by false representations respecting the land, made by the plaintiff and his agent; and pleaded a rescission of the contract. Afterwards he asked leave to amend his answer so as to allege that the false representations were made with intent to deceive him, that he relied on them, and aver that he was damaged, by reason of the land not being as represented, in the sum of \$1,850; which amendment, over the objection

of the plaintiff, was allowed by the court, upon condition that the defendant pay the cost in the case, taxed at \$75.60; and the cause was then continued until the next term of the court. *Held*, that such amendment did not prejudice the substantial rights of the plaintiff, and therefore its allowance was not error. Section 140, Civil Code.

2. Evidence examined, and *held* sufficient to sustain both the general and special verdicts.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Labette county; GEORGE CHANDLER, Judge.

*Kimball & Osgood*, for plaintiff in error.  
*Case & Glasse*, for defendant in error.

STRANG, C. Action on contract for the sale of land. The defendant pleaded fraudulent representations as inducement for making the contract, and rescission of the contract. Afterwards, with leave of court, over the objection of the plaintiff, the defendant amended his answer, affirming the contract, and alleging that the fraudulent representations were made with intent to deceive him, and that he relied on them, and claiming damages in the sum of \$1,850, as the difference between the real value of the land and what it would have been worth if as represented. This amendment was made at the cost of the defendant in the sum of \$75.60, and the case continued to the next term. June 18, 1888, the cause was tried to a jury, resulting in a verdict for the sum of \$496.40 in favor of the plaintiff. The jury also made the following special findings: "Question 1. Did the plaintiff himself, knowingly and with intent to deceive, make any false representations to the defendant concerning the land described, which were relied upon by him, and which induced the defendant to purchase said land? Answer. Yes. Q. 2. If you answer the last question in the affirmative, then what were such representations? Set forth the same fully. A. The plaintiff did misrepresent by saying the land laid very nicely, or very well. Q. 3. Did Mr. Barrows, the agent of the plaintiff, with intent to deceive the defendant, make any false representations to him concerning the land described, which were relied upon by the defendant, and which operated to induce him to purchase said land? A. He did. Q. 4. If the last question is answered in the affirmative, then state what were said representations. Set them forth fully. A. He said the block laid very nicely and smoothly, with the exception of a small draw across the south end. Q. 5. Were both plaintiff and defendant residents of the city of Parsons at the time of the making of the contract set forth in the petition? A. Yes. Q. 6. Were the means of ascertaining the lay of the land, the location of the draws or ravines, and other matters in relation thereto, equally within the reach of both plaintiff and defendant? A. Yes. Q. 7. Could the defendant, by the exercise of reasonable diligence, have ascertained the facts concerning the lay and character of the land described, before signing the contract? A. Yes; and we think he did." The plaintiff filed a motion for a new trial, which was

overruled, and he brings the case here for review.

The first error assigned is based upon the action of the court in permitting the defendant to amend his answer, over the objection of the plaintiff. It is claimed that the amendment substantially changes the cause of defense, and is therefore erroneous, under section 139 of the Code of Procedure. Amendments of pleadings are largely within the discretion of the trial court; and in this case the fact that the court allowed the amendment, only at the cost of the party asking it, and continued the case to the next term of court, indicates a proper exercise of judicial fairness and discretion. If section 139 was the only section upon the subject of amendments in our Code, the contention of the plaintiff would possess more force; but the following section (140) cuts an important figure in this connection: "The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Were the substantial rights of the adverse party affected by the amendment allowed by the court? We think not. The court required the party amending to pay all the costs, amounting to \$75.60, as a condition upon which his amendment was allowed; and the case was continued until the next term of the court. The plaintiff was not taken by surprise, and compelled to go to trial without an opportunity to secure evidence to meet the new condition of things in the answer. He had ample time to prepare his case for trial under the answer as amended. We do not see how the substantial rights of the plaintiff were affected by the amendment. Now, suppose the plaintiff had wanted to amend his pleading. If the court had refused he could have dismissed his case, paid his costs, and commenced his action over again with his petition as he desired to make it. The plaintiff's rights in a case should be no greater than those of the defendant; and where a court permits a defendant to amend his answer upon condition that he pays the cost, and submits to a continuance of the case, he is given no greater rights than the plaintiff may take. Every amendment of a pleading which substantially changes a cause of action or defense is not erroneous. It is only when such amendments are so made as to affect the substantial rights of the adverse party that they constitute error. Section 140, Code Civil Proc. In this case no substantial right of the plaintiff was affected by the amendment allowed in the manner and upon the conditions of its allowance.

The next contention of the plaintiff is that, under the issues as they were made up when the case was tried, the plaintiff was entitled to recover the contract price for the land, unless the defendant established by a preponderance of the evidence that by reason of false representations as to material matters of fact, made by the plaintiff or his agent, upon which the defendant relied, and had a right to rely, he

was induced to agree to pay more for the land than he would otherwise have done; and the plaintiff asserts that the defendant failed to show this. The difficulty about the plaintiff's position in this matter is that the jury found against him upon the evidence both in their general verdict and special findings. The jury returned a general verdict for the plaintiff for only \$496.40; so they in effect found the land to be worth in the neighborhood of \$900, from which they deducted the \$400 already paid by the defendant, giving the plaintiff a verdict for the difference between what they found the value of the land to be and the amount already paid thereon. In the special verdict, the jury found that the plaintiff and his agent both knowingly, and with intent to deceive, made false representations affecting the value of the land. Plaintiff's counsel seek to overcome all this by calling the court's attention to, and construing, special answers of the jury numbered 6 and 7. No. 6 is as follows: "Question. Were the means of ascertaining the lay of the land, the location of the draws or ravines, and other matters in relation thereto, equally within reach of both plaintiff and defendant? Answer. Yes." In the sense in which the jury seems to have answered this question, it does not affect the plaintiff's right of recovery. They had just answered that the plaintiff and defendant were both residents of the city of Parsons; and, being residents of such city, the means for going to and making an examination of the land were probably equally within the reach of each. But the other special answers of the jury, as well as the general verdict, show that the jury believed the allegations of the defendant that he did not know the lay of the ground, so far as the particular block in controversy was concerned, and that the plaintiff and his agent did, and that the defendant told them he did not, and relied upon their statements in relation to the lay of the land. The plaintiff seems to think that, because there was a greater number of witnesses on his side in relation to these facts, the preponderance of the evidence was with him, or at least was not with the defendant. The preponderance of the evidence does not depend upon the greater number of witnesses, but upon the greater weight of evidence; and the jury are the exclusive judges of the weight to be given the testimony. The jury weighed the evidence in this case, and found in favor of the defendant; and we cannot say they did not properly adjust the scales. The seventh special finding reads as follows: "Question. Could the defendant, by the exercise of reasonable diligence, have ascertained the facts concerning the lay and character of the land described before signing the contract? Answer. Yes; and we think he did." This question and answer, standing by themselves, are susceptible, perhaps, of both constructions contended for by the parties. But this question and answer must, if possible, be harmonized with the other special answers, and with the general verdict. In the first and third answers the jury say that the plaintiff and his agent made false

representations with intent to deceive, and that the defendant relied on them, which he could not have done if he had ascertained the facts for himself before signing the contract; and this is so plain a proposition that it is difficult to believe that the same jury, at the same time that they answered the first and third questions, and in connection therewith, intended, in answering the seventh question, to say that the defendant had ascertained the facts about the lay of the land for himself before signing the contract. If we put such a construction upon this last question and answer, they are in direct conflict with the general verdict. Taking all the special answers together, and in connection with the general verdict, we cannot think the jury intended to say that the defendant ascertained the lay of the block of land in any way except from the statements of the plaintiff and his agent before he signed the contract therefor. We must conclude, therefore, that by this answer the jury meant to say that the defendant exercised reasonable diligence, by making inquiry of the plaintiff and his agent, before signing the contract.

The plaintiff also complains of the instructions, or portions thereof. The instructions are very full and complete, covering all the questions that in any way arose in the case, and, taken altogether, we think, are not only not erroneous, but very fair to the plaintiff. It is recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring

(45 Kan. 580)

MYER v. MOON.

(Supreme Court of Kansas. March 7, 1891.)

TRIAL—INSTRUCTIONS—EXCEPTIONS TO CHARGE—ACTION ON CONTRACT—PLEADING.

1. The court, in stating the issues of the case, referred the jury to the petition for the terms of a contract alleged to have been violated, and also for certain statements alleged to have been made by the defendant, designating where each might be found in the petition by pencil-marks, but the construction of the petition, and the determination of what the issues were, were not left to the jury. *Held* not prejudicial error.

2. A single general exception to a charge of the court, containing several propositions of law, the general scope of which is correct, is unavailing.

3. The allegations of the petition examined, and *held* to state a cause of action.

(Syllabus by the Court.)

Error from district court, Finney county; A. J. ABBOTT, Judge.

A. J. Hoskinson, for plaintiff in error.  
C. W. Morse, for defendant in error.

JOHNSTON, J. Joseph Myer asks a reversal of a judgment for \$74, rendered against him and in favor of A. T. Moon, in the district court of Finney county. One ground for the reversal is that the petition did not state a cause of action. In substance, the allegations of the petition were that on August 19, 1886, Myer, who was in the ice business in Garden City, agreed to turn over his business to Moon, together with the benefits of a contract

which Myer had with Olin Bros., of Pueblo, Colo., to furnish ice to him in Garden City at a certain price, and the ice was to be ordered and purchased from Olin Bros., in the name of Myer. In pursuance of this agreement, on August 20, 1886, a car-load of ice was ordered from Olin Bros., in the name of Myer, which was received by Moon, when Myer represented that Olin Bros., were indebted to him for the amount of the bill for that car-load, and that he would settle with Olin Bros. for the same, and would do so immediately, in order to preserve credit under the contract with them, so that the ice could be promptly procured from them when ordered. Moon, relying on the truth of these statements, paid Myer the amount due for the ice; but he alleges that the statements of Myer that Olin Bros. were indebted to him were untrue; that Myer did not pay or settle with them for the ice, as he agreed to do; and that, by reason of his failure to settle with them for the ice, Olin Bros. refused to ship ice to Moon when ordered by him in the name of Myer, and disposed of the ice which they intended to supply under their contract with Myer to other parties; and that thereby Moon was unable to procure ice under the contract; and that, by reason of the conduct of Myer, Moon has been damaged in the sum of \$500. We think the demurrer to the petition was properly overruled. The contract between the parties is valid, and appears to be based upon sufficient consideration. Moon agreed to pay to Myer the sum of \$25, and also to furnish to Myer 5,000 or 6,000 pounds of ice at the net cost of the same at Garden City. Although the petition is not as elaborate as it might have been, it states a valid agreement, a breach of the same by Myer, and that his non-compliance and wrongful conduct resulted to the damage of Moon. It may be that the allegations of the petition are not sufficiently specific, but, if this defect exists, it should be corrected by motion, and not by demurrer. *Stringfellow v. Alderson*, 12 Kan. 112. The motion to require defendant in error to elect on which cause of action he would proceed to trial was properly overruled, as only a single cause of action was stated. In charging the jury, the court, instead of reciting at length the contract alleged to have been violated and the misrepresentation alleged to have been made, referred the jury to the petition, and indicated those portions of the petition where the contract and misrepresentations might be found by pencil-marks, and permitted the jury to take the petition to the jury-room with them. The practice of referring the jury to the pleadings in order to determine in whole or in part the issues of the case is not to be commended. It is the province of the court to determine the issues, and state them to the jury, and not leave them to ascertain the effect of the pleadings or the issues which they present. In this case, however, the issues were stated by the court, and the jury were only referred to the petition to ascertain the terms of the contract, which were not disputed, and the misrepresentations which it was alleged had been made by Myer. The con-

struction of the pleadings, or the determination of what the issues were, were not left to the jury, and no prejudice could have resulted from the action of the court. It is contended that the charge of the court was incorrect in several particulars, but the exceptions were not such as to require an examination of the questions suggested. The charge contains several propositions, but only a general exception was taken at the end of the instructions. The charge appears to be correct in its general scope, and hence a general exception is unavailing. *Fullenwider v. Ewing*, 25 Kan. 69, and cases cited. The sufficiency of the testimony is also challenged, but there is enough to sustain a verdict which has received the approval of the trial court. Judgment affirmed. All the justices concurring.

(45 Kan. 547)

PELHAM v. EDWARDS, Sheriff.

(*Supreme Court of Kansas. March 7, 1891.*)

WRIT AGAINST SHERIFF—SERVICE BY CORONER.

1. An order for a provisional remedy, or any other process in an action where the sheriff is a party, should be directed to the coroner. Section 701, Civil Code.

2. Where a summons is directed to the sheriff of a county, it is irregular for the coroner of the county to receive and serve it.

3. An order for the delivery of personal property cannot be issued rightfully before the action is commenced.

(*Syllabus by the Court.*)

Error from district court, Wichita county; A. J. ABBOTT, Judge.

*Ward & Mead*, for plaintiff in error.  
*C. H. Coan*, for defendant in error.

HORTON, C. J. Thomas W. Pelham brought this action against John H. Edwards, sheriff of Wichita county, in this state, to recover the possession of certain personal property of the value of \$196.45, and also for \$50 as damages for the wrongful detention of the property. An affidavit for an order for the delivery of the property to the plaintiff was also filed. On the 19th day of November, 1887, the clerk of the district court issued a summons directed "To the Sheriff of Coroner County." No return was made on this writ. On the 25th day of November, 1887, the clerk of the court issued another summons, directed "To the Sheriff of Wichita County," and delivered the same to the coroner, who executed the writ and made return thereof. On November 19, 1887, the clerk issued an order of delivery directed "To the Coroner of Wichita County." This was executed by him. The term of office of John H. Edwards, as sheriff, expired on the second Monday of January, 1888, and he was succeeded by M. P. Brown. On the 25th day of April, 1889, the clerk issued another summons, directed "To the Sheriff of Wichita County." This was served and returned. On the 12th day of June, 1888, John H. Edwards, the defendant, filed a special motion to strike the summons and the writ of replevin from the files, upon the ground that they were not directed to or served by the proper officer, and for want of any legal service on the defendant. This motion

was sustained by the court. Exceptions were taken, and the plaintiff brings the case here. The summons of the 25th of November, 1887, was not directed to the coroner, and therefore was not issued in accordance with the provisions of the statute. Section 701, Civil Code; paragraphs 1778, 1779, Gen. St. 1889. It being irregularly issued, the court committed no error in setting the writ and the service thereon aside. The order of delivery of November 19, 1887, was directed to the coroner, but the service thereof was properly set aside, because it was issued before the commencement of the action, and such an order cannot rightfully issue before the action is commenced. *Dunlap v. McFarland*, 25 Kan. 488; *Thompson v. Wheeler*, 29 Kan. 476. There was no proper summons issued or service made until the 25th day of April, 1889. As no regular summons was issued or any valid service made upon the defendant within 60 days after the filing of the petition, all of the proceedings before the issuance of the summons of the 25th of April, 1889, were irregular, and therefore the ruling of the court must be affirmed. It seems that the summons of April 25, 1889, was properly directed, served, and returned. The action is pending in the court below upon that service, as it does not appear from the record presented to us that this summons or the service thereof has been interfered with by the court. If no new order of delivery is issued, the action can therefore proceed upon the service last made. As before stated, the ruling of the district court will be affirmed, with costs. All the justices concurring.

(45 Kan. 556)

#### HAMILTON V. COFFIN. -

(*Supreme Court of Kansas*. March 7, 1891.)

#### LIMITATION OF ACTIONS—PAYMENTS ON ACCOUNT.

An entry of credit, made in a book of accounts by a creditor upon an account with his debtor after a cause of action thereon is barred by the statute of limitations, is of itself insufficient to establish such a partial payment on the account as will take it out of the statutory bar.

(*Syllabus by the Court*.)

Error from district court, Coffey county; CHARLES B. GRAVES, Judge.

G. E. Manchester, for plaintiff in error.  
J. I. Wolfe, for defendant in error.

JOHNSTON, J. This was an appeal from the decision of the probate court rejecting a demand presented by Dr. A. V. Coffin against the estate of W. T. Hamilton, deceased. The demand was a long account for medicines and medical services running from 1868, and which Coffin claimed was open and unsettled at the time of Hamilton's death, the occurrence of which is not definitely shown by the record, but must have been about the first of the year 1886. The claim was filed in the probate court on August 27, 1886, and tried in the district court on April 11, 1888, without a jury. To establish his demand, Coffin introduced in evidence a book of accounts, in which was entered in his own handwriting an account against Hamilton. The

first item in the account was dated June 1, 1868, and the last item entered as a charge is dated September 6, 1881. The last item of credit entered, other than the one in dispute, is in 1876. The last entry in the account is as follows: "1885, 8, 20. Cash on above account, \$2.00." This entry is in the handwriting of Coffin, and which he testifies he made on August 20, 1885. No other testimony was offered to establish the account, and the administratrix demurred to the evidence, but the demurrer was overruled, and judgment given in favor of Coffin. The only question presented is whether the entry of credit in the book of accounts, made by the creditor himself after the statute has barred the account, is such an evidence of partial payment as will revive the claim, and start the statute of limitations to running again. Assuming that the account is correct, and that it was unsettled when the last charge was made, it appears that it had long been barred before the two dollars credit was given in 1885. It was not then a subsisting debt; and will a mere entry of credit by the creditor revive a barred debt, and take the entire account out of the statute? We think not. Entries in books of account are admissible in evidence under certain circumstances, (Civil Code, § 387,) and an entry of charge or credit in a current mutual account that was within the period of limitation would be evidence tending to take the entire account out of the statute; but, where the statute has run, it is no longer an open account or a present or subsisting debt, and the creditor cannot manufacture evidence for himself by making an entry of credit upon an account on which the debtor was not liable when the entry was made. When a claim is barred, it is the act of the debtor, and not of the creditor, that will take it out of the statutory bar. An indorsement upon a note or other written obligation is the usual proof of a partial payment. Notwithstanding this, it is held that an indorsement of credit by a creditor upon a note after the statute has run affords no evidence of payment in favor of the payee, "for the reason that it is an *ex parte* declaration made by a party in his own favor; and no one is allowed to make evidence for himself." *Easter v. Easter*, 44 Kan. 151, 24 Pac. Rep. 57. The supreme court of Ohio, in determining a similar question to the one presented here, held that "the items of credit in the account-book of the deceased, given after the statute had barred the action, constitute no evidence that it was the intention of the parties that the articles thus credited should be applied on the barred account as payment." *Kaufman v. Broughton*, 31 Ohio St. 424. See also, *Oberg v. Breen*, (N. J.) 12 Atl. Rep. 203; *Acklen's Ex'r v. Hickman*, 60 Ala. 568. In the absence of other evidence than the mere entry of a credit by Coffin in his book of accounts after that statutory bar against the account was complete, his claim was not established, and therefore the demurrer to the evidence should have been sustained. The judgment of the district court will be reversed, and the cause remanded, with the direction to sustain the demur-

rer to the evidence interposed by the plaintiff in error, and to give judgment in her favor. All the justices concurring.

(45 Kan. 543)

SCHOOL-DIST. NO. 2 OF CHEYENNE COUNTY  
v. SCHOOL-DIST. NO. 1 OF CHEYENNE  
COUNTY.

(*Supreme Court of Kansas. March 7, 1891.*)

ACTION BY SCHOOL-DISTRICT—VALIDITY OF ORGANIZATION.

In an action by one school-district against another to recover taxes alleged to have been assessed upon the territory of the former, and illegally paid over to the latter, the validity of the organization of such school-district cannot be called in question. If the school-district bringing the suit had a *de facto* existence at the time of the tax-levy, its organization cannot be attacked in a collateral proceeding.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Cheyenne county; L. K. PRATT, Judge.

E. M. Phillips and S. D. Decker, for plaintiff in error. Finley & Oberlander, for defendant in error.

GREEN, C. This was an action brought in the district court of Cheyenne county by school-district No. 2 against school-district No. 1 of said county to recover \$460, taxes alleged to have been collected by the latter district in the year 1885, and the apportionment due from the state school fund for the years 1885 and 1886, claimed to have been collected and paid over to district No. 1 by the treasurer of Rawlins county. It seems that before the organization of Cheyenne county it was attached to Rawlins county, and an attempt had been made to form school-district No. 2 out of a portion of the territory comprising district No. 1; and when the tax-levy was made by the officer of Rawlins county it embraced the territory of both districts; and when the taxes were collected school-district No. 1 received the entire tax, and failed to account to the plaintiff below for its proportion of the tax. The court below found for the defendant, and the plaintiff brings the case here. From the evidence, it appears that school-district No. 2 was organized on the 15th day of April, 1885. On the 15th day of May following, the voters of the newly-organized district met to perfect the organization, and officers were duly elected and qualified. The defendant below questioned the organization, and considerable evidence was introduced in regard to such organization; and it is obvious that the court decided the case in favor of the defendant on the ground that such district was not organized prior to the annual tax-levy in August, 1885, by the board of county commissioners of Rawlins county. This, we think, was error. There was sufficient evidence to clearly indicate a *de facto* existence of this school-district when this levy was made, and was recognized as such; and it may be that at that time it was legally organized. But that question we do not care to decide in this action. All we care to know is that it had an actual existence at the time the levy was made. The organization, and the

steps taken to effect such existence, cannot be questioned in this action. Such attack must be made in a direct proceeding, prosecuted at the instance of the state, by the proper officer. Railroad Co. v. Wilson, 33 Kan. 223, 6 Pac. Rep. 281, and authorities there cited. We recommend that the judgment of the district court be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 567)

CLARK v. LILLIEBRIDGE.

(*Supreme Court of Kansas. March 7, 1891.*)

FORECLOSURE OF MORTGAGE—APPEARANCE BY ATTORNEY—EFFECT.

1. Evidence in this case examined, and held sufficient to support the findings of fact made by the trial court.

2. In a foreclosure proceeding against a non-resident defendant, who employs an attorney authorized to practice in the court in which the case is pending to take charge of his case, without limiting his authority, and such attorney makes a general appearance, held, that such appearance binds the defendant, and gives the court jurisdiction over his person.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Washington county; E. HUTCHINSON, Judge.

J. G. Lowe and Charles Smith, for plaintiff in error. A. S. Wilson, for defendant in error.

STRANG, C. Action in ejectment for the recovery of the W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , and the W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , of section 8, in township 3 S., of range 5 E., in Washington county, Kan. The plaintiff claims the land as patentee of the government. The defendant claims under a sheriff's deed resting upon a judgment of foreclosure and sale of the land upon a mortgage executed by the plaintiff to one J. Mixell. The question in the case is, did the court in the foreclosure proceeding by Mixell against the plaintiff herein obtain and have jurisdiction of the person of the defendant in that proceeding? If it did, then the judgment in this case should stand; otherwise it should be reversed. Mixell commenced a suit in the district court of Washington county to foreclose his mortgage against Clark, plaintiff herein. Clark lived in Iowa at the time. Service was had by publication, and was defective. Clark had some correspondence with J. W. Rector, a lawyer of Washington, Kan., in relation to the foreclosure proceedings, in consequence of which Rector appeared specially in the case, and had the service set aside. The case was then continued until the next term of court. The defendant herein claims that Rector, when the service was set aside, appeared generally, and asked 30 days in which to answer. The plaintiff contests this point, and it becomes the principal question of fact in the case. There was no further attempt to obtain service by publication in said foreclosure proceeding, and if the court in that proceeding got jurisdiction of the defendant therein, Clark, it was by reason of the appearance made for him in



the case by J. W. Rector. Trial was had in this case, June 21, 1888, by the court without a jury, the court making the following findings of fact and conclusions of law: "Findings of fact: (1) On the 1st day of August, 1873, the plaintiff was the owner, by virtue of a patent of that date from the United States to him of the west half of the north-west quarter, and the west half of the south-west quarter, of section 8, township 3, range 5, in Washington county, Kansas. Afterwards, on the 13th day of August, 1873, he gave to one J. Mixell his promissory note for \$250, due in six months, without interest, and to secure the payment of the same on the same date he executed and delivered to Mixell a mortgage on said land. (2) On May 11, 1875, said Mixell commenced an action in the district court of Washington county, Kansas, to recover the amount of said note, and to foreclose said mortgage. The plaintiff, James D. Clark, was at that time residing in Bedford, Iowa. Service by publication was attempted to be made in said action, but the service was void, and no valid service was ever made on the defendant in that action in any manner. (3) Before the August term of said court the said Clark was informed of the pendency of said action, and employed J. W. Rector, an attorney of said court, to represent him in said action, and procure a delay in the rendition of judgment, without prescribing any particular course of action to be pursued. In pursuance of such authority, J. W. Rector appeared specially at the August term of said court to set aside the service by publication, and at the same term of court, on August 6, 1875, the service was set aside and vacated, and thereupon the said J. W. Rector entered a general appearance in said action for said Clark, and asked and obtained an order of the court allowing him to file an answer in the action in 30 days from that date, and continuing the action until the next term of court. No answer was ever filed in the action, and no further appearance was made by the defendant or any one for him. (4) At the November term of said court, on November 23, 1875, judgment was rendered by default in favor of J. Mixell against James D. Clark for the amount of said note, with costs, and a foreclosure of said mortgage. The said premises were duly sold at sheriff's sale under said judgment. The sale was afterwards confirmed by said court, and on May 19, 1876, the sheriff executed and delivered to J. Mixell a deed for said premises. Afterwards, on June 7, 1876, Jerome Mixell, and Maggie, his wife, executed and delivered to one John Benda a warranty deed conveying all of said premises. Afterwards, on May 30, 1877, John Benda, and Mary, his wife, executed and delivered to the defendant, William Lilliebridge, their warranty deed, conveying to him all of said premises for the consideration of \$700, which was a fair and reasonable price for the land at that time. All of said conveyances were duly recorded in the office of the register of deeds of Washington county, Kansas. (5) The defendant William Lilliebridge, since purchasing the land,

has grubbed and broken about 85 acres of the land, and maintained the same in cultivation. He has built, and now has on the premises, about three-quarters of a mile of wire fence, and has paid all taxes on the premises since he purchased them, amounting in the aggregate to about \$350. The premises are now worth from \$3,000 to \$4,000, and have a rental value of \$200 per annum." "Conclusions of law: The plaintiff was divested of his title to said premises by said judgment, sheriff's sale, confirmation, and sheriff's deed, and is not entitled to recover the premises, and the defendant is entitled to judgment for costs." Motion to set aside the findings of fact, and for new trial, overruled, and judgment entered for the defendant for costs. A very lengthy brief is filed by the plaintiff in error, whose counsel also made an able oral argument before the commission. The case, however, is quite free from complications, there being but few questions to settle in this court.

The first question argued by counsel is, did J. W. Rector in fact appear for Mr. Clark in the foreclosure proceeding? The court found that he did. This settles the question, unless there is a total want of evidence to support the finding. Counsel argue very strenuously that Rector did not appear for Clark in that case. We have examined the evidence with some care, and find—*First*, that the appearance docket shows an appearance by Rector in his own handwriting; *second*, the journal entry shows that Rector appeared first specially, and had service by publication set aside, and then that he asked for 30 days to answer, which was allowed him, and the cause continued to the next term; and, *lastly*, Rector testifies that he appeared. It would seem that this was sufficient evidence on which to base a finding that Rector appeared in the foreclosure proceeding for Clark. If it is not, we would not know how and where to look for evidence sufficient to uphold a finding of a trial court. The plaintiff next contends that, if Rector did appear for Clark in the foreclosure proceeding, he did so without authority from Clark, and that his appearance therein could not, therefore, bind Clark to his prejudice. The court finds that Clark employed Rector to represent him in said action to procure delay in the rendition of judgment, without prescribing any particular course of action to be pursued by him in connection therewith. Plaintiff moved to set aside this finding of the court, because not sustained by the evidence; and now contends that it is not supported by the evidence, and that, as the evidence is wholly in writing in the form of letters, this court should construe them, and say whether the evidence therein contained supports the finding of the court. It is conceded that all the authority Rector had to represent Clark was contained in certain letters from Clark to him. Clark first wrote Rector from Bedford, Iowa, May 31, 1875, asking Rector to let him (Clark) know whether or not Mixell had foreclosed the mortgage on his land. Rector evidently answered that letter, though the answer does not



appear in the record, for on June 12th Clark again writes Rector, in which he says: "I was not surprised that Mixell had commenced suit." And after writing a long letter, telling Rector all about the transaction with Mixell, and his own hard luck, and some other matters, he winds up by saying: "Now these are the facts in the case. I wish you to attend to it accordingly. I will send you a retainer as soon as I hear from you again." It would seem as though the request of Clark, in this letter, for Rector to look after the foreclosure proceeding, is broad enough to justify Rector in appearing generally in the case, or in doing anything that an attorney could do legitimately for his client in the case. And if, pursuant to said request, Rector thought it best to appear for Clark, and get time to answer in the case, and he did do so, we think the authority was sufficient. Counsel for plaintiff say, however, that Rector did not appear pursuant to the authority contained in the letter last above mentioned, and cite Rector's letters written to Clark thereafter on June 21st and July 18th as evidence to sustain their contention. They argue that the letters show that Rector did not accept the employment tendered him in Clark's letter when he received it, but demanded in his letters of June 21st and July 18th a retainer of \$15; and that at the time of his appearance for Clark, August 4th, he had not again heard from Clark, and had not received his retainer fee; and that therefore no contract of employment was consummated which authorized Rector to appear for Clark. It is true Rector wrote, saying: "If you want me to attend to the matter for you, send me a retainer of \$15." He did not say, however, that he would not attend to the matter for Clark until he received the \$15. Rector had not heard from Clark, after writing him on July 18th, up to the time when it became necessary to act in the matter by reason of the fact that the court was in session, and the foreclosure case reached for trial. Rector then appeared. Looking back to Clark's last expression upon the subject, contained in his letter of June 12th, Rector concluded he would attend to the matter for Clark, and take his chances of getting his fee when he heard from Clark. We think he had a right to do that; and, having done it, and appeared, his appearance binds Clark. And to show that what he did was in exact accord with Clark's wishes in relation thereto, we call attention to Clark's next letter, written five days after Rector had appeared in the foreclosure case, in which Clark says: "I want you to stave off this case by all means, and I will send you the retainer certainly in a very few days. \* \* \* Take hold of the case at once, and be sure to stave it off." If this letter had been received by Rector before he appeared, there would be nothing left to hang a doubt upon, concerning his right to appear. Being received by Rector immediately after he had appeared, and requesting him to do exactly what he had asked Rector in his last letter to him, before this one, to do, and exactly what Rector had done, we think Clark is estopped now from denying Rec-

tor's authority to appear for him. Rector having authority to appear for Clark in the proceeding to foreclose the Mixell mortgage, and having done so, the court in that case got jurisdiction over the person of Clark, and the judgment and sale which followed divested him of title in the land in controversy; and the defendant herein, having procured the title derived from the sheriff in that proceeding, has a good title to the land in dispute. It is recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 653)  
SOUTHERN KAN. RY. CO. v. WALSH.

(Supreme Court of Kansas. March 7, 1891.)

INJURIES TO PASSENGERS—BURDEN OF PROOF—DEGREE OF CARE—EXCESSIVE DAMAGES.

1. Where a passenger brings an action to recover for injuries resulting from the derailment of the train on which he was riding, and therein shows the occurrence of the accident and the extent of his injuries, a *prima facie* case is made out in his favor, and the burden is thrown upon the railway company to show that the injury did not result from a want of care upon its part.

2. The *prima facie* case thus made out may be overthrown by showing that the injury resulted from inevitable accident, or something against which no human prudence or foresight on the part of the company could provide.

3. The railway company owes a higher duty to its passengers than mere ordinary care and foresight in the construction and maintenance of its tracks. It is bound to exercise the highest degree of practicable care; not the utmost possible precaution that might be imagined, but the highest care and best precaution known to practical use, and which are consistent with the mode of transportation adopted.

4. The question of how general or how particular the question of fact to be submitted to the jury, in any particular case, should be, rests largely in the sound judicial discretion of the trial court.

5. The admission of improper evidence is not a ground of reversal, where the special findings show the testimony elicited to have been immaterial.

6. The testimony examined, and held to be sufficient to sustain the findings of the jury that the injury resulted from the negligence of the railway company; and the testimony in relation to the character of the injury is found to be of such a character that the allowance of \$5,246 as damages is not so excessive as to warrant the court in interfering with the verdict.

(Syllabus by the Court.)

Error from district court, Montgomery county; GEORGE CHANDLER, Judge.

Geo. R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. William Dunkin, for defendant in error.

JOHNSTON, J. This was an action for injuries received by L. C. Walsh while a passenger on one of the trains of the Southern Kansas Railway Company, en route from Moline to Independence. The train was derailed between the points mentioned, and he alleged in his petition that the track of the railroad between the points named was out of repair and dangerous for travel; that the company willfully and wantonly permitted the rails to become battered and worn, the cross-ties

rotten and unfit for use, and negligently failed to use a proper quantity and quality of ballast on the track; and that on February 14, 1887, when the derailment occurred, the road was utterly unsafe and unfit for use. He avers that, as a result of this condition, the train was thrown from the track when running at a high rate of speed, and he was injured, as follows: "Severe wound on the left side of the head, laying open the scalp for two inches in length, cutting through to the bone; also severe contused injury of left shoulder, and to the entire scapular region of the left shoulder, tearing the *scapula* from its muscular attachments, and tilting it forward; and also causing a separation of the first, second, and third ribs from their sternal attachment; also causing a separation of the clavicle from its sternal attachment, throwing it forward and upward, permanently dislocating the said clavicle; also a severe contusion of the left lung, causing spitting and coughing of blood; also bruises in face and over various parts of the body." A verdict was rendered in favor of Walsh, in which the jury assessed his damages at \$5,246.

It is first insisted that the evidence was insufficient to sustain the verdict rendered, or to show any liability whatever on the part of the company. It appears that on February 14, 1887, Walsh purchased a ticket at Moline for a passage from that point over the Southern Kansas Railroad to Independence, paying therefor the sum of \$1.10. The train was behind time, and when it arrived at Moline he entered one of the coaches, seated himself, and proceeded on his journey until they reached a point about two miles east of Longton, where the train was derailed. Some of the coaches were overturned, down an embankment, and Walsh was severely injured. There is testimony tending to show that the track was in bad condition where the accident occurred; that the ties were unsound, and not properly ballasted. It is shown, and conceded, that the immediate cause of the derailment was the breaking of a rail. It had been put in the track only two days before, to replace one which had also been broken at the same place. The company contends that an examination of the broken place disclosed no flaws or defects which could have been detected by the exercise of the utmost caution and foresight, and that therefore the accident was fortuitous and unavoidable, for which it should not and could not be held liable. On the other side, it is contended that, although there were no apparent flaws or cracks in the rail, it was broken, because it was not sufficiently supported by ties and ballast. Upon this question there is a sharp conflict in the testimony. The sectionmen who put in the rail two days before the occurrence of the wreck testified that the rail was placed on a solid bearing; that ties were placed under the end of the rail which broke off, and that soil and ballast were tamped about the ties so as to make the track solid and secure. On the other hand, there is positive testimony offered by Walsh that the rail which broke extended about two feet over a cattle-guard,

the frame-work of which was solid, and that the end which projected beyond the cattle-guard was spiked to ties, but that the ties were drawn or lifted from the ground at one end about six inches, and that the soil and ballast were not filled in and tamped under and about them. If the track was in this condition, it was dangerous and unfit for use; and this defect would fairly account for the breaking of the rail and the wreck of the train. In view of this testimony, and the finding of the jury that the sectionmen did not fill the space between the tie and the ground, but left the end of the rail with the ties attached suspended several inches from the ground, and that the ties at the place of the accident were unsound, we cannot say that the verdict is without support. The company are not insurers of their passengers, nor liable for injuries resulting from unavoidable accident in the operation of passenger trains; but there is testimony tending to show a great lack of care in providing a safe road-bed and track, and, "if the defendant could have prevented the accident by the utmost human sagacity or foresight with respect to their track, then the defendant is liable." *Railroad Co. v. Hand*, 7 Kan. 392.

It is also contended that there was error in permitting testimony to be offered by Walsh in regard to the condition of the track at other points than where the wreck occurred. Of course, testimony of defects which did not cause the derailment nor contribute to the injury was not admissible. An examination of the record indicates that the purpose of the court was to confine the testimony to the condition of the track in the immediate vicinity of the place, and near to the time where and when the train was derailed. The inquiry as to the condition of the company's track was considerably extended by both parties, and in many cases without objection, for the purpose of determining the real cause of the wreck; but as the trial proceeded it soon became evident to all that the breaking of the rail caused the derailment of the cars, and the findings of the jury showed that they attributed the accident to this cause; and, looking at the testimony and findings together, we see nothing substantial in any of the objections to the admission of evidence.

Complaint is also made that the court erred in refusing to submit three special questions which were asked. No error was committed in this respect. A long list of particular questions were submitted and answered, and, so far as any facts inquired about in those refused were proper and material, they were covered by the questions that were submitted and answered. The principal question refused was: "Could any reasonable and ordinary foresight have anticipated the breaking of the iron rail after it had been left in the track by the workmen?" In the first place, the question is somewhat general, while only particular questions of fact are required to be submitted; and the question of how general or how particular the question of fact to be submitted to a jury, in any particular case, should be, rests very largely in the sound judicial discre-

tion of the trial court. *Foster v. Turner*, 31 Kan. 62, 1 Pac. Rep. 145. Then, again, as we have seen, the company owes a higher duty to its passengers than mere ordinary care and foresight in the construction and maintenance of its tracks. It must use the most exact diligence, and is answerable for any negligence, however slight. It is bound to exercise the highest degree of practicable care; not the utmost possible precaution that might be imagined, but the highest care and best precaution known to practical use, and which are consistent with the mode of transportation adopted. *Railroad Co. v. Hand*, supra; 2 Wood, Ry. Law, 1088.

There is also complaint that the court erred in the instructions given to the jury. The charge was very elaborate, calling attention to some of the evidence, and it is claimed that in doing so the court indicated its opinion of the facts, and improperly influenced the jury. A reading of the entire charge satisfies us that the court expressed no opinion on the facts, and that the company was not prejudiced by the course taken. The trial judge simply called attention in a general way to the theories advanced by the respective parties, and the testimony offered in support of their theories, without indicating his view on any disputed point in the testimony. Besides, he repeatedly stated to the jury that he did not intend to express any opinion on the facts, and told them that they were the exclusive judges of the facts established by the evidence in the case, the credibility of the witnesses, and the weight to be given to the testimony of each.

Special objection is taken to an instruction a portion of which reads as follows: "I may likewise say to you there is still another rule applicable to this case: That if you find from the evidence in this case that the plaintiff in this action was free from fault, and was injured, then the law presumes negligence on the part of the defendant." It is contended that this instruction was erroneous and misleading, and permitted the jury to find the company guilty of negligence, and liable therefor, on the mere evidence that the plaintiff was injured. It is conceded that, if the court had added to this instruction that if the jury found that Walsh was a passenger on the train of the company, and was injured on account of a defect in the track or some of the appliances of the road or its machinery, then the presumption of negligence would arise; but, as injuries frequently happen without any fault or misconduct on the part of the company or its employees, that, therefore, the instruction was erroneous and prejudicial. The instruction complained of is not to be taken by itself, and without reference to the other portions of the charge in which it is found. The court expressly stated to the jury that the burden rested on the plaintiff to show that the injury resulted from the negligence of the company, and that negligence could not be presumed. The part of the charge criticised referred to the presumption which arises where a collision between railway trains occurs, or where a train is derailed and passen-

gers thereon are injured. It is well settled by the authorities that in such cases a *prima facie* presumption of negligence on the part of the railroad company arises, which throws the *onus* upon the company of disproving a want of care on its part. Proof of the occurrence of the accident, and the extent of the passenger's injury, makes a *prima facie* case in his favor; but this may be overthrown by showing that the injury resulted from inevitable accident, or something against which no human prudence or foresight on the part of the company could provide. *Breen v. Railroad Co.*, 109 N. Y. 297, 16 N. E. Rep. 60; *Railway Co. v. Napheys*, 90 Pa. St. 135; *Stokes v. Saltonstall*, 18 Pet. 190; *Railroad Co. v. Pollard*, 22 Wall. 341; *Smith v. Railroad Co.*, 32 Minn. 1, 18 N. W. Rep. 827; *Railroad Co. v. Anderson*, 6 Amer. & Eng. Ry. Cas. 407; *Hipsley v. Railroad Co.*, 27 Amer. & Eng. Ry. Cas. 287; *Railroad Co. v. Walrath*, 38 Ohio St. 461; *Bowen v. Railroad Co.*, 18 N. Y. 408; *Feltal v. Railway Co.*, 109 Mass. 398; *Railway Co. v. Findley*, 76 Ga. 311; 2 Wood, Ry. Law, 1096; *Patt. Ry. Acc. Law*, 438, and cases cited. The instruction complained of should have required a finding by the jury that the injury resulted from the derailment; but this fact was not disputed, and, as the derailment is conceded to have been caused by a broken rail in the track of the company, the omission is unimportant. In other portions of the charge the jury are advised that, if the derailment was an inevitable accident, and not the fault of the company, the law will hold it blameless and free from liability. The degree of care required of the company and of Walsh, and the rules of law applicable to the case under the evidence that was given, were fairly stated, and we find nothing in the charge which requires a reversal.

One other objection remains, and that is that the damages awarded are excessive. Only compensatory damages were allowed, and the amount of the allowance (\$5,246) was itemized by the jury, as follows: "For suffering in the past, \$1,000; for suffering in the future, \$1,000; for inability to perform physical labor, \$3,000; for physician's bills, \$150; for board and lodging, \$42; for loss of time, 18 days, at \$3 per day, \$54." While it appears to us that the amount awarded is liberal, we cannot say that the jury acted corruptly, or under the influence of passion, partiality, or prejudice. At the time of the accident, Walsh was 31 years of age, in excellent health, and held the position of United States pension examiner, the compensation of which was about \$2,500 per year. Dr. McCulley, who examined him shortly after the injury occurred, found a wound on the back of his head two inches in length, and half an inch deep; a fracture of the clavicle bone, near the middle breast-bone; a complete fracture of the first, second, and third ribs; the *scapula* was thrown out of its natural position, and one of the large muscles which held the *scapula* was torn from its attachment; the *pleura* which surrounds one of the lungs was ruptured; and he also found a continual coughing, and an occa-

sional coughing up of blood. On a subsequent examination, shortly before the trial, the same witness stated that he found a vesicular condition of the lungs, and inability to expire air, and that it was his opinion that his ability for labor was greatly impaired, and perhaps to the extent of one-half; that the effect of his injury would be to render him liable to attacks of asthma and diseases of the lungs, and to shorten his life. Dr. Masterson, one of the surgeons of the railway company, examined Walsh shortly after his injury, and discovered the same fractures and injuries that were found by Dr. McCulley. He also found that there was an emphysematous condition of the lungs, and that the upper lobe of the left lung was injured. There was also a cough, and bloody expectoration. That, on account of a rupture of the lung tissue, the air escaped and passed through the *pleura* of the lung into the cellular tissues. On another examination, shortly before the trial, he found that there was a dilation of the air vessels, and enlarged condition of the terminal ends of the bronchial tubes, and that, in his opinion, Walsh would never fully recover from the effects of the injuries. Another physician who examined him stated that the effect of the injury would be to weaken his lungs, shorten his life, and occasion him pain and suffering. Walsh testified that he had suffered great pain from the injuries until the wounds were healed and the bones united; that the injuries had greatly affected his general health; that he had continuous pain in the region of his kidneys, a bloody discharge with his urine, a continuous cough, with pain in the lungs; that his powers of endurance were greatly lessened, and his ability to perform manual or mental labor was not more than one-half of what it was prior to the injury. The testimony shows that the injury, which has already caused Walsh great pain and suffering, is of a permanent character, that it greatly impairs his ability for labor, will subject him to discomfort and pain during the future, and render him less able to resist or recover from other diseases hereafter. In view of the age, former good health, and earning capacity of Walsh, and his condition as shown by the testimony referred to, we do not feel warranted in interfering with the verdict upon the ground that the award of damages is excessive. The judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 515)

## CARTWRIGHT V. KORMAN.

(Supreme Court of Kansas. March 7, 1891.)

## RECOVERY OF LAND SOLD FOR TAXES—LIMITATIONS—TAX-DEED.

1. The limitation provided by section 141 of the tax law is not modified or limited by section 17 of the Civil Code, nor are persons who are insane excepted from its operation.

2. A tax deed recited that four lots on a certain street of a city, describing them, were subject to taxation for a certain year, and, the taxes not being paid, they were sold separately to a single purchaser. In the recitals of the sale the description of each is distinct from the others, but all stand described together in the body of

the deed. In the subsequent recitals relating to assignment and redemption they were all referred to as "said property." The granting clause then provides that in consideration of the taxes due and paid on "said land" the county clerk conveys to the purchaser "the real property last hereinbefore described." *Held*, that the deed was valid on its face, and effectually conveys all four of the lots.

(Syllabus by the Court.)

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

*Hazen & Isenhardt*, for plaintiff in error.  
*J. D. McFarland*, for defendant in error.

JOHNSTON, J. This was an action in the nature of ejectment to recover the possession of lots 28 and 30 on Harrison street in the city of Topeka. Amelia Korman was the owner of the lots named in 1862, and still continues to be the owner, unless she has been divested of her title by a tax-deed executed and delivered to S. S. Cartwright on November 15, 1878. Amelia Korman has been of unsound mind ever since 1869, and on July 16, 1877, she was duly adjudged by the probate court of Leavenworth county to be insane and incapable of managing her own affairs, and immediately afterwards she was committed to the insane asylum, where she has since remained, never having been restored to her right mind. In May, 1873, the lots in question were sold for the taxes of 1872, and on November 15, 1878, they were conveyed by tax-deed to Cartwright, as has been stated, and the deed was duly recorded on the same day. The property was vacant and unimproved when the conveyance was made and until September, 1879, when Cartwright took possession of the same and erected buildings and fences thereon, and has continued in possession ever since that time. In July, 1877, B. Korman was appointed guardian of the person and estate of Amelia, and has continued to be such guardian till the present time. The district court found these facts, and also what the rental value of the lots would have been in an unimproved condition as well as in their improved condition for the time Cartwright has been in possession. It also found that the proceedings upon which the tax-deed was based were irregular, and insufficient to sustain the deed, and thereupon rendered judgment in favor of Amelia Korman and against S. S. Cartwright for the possession of the lots, and for \$1,209 damages for the unlawful withholding of the same.

The main question presented by the record is whether the irregularities mentioned are now available to defeat the deed, or whether they have been cured by the limitation prescribed in section 141 of the tax law. It reads as follows: "Any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of land sold for taxes, or to defeat or avoid a sale or conveyance of land for taxes, except in cases where the taxes have been paid or the land redeemed as provided by law, shall be commenced within five years from the time of recording the tax-deed, and not thereafter." This section is broad and general in its terms, and makes no exception of persons under disabilities. The limitation begins to run immediately

upon the recording of the tax-deed, and against all persons except in such cases, and against such persons as are expressly excepted from its operation. The only exception provided is where the taxes have been paid or the lots redeemed as provided by law. Provision is made in the Code whereby persons who are under disability such as infancy or insanity when the cause of action accrues may bring their action within two years after the disability is removed. Civil Code, §17. But section 141 of the tax law is not modified, controlled, or limited to any extent by the provisions of the Code. It has been determined that it is complete in itself, except so far as it is modified by other provisions of the tax law. *Beebe v. Doster*, 36 Kan. 666, 14 Pac. Rep. 150. See, also, *Edwards v. Sims*, 40 Kan. 235, 19 Pac. Rep. 710. Our attention is not called to any provision of the tax law which modifies or limits this provision, except section 128 of that statute. It provides that minors may redeem lands sold for taxes at any time before they become of age, and one year thereafter. It also provides that the lands of idiots and insane persons may be redeemed at any time within five years after the sale in the manner provided in the tax law. In section 127 of the tax law the ordinary period of redemption is fixed at three years, and certainly, if there had been no exception to this general provision, neither minors nor insane persons could have had longer time than three years in which to redeem. The right to redeem is purely statutory, and the legislature having made the exceptions named, indicates that no others were intended. For the same reason the period for bringing actions to defeat or avoid a sale or conveyance of land sold for taxes as provided in section 141 cannot be extended, nor can any cases be excepted from its operation beyond those expressly provided by the legislature. An insane owner may bring an action to defeat the tax-deed within five years after the recording of the same, and may redeem or institute proceedings to redeem within five years after the sale of land for taxes. Taking the two provisions together, it is manifest that insane persons are not excepted from the operation of section 141. However wise and politic it might be to give persons laboring under the disability of insanity a longer time in which to redeem or to begin an action for the recovery of land sold for taxes, the courts have no power to extend the time of limitation beyond that fixed by statute. The legislature alone has this power. In this case the guardian was appointed prior to the execution of the tax-deed, and before the expiration of the time to redeem the land or to bring an action to defeat the tax-deed for irregularity. He neglected to take any steps to redeem or recover the property, and the responsibility for any loss or damage occasioned by his neglect to protect the interests of the estate rests upon him.

There is a further contention that the deed is void on its face, and therefore Cartwright acquired no right of possession under it; but counsel for plaintiff in error

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state that this position was not sustained by the district court. The deed purports to convey lots 24, 28, 30, and the south half of 22, on Harrison street. It recites that these lots, naming them, were subject to taxation for the year 1872, and, the taxes not being paid, they were sold separately for several distinct sums. In the recitals of the sale the description of each lot is distinct from the others, but all are given together in the body of the deed, and all were sold to the same purchaser. Then follows a recital that the purchaser assigned the certificate of sale of "said property" to Cartwright, who had paid the subsequent taxes thereon, and that "said property" had not been redeemed. The granting clause then provides that, in consideration of the taxes due and paid on "said land," the county clerk grants, bargains, and sells to Cartwright "the real property last hereinbefore described." It is claimed that the "property last hereinbefore described" is only the south half of lot 22, and that under the decision of *Spicer v. Howe*, 38 Kan. 465, 16 Pac. Rep. 825, it must be held that the deed was ineffectual to convey lots 28 and 30, which are in controversy. We do not think the present case is ruled by the one cited. In that case there was in the granting clause a single and independent tract of land, which was specifically described wholly apart from any other description, and it was held that the property "last hereinbefore described" referred alone to that description. In the present case all four of the lots are described together, and in the subsequent recitals of the deed all four lots are referred to as "said property" and "said land." As they were all sold to a single person, and as they stand described together in the deed, and as all are afterwards spoken of together as "said property" in the recitals relating to assignment and redemption, we think the phrase in the granting clause, "the real property last hereinbefore described," fairly includes all of them, and that the deed effectually conveys all. It follows from these considerations that the plaintiff in error was entitled to judgment upon the findings, and therefore the judgment of the district court will be reversed, and cause remanded, with direction to give judgment in favor of plaintiff in error. All the justices concurring.

(45 Kan. 520)

MISSOURI PAC. RY. CO. v. BAXTER.

(Supreme Court of Kansas. March 7, 1891.)

RAILROAD COMPANIES—KILLING STOCK—FENCES.

1. Whenever it is shown that a railroad has not been fenced, and that an animal has passed upon the track and been killed or injured, a *prima facie* case has been made out against the company. *Railway Co. v. Bradshaw*, 33 Kan. 533, 6 Pac. Rep. 917, cited and followed.

2. The laws of this state impose an obligation upon railroad companies to fence their tracks against all animals against which a good and lawful fence would be a protection.

3. The fence law makes a distinction as to animals and lawful fences. Where hogs are permitted to run at large, a certain fence is a lawful one; where they are not allowed to run at large, another standard is adopted.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Dickinson county; M. B. NICHOLSON, Judge.

Waggener, Martin & Orr and Stambaugh, Hurd & Dewey, for plaintiff in error. John H. Mahan, for defendant in error.

SIMPSON, C. Baxter commenced this action before a justice of the peace in Dickinson county to recover from the railway company for killing and injuring certain sheep belonging to him. The case was tried before the justice, and then appealed to the district court. A trial was had before a jury at the October term, 1887, and a verdict and judgment rendered in favor of the defendant in error for \$90 damages, and \$33 attorney fees. At the trial in the district court it was shown that Baxter kept about 320 sheep in a large pasture, through which the track of the defendant's road was located. This pasture was in one inclosure, and fenced with a barb-wire fence, sheep-tight. The fence consisted of five wires stretched tightly from post to post, the posts being two rods apart. The top wire is about four feet from the ground. There is a space of fifteen inches between the first and second wires, a space of ten inches between the second and third wires, and a space of about nine inches between the third and fourth wires, and a space of from five to seven inches between the fourth and fifth wires; the latter wire being about four inches from the ground. The railroad track running through the pasture was not fenced. On the 10th day of April, 1887, 12 sheep were killed and 17 injured by the engine and cars of the railroad company. These were all killed or injured in the pasture. The negligence of the railroad company consisted of the fact that they had neglected to fence their track. When the plaintiff below rested his case, the attorneys for the railroad company demurred to his evidence, and the overruling of this demurrer is their first assignment of error.

The theory of the demurrer was that, if the railroad company had inclosed their track with a fence composed of posts and three wires, it would not have prevented the sheep from going onto the railroad track. All the law requires of a railroad company, to escape the charge of negligence, is the construction of a lawful fence. If such a fence, as a matter of fact, would not prevent the sheep from getting on the railroad track, yet the compliance of the company with the statutory requirement would relieve it from all damages. The law declares the material, height, and construction of a lawful fence. Its function is to secure the growing crops, the grass, and the live-stock of the land-owner from injury and damage. As a matter of legal presumption, a lawful fence is amply sufficient to protect the track from the invasion of live-stock and trespassing animals. The defendant in error, on cross-examination, virtually admitted that a fence whose lower wire was two feet from the ground would not be a protection to all the sheep; that some could pass under the lower wire of such a fence. The rail-

road stock law of 1874 imposes an obligation upon railroad companies to fence their tracks against all animals against which a good and lawful fence would be a protection. *Railway Co. v. Roads*, 33 Kan. 640, 7 Pac. Rep. 213; *Railway Co. v. Bradshaw*, 33 Kan. 533, 6 Pac. Rep. 917. Whenever it is shown that a railroad has not been fenced, and that an animal has passed upon the track and been killed, a *prima facie* case has been made out against the railroad company. *Railway Co. v. Bradshaw*, 33 Kan. 533, 6 Pac. Rep. 917. How legal fences are to be constructed is plainly set forth in chapter 40, Gen. St. 1889. The contention in favor of the demurrer to the evidence in this case assumes that a post and wire fence such as is described in paragraph 3062 of the General Statutes is the fence that a railroad company is obligated to build; whereas the law requires such a fence as will keep all animals off of the track. There was no showing as to whether hogs were permitted to run at large in the township in which the pasture was situated; and we think it was incumbent upon the railroad company to show affirmatively what would have been a legal fence in that township, and that such a fence, if built, would not have kept the sheep away from the track, in order to escape liability. There was no error in overruling the demurrer to the evidence.

Exceptions were taken to certain instructions given by the court, but the brief only criticises the seventh. It says: "It is not a question of negligence. The question is, did they have their railway fenced? If they did not, and if they killed this man's sheep on his premises, and failed and neglected to fence their right of way as it ran through his pasture, then they are liable to pay him the full value of the animals killed or injured." It being incumbent upon the railroad company to show a lawful fence, or, if they had a lawful fence, it would not have kept the sheep off the track, and no such showing having been made, the instruction is not error. We recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 617)

MISSOURI PAC. RY. CO. v. RICKETTS.

(Supreme Court of Kansas. March 7, 1891.)

RAILROAD COMPANIES—KILLING STOCK—DEFECTIVE CATTLE-GUARDS.

1. It is the duty of a railroad company operating a railroad to see that the proper cattle-guards exist wherever the track of the operated railroad enters or leaves inclosed or fenced land, whether such railroad company owns or is operating the railroad under a lease.

2. In an action for damages, caused by the neglect of a railroad company, operating a railroad that it owns or leases, to keep the cattle-guards in repair at the place the track enters and leaves the inclosed or fenced land of the complaining party, that party has the right to include in his claim for damages the value of his services, and that of his children, in driving out and herding stock to prevent further and additional damages.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Anderson county; A. W. BENSON, Judge.

*W. A. Johnson*, for plaintiff in error. *Kirk, Schoonover & Bowman*, for defendant in error.

SIMPSON, C. The defendant in error commenced three several suits before a justice of the peace of Garnett, Anderson county, Kan., and judgments were taken, and the cases appealed to the district court, where the cases were consolidated, and tried as one case. The several suits were for damages alleged to have been sustained by defendant in error for failure to put in and maintain cattle-guards on the line of road running through defendant's premises, which were particularly described in the bills of particulars. It is alleged in the several bills of particulars that the Missouri Pacific Railway Company owned, operated, and controlled the railway running through the premises of Flora R. Ricketts. The Missouri Pacific Railway Company denied that it owned or controlled a line of railway running through the premises of Mrs. Ricketts, and says that it is not liable for a failure to construct cattle-guards on said railway. The case was tried before the court and jury. The jury returned answers to special interrogatories as follows: "(1) What was the value of the services of Flora R. Ricketts per day for what she did about herding the cattle out of her crops? Answer. \$.50 per day. (2) How many days did Flora R. Ricketts spend in and about herding her crops? A. 125 days. (3) Did Flora R. Ricketts devote all of her time to the keeping the cattle out of her crops? A. No. (4) What do you allow Flora R. Ricketts, if anything, per day for herding the cattle out of her crops? A. \$1.00 per day. (5) What amount do you allow plaintiff for her children in searching her crops to keep cattle out of the crops? A. \$.50 per day. (6) What amount do you allow plaintiff for the destruction of the oats crop? A. \$5.33%. (7) What amount do you allow plaintiff for loss of corn? A. \$10.66%. (8) Did the plaintiff keep the cattle out of her crops from the 1st day of April, 1887, to the 1st day of August, 1887? A. No. (9) Who owns the railroad which runs through the land on which plaintiff's crops were injured? A. Missouri Pacific Railway Company. (10) Did the plaintiff devote all her time to watching and herding the cattle out of her crops from April, 1, 1887, to August 3, 1887? A. No. (11) Did plaintiff attend to her usual household duties during all the time from April 1, 1887, to August 3, 1887, and watch the field from her house, and, when the cattle came to the field, send her children to drive the cattle away? A. No. (12) Did the plaintiff have any person herd or watch her crops from April 1, 1887, to August 3, 1887, except her children, one of about 12 years of age, and one of the age of about 9 years? A. No. (13) What amount do you allow in the aggregate for damages to crops by cattle in this action? A. \$14.00. (14) What amount do you allow to plaintiff in this action in the aggregate, in addition to the amount

allowed as damages to the crops? A. \$125.00." A judgment was rendered in favor of Mrs. Ricketts for \$139.

1. After the plaintiff below had introduced all her evidence, and rested her case, the railway company filed a demurrer to her evidence, for the reason that the evidence on behalf of the plaintiff did not prove a cause of action in her favor, which demurrer was overruled by the court, and defendant excepted to the judgment of the court in overruling said demurrer. This is the first error complained of. Robert Wing, the station agent of the Missouri Pacific Railway Company at Garnett, was called as a witness, and, after testifying to his agency, stated that on the 1st day of April, 1887, the Missouri Pacific Railway Company was operating the Kansas, Nebraska & Dakota line through Anderson county, and had been since about the 1st day of March; that they ran trains, collected fares and charges, and had full control. In view of this showing, we think the trial court ruled properly on the demurrer to the evidence. In the case of *Railway Co. v. Morrow*, 32 Kan. 217, 4 Pac. Rep. 87, it is said: "It is always the duty of a railroad company operating a railroad to see that proper cattle-guards exist wherever its railroad enters and leaves improved or fenced land, whether such railway company owns the railroad, or is simply operating it under a lease."

2. It may be that there is not sufficient evidence to justify the jury to say, in answer to the ninth special interrogatory, that the Missouri Pacific Railway Company owned the line that runs through the land of Flora Ricketts, but, as there was proof that it was being operated by that company, its ownership is immaterial.

3. It is claimed that the amount of recovery is too large; that, if the plaintiff below undertook to protect her crops at the expense of the railroad company, she should not be allowed for injury to the crops. This objection is covered by the cases of *Railway Co. v. Sharp*, 27 Kan. 134, and *Same v. Ritz*, 33 Kan. 408, 6 Pac. Rep. 533, that hold substantially that, for damages resulting by the omission of the railroad company to perform a plain duty under the statute, the injured party has the right to include in his claim for damages the value of his services in driving out and herding stock to prevent further and additional damages. The cases cited are sufficient in all respects to sustain the rulings and judgment of the trial court. It is recommended that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(44 Kan. 754)

DOTY v. BASSETT.

(*Supreme Court of Kansas.* March 7, 1891.)

COLLECTION OF TAXES—PUBLIC LANDS.

Chapter 39, Sess. Laws 1877, relating to the collection of delinquent taxes on real estate bid off by counties and cities at tax-sales, is to be understood as referring to real estate where "taxes are due and unpaid," and not as including real es-



tate belonging to the United States, and therefore not liable to taxation. Substituted for 24 Pac. Rep. 944.

(Syllabus by the Court.)

On rehearing. For former opinion, see 24 Pac. Rep. 944.

PER CURIAM. The land in controversy was located by A. P. Hamilton with a land-warrant on June 6, 1871, and was approved August 20, 1872. It was assessed for taxes in the spring of 1871, before the location of the land-warrant, and while it was government land. It was sold to the county in May, 1872, for \$4.84 for the tax wrongfully assessed against it in 1871. The land has always been vacant. The taxes for the year 1872, and each year since, have been paid by Oren Doty or his grantors. In October, 1877, an action was begun in the district court of Greenwood county to subject a large number of pieces of land to the payment of taxes, under the provisions of chapter 39 of the Laws of 1877. This land was attempted to be described in an exhibit filed with the petition, but it is doubtful whether it was ever attached as an exhibit. A judgment was rendered for the alleged tax of 1871 and penalties, amounting to \$19. The land was appraised at \$200. It was subsequently sold and bid in by the county with much other land, and retained by the county until after the repeal of said chapter 39. On the 9th of January, 1880, the board of county commissioners sold about 14,000 acres of land, including this piece, at private sale, to Ira P. Nye, J. M. Seidle, H. C. Kizer, and C. A. Wakefield, for \$1,000, and conveyed the same by a quitclaim deed. Albert Bassett claims title by a quitclaim deed from Nye and Seidle, executed March 10, 1882. He paid about six cents per acre. Oren Doty and his grantors, having all been non-residents of Greenwood county, had no actual knowledge of the existence of the claim of title of Bassett, or the facts upon which the same is based, until a few months before the bringing of this action, when, in attempting to sell, an abstract of title revealed the same. On the 7th of September, 1887, Doty obtained a decree quieting title against Greenwood county. This is an action to quiet his title as against the pretended claim or title of Albert Bassett. The collection of taxes is a proceeding *in rem*. There is no inherent vice in collecting taxes by judicial proceedings in the courts, if the property or real estate is taxable, and there are taxes to collect. A tax, when duly levied, becomes a lien upon the land, which may be enforced in such manner as the legislature may prescribe. *Pritchard v. Madren*, 24 Kan. 486. But in this case no tax was duly levied. The real estate was government or public land, and not subject to assessment or taxation on the 1st of March, 1871. The 1st of March is the time at which the taxability of property is determined. This is true, as a general rule, of both personal and real property. Gen. St. p. 1023, § 8; Id. p. 1024, § 11; Id. p. 1027, § 19; Id. p. 1029, §§ 25, 27; Id. p. 1032, § 35. The last section provides that "lands entered on or before the 1st day of March in each

year shall be subject to taxation for that year." *Long v. Culp*, 14 Kan. 412. As the land was not taxable in the spring of 1871, and as the land had not been sold or bid in by the county for any delinquent taxes, chapter 39, Sess. Laws 1877, had no application, and the district court no jurisdiction to condemn or sell the land. Said chapter 39 has application only "for any taxes due and unpaid." Where land is not taxable, there are no "taxes due and unpaid." *Railway Co. v. Culp*, 9 Kan. 88, (see note containing the opinion of Mr. Justice MILLER, of the United States supreme court;) *Taylor v. Miles*, 5 Kan. 498. As the alleged tax of 1871 was not merely voidable, but absolutely void from the beginning, for the reason that the land in question was not subject to taxation for that year, neither the legislature nor the court had any control over the land to levy or collect taxes thereon for 1871. In *Taylor v. Miles*, supra, it was said, among other things, by Mr. Justice VALENTINE, that "when a party may know that his land is subject to taxation, (and in such a case the law conclusively presumes that he does know it,) he is presumed to take notice of all the steps taken with reference to the assessment, levy, and collection of taxes thereon; the sale, the deed, and the record thereof; and all other proceedings connected therewith; and, if any mere irregularities occur in the proceedings, he is presumed to have waived the same, unless he commences his action within the prescribed time. But no such presumption can arise in favor of a void tax-deed, founded upon a void tax, which the state has no authority to impose. \* \* \* The legislature cannot say that a man shall do a thing that they have no right to compel him to do, and then say, if he does not do it, he shall forfeit his estate. The legislature may properly compel a man to watch the offices of the county treasurer, the county clerk, and the register of deeds, to see that no tax-title shall accrue upon his land, if it is subject to taxation,—to see that no valid tax-lien shall ripen thereon by lapse of time into an absolute estate; but they have no authority to compel men to watch to see that no tax-title shall accrue upon land not subject to taxation. The defendant had no right to suppose his land would be taxed for the year 1858. On the contrary, he had a right to believe it would not be taxed for that year, as it was not subject to taxation." The motion for a rehearing will be overruled, and the judgment of the district court will be reversed, solely upon the ground, however, that the land could not be assessed for taxes in the spring of 1871, as it was not subject to taxation; and therefore that said chapter 39 did not apply, because that act relates to the collection of delinquent taxes on real estate. Here there was no delinquent tax. The district court therefore had no jurisdiction. See, also, *People v. Doc*, 36 Cal. 220. The syllabus and opinion originally filed in this case are hereby reconsidered. The questions referred to in the syllabus and former opinion are not passed upon, and this opinion will be substituted for the opinion handed down from



the commission. As before stated, the judgment of the district court will be reversed, and the motion for a rehearing overruled.

(45 Kan. 545)

CALAHAN v. WARD.

(*Supreme Court of Kansas. March 7, 1891.*)

DEMURRER TO EVIDENCE—QUESTION FOR JURY.

1. It is error for a trial court to sustain a demurrer to the evidence of the plaintiff, and render a judgment against him for costs, when there is any proper evidence offered in support of all the material questions involved in the issues of the case.

2. Whether the goods were sold upon the credit of Mounts or Ward in this case was, under all the evidence offered, a question of fact for the jury.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Atchison county; W. D. GILBERT, Judges.

J. T. Allensworth, for plaintiff in error.

STRANG, C. Action on account, commenced before a justice of the peace of Atchison county, where the plaintiff obtained a judgment for \$50. Defendant appealed to the district court, where the case came on for trial November 12, 1888, before the court and jury. After the plaintiff had introduced his evidence, and rested, the defendant demurred thereto, and the court sustained the demurrer. A motion for a new trial was filed and overruled, and the plaintiff asks this court to reverse the action of the district court on said demurrer, and send the case back to be tried by a jury. We think the court below should have submitted the case of the plaintiff to the jury. There certainly was some evidence to support his contention. The evidence, as it now stands, makes a *prima facie* case against the defendant. It shows that one J. F. Mounts desired to purchase of the plaintiff, a merchant in the city of Atchison, some groceries, on credit. That the plaintiff, by his chief clerk, refused to sell Mounts any more goods on credit, he already being indebted to the plaintiff for goods before purchased of him. Mounts then called the defendant, for whom he (Mounts) was at the time working, to the rear of the store-room, and asked him if he would become responsible for some groceries for him. Defendant said he would. Mr. Toohy, plaintiff's clerk, asked Mr. Ward, the defendant, how much in groceries he should let Mounts have, and Ward said, "What he wants." Toohy then asked Ward "if he should let Mounts have \$100 worth," and Ward replied that "he did not think Mounts would need so much." Mounts also said "he did not think he would want \$100 worth." Toohy then asked Ward "if he should let Mounts have \$50 worth," and Ward said, "Yes, but he wanted some time on it, until the money would be coming to Mounts from him." Toohy asked him "how long a time he wanted;" and he said, "90 days." This evidence was corroborated and supplemented by other witnesses. The account for the goods sold pursuant to the arrangement made, as above described, was kept with Mounts; that is, the goods

sold him were charged to him, instead of being charged to Ward, and the defendant claims that he is thus let out. The plaintiff offered evidence to explain why the goods were charged to Mounts instead of to Ward. We think the whole matter should have been submitted to the jury, for them to say whether the goods were sold to Mounts on his own credit, or on the credit of Ward. If the goods were sold to Mounts on the credit of Ward, then the undertaking of Ward was an original one, and he would be liable, under the circumstances set forth in the evidence of plaintiff. *Burkhalter v. Farmer*, 5 Kan. 477. The evidence shows that the plaintiff had before sold some goods to Mounts, for which he had taken Mounts' note for \$23.13. After the arrangement was made with Mounts and Ward to sell Mounts goods on Ward's credit, plaintiff surrendered to Mounts his note, and charged the amount thereof up to the new account, so as to secure the payment of said sum through Ward. This plaintiff could not do. Ward in no way became liable for goods sold by the plaintiff to Mounts before the arrangement of February 27, 1888, was made with Ward. This item should be dropped from plaintiff's claim, on a new trial. It is recommended that the judgment of the district court be reversed, and cause remanded for a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 529)

KEMPER v. CAMPBELL, Mayor, et al.

(*Supreme Court of Kansas. March 7, 1891.*)

TEMPORARY INJUNCTION—DISSOLUTION—CHANGE OF STREET GRADE.

1. Where a temporary injunction is granted without notice by a probate judge, in the absence of the district judge, the defendant, at any time before the trial, may apply, upon notice, to the district judge to vacate the same; and where the notice of the motion to dissolve or vacate states that the motion will be heard upon the petition and affidavits, and the court, upon the hearing of the motion, vacates the temporary injunction upon the ground that the petition does not state facts sufficient to constitute a cause of action, the notice is sufficiently specific.

2. *Methodist Church v. City of Wyandotte*, 31 Kan. 731, 3 Pac. Rep. 527, followed.

(*Syllabus by the Court.*)

Error from district court, Brown county; R. C. BASSETT, Judge.

On the 7th day of September, 1889, Grace G. Kemper commenced her action against A. X. Campbell, mayor of the city of Horton, and Joseph Madeau, street commissioner of that city. The petition, omitting caption, was as follows: "Comes now the above-named plaintiff, and complains of the said defendants, and for cause of action alleges that the city of Horton is a municipal corporation, duly organized and existing under the laws of the state of Kansas as a city of the second class, in Brown county, Kansas, and has been such corporation for more than two years last past; that said defendant A. X. Campbell is the duly elected, qualified, and acting mayor of said the city of Horton, and has been for more than four

months last past; that said defendant Joseph Madeau is the duly appointed, qualified, and acting street commissioner of said city of Horton, and has been for more than four months last past. Plaintiff further alleges that she is the owner in fee-simple of the following described real estate, situate in Brown county, state of Kansas, to-wit, lot No. one (1) and two (2) in block number twenty-five (25) in the original town (now city) of Horton; that said lots are situate at the corner of Main and Front streets in said city; that there is situated thereon two two-story brick buildings, which said buildings are of the value of more than thirteen thousand dollars; that the said buildings are situated on the lot line of said described real estate along the said named streets, and that the lower or first-floor rooms of said buildings are used and occupied by the tenants of said plaintiff as store-rooms in which to carry on and transact mercantile business of various kinds; that the grade of said streets along and in front of said lots, as it now exists, and is established by the mayor and city council of the city of Horton, is such as makes the said buildings and rooms easy of ingress and egress, and fit for the purposes for which they were built and are occupied; that said defendant Joseph Madeau, as street commissioner of said the city of Horton, and under the orders and direction of said A. X. Campbell, acting as mayor of said city, threatens and is about to excavate and change the grade of said streets along and in front of said described property by removing the dirt therefrom, without authority of law, and in such a manner as to make said buildings hard of ingress and egress, and almost totally unfit for the purpose for which they were built and are occupied, to the great injury and damage of said plaintiff; that said defendant A. X. Campbell, acting as mayor of said the city of Horton, threatens, and is unlawfully procuring and suffering the said Joseph Madeau and others, to excavate and change the grade of said streets along and in front of said property by removing the dirt therefrom in such a manner as to make said buildings hard of ingress and egress, and almost totally unfit for the purpose for which they were built and are occupied, to the great injury and damage of said plaintiff. Plaintiff further alleges that, unless said defendants are enjoined and restrained as herein prayed for, said plaintiff will be irreparably injured, and that said plaintiff has no adequate remedy at law. Wherefore plaintiff prays judgment that until the final hearing of this cause the said defendants be enjoined and restrained from in any manner excavating or changing the grade of said streets along and in front of said described property, and from procuring or suffering the same to be done, and that upon the final hearing such injunction be made perpetual, and that she recover her costs herein, and for such other and further and different relief as may seem to the court just and right." At the commencement of the action the probate judge of Brown county granted

a temporary injunction restraining the defendants from excavating certain streets in the city of Horton. Upon the *præcipe* of plaintiff, a summons was issued, indorsed: "Injunction granted." This was personally served upon each of the defendants. On the 10th day of September, 1889, defendants served notice that an application would be made to the judge of the district court on the 11th day of September, 1889, at Chambers, for the vacation of the temporary injunction. The application, after being continued, came on for hearing on the 16th day of September, 1889. On said notice, plaintiff objected to the hearing of the application for the dissolution of the injunction. This was overruled. Defendants thereafter offered in evidence the petition in the case, and several affidavits. The district judge, over the objection and exception of plaintiff, dissolved the temporary injunction because the petition did not state a cause of action. Plaintiff excepted, and brings the case here.

*Ryan & Stuart*, for plaintiff in error.  
*Flintoft Smith*, for defendants in error.

HORTON, C. J., (after stating the facts as above.) A temporary injunction was granted in this case, without notice, by the probate judge, in the absence of the district judge. Upon notice, and after hearing of a motion therefor, the district judge dissolved the temporary injunction. It is contended that the notice of the hearing before the district judge was not specific or sufficient. The notice stated that "the application for dissolution would be made upon the petition and the affidavits on which the injunction was granted, and such other affidavits as the defendants might deem proper to use in support thereof." Upon dissolving the temporary injunction, the district judge ruled that the petition did not state a cause of action. Under these circumstances the notice was sufficiently specific. The notice was served on the 10th day of September, 1889, and stated the motion would be heard on the next day, (September 11th,) but upon the 11th, as the plaintiff objected to taking up the motion at that time, the hearing thereof was continued to September 16th. Ample time was thereby given for the hearing of the motion. It appears from the petition that the city of Horton is a city of the second class, and cities of that class have the power to alter the grade or change the level of the land on which the streets are laid out. The petition treats the acts of the mayor and street commissioner as if they were acting for the city of Horton. It is true that it alleges that they are excavating and changing the grade of the streets "without authority of law," and that the mayor was "unlawfully" procuring and suffering the excavation to be done, but these words add nothing to the petition. *Methodist Church v. City of Wyandotte*, 31 Kan. 721, 3 Pac. Rep. 527. Upon the authority of that case, the petition does not state sufficient facts to constitute a cause of action. Again, "an injunction *in limine* is not a matter of strict right. It may sometimes be properly refused upon the same facts which would entitle the party of right to

a perpetual injunction on final bearing." *Akin v. Davis*, 14 Kan. 143; *Olmstead v. Koester*, Id. 463. The order of the district court will be affirmed. All the justices concurring.

(45 Kan. 525)

#### STATE v. ELLIOTT.

(*Supreme Court of Kansas. March 7, 1891.*)

##### SALES OF INTOXICATING LIQUORS—EVIDENCE.

Where, in a prosecution under the prohibitory law of this state for selling intoxicating liquor for an unlawful purpose, the state elects to rely on a sale made on the 6th of April, evidence of other sales on other days may be given to the jury for the purpose of showing that the liquor was not needed for medical purposes, but was wanted for use as a beverage, and that the defendant knew, or had good reason to know, that the applicant wanted the liquor for use as a beverage; and in such a case the applications on which the sales were made may be used in evidence for such purposes.

(*Syllabus by Strang, C.*)

Commissioners' decision. Appeal from district court, Republic county; F. W. STURGIS, Judge.

A. D. Wilson and Noble & Surface, for appellant. L. B. Kellogg, Atty. Gen., and J. F. Close, for the State.

STRANG, C. This was an action brought by the state of Kansas against Charles N. Elliott, charging the said Elliott with the violation of the liquor law of Kansas. The information contained 10 counts. The defendant was acquitted upon all of them but the last one. Upon this count he was convicted. A motion for a new trial was overruled, also a motion in arrest of judgment; and the defendant was sentenced to pay a fine of \$100, and costs accruing on the tenth count, and to undergo imprisonment in the county jail for the period of 30 days. From this sentence the defendant appeals to this court. The tenth count of the information reads as follows: "And I, the county attorney, come now here and give the court to understand and be informed that on the 15th day of August, 1889, the said Charles N. Elliott, in Republic county, Kansas, did then and there willfully and unlawfully sell and barter malt, vinous, fermented, spirituous, and other intoxicating liquors for other than medical, mechanical, and scientific purposes." The charge against the defendant in this count is the sale of intoxicating liquor for unlawful purposes. The defendant could not, under this count, be tried for selling in an unlawful manner for a lawful purpose. Nor do we gather from the record that there was any attempt in the court below to try the defendant for so selling. We do not understand that the defendant was tried for selling without the statement required by law having been first made, nor for selling upon a statement mistakenly filled out. If the liquor sold to Emil Rudeman on April 6th was for medicine, then the fact that there was a technical error in the filling of the blank application for the liquor would not render the defendant guilty of a violation of the law, and subject to punishment. The state does not seek to convict her citizens of crime upon mere technicalities growing out of immaterial er-

rors. In this case the attorney general disclaims any desire to hold the defendant guilty because of the error in the manner of filling up the blank application for the liquors. The contention of the state is that the defendant was tried for selling liquor for an unlawful purpose,—a purpose for which, under the constitution and laws of Kansas, it cannot be lawfully sold, no matter what the manner of the sale may be. The purpose for which it was sold was clearly set out in the tenth count of the information, and upon the trial the defendant was convicted. There was some evidence to support the verdict of the jury, and therefore this court could not disturb the judgment of the court below. The sale complained of was admitted, and also proved by the application for the liquor sold. The only question is, was it sold for a lawful purpose? If it was, then the judgment of the court below should be reversed; if it was sold for an unlawful purpose, then the judgment should stand.

The appellant complains of the character of the evidence to show that the sale was unlawful. He says the evidence consisted in statements that the law compelled the defendant to take in his business, and that they could not be used against him, because he could not, under the law, be required to criminate himself. There is no force in this position of the appellant. The statements taken by a druggist who has a permit to sell intoxicating liquors for lawful purposes are not his statements, but are the statements of the applicant for the liquor. There is nothing in the law that requires a druggist to sell even upon such statements. He may refuse to sell notwithstanding the statement. And besides, the purpose to be subserved by the requirement in the law which necessitates the taking and filing with the probate judge of such statements is that the public may ascertain whether the druggist, who has been given the right to sell for legitimate purposes, is complying with the law or otherwise.

Appellant also complains that statements relating to other sales were introduced in evidence after they had been withdrawn by reason of the state electing to rely on the sale made on the 6th of April. The state denies that such statements were reintroduced, but says the defendant was simply cross-examined with reference to them. We think, however, that the state had a right to such statements in evidence, not for the purpose of convicting the defendant of other sales, nor for the purpose of proving the sale relied on, but for the purpose of showing—*First*, that the defendant had made other sales to Rudeman of liquor so recently before the sale complained of that Rudeman could not have wanted the liquor, the sale of which was relied on to convict him, for medical purposes; and, *second*, to show that defendant knew the appellant did not want the liquor, the sale of which was complained of, for medical purposes, and to show the defendant's want of good faith in making the sale. The application for liquor made by the purchaser,

no matter how regular it is, does not constitute an absolute shield to the druggist selling thereon. If, from any source, he knows the liquor is sought to be used as a beverage, and with such knowledge he sells it, he is guilty of a violation of the law, notwithstanding the statement. In this case the evidence shows that the defendant sold Rudeman one-half pint of alcohol on April 1st, one-half pint April 2d, a half pint April 3d, a half pint April 5th, one pint April 6th, a pint April 9th, and a half pint April 10th, and so on. The question on this evidence was, did Rudeman need the liquor sold him on the 6th for medical purposes, or did he want it for use as a beverage? and, *second*, if he wanted it for use as a beverage, did the defendant know that the appellant wanted the liquor to be used as a beverage? The applicant had purchased from the defendant a pint of alcohol, equivalent to at least half a gallon of whisky, the very day before the sale on the 6th. He also purchased on the 1st, 3d, and 5th of the month a half pint each time. We think the jury had a right to this evidence for the purposes mentioned, and that having heard it, together with the other evidence, had a right to say Rudeman did not need the alcohol purchased on the 6th for medical purposes, but wanted it for a beverage; and had a right also to say that the defendant knew it was wanted as a beverage when he sold it, and that he was therefore guilty of a violation of the law. A druggist who does not know that a man does not need a pint or half pint of alcohol every day for a mere tonic or "stimulant" should be disqualified to handle poisons of any kind.

The appellant complains of the eleventh instruction given by the court to the jury, and says that the court should have limited the sale to the 6th of April, instead of the statutory limit. Where, in a prosecution for an alleged violation of the prohibitory law, the state relies on a single sale of intoxicating liquor, it may prove the sale on any day within the statutory limitation.

We have examined the third, fifth, and sixth instructions asked by the appellant, and refused by the court, which refusal is complained of, and do not think any error was committed in refusing to submit them to the jury. We recommend that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 510)

FIRST NAT. BANK OF NEWTON *et al.* v. WM. B. GRIMES DRY-GOODS CO.

(Supreme Court of Kansas. March 7, 1891.)

VACATION OF JUDGMENT—VALIDATING VOID JUDGMENT.

1. A judgment irregularly obtained within the meaning of the third subdivision of section 568 of the Civil Code, or a void judgment within the meaning of the last clause of section 575 of the Civil Code, may be corrected or vacated upon a motion of a party affected thereby upon reasonable notice given to the adverse party or to his attorney of record in the action, (Civil Code, §§

535, 569;) and it is not necessary that the motion should be filed at the same term at which the irregular or void judgment is rendered, but it may be filed at any time afterwards within three years after such judgment was rendered, and even at a later period of time if the judgment should be considered as absolutely void.

2. A judgment rendered against a person without any service of summons upon him and without any appearance by him, and only upon an appearance made by an unauthorized attorney, which appearance has never been ratified or confirmed, is absolutely void as to the person for whom the appearance was made.

3. An appearance in an action by a person upon a motion to have a judgment, which is void as to him but valid as to others, so corrected that it will not affect or seemingly affect any of his rights or interests, will not render the void judgment valid as to him.

(Syllabus by the Court.)

Error from district court, Harvey county; L. HOOK, Judge.

*Brown & Kline*, for plaintiffs in error. *William G. Clark* and *E. C. Ellis*, for defendant in error.

VALENTINE, J. The present proceeding in error was instituted in this court by the First National Bank of Newton and others against the Wm. B. Grimes Dry-Goods Company, a corporation, to reverse an order of the district court of Harvey county made upon a motion filed in such court by the Wm. B. Grimes Dry-Goods Company, under the third subdivision of section 568, and the last clause of section 575, of the Civil Code, for the purpose of having a judgment formerly rendered by such court vacated or modified so far as the same might seem to affect or interfere with any of the rights or interests of the Wm. B. Grimes Dry-Goods Company. In the original action in which such judgment was rendered, Tootle, Hosea & Co. were the plaintiffs, and the First National Bank of Newton and a great many others were the defendants. The petition of the plaintiffs in that action named the Wm. B. Grimes Dry-Goods Company as a defendant, but no service of summons was ever made upon the company, nor did it in fact at any time appear in the action, except at a time long after the time when such judgment was rendered, to file and prosecute the aforesaid motion. Some of the attorneys of the other parties, however, who were friendly to the Wm. B. Grimes Dry-Goods Company, upon their own volition, and without any authority from the dry-goods company, made an appearance for the company and filed an answer for it, and also on the trial attempted to introduce evidence to prove its case; but counsel representing the First National Bank of Newton and others objected to the introduction of any such evidence, for the reason, among others, that another suit was pending in the same court in which such matters should be litigated; and the court, for that reason, sustained the objection, and the aforesaid attorneys appearing for the Wm. B. Grimes Dry-Goods Company were not permitted to litigate or protect its alleged rights or interests at that time, nor in that action. Afterwards the court rendered a judgment in the action, but it did not at that time have, and never had,

any intention to render any judgment that would in any manner or degree affect any of the rights or interests of the Wm. B. Grimes Dry-Goods Company, but always intended otherwise; but, after the decision of the court, counsel for the First National Bank of Newton and others drew up the form of the judgment which they desired to have entered, and the court, believing that it did not in any manner affect or interfere with any of the rights or interests of the Wm. B. Grimes Dry-Goods Company, permitted it to be entered. This form of judgment, however, if permitted to remain, would, it is now believed, contrary to the intention of the court, seriously and materially affect the rights and interests of the Wm. B. Grimes Dry-Goods Company. But the judgment, as entered, is not only irregular for the reason that it did not and does not express the real intention of the court, but it is also absolutely void as against the Wm. B. Grimes Dry-Goods Company for the reason that such company was never a real party to the action. The attorneys who appeared for the Wm. B. Grimes Dry-Goods Company in that action had no authority from the company to make any such appearance, or to file any answer, or to do anything else for the company in that action; and the company never ratified or confirmed any of the acts of such attorneys. The judgment was rendered on February 6, 1890. On February 17, 1890, the Wm. B. Grimes Dry-Goods Company instituted proceedings in the said district court to vacate or modify the judgment so that it would not in any manner affect, or seem to affect, any of the rights or interests of the company. Such proceedings were instituted upon the aforesaid motion filed by the company in the district court, with proper notice thereof given to the adverse parties or to their attorneys. The motion was founded upon the third subdivision of section 568 of the Civil Code, which provides, among other things, for vacating or modifying judgments or orders "for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order;" and also upon the last clause of section 575 of the Civil Code, which reads as follows: "A void judgment may be vacated at any time, on motion of a party, or any person affected thereby." And the motion was also filed, and notice given, upon the authority of section 569 of the Civil Code, which reads, so far as it is necessary to quote it, as follows: "The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party or his attorney in the action." See, also, generally, as to the notice required to be given of the hearing of motions, section 535 of the Civil Code. At the hearing of the motion a great many objections were urged by counsel for the First National Bank of Newton and others, but it will be necessary to mention only a very few of them.

The court below in effect found that sufficient notice had been given to every "adverse party or his attorney in the action," that is, to every party or his at-

torney who really had any interest in the case adverse to the Wm. B. Grimes Dry-Goods Company; and in our opinion the finding of the court below was correct. It is not necessary that a proceeding to vacate or modify a judgment in a case like the present should be by petition, but it may be upon motion; and it is not necessary that the motion should be filed at the same term at which the judgment was rendered, but it may be filed afterwards, and at any time within three years after the judgment was rendered, (Civil Code, § 575,) and even at a later period of time if the judgment should be considered as absolutely void. *Foreman v. Carter*, 9 Kan. 674; *Hanson v. Wolcott*, 19 Kan. 207; *Toble v. Commissioners*, 20 Kan. 14. And a service of the notice upon the adverse party's attorney is certainly sufficient, for the statute itself so provides. Civil Code, §§ 535, 569. And, where the attorney has been the attorney of record in the action of the adverse party, it can certainly make no difference that the attorney may not, at the time of the service of the notice, be the attorney of the adverse party, unless the party making the motion knew that fact. And possibly even knowledge of that fact would not make any difference, unless the adverse party should have designated some other attorney or person equally accessible upon whom the service could be made. All that the statute requires is that the attorney shall be the adverse party's "attorney of record," (Civil Code, § 535,) or "his attorney in the action," (Civil Code, § 569.) We would also think that service upon the adverse party, or his attorney "of record" or "in the action," might be made through the United States mails, though it is probably not necessary to decide this question in this case. Under the facts of this case, about the only party interested in preventing the Wm. B. Grimes Dry-Goods Company from having the judgment vacated or modified as such company desired, was and is the First National Bank of Newton; and there can be no question but that the bank had ample notice. And it and all, or nearly all, the other parties were present at the hearing of the motion.

The bank, with some of the other parties, urge another objection which we might perhaps mention. It is this: The notice states that the motion will be heard before the district court on February 27, 1890, "or as soon thereafter as the same can be heard by said court." The notice was not served on some of the parties until after February 27, 1890, but it was served long before the hearing of the motion, which was on March 24, 1890, and the First National Bank of Newton was present at the hearing by its attorneys, and so were all, or nearly all, the other parties. The judgment, however, as we think, was absolutely void as against the Wm. B. Grimes Dry-Goods Company, and therefore it was not necessary that all the adverse parties should have notice or be present, but only those against whom the Wm. B. Grimes Dry-Goods Company might desire to have the judgment declared void as entered. The findings of the court be-

low show that the judgment as entered was absolutely void as against the Wm. B. Grimes Dry-Goods Company. The court below made the following finding, among others, to-wit: "That no summons in this action was ever served on the defendant, Wm. B. Grimes Dry-Goods Company; that the act of the attorneys, Bowman & Bucher, and of E. C. Ellis, and of J. D. Henry, in appearing on behalf of the defendant, Wm. B. Grimes Dry-Goods Company, and filing the various pleadings on its behalf in this action, was wholly unauthorized by said defendant, and that said defendant has never ratified or confirmed said acts other than by this motion." And certainly the defendant did not by this motion ratify or confirm any of the aforesaid acts of the attorneys so as to render the previously void judgment valid. *Shaw v. Rowland*, 32 Kan. 154, 4 Pac. Rep. 146; *Green v. Green*, 42 Kan. 654, 657, 22 Pac. Rep. 730. It is true, the motion stated all the facts of the case, giving a complete history of the case up to the filing of the motion, but the object of the motion was simply to have the judgment, as entered, so modified that it would not affect, or seemingly affect, any of the rights or interests of the Wm. B. Grimes Dry-Goods Company. It was virtually and in effect an application to have the judgment, as entered, declared void as against the Wm. B. Grimes Dry-Goods Company; and certainly an application to have a void judgment declared void would not render such judgment valid. The court corrected the judgment, or rather the entry thereof, as desired by the Wm. B. Grimes Dry-Goods Company, and so modified it that it does not now affect, or seemingly affect, any of such company's rights or interests; but with this exception, and as to all the other parties and the other matters, the judgment remains precisely the same as the original entry thereof made it appear to be. With this modification it is now precisely as it was originally intended to be, and as it was in fact rendered by the trial court, although it is not the same as it was originally entered upon the records of the court. The judgment of the court below will be affirmed. All the justices concurring.

<sup>1</sup>44 Kan. 697, 700)

#### STATE V. READY.

(Supreme Court of Kansas. Dec. 6, 1890.)

#### ROBBERY—INDICTMENT—COMPETENCY OF JUROR—NEW TRIAL.

1. In an information for robbery, that follows the language of the statute, it is not necessary to use the word "rob," or the words "to rob." The statute defining the various degrees of robbery does not contain these words.

2. An information for robbery charged the feloniously taking from the person of affiant "thirty-five dollars, lawful money of the United States, a more particular description of which said money is unknown to this affiant," and the proof showed that three \$10 bills and \$5 in silver were taken. *Held* to be no variance.

3. When a juror, examined upon his *voir dire*, said that he had not served upon a jury in any court of record in this state within 12 months, and it is shown that he had, and the fact of the prior service of the juror was not known to the appellant until after the trial, the fact of the pri-

or service of the juror is not sufficient to grant him a new trial. The case of *State v. Jackson*, 27 Kan. 581, followed.

(Syllabus by Simpson, C.)

#### ON REHEARING.

Where an objection to the competency of a juror, namely, that he had served as a juror in the same court in another case within the preceding year, is first raised after verdict, and the party objecting fails to show that the ground of challenge was unknown to him and his counsel when the juror was accepted, or that he would have exercised his right of challenge if he had known that the cause therefor existed, or that he has suffered any prejudice by the retention of the juror, the objection will not be available for the purpose of obtaining a new trial.

(Syllabus by the Court.)

Commissioners' decision. Appeal from district court, Shawnee county; A. H. Vance, Judge.

*James J. Hitt*, for appellant. *L. B. Kellogg*, Atty. Gen., and *R. B. Welch*, for the State.

SIMPSON, C. An information was filed against one Rough Ready, charging that on the 15th day of February, 1890, and within the jurisdiction of the district court of Shawnee county, he "did then and there unlawfully and feloniously make an assault on one Wm. Glaze, and did then and there unlawfully and feloniously and by violence overcome and put in fear, and from the person of him, the said Wm. Glaze, did then and there unlawfully, feloniously, by violence and against his will, take, steal, and carry away, of the property of the said Wm. Glaze, thirty-five dollars, lawful money of the United States, a more particular description of which said money is unknown to this affiant, and cannot be given, of the value of thirty-five dollars," etc. Trial at the April term. The jury returned a verdict of guilty "as charged in the information." A motion for a new trial was made and overruled, and the defendant brings the case here for review.

1. The first objection made is to the sufficiency of the information, because the description of the property taken is indefinite, and the cases of *State v. Tilney*, 38 Kan. 714, 17 Pac. Rep. 606, and *State v. Segermond*, 40 Kan. 107, 19 Pac. Rep. 370, are invoked in aid of the objection. These cases hold that general descriptions of the property taken, such as "national bank notes," "United States treasury notes," "United States silver certificates," "money of the amount and value of one thousand dollars," and "twenty-five dollars in money," without any allegation of the inability of the prosecutor to give a more specific description, is insufficient and fatally defective. It is almost universally held, by courts of last resort every where, that, where there is an allegation in the indictment or information that a more particular description could not be given for some sufficient reason, a general one, as contained in this information, is sufficient.

2. It is also insisted that the county attorney could have given a better description of the money taken than was recited in the information, if he had exercised ordinary diligence. This is a question of fact that we are not required to investi-

gate. At the trial the prosecuting witness testified that the money taken from him consisted of three \$10 bills and \$5 in silver, and it is claimed that there is a variance between pleading and proof, but the fact that there was no particular description of the money is now overlooked by counsel for appellant. The charge was "thirty-five dollars, lawful money of the United States;" the proof was "three ten-dollar bills and five dollars in silver," and one is the equivalent of the other.

3. It is shown by the record that one of the jurors, when examined on his *voir dire*, said that he had not served upon a jury in any court of record in this state within 12 months last past, when it is shown that he had. The fact of the prior service of the juror was not known to the appellant or his attorney until after the trial. At the trial the appellant exhausted all his peremptory challenges. We think that for the reasons given and authorities cited in the case of *State v. Jackson*, 27 Kan. 581, the objection to the juror is made too late.

4. Finally, it is said that the information is not good on a motion in arrest of judgment, because the words "to rob" are not used therein. It will be noticed that every essential element constituting the crime of robbery is charged in the information, in the exact language of the statute, and that the statute, in defining the crime of robbery in the various degrees, nowhere uses the words "rob" or "to rob." It is recommended that the judgment of conviction be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### ON REHEARING.

(March 7, 1891.)

JOHNSTON, J. The appellant asks the court to re-examine all the points of error originally assigned by him, but it is not deemed necessary to re-examine or notice any, except the single one that a juror who returned the verdict had within a year before that time served as a juror in the same court. It is now insisted that the objection, made after verdict, was not too late, and that the case of *State v. Jackson*, 27 Kan. 581, is not controlling. The record shows that Cope had within a year served as a juror in another case; and it further appears that all of the jurors, including Cope, answered the question, "Have any of you served upon a jury in any court of record in this county within one year last past?" in the negative. Appellant urges that he had a right to rely on the answer given by the juror in his *voir dire*, and was therefore excused from making further inquiry. It is true that a party may ordinarily rest on the testimony given by a juror on his *voir dire* in regard to his qualifications. *Lane v. Seoville*, 15 Kan. 402. But neither the inquiry as to prior services by the juror, nor the answer which he gave, proves that the appellant or his counsel had no knowledge of such prior service. In his motion for a new trial appellant alleges that neither he nor his counsel was aware that Cope had served as a juror within 12 months of the

trial, but no testimony was offered to sustain the allegation, and it does not appear to have been one of the conceded facts. "A known cause of challenge is always waived by withholding it, and raising it as an objection after verdict, since such a practice is incompatible with the good faith and fair dealing which should characterize the administration of justice." *Thomp. Trials*, § 114. The fact that Cope had served as a juror during the preceding year is not a positive disqualification which vitiates the verdict, but is only a ground of challenge, which may be waived. There is nothing to show that Cope solicited the place, nor that he is what is known as a "professional juror." It does not appear but that Cope had no recollection of his former service, and had no intention to prevaricate and mislead. No attempt is made to show any bias or prejudice on his part, or that he is other than an honorable and fair-minded man. Appellant made no showing that he desired to challenge all jurors who had served in that capacity within the preceding year, or that he desired to or would have excluded Cope from the jury upon this or any other ground of challenge. For all that is shown in the record, appellant may have known of this statutory ground of challenge, and yet, with a full understanding of it, desired to retain Cope upon the jury. If this is the fact, will any one contend that the verdict should be set aside and a new trial granted? Although there is much complaint in the brief filed, there is absolutely no showing that the verdict is unjust, nor that the appellant was prejudiced by Cope's wrong answer, or by his presence on the jury. If it had been shown upon the motion for a new trial that appellant and his counsel were ignorant of Cope's former service, and that they desired to exclude from the jury all those who had served as jurors within the preceding year, or that they desired to have Cope excluded from the jury, and would have used this ground of challenge to accomplish their purpose, but that the answer of the juror misled them, and prevented the challenge, it might be that the objection first made to the juror after the verdict would be available. In the absence of any such showing, we cannot say that the appellant has not waived the objection to the juror, nor that it is made in good time. We are still of the opinion that no injustice has been done to the appellant, and that the verdict should be allowed to stand. The motion for a rehearing will therefore be denied. All the justices concurring.

(45 Kan. 523)

#### STATE v. LEIGH.

(*Supreme Court of Kansas*. March 7, 1891.)

#### CRIMINAL LAW—APPEAL FROM JUSTICE.

To effect an appeal in a criminal trial before a justice of the peace, upon a judgment of conviction the appellant must, within 24 hours after the rendition of the judgment, enter into a recognizance to the state, in the sum and with sureties to be fixed and approved by the justice before whom the trial was had. Simply going to the office of the justice of the peace at the dinner



hour, with a recognizance, during the statutory time allowed, is not sufficient.

(*Syllabus by Green, C.*)

Commissioners' decision. Appeal from district court, Geary county; M. B. NICHOLSON, Judge.

*Thomas Dever*, for appellant. *J. N. Ives*, Atty. Gen., and *W. J. Franklin*, for the State.

GREEN, C. The facts material to this case are substantially as follows: On the 6th day of May, 1890, the appellant was tried before a justice of the peace and a jury in Junction City, Geary county, and convicted of violating the prohibitory law. Judgment was rendered against her on the same day, by the justice of the peace, at 2:50 P. M. Upon the following day the attorney for the defendant went to the office of the justice of the peace with a recognizance, a few minutes before 1 o'clock in the afternoon, but found the door locked. The attorney, being engaged in the trial of another case before another justice of the peace in the same city, did not return to the justice's office before whom the defendant was tried until a quarter to 5 o'clock on the same afternoon, when the bond was declined, for the reason that the 24 hours had expired in which a recognizance could be accepted. Subsequently, the bond was presented to the justice, who made the following indorsement thereon: "This bond presented for filing and approved on May 7th, 1890, at 4:45 P. M. of that day, and by me accepted and approved as of that date and hour." The papers were transmitted to the district court, and a motion was made and sustained to dismiss the appeal for the reason that the same had not been taken in time. The appellant brings the case here, and insists that the appeal was taken within the 24 hours after the rendition of the judgment; that the recognizance was at the office of the justice of the peace within the statutory time. The language of the statute is: "No appeal shall be granted or proceedings stayed unless the appellant shall, within 24 hours after the rendition of such judgment, enter into a recognizance to the state of Kansas, in a sum and with sureties to be fixed and approved by the justice before whom said proceedings were had, conditioned for his appearance at the district or criminal court of the county, at the next term thereof, to answer the complaint against him." Section 5454, Gen. St. 1889. There is nothing in the record to show that this recognizance was filed in time. The defendant had the right of appeal; and to complete that right certain conditions were imposed upon her, viz., the giving of a bond, to be approved by the justice before whom she had been convicted, within 24 hours after judgment. This she did not do. It is clearly the duty of a party wishing to effect an appeal in a criminal case to see to it that the recognizance is furnished and delivered to the justice of the peace within the statutory time, and, if not delivered in accordance with the requirements of the statute, no valid appeal is effected. While appeals are favored, and substance rather than form should con-

trol, the appellant failed to place herself within the provisions of the law granting the right of appeal. If she had presented her recognizance, with sufficient sureties, at the office of the justice of the peace within the time allowed by law, during business hours, or if the justice had indicated his approval within the 24 hours, it would have been good; but this was not done. The attorney for the defendant went to the justice's office at the dinner hour with the bond, and, not finding the officer, carried it away with him, and made no further effort to furnish a bond until the time had expired. While an appeal cannot be defeated through any omission of the justices of the peace to make the necessary and proper entries upon his docket, yet the statute must be substantially complied with by the appellant to make an appeal effectual. *Bubb v. Cain*, 37 Kan. 692, 16 Pac. Rep. 89; *Struher v. Rohlf*, 36 Kan. 202, 12 Pac. Rep. 830. We recommend an affirmance of the judgment of the district court in dismissing the appeal.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 332)

DEFORD V. HUTCHINSON.

(*Supreme Court of Kansas. March 7, 1891.*)

REPLEVIN—PLEADING—GENERAL DENIAL—EVIDENCE.

In an action of replevin by a mortgagee for the possession of mortgaged property, the defendant in possession thereof may, for the purpose of defeating the plaintiff's right of recovery, prove, under the general denial, a sale of the property by her to the plaintiff subsequent to the execution and delivery of the mortgage and his refusal to take the goods and pay her the contract price. *Further held*, that, in such an action, where the plaintiff is permitted to retain the goods, the defendant may plead such sale, and, if maintained on the trial, may recover judgment against the plaintiff in the alternative for a return of the property, or the value of her interest therein. Modifying 25 Pac. Rep. 641.

(*Syllabus by the Court.*)

On rehearing.

PER CURIAM. Upon a re-examination of the former opinion and syllabus handed down, we think it necessary to correct the same so far as to eliminate therefrom all reference to any counter-claim or set-off. In the action the defendant successfully maintained the sale of the goods from her to Deford, with the right upon her part to retain the same until her interest therein was paid. She was therefore entitled to recover a judgment against the plaintiff in the alternative for a return of the property to her, or the value of her interest therein. The original syllabus and opinion will be corrected accordingly.

GAGE V. PHILLIPS. (No. 1,337.)

(*Supreme Court of Nevada. March 16, 1891.*)

PAROL EVIDENCE—COMPETENCY OF WITNESS.

1. In the absence of fraud or mistake, parol proof of the contents of letters is inadmissible to vary the terms and effect of a mortgage subsequently executed between the parties.



2. One who executes a bill of sale, and does not claim that there were misrepresentations in its procurement, cannot contest it, on the ground that she thought she was signing something else.

3. Under St. Nev. 1881, p. 80, prohibiting a person from testifying when the other party to the transaction is dead, or when the opposite party to the action is the representative of a deceased person, as to facts which transpired before the death of such deceased person, defendant, in a suit by a surviving partner to foreclose a mortgage, cannot testify that the deceased partner accepted property under a verbal agreement in satisfaction of the mortgage.

Appeal from district court, Ormsby county; RICHARD RISING, Judge.

*Trenmore Coffin* and *Wm. Woodburn*, for appellant. *W. E. F. Deal*, for respondent.

MURPHY, J. This action was brought by W. S. Gage, as surviving partner of the firm composed of Clark P. Hubbell, J. C. Hampton, and W. S. Gage, doing business under the firm name of J. C. Hampton & Co., to foreclose a mortgage executed by M. A. Phillips, the defendant, to J. C. Hampton & Co., of Virginia City, Nev., dated on the 16th day of May, 1887. The complaint contains the usual allegations in actions of the kind. In her answer the defendant avers: "That on or about the — day of May, 1888, said defendant was the owner of a certain lot of furniture, carpets, bedding, stoves, and all necessary articles for the complete furnishing of a lodging-house, which was then in a lodging-house situated on B street, in Virginia City, Nev., \* \* \* and which said lot and lodging-house were then owned by said J. C. Hampton, now deceased, or by said firm of J. C. Hampton & Co. That on or about said — day of May, 1888, this defendant and said J. C. Hampton, now deceased, agreed together that said J. C. Hampton should take said furniture, bedding, carpets, stoves, and other articles, then in said lodging-house, in full satisfaction of the note and mortgage mentioned in plaintiff's complaint. That said J. C. Hampton, now deceased, then, either for himself, or for said J. C. Hampton & Co., did take said furniture and property in full satisfaction of said note and mortgage. That said J. C. Hampton died without satisfying said mortgage, or the record thereof. That said furniture and other property was of the reasonable worth and value of three thousand dollars." The plaintiff introduced his note and mortgage in evidence, and rested his case in chief. It appears from the transcript that in the year 1881 the defendant borrowed a large sum of money from J. C. Hampton & Co., giving as security for the payment thereof notes secured by mortgages on property situated in Virginia City and Carson City, Nev. That the furniture now in controversy was in the house in Virginia City, and has never been removed therefrom. That on the 16th day of May, 1887, J. C. Hampton, for the firm of J. C. Hampton & Co., had a settlement of accounts with the defendant, and it appears that on such settlement defendant owed the firm of J. C. Hampton & Co. about \$12,000. The defendant gave to J. C. Hampton a deed to

the Virginia City property; consideration, \$1,000. She also executed and delivered to J. C. Hampton & Co., at the same time and place, and as a part of the same transaction, the note and mortgage sued upon, and a bill of sale of all the furniture in the Virginia City house. The defendant now swears that, at the time she signed the bill of sale, she did not know what she was signing, as she had no glasses with her, and, as she had borrowed \$150 from Hampton on the day she signed the papers, she supposed she was signing a note for that amount. The defendant also testified, or attempted to, that she had a conversation and some correspondence with J. C. Hampton, in which he agreed to take the furniture in payment of the \$2,000 indebtedness, and enter satisfaction of the mortgage sued upon. The letters claimed to have been received from Hampton could not be found, and the defendant called a Mrs. C. H. Robinson as a witness, and offered to prove by her the contents of the letters written by her for Mrs. Phillips to Hampton, and Hampton's letter in reply, which it appears that Mrs. Robinson had read to the defendant; to all of which counsel for the plaintiff objected, on the ground and for the reason that all the correspondence was had before the note and mortgage were given. The court sustained the objection, and the defendant excepted to the ruling. The testimony was inadmissible for the purpose offered. When parties reduce their contract to writing, all oral negotiations and agreements are merged in the writing, and the instrument must be treated as containing the whole contract, and parol proof is not admissible to alter its terms, or to show that, instead of being absolute, as it purports to be, it was in reality conditional, unless the party attacking the instrument can establish fraud or mistake in its execution. The case of *Stewart v. Babbs*, 120 Ind. 571, 22 N. E. Rep. 770, is directly in point on this case. In that case the defendants purchased land. They gave notes and mortgages to secure the payment of the purchase money. On the trial of the case the defendants gave testimony changing the terms of the deed and mortgage. On appeal, the supreme court said: "It is well settled, by a long line of decisions of this court, that, when the parties reduce their contract to writing, all oral negotiations and stipulations are merged therein." See, also, *Wight v. Railroad Co.*, 16 B. Mon. 4; *Fairbanks v. Metcalf*, 8 Mass. 238; *Ward v. Lewis*, 4 Pick. 520; *Worrall v. Munn*, 5 N. Y. 238; *Clark v. Gifford*, 10 Wend. 313; *Gilbert v. Insurance Co.*, 23 Wend. 45; *De Witt v. Berry*, 10 Sup. Ct. Rep. 536; *Polhill v. Brown*, (Ga.) 10 S. E. Rep. 921; *Land Co. v. Dromgoole*, (Ala.) 7 South. Rep. 444; *Bruns v. Schreiber*, (Minn.) 45 N. W. Rep. 861; *Northwestern Fuel Co. v. Bruns*, (N. D.) Id. 699; *Hills v. Rix*, (Minn.) 46 N. W. Rep. 297.

There is neither fraud nor mistake charged in the answer, and the attorney for the defendant stated in open court "that they did not claim that there was any fraud in the transactions." The mere statement of the defendant "that she did

not know what she was signing, when she signed the bill of sale," is no excuse in law. In order to be of any benefit to her, she should have set out in her answer that the paper introduced in evidence was obtained by misrepresentations of its contents, and that the misrepresentations were false, and that she had exercised due diligence to guard against fraud; and, to excuse a want of due care and diligence in a case of this kind, the defendant should show that there was known trust and confidence between the parties to the instrument, and that the relationship of the parties was such as to justify the existence of such trust and confidence.

Defendant attempted to prove that in the spring of 1888, and prior to the death of Hampton, she had a conversation with him, wherein he agreed to take the furniture in full payment of the amount due on the note and mortgage, to-wit, \$2,000, and enter satisfaction of the same. To the introduction of this testimony plaintiff objected to the defendant testifying to any conversation had between herself and Hampton in relation to their business transaction, for the reason that the other party to the transaction was dead. The defendant admitted that all her dealings and conversations were with J. C. Hampton. The court sustained the objection, and this defendant claims to be error, and in support thereof rely upon the authority of the cases of *Crane v. Gloster*, 13 Nev. 279, and *Vesey v. Benton*, Id. 284. In the statute of 1864, p. 77, we had an act of the legislature defining who should and who should not be witnesses. Under that statute the decision in the case of *Roney v. Buckland*, 4 Nev. 45, was rendered, in which this court held: "When a surviving partner is sued for a loan for the use of the firm made to the deceased partner, and of the particulars of which the deceased partner only was cognizant, the plaintiff is not a competent witness in his own behalf." In 1869, at the time of the adoption of our civil practice act, (either by mistake or design,) the following paragraph was omitted from the act: "Except where the adverse party is dead, or where the opposite party shall be the administrator or executor." Under the act of 1869, the cases in 13 Nev. were decided, and each of these opinions were written by the judges under protest, and they did not hesitate to express their contempt of an act that required of them to affirm judgments, when such judgments had been obtained on the testimony of parties to a transaction, when the opposite parties, and the only persons who could testify or contradict their statements, were dead. In the case of *Crane v. Gloster*, Justice BEATTY, at page 281, said: "It appears, then, that the old law recognized two reasons for excluding the testimony of a party interested, while the present law recognizes but one. Of the two principles of exclusion, the sounder and better has been rejected, and the more arbitrary and unreasonable retained. The result is that our law on this subject is about as bad as it could be made. The policy of sealing the lips of the surviving party to any transaction, when the opposite party, whether

principal or agent, is dead, is sanctioned and approved by the statutes of several of the states. \* \* \* We, however, have retained this rule in its most arbitrary form, and have abolished altogether the other rule, which invariably operated to the promotion of justice." HAWLEY, C. J., in *Vesey v. Benton*, said: "It seems proper, however, in view of the results reached in *Crane v. Gloster*, ante, and in this case, to call the attention of the legislature to the crude and unsatisfactory provisions of the statute referred to. The only object of incorporating any provision of exclusion is to prevent fraud and injustice." Then, after commenting upon the facts in the two cases mentioned and the application of the statute, he says: "Thus, as will readily be seen, giving to the defendant in the former, and the plaintiff in the latter, case an undue and unfair advantage. A statute that leads to such results is repugnant to every sense of justice and of right, and ought to be amended." It was amended by an act of the legislature of 1881, (St. 1881, p. 80,) and reads as follows: "No person shall be allowed to testify \* \* \* when the other party to the transaction is dead, or when the opposite party to the action, or the person for whose immediate benefit the action or proceeding is prosecuted or defended, is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased person." Under the above statute, the defendant was not a competent witness to prove the conversations had between herself and Hampton. She is prohibited from testifying as to any statement made by the deceased to her, or to any business transaction between herself and the deceased. The statute has in view transactions between parties one of whom had since died, and whose representative was engaged in a suit with the survivor. As to such transaction neither party is allowed to testify. The survivor should not, because the mouth of the other party to the transaction is forever closed. Therefore the rule as laid down in the case of *Roney v. Buckland*, 4 Nev. 55, is a clear exposition of the law as it then existed, and re-enacted in 1881, while the cases in 13 Nevada were a correct interpretation of the law at the time the decisions were rendered. The act of the legislature governing the cases being repealed, they are no longer authorities in actions such as the one under consideration. In support of the views herein expressed, we cite as authorities: *Wilcox v. Corwin*, 117 N. Y. 502, 23 N. E. Rep. 165; *Clift v. Moses*, 112 N. Y. 431, 20 N. E. Rep. 392; *Tuck v. Nelson*, 62 N. H. 471; *Parks v. Andrews*, 10 N. Y. Supp. 344; *Kimble v. Carothers*, 81 Pa. St. 506; *Koehler v. Adler*, 91 N. Y. 657; *Shain v. Forbes*, 82 Cal. 583, 23 Pac. Rep. 398; *Parks v. Caudle*, 58 Tex. 221; *Dolan v. Dolan*, (Ala.) 7 South. Rep. 425; *Glover v. Thomas*, (Tex.) 12 S. W. Rep. 685; *Fulcher v. Mandell*, (Ga.) 10 S. E. Rep. 582; *Nesbitt v. Parrott*, Id. 590; *Patterson v. Martin*, (W. Va.) Id. 820; *Gunther v. Bennett*, (Md.) 19 Atl. Rep. 1048; *Gavin v. Bischoff*, (Iowa,) 45 N. W. Rep. 306. In the case of *Simpson v. Simpson*, (N. C.) 12 S. E. Rep. 450, plaintiff was per-

mitted to testify that the sum of \$50 had been paid on the note and mortgage. The mortgagor and maker of the note was dead. The supreme court held "that the plaintiff was not a competent witness to prove what was or was not paid. The proof necessarily concerned transactions with the deceased about which he could testify, and might testify, differently, if living, and we think he was rendered incompetent as a witness for any such purpose." Counsel for appellant, in their oral argument in this court, claimed that, the action being prosecuted by Gage as surviving partner, the rule did not apply, and the defendant should have been permitted to testify. The act of the legislature under consideration in this case accomplishes the very purpose of its enactment, namely, it prevents living witnesses from establishing contracts, by their own evidence, as to personal transactions and communications with parties whose lips have been sealed by death. The case of *Green v. Edick*, 56 N. Y. 613, was an action against the defendant, as surviving partner of the firm of Edick & Son. Upon the trial plaintiff, as a witness in his own behalf, was allowed to testify to a conversation between himself and the deceased partner. Held to be error, and judgment reversed. *Roney v. Buckland*, 4 Nev. 45; *Shain v. Forbes*, 82 Cal. 583, 23 Pac. Rep. 198; *Dolan v. Dolan*, (Ala.) 7 South. Rep. 426. There was no error in the ruling of the court in refusing the defendant permission to amend her answer: (1) The amendment was intended to vary the terms of a written contract, which was not permissible, in the face of the admission of the defendant that she did not claim there was any fraud in the transaction; and (2) the court stated that, if the defendant wanted to show that the bill of sale was intended as a mortgage, she could do so. There was no error in the court's refusal to make the finding asked for by the defendant. There is nothing in the case that would justify the making of any such finding. It therefore follows, from the views we have expressed, and from the authorities we have cited, that there was no error committed by the court in its rulings, and the claim of the appellant that there is no evidence to sustain the decree of the court is not well founded. The judgment of the district court and the order refusing a new trial are affirmed.

COUNTY OF EUREKA v. COUNTY OF LANDER.  
(No. 1,330.)

(*Supreme Court of Nevada.* March 10, 1891.)

COUNTIES—CREATION—BOUNDARIES.

L. county was created, and the fortieth meridian designated as its western boundary, being also designated as the eastern boundary of H. county. The line was established by the surveyors of both counties, as provided by law, for the guidance of their public officers, and was generally recognized. E. county was afterwards created out of L., to be divided by a line beginning on the north line of L. county, equidistant from its north-east and north-west corners. Held, that E. county was created with reference to the north-west corner of L. county, as then established, though it was afterwards found not to be on the fortieth meridian.

Appeal from district court, Ormsby county; RICHARD RISING, Judge.

W. D. Jones, Henry Mayenbaum, and T. Coffin, for appellant. Baker & Wines, for respondent.

BELENAP, C. J. Mr. Wenbaw, the owner of real estate lying near the boundary line of Eureka and Lander counties, and assessed by each county as within its jurisdiction, paid his taxes to Lander county, under the law authorizing a tax-payer to pay either county. Gen. St. § 1205. The county of Eureka, claiming that the assessed property is within its boundaries, brought their action to recover back the amount of money paid. The statute creating the county of Eureka describes the boundary line between Eureka and Lander counties as follows: "Beginning at a point on the north boundary line of Lander county, equidistant between the north-east and north-west corners of said Lander county; thence running due south from said initial point to the south boundary line of said Lander county." Eureka county was required to establish this line at its own expense. St. 1873, p. 107. The line was accordingly established by Mr. Edwards, the county surveyor of Eureka county. His survey placed the disputed territory in Lander county. At the time of the passage of the law creating Eureka county the north line of Lander county and its north-east and north-west corners had been established. As the position of the north-west corner is the principal matter of contention upon this appeal, the manner in which it was established may be stated. The statute creating Lander county designates the fortieth meridian as its western boundary. St. 1862, p. 53. The meridian is also the eastern boundary of Humboldt county. In the year 1870 the position of this boundary line was established by a joint survey of the county surveyors of the respective counties, made at the instance of the county commissioners, in pursuance of a statute requiring the establishment of boundary lines between counties by their surveyors whenever the positions of such lines are disputed by reason of the settlement of persons or ownership of property thereon. St. 1866, p. 130. Subsequently the north-west corner of Lander county was established by the county surveyors of Humboldt and Lander counties. The point was accepted by the county surveyor of Elko county; and the south boundary line of that county, which is the north line of Lander county, commences at this corner. This line and corner were established in order that certainty could be attained in questions touching the territorial extent of the jurisdiction of courts of the right of taxation, and other matters of a public nature; and, having been established for the information and guidance of public officers and private citizens, their position was matter of public knowledge. When the legislature created the county of Eureka from the territory embraced within Lander county, and referred to the line and corners mentioned, it must be presumed to have acted with knowledge of these public facts. There was in

fact no other north line or north-west corner of Lander county than these, nor was provision made for the ascertainment of any other. The position of the line and corner was matter of interest to the counties of Elko, Humboldt, and Lander, as well as Eureka, and, if the legislature had intended any other, provision would probably have been made for a joint survey by the counties interested. But at this time no one had questioned the correctness of their position. Another act, framed at the same session, illustrates the understanding of the members of the legislature upon this subject. The act is entitled "An act to define and establish the boundary line between Humboldt and Lander counties." (St. 1873, p. 189,) and describes the portion of the line under consideration as follows: "Beginning at the north-west corner of Lander county, and running due south on the present line between Humboldt and Lander counties to a point due north of Battle Mountain station. \* \* \* The 'present line' here mentioned was that made by the joint survey of 1870, because down to the time of the passage of this law no other line had been run, and the 'north-west corner' could have been no other than that made by the intersection of the southerly boundary line of Elko county with the Humboldt-Lander line in the year 1871. In the year 1887 it was discovered that the Humboldt-Lander line, as fixed by the joint survey of 1870, was not at the fortieth meridian, but was one and a half miles east of it; and it results that if the north line of Lander county were extended westward so as to intersect the meridian, and the equidistant point mentioned by the statute taken upon such extended line, the disputed territory would fall in Eureka county. But the error in the survey was not known until long after the enactment of the law creating Eureka county, and has no bearing upon the question of the intention of the legislature. The intention must be ascertained from the facts existing at the time of the passage of the law, and not from facts arising afterwards. At the time the law was framed the impression was that the position of the line and corner had been correctly ascertained, and they were, therefore, adopted by the legislature as fixed objects from which the Eureka line could be established. The judgment of the district court in favor of Eureka county is reversed, and the cause remanded

HALEY V. EUREKA COUNTY BANK *et al.*  
(No. 1,325.)

(Supreme Court of Nevada. March 10, 1891.)

JUDGMENTS BY DEFAULT—FICTITIOUS SUITS—MOTION BY *AMICUS CURIAE*—PRACTICE.

1. On default in an action for the conversion of personal property, it is not error for the court, before entering judgment, to require proof of the value of the property.

2. No notice is necessary before motion by an *amicus curiae* to dismiss an action on the ground that it is fictitious.

3. Defendants purchased property, and organized a company, of which they elected plaintiff secretary. Afterwards, to settle their title to the property, they transferred the title thereto to

plaintiff, and had him sue them for its conversion, agreeing to submit to a judgment by default, after which plaintiff was to transfer to them all his legal rights in the property. Defendants retained and paid plaintiff's attorney. It appeared that plaintiff had paid nothing for the property. Plaintiff claimed that the suit was not fictitious, but hostile to defendants. *Held*, that the suit should be dismissed as fictitious, on motion by defendants' counsel, as *amicus curiae*, supported by affidavits. BIGELOW, J., dissenting.

4. Such suit may be dismissed after the assignment of a judgment by default, since there are no rights under such a judgment to assign.

5. Communications to plaintiff's attorney in such case are not privileged, since he was acting both for plaintiff and defendants.

6. A party cannot, on appeal, complain that judgment was entered without trial by jury, which was not waived, if the record does not show that a jury was demanded.

7. Any attorney may, as *amicus curiae*, move the dismissal of a fictitious suit.

Appeal from district court, Eureka county; A. L. FITZGERALD, Judge.

Wren & Cheney, for appellant. Baker & Wines, for respondents.

MURPHY, J. This case came before this court on appeal from an order of the district court, setting aside the default of the defendants. The order was reversed, and the cause remanded. 22 Pac. Rep. 1098, 20 Nev. 410. It is unnecessary to repeat the history of the case here. On the return of the case to the district court, the plaintiff, by his attorney, appeared in court, and asked for judgment on the pleadings for the full amount prayed for in the complaint, no answer having been filed; which motion was by the court denied, on the ground that the plaintiff was not entitled to a judgment without proof of the value of the property alleged to have been converted. In an action arising upon contract, for the recovery of money or damages only, a default and final judgment may be entered by the clerk. In all other cases the plaintiff must apply to the court for the relief prayed for in his complaint, and when he does so the court may require additional proof, and it is not error for the court to refuse to enter judgment on the pleadings alone, and the proof must be made when demanded. *Parker v. Wardner*, (Idaho,) 13 Pac. Rep. 173.

G. W. Baker, as an officer of the court, and as *amicus curiae*, submitted a written motion to the court "to dismiss the action as to all the defendants, except the Eureka County Bank, upon the ground and for the reason that the same was and is a sham action, colorably instituted between the plaintiff and the defendants Sadler, Torre, Barbieri, and the Nevada Stage & Transportation Company, without any intention of ever determining any dispute, or litigating any question, or ever having any adversary trial, but simply to obtain the judgment and decision of the court upon a feigned issue, which might affect other parties not impleaded; and that said action between the parties last above mentioned was amicably instituted, without any real dispute between them, and their interest in the question when the said suit was brought was one and the same, and not adverse. That in these proceedings the plaintiff and said defendants men-

tioned were seeking to secure such a judgment to be entered as might result to the advantage of the defendants, with reference to the title of the property mentioned in the complaint, and adversely to the interest of other parties not before the court, and who had no knowledge of the suit, and no opportunity to be heard, and have any interest they might have in the subject-matter of the suit determined. That the attorney for the plaintiff, who brought the action for the defendants last above mentioned, was employed and paid by them, and such suit was simply a scheme to in some way obtain a judgment of the court upon a feigned issue, which it was conceived might be of advantage to the defendants, and for which purpose the plaintiff permitted his name to be used in instituting the same." In support of this motion, the *unicus curiæ* offered the affidavits of Sadler and Rives, and it was stipulated between the parties that the testimony taken on the hearing of the motion to open the default should be considered admitted as evidence on the hearing of this motion, in so far as the same was applicable. The plaintiff objected to the consideration of the motion, upon the ground that the same had not been noticed. The court permitted the motion and affidavits to be filed, and informed the plaintiff that he might have all the time he required to prepare counter-affidavits and argue said motion. The plaintiff denied the right of counsel to make the motion, and excepted to the ruling of the court.

The objection of the plaintiff to the filing and hearing of the motion to dismiss, on the ground that the same was not noticed, is without merit: (1) Because upon the reading and filing of the motion the court informed counsel for plaintiff that they should have all the time they desired to file counter-affidavits and argue the motion, which offer they declined to avail themselves of, but stipulated that the affidavits, submitted to the court on the consideration of the motion to open up the default, on the former hearing of this case, should be admitted as the evidence on this motion, in so far as the same was pertinent to the question submitted for decision. And (2) a motion of this character is in the nature of a suggestion to the court that the action then pending is not a real, but a fictitious, one, to obtain a judgment of the court, not upon any issue then involved between the parties to the action, but that might be used by either the plaintiff or the defendants against strangers to the action who might thereafter come in and claim an interest in the property sued for. When actions are brought in a court of law, a duty devolves upon the judge, and that is scrupulously to guard its proceedings from being used by the parties collusively, and not suffer a judgment to be entered without being fully satisfied that a cause of action really exists as provided for by law. Whenever facts are placed before a court, which cause any suspicion that there is any collusion between the parties, no matter in what way or form the facts are brought to the knowledge of the court, it is the duty of the judge at once to institute such

an examination as will satisfy him of the truth or falsity of the charge.

There are many circumstances connected with this case which certainly give a strange appearance to the mode in which this action was commenced and has been prosecuted, sufficient, in our opinion, to sustain the order of dismissal. It appears from the uncontradicted testimony that one Townshend had a contract from the government of the United States for the transportation of the United States mail from Eureka, in Eureka county, to Pioche, in Lincoln county, all in this state. He was in possession of horses, wagons, and harness sufficient to stock the route. R. Sadler and John Torre were his bondsmen. Townshend became indebted to the Eureka County Bank in the sum of "four thousand eight hundred dollars, to Torre, Sadler, and Barbieri in the sum of two thousand dollars, and there was still due to the Utah, Nevada & California Stage Company the sum of two thousand dollars, balance of purchase money for the stock on the road; making a total indebtedness of eight thousand eight hundred dollars." The Eureka County Bank insisting upon the payment of its claim, Townshend, on the 11th day of March, 1887, sold and delivered to the bank all the property used in transporting said mail, and his interest in the said contract with the government. That the said Sadler, Torre, and Barbieri, in order to protect themselves from loss, upon the failure of the parties to carry said mail in accordance with the contract for which they were bondsmen, with the knowledge and consent of Townshend, purchased the property and contract from the Eureka County Bank, paying therefor the sum of \$4,800. They also assumed the indebtedness due from Townshend to the Utah, Nevada & California Stage Company. That after the purchase of said property by Sadler, Torre, and Barbieri they organized the Nevada Stage & Transportation Company, and they subscribed for and owned all the stock. That in order to qualify Thomas E. Haley, the parties above named gratuitously transferred to him 25 shares of the capital stock of said company, and made him secretary thereof. The Utah, Nevada & California Stage Company setting up its claim to the property, R. Sadler purchased all the right, title, and interest of the said Utah, Nevada & California Stage Company, for himself, Torre, Barbieri, and the Nevada Stage & Transportation Company, agreeing to give notes signed by himself, Torre, and Barbieri for the sum of \$2,000. When the time came for the giving of said notes, Torre was absent from Eureka, and the notes of Sadler, Haley, and Jackson were offered in lieu thereof; but the same were not accepted by the company, and they were returned to the makers thereof, and the notes of Sadler, Torre, and Barbieri were made, and accepted by the company, and, through the advice of Henry Rives, the title of the Utah, Nevada & California Stage Company was taken in the name of Haley, for the purpose of commencing a suit and clearing the title to the property, which was to be done for the use

and benefit of Sadler, Torre, and Barbieri, and the Nevada Stage & Transportation Company, but that the said Haley never bargained for, purchased, or paid one dollar for said property, and only received the legal title to said property at the request of Sadler, and with the express understanding and agreement that he was in all things to be governed by the advice of the said Henry Rives, and that, if a suit was to be instituted, it was to be conducted in a friendly manner, and under the control of the defendants, and in their interests, and, when the title thereto was settled, to convey all of said property to the said Sadler, Torre, and Barbieri, or to any person whom they might designate. This suit for conversion was commenced by the plaintiff while he was acting as secretary of a corporation, against the corporation and three of the stockholders. The defendants Sadler, Torre, and Barbieri employed and paid the fees of the attorney for the plaintiff and all the costs of court. Haley testified, and denied that there was any agreement between himself, Sadler, Torre, and Barbieri that a judgment should not be taken against the defendants Sadler, Torre, Barbieri, and the Nevada Stage & Transportation Company; or that the suit should be a friendly one, and should inure to the use and benefit of the defendants above named. He admits that Sadler first spoke to him about purchasing the title of the Utah, Nevada & California Stage Company; admits the giving of the notes of Sadler, his own and Jackson's, and the return of them to him; admits that he never paid any money whatever for the property, but says he expected to pay his notes. But they were returned to him, and Sadler, Torre, and Barbieri gave notes, and paid them as they became due. They had prior thereto paid the Eureka County Bank the sum of \$4,800, and had been in possession of all the property.

The evidence was sufficient to satisfy the court that there was collusion between the plaintiff and the three defendants named, and that the action was not commenced for the purpose of settling any real controversy then existing between the parties. In the case of *Brewington v. Lowe*, 1 Ind. 23, the supreme court said: "We think these proceedings were instituted under a mistaken apprehension of the proper function of the judiciary. Courts of justice are established to try questions pertaining to the rights of individuals. An action is the form of a suit given by law for the recovery of that which is one's due, or a legal demand of one's rights. \* \* \* Indeed, it is well settled that courts will not take cognizance of fictitious suits, instituted merely to obtain judicial opinions upon points of law." In the case of *Loughead v. Bartholomew*, reported in *Wright*, (Ohio,) 91, *LANE, J.*, said: "Courts are instituted to try questions pertaining to the real interests of individuals; to settle substantial controversies; to preserve the peace of society; and where questions submitted to their action are merely questions of speculation, and where their discussion is *contra bonos mores*, or against public policy, or

where the inquiry tends to cast ridicule upon the court, or where the investigation is palpably injurious to the interests or feelings of third persons, without affecting the substantial rights of the litigants, some means will be found to arrest the inquiry." In the case of *Lord v. Veazie*, 8 How. 255, *TANEY, C. J.*, said: "It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves, and to do this upon the full hearing of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as punishable contempt of court. \* \* \* The objection in the case before us is not that the proceedings were amicable, but that there is no real conflict of interest between them; and that the plaintiff and defendant have the same interest, and that interest adverse, and in conflict with the interest of third persons. \* \* \* A judgment entered under such circumstances, and for such purposes, is a mere form. The whole proceeding was in contempt of the court, and highly reprehensible, and the learned district judge, who was then holding the court, undoubtedly suffered the judgment *pro forma* to be entered under the impression that there was in fact a controversy between the plaintiff and defendant, and that they were proceeding to obtain a decision upon a disputed question of law, in which they had adverse interests. A judgment in form, thus procured, in the eye of the law, is no judgment of the court. It is a nullity, and no writ of error will lie upon it. This writ is therefore dismissed." In *Smith v. Railway Co.*, 29 Ind. 546, a fictitious name was used for plaintiff in the action. The testimony shows that the name of Smith, instead of Reeder, was more by accident than intentional. But the court did not dismiss the appeal on that ground, but that the interests of Reeder and the railroad company were not antagonistic, and the decision was intended to affect third persons. See, also, *Hotchkiss v. Jones*, 4 Ind. 260. The case of *Cleveland v. Chamberlain*, 1 Black, 425, was a real action. The plaintiff had judgment. Thereafter defendant purchased the plaintiff's judgment, and perfected an appeal to the supreme court. These facts were called to the attention of the court. *Mr. Justice GRIER* said: "This appeal must be dismissed. *Seliah Chamberlain* is, in fact, both appellant and appellee. By the intervention of a friend, he has purchased the debt demanded by Cleveland in his bill, and now carries on a pretended controversy by counsel, chosen and paid by himself, and on a record selected by them, for the evident purpose of obtaining a decision injurious to the rights and interest of third parties." In the case of *Berks Co. v. Jones*, 21 Pa. St. 416, *BLACK, C. J.*, speaking for the court, said: "Without a doubt, the object of the proceeding

was not to settle a real dispute, but merely to ascertain the law; in other words, to make the court act as counsel for the commissioners. But they have no right to get advice in this way. Courts ought to encourage amicable submissions of real disputes, but people have no right to propound abstract questions to them. For this there is not only the clearest reason, but the highest authority. \* \* \* The judge of the common pleas, overindulgent to the parties, decided the law for them, when he might have stricken the case from the record. With an easy good nature, equally inexcusable, we have done the same thing. We have considered the subject with as much care as if it had been regularly before us, and we unanimously agree in pronouncing the opinion of the court below to be a perfectly sound exposition of the law. But, because there was nothing on which a judgment could be entered, the writ of error must be quashed." *Pittsburgh v. Allegheny*, 1 Pitts. R. 99. In the case of *Meeker v. Straat*, 38 Mo. App. 243, the supreme court said: "This decree cannot stand. Suits contemplate adversary parties, although amicable suits may be brought to determine the respective rights of the parties thereto. When a suit is brought with a view of affecting the rights of third parties, and it is apparent that that is its sole object, the suit ceases to be adversary, and becomes collusive. No court should lend its aid to such a proceeding, least of all a court of equity. \* \* \* All these considerations lead to the inevitable conclusion that the decree in the present case was unwarranted by the law and the evidence, and that the trial court, instead of rendering a decree for plaintiff, should have dismissed her bill. Judgment reversed, and bill dismissed."

Courts of justice are established for the purpose of deciding really existing questions of right between parties who in good faith submit a case to the court for a decision, and the court should not try an action upon a feigned issue, or an abstract question of law, or judicial practice, not arising out of circumstances really existing, in which the parties have a legal interest. An action is a legal prosecution by a party complainant against a party defendant, to obtain the judgment of the court in relation to some rights claimed to be secured, or some remedy claimed to be given by law to the party complaining. It is given by law, for the recovery of that which is one's due, or a legal demand of one's rights. From the evidence in this case we are satisfied that, at the time of commencing this action, the plaintiff had no legal demand against the defendants, and they did not infringe upon any of the plaintiff's rights in relation to the property in controversy; that the action was commenced by the plaintiff as the agent and trustee of the defendants, and his denial "that there was no agreement between himself and Sadler that no judgment should be taken against Sadler, Torre, Barbieri, or the Nevada Stage & Transportation Company," need occupy but little attention, as all the circumstances con-

nected with the purchase and possession of the property, as well as the affidavits of Rives, Sadler, and Torre, in support of the motion to dismiss, clearly show that plaintiff had agreed to and was holding the bill of sale of the property in trust for the defendants named, and for their use and benefit, and for the purpose of protecting their title to the property, and, as they supposed, to prevent Townshend from asserting any claim to the property, under an agreement entered into by Townshend on the one part, and Sadler, Torre, and Barbieri on the second part, wherein they covenanted and agreed "that immediately upon the receipt by us of all moneys which we have agreed to pay said Eureka County Bank, and all money now due us from W. J. Townshend, together with all which we may hereafter have to pay out in order to conduct said stage line, and upon our being secured from loss by reason of our being sureties upon the mail contract bonds of said W. J. Townshend, we will transfer and set over unto said Townshend, or his order, all of said property connected with said lines which we may acquire in connection with the conduct of said lines, and which we may charge as having been necessarily purchased in the conducting of said lines and business. It is also understood and agreed that, in case we have to pay interest, and any money, to the Utah, Nevada & California Stage Company, in order to carry on said stage lines, or to retain possession of the property hereinbefore mentioned as having been transferred to us, this agreement to reconvey shall not become operative until such interest and payment to said Utah, Nevada & California Stage Company shall be repaid to us;" and, as was said in the case of *Lord v. Veazle*, supra, any judgment, entered under the above state of facts, would be a nullity; and a right of action must be complete before the suit is brought, and no subsequent occurrence of a material fact will avail the plaintiff in maintaining the suit. *Moore v. Maple*, 25 Ill. 343. Therefore the assignment of the judgment by Haley to Ahern did not change the condition of things as to the fictitiousness of the action when commenced. There could be no rights, under such a judgment, to assign.

The plaintiff also objected to the reading of the affidavit of Rives, for the reason that the same was incompetent, irrelevant, and immaterial, and discloses information which was obtained when he was acting as attorney for the plaintiff, and discloses privileged communications between attorney and client, and that it attempts to prove facts contrary to the admitted allegations of the complaint. It did not disclose privileged communications. Some of the statements made by him were in the nature of communications received while acting as the agent and attorney for the defendants in the purchase of the property from the Eureka County Bank, Townshend, and the Utah, Nevada & California Stage Company, and conversations had by Haley and Sadler, in the presence and hearing of Rives; and such statements are not privileged, when the action is between the par-



ties to the conversation. *Michael v. Foll*, (N. C.) 6 S. E. Rep. 264. Where an attorney was acting for both plaintiff and defendant in drawing a contract for them to sign, communications of the parties to such attorney are not confidential. *Appeal of Goodwin Gas-Stove & M. Co.*, (Pa.) 12 Atl. Rep. 736; *Griffin v. Griffin*, (Ill.) 17 N. E. Rep. 782; *Hurlburt v. Hurlburt*, 2 N. Y. Supp. 317. In the case of *Bauer's Estate*, reported in 21 Pac. Rep. 762, the supreme court of California said: "When two persons address a lawyer as their common agent, their communications to the lawyer, as far as concerns strangers, will be privileged, but as to themselves they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations. The appellant claims that the court erred in granting said motion to dismiss, and in entering said judgment, for the reason that no jury was ever waived in this action." An answer to that objection is that a jury was not demanded, and by the silence of the plaintiff he waived his right thereto if any he had. In the case of *Sheets v. Bray*, 24 N. E. Rep. 358, the supreme court of Indiana said: "We have been unable to find any bill of exceptions in the record showing a request on the part of appellants for a jury trial, and a refusal and exception thereto, nor is any such bill referred to by counsel in their brief. In the absence of such request, the right to a trial by jury, if such right existed in this case, must be regarded as waived." *Grant v. Hughes*, (N. C.) 2 S. E. Rep. 345.

The objection of the plaintiff to *G. W. Baker*, as *amicus curiæ*, making the motion to dismiss the action, is without merit. In the earlier English cases we find that any stranger, as *amicus curiæ*, may move the court of matters apparent in the writ, and the court *ex officio* is bound to abate the writ, if it be vicious, for false Latin or default of form, or that the one plea goes to the whole, and the court will discharge all others; or may move to quash an indictment apparently vicious, be the crime what it will; and a party was permitted to state in court that he was present at the making of the statute, and what was the intention of parliament in enacting the law; and, if an action be abated, any one may move to have the verdict set aside, even the defendant himself. 2 Vin. Abr. 175. If a judge be doubtful or mistaken in a matter of law, a stander-by may inform the court, as *amicus curiæ*. In some cases, a thing is to be made apparent by suggestion; on the roll, by motion; sometimes by pleadings; and sometimes as *amicus curiæ*. *Tayl. L. Gl.* 43, and 29 Ind., *supra*. In the case of *Ex parte Randolph*, 2 Brock. 454, Mr. Nichols appeared as *amicus curiæ* at the request of the court, and argued the question therein pending. And in *Ex parte Yeager*, 11 Grat. 656, where the petitioner had made application for a license to keep a public house, Fry, who was counsel in a similar action, was permitted to appear as *amicus curiæ*, and argue against granting the same. In the case of *People v. Gibbs*, (Mich.) report-

ed in 38 N. W. Rep. 258, Thompson asked permission of the court to assist in the prosecution of the case, he having theretofore had something to do with the prosecution, but his request was denied. Thompson then suggested to the court that the defendant be required to plead to the information. Counsel for the defendant objected to Thompson addressing the court, the objection was overruled, and the defendant required to plead. On appeal, the supreme court said: "The suggestion of Thompson was one which might very properly have been made, as *amicus curiæ*, by any member of the bar." The court may, and often does, of its own motion, ask of counsel information upon a point in doubt, or in relation to the merits of the case on trial. *State v. McCullough*, 18 Pac. Rep. 756, 20 Nev. 154. It is not only the right, but the duty, of an attorney of the court, if he knows or has reason to believe that the time of the court is being taken up by the trial of a feigned issue, to so inform the judge thereof; and it is discretionary with the court to stay proceedings, make due inquiry, and, if the facts warrant the suggestion, then dismiss the case. The judgment of dismissal is affirmed.

*BIGELOW, J., (dissenting.)* In the verified complaint filed in this action, the plaintiff alleges that he is the owner and entitled to the possession of certain personal property of the value of \$6,200, which the defendants have unlawfully taken from him, and converted to their own use. The defendants demurred; their demurrer was overruled; and, all but the bank failing to answer, their default was entered. Subsequently, upon their motion, the default was set aside by the district court, but, upon appeal to this court, (22 Pac. Rep. 1098,) the order was reversed. Upon the return of the case to the district court, for further proceedings upon the default, on motion of the defendants' attorney, *G. W. Baker*, acting as *amicus curiæ*, the action was dismissed, upon the ground that it was collusive and fictitious. It is agreed that the property originally belonged to the Utah, Nevada & California Stage Company. One Townshend was in possession of it, under a contract of purchase, the company retaining title until it was paid for. The defendants were sureties upon a certain bond for Townshend, and he was also indebted to them. Becoming involved, he transferred the property to the Eureka Bank, to which he was also indebted. The defendants paid the bank the amount due it, and took possession of the property, under an agreement with Townshend that when they were indemnified upon the bond, and repaid the money advanced upon the property, and the amount then owing them, it was to revert to him. The defendants' evidence, upon the motion, tends further to prove that the stage company, demanding payment of the balance due it, was also paid by the defendants, but the legal title to the property was taken in the name of the plaintiff, under an agreement that he was to hold it in



trust for them; that it was further agreed that the plaintiff should bring this action, obtain judgment against the defendants, and sell the property out in their interest. This, of course, vested the legal title in him, but as a trustee for the defendants, other than the bank. On the other hand, the plaintiff denies this, and upon the hearing of the motion testified that he bought the property for his own purposes, paid for it with his notes, and that there was no agreement or understanding that he should hold it in trust or in any manner for the defendants. Under these circumstances, I shall not investigate the evidence, to determine whether the plaintiff's or the defendants' contention is the better supported by it. In my judgment, the principles asserted in *Lord v. Veazle*, 8 How. 251, and similar cases, concerning fictitious actions, have no application here. Taking the broadest and most charitable view of the defendants' case as presented upon the motion, it appeared that the plaintiff alleged by his verified complaint that he was the owner and entitled to the possession of the property. The defendants admit that he holds the legal title, but claim that it is only in trust for them, and consequently he is not, as against them, entitled to its possession, nor to recover its value. The burden of showing this is, of course, upon them. This is the ordinary situation in a contested lawsuit: The plaintiff asserts a right, which the defendant denies. Under such circumstances, it has heretofore been supposed that the parties are entitled to a regular trial, either with or without a jury, as they may elect, to determine whether this right exists or not. This is perhaps the first time where, in advance of the trial, against the protests of one of the parties, the case has been taken up, the evidence heard, and the merits of the action decided upon a simple motion,—decided, too, against a plaintiff whose evidence made at least a *prima facie* case, such a case as would have prevented a nonsuit upon a trial. Unquestionably, before it could be determined that the action was collusive, it was necessary to decide the very point in dispute between the parties; that is, that the plaintiff was holding the title to the property, in trust for the defendants. If he was not, if, as he alleged and testified, it was absolutely his, and they were wrongfully detaining it from him, then there was no collusion in commencing the action, nor in maintaining it. In determining this point against him, the court decided in the defendants' favor the only defense they could possibly have made, had they been allowed to answer. Usually, after a claim legal upon its face is sufficiently stated in a complaint, and the defendant has lost the right to make any defense, judgment goes against him as a matter of course. But here, after this right had been lost, the defendants were allowed, upon a mere motion, to make their whole defense, and in a much more expeditious manner than they could had they been permitted to answer. I say the defendants were allowed, because the proposition that Mr. Baker, who had been their attorney through all these

years of litigation, made this motion, not in their interest, but as an *amicus curiæ*,—a friend of the court,—is too transparent for sober consideration.

2. If the transaction was just what the defendants claim it to have been, if the plaintiff took the title to the property in trust for the defendants, and commenced the action in their interest, it also appears clearly enough that this was done for the purpose of obtaining some unfair advantage of Townshend or his creditors. It is hard to determine just what their ideas were, probably owing to the fact that they themselves did not have a clear perception of them, but it is safe to say that men do not resort to such crooked methods for honest purposes. The bill of sale, vesting the legal title to the property in the plaintiff, was, in my judgment, under the circumstances, equivalent to the deed in *Peterson v. Brown*, 17 Nev. 175, and brings the case directly within the principles there laid down. In the attempt to overreach some one else, through the treachery of their confederate, they have been caught in their own trap, and neither law nor justice calls upon the courts to interfere in their behalf. Why this should be the rule has been so clearly and fully stated in the last-mentioned case that I refrain from saying more concerning it. A fictitious case is one where, without there being any real litigation between the parties, a pretended case is presented, in which it is sought to obtain an authoritative decision of some point of law that will, as a precedent, determine the rights of others, who may have a real controversy with the parties to this collusive proceeding. This constitutes a fraud upon the third person, as well as the court, because it is highly probable that only one side will be properly presented or argued, and that consequently a biased decision will be rendered, that will affect their rights without their being heard. This is not that kind of a case. There is no question of law to be decided here, nor, whatever may have been the purpose in the beginning, will the result affect any third person. This is a case of attempted fraud, where the parties to the attempt, after going a certain length, and after, perhaps, reaping all the benefits they expected from their acts, have fallen out, the same as they did in *Peterson v. Brown*, and now the defendants are trying to relieve themselves from a position which they have voluntarily assumed, by showing that the bill of sale was not made, and the action based thereon was not brought, *bona fide*, but for the purpose of deceiving and overreaching others. To permit them to do this is to allow them to plead their own fraud in avoidance of the consequences of their acts. Of course, the plaintiff did not demand a jury trial upon the hearing of the motion. He would not have been entitled to it, if he had; for juries are not called to decide motions. Upon this point the error of the court consists in hearing and deciding, upon a mere motion, the entire merits of the action, without a trial of any kind, either with or without a jury. I think the judgment should be reversed.

(20 Or. 285)

**MILLER et al. v. SOUTHERN PAC. R. CO.**

(Supreme Court of Oregon. Jan. 6, 1891.)

**MASTER AND SERVANT—CARE REQUIRED OF RAILROAD COMPANY—NEGLIGENCE OF FELLOW-SERVANT—ASSUMPTION OF RISK.**

1. Any duty which the master is required to perform for the safety and protection of his servants cannot be delegated to any servant of any grade, so as to exempt the master from liability to a servant who has been injured by its non-performance.

2. It is the duty of a railroad company to keep its road-bed and track, rolling stock, machinery, and appliances in good and safe condition, to cause frequent and thorough inspection of these as can be done consistently with the conduct of its business, for the purpose of discovering any defects that may occur from accidental causes, or the effects of wear and tear or the progress of decay, to exercise care in the selection of its servants and in their retention in its service, and to adopt such rules and regulations as are calculated to guard against accidents, and to make the servants in its employ reasonably safe.

3. It is the duty of a switchman to operate the switch, and see that it properly adjusts the rails, so that the trains may pass with safety. The act he performs involves no duty of construction or repair, or other duty in regard to the switches of the road, if out of repair, or unfit for use, whether by wear or tear, or by the criminal interference of strangers, than to promptly notify the company of its condition, so that it may be repaired, or its place supplied.

4. It is the law, in the absence of express contract, that establishes the relation of the parties, creating him agent or representative of the master who performs duties which the law itself makes it incumbent on the master to perform, and not the rules or regulations of the company designed for the guidance of its servants, and to secure reasonable safety in the conduct of its business.

5. The co-operation of the switchman is necessary to the successful management of the trains, and employees upon the train in the common service assume the risk of the negligent discharge of his duty.

6. Where the trial court refused to admit as evidence the indictment and judgment of the conviction of one W. A. Hill for the killing of the plaintiff's intestate by disarranging a switch on the defendant's railroad, and certain confessions he had made to one Dr. Davis, upon the ground that such conduct was *res inter alios acta*.

(Syllabus by the Court.)

Appeal from circuit court, Marion county; R. P. BOISE, Judge.

Bronaugh, Northrup & McArthur, for appellant. R. & E. B. Williams and Chas. H. Carey, for respondents.

LORD, J. This is an action to recover damages, brought by the plaintiff, as administratrix of the estate of her husband, J. W. Miller, deceased, under section 371, Hill's Code, for the death of the intestate, who was killed on the night of the 28th of July, 1889, by the derailing of an engine, of which he was engineer, in the employ of the defendant. His death is alleged to have been caused by the negligence of the defendant and its agents in suffering a certain switch at Lebanon Junction, on the line of the road, to be out of order, so that in operating it the rails did not form a continuous line, whereby the engine was thrown from the track, and he was so badly injured that he died the next day. After denying these facts, the defendant alleges as a separate defense

(1) that the derailing of the engine was caused by one W. A. Hill, who, immediately before the engine was thrown from the track, criminally, and without the knowledge of the defendant, broke and disarranged said switch, whereby the rail was thrown out of line, so that the engine in passing at that place was derailed, and the intestate mortally injured; (2) that if any agent or servant of the defendant was guilty of negligence which caused the injury of the plaintiff's intestate, he was a fellow-servant of such intestate of Miller; and (3) that the injury was caused by the criminal act of one W. A. Hill, a stranger to defendant, combined with the negligence of said Miller and his fellow-servants. Issue being joined on this, a trial was had, which resulted in a verdict and judgment for the plaintiff, and from which this appeal is brought. At the close of the evidence for the plaintiff, the defendant interposed a motion for a judgment of nonsuit, which, the trial court refusing, is assigned as error.

The evidence tended to show that the overland train, on which the plaintiff's intestate was acting as engineer of the locomotive drawing such train, was derailed at a switch about one and a half miles south of Albany, a little after 9 o'clock on the evening of Sunday, July 28, 1889; that the locomotive was overturned, and Miller was caught in or under it, whereby he was so badly bruised and scalded by the escaping steam that he died the next day. That the train reached Albany about 8:40 o'clock P. M., and stopped there 20 minutes for supper; that shortly after its arrival the Lebanon locomotive, in charge of Conductor Huston, left Albany on the main track to the Lebanon switch. On reaching the switch, Huston's locomotive was halted until a brakeman aboard of it could throw the switch, and let his locomotive pass from the main track to the Lebanon branch track; that it was after dark, necessitating the use of a lantern, and that when he attempted to move the switch, so as to throw the rails in position for the passage of the locomotive, something interfered with the shoving over of the switch-rails, whereupon, taking his lantern to discover the cause of it, he found clamped between the rails a stone, and that to remove it he had to return to the switch-lever, and throw it back into the same position it had occupied before he touched it, but that, in doing so, he observed the rails came properly back into place for the main line; that he went and threw the stone from the track, and then returned the switch-lever, without further difficulty, into position for the passage of the locomotive from the main track to the Lebanon branch track; that the locomotive passed through, and he then threw the switch back into proper position, for the passage of trains on the main track, but that he did not observe at the time, whether or not the rails obeyed the switch, and came back into line with the rails of the main track, but supposed that they did. Huston however, who was on the locomotive at the time, and about 20 feet distant from the switch, testified that he did

not notice and observe that the rails at that time came into line with the rails of the main track; that he was able to observe the movements of the rails by the brakeman's lantern, which shone on the bright surface of the rails; that the switch was then locked by the brakeman, who remounted the locomotive, and it moved on towards Lebanon. In a few minutes after this, Miller came on the main track with his engine and train from Albany, and when within about 50 feet of the switch observed that the switch-rail was not in line with the main-track rail adjoining to and next beyond it on the south, but it was then too late to stop the train, and the locomotive was derailed, whereby Miller was so badly injured that he died the next day. The cause of the accident was due to the fact that a draw-bar of the switch was out of place, the linch-pin being out, so that the rails had not come back to place when the brakeman had adjusted the switch after the engine going to Lebanon passed it. The construction of the switch was such that two iron rods attached to it passed from it through the switch-rail, one of the rods pushed the T-rail over into line with the rails on the branch line when desired, and the other rod pulled the rail back, when it was necessary, into line with the rails on the main track. Each rod had an iron eye or ring on the end next to the switch, which fitted into a shank, and was held in to it by an iron pin or split key, passing through a hole in the outer end of the shank. An iron washer worked between the eye of the rod and the split key, so that the eye of the rod could not be slipped off of the shank without first drawing the split key out of its hole, and removing the washer from off the shank. When the switch was examined soon after the accident it was found that the switch indicated, or at least appeared to have been tampered with prior to the accident, either before or after the Lebanon locomotive passed through the switch. The rod which should have pulled the switch-rail back into line with the rails on the main track had been taken off of its shank, and dropped to the ground. The split pin which had held that rod in place on its shank was not found, but the washer which worked between the split pin and the rod's eye had been put back on the shank after the rod was removed off it. There is no other testimony than this tending to show how long the switch had been so disarranged before the accident occurred, or that the defendant company knew, or by the exercise of reasonable diligence ought to have discovered, that the switch had been tampered with, or was not in proper working order, before the time when the accident occurred.

Numerous exceptions were taken to instructions asked and refused and to instructions given by the trial court, and to the refusal to admit certain testimony relative to the confession and conviction of one W. A. Hill for tampering with and disarranging the switch which caused the accident, but all the questions involved may be reduced to two, namely: (1) Whether Conductor Huston or the brake-

man who operated the switch occupied the position of vice-principal to the plaintiff's intestate Miller, so that his negligence in failing to discover that the switch was disarranged was the negligence of the company, and rendered it liable for the injury he sustained; and (2) whether the trial court erred in refusing to allow the judgment roll of the circuit court of the state of Oregon for Linn county, showing the indictment and conviction of one W. A. Hill for the killing of the said John W. Miller by disarranging a switch on the road of the defendant, and thereby causing the locomotive to be derailed in Linn county on July 28, 1889, to be received in evidence, or to allow Dr. Davis, a witness for the defendant, to answer certain questions as to whether he (W. A. Hill) ever confessed or admitted to him that he interfered with or broke the switch on the occasion under consideration. These will be considered in the order stated. There was a general rule of the company providing that conductors would be held personally responsible for the proper adjustment of switches used by their trains, and it was claimed that the effect of this rule was to create Huston vice-principal of Miller as between the latter and the company. The argument for the plaintiff proceeds upon the assumption that the switch was broken and disarranged when the Lebanon locomotive used it, and that Huston had devolved upon him the duty of seeing that the switch was properly adjusted, which being a personal duty the company owed to Miller, that the negligence of Huston in failing to discover that the switch was out of order was the negligence of the company, and rendered it liable for the injurious consequences which ensued. The rule was a proper and needful regulation, and obedience to it was well calculated to insure safety, but it was not designed to create any new or distinct liability other than the law established. As a rule, it did not operate to change the rule of law which governed the relation of the parties and fixed their liabilities. The conductors were not expected to perform the duties of switchmen,—some one under them, usually a brakeman, discharged this duty, by their direction; and the object of the rule in making them responsible was to secure the best possible performance of the duty of a switchman to insure safety in operating the trains. It added no new or other element to the legal relation of the parties concerned than already existed. The whole duty combined and to be performed in this regard by conductor and switchman, in operating the switch, only constituted the proper discharge of the duty of a switchman. It is not the duty of the master "as with a personal sight and touch" to operate the switches on the road. "It is utterly impracticable so to do, and a brakeman or fireman on a train knows that he is, as well as any person, connected with the business." And FOLGER, J., said: "The duty of the master is performed when he provides beforehand, and makes known to his servants, rules explicit and efficient, which, if observed and followed by all concerned, will bring

personal notice to every one entitled to it," (*Slater v. Jewett*, 85 N. Y. 61;) and in the present case, "if followed and observed," will bring safety and security, as was intended by the rule. But the act performed was that of a switchman, the duty being to operate the switch and adjust the rails, and the object of the rule was to secure its proper performance, or to avoid its negligent discharge to insure safety. It was its negligent discharge which caused the injury. It is, then, the character of the act to which we must look to determine the legal relations of the parties concerned. The act involved the duty of a switchman, which was to operate and properly adjust the switch, a duty which could not properly be performed without discovering any failure of the switch to properly adjust the rails. In the case at bar the duty was to operate the switch and pass the locomotive on the branch track, and then adjust it so that the south-bound train coming on the main track would have a continuous line at that point. A like duty would have devolved upon any switchman who might have been detailed and stationed at that switch, and which counsel claim ought to have been done to guard against the switch being tampered with and disarranged. The duty of a switchman is to operate the switch, and see that it properly adjusts the rails, so that the trains may pass with safety; and it is the negligent discharge of this duty with which we are to deal. We begin by saying that the principle that any duty which the master is required to perform for the safety and protection of his servants cannot be delegated to any servant of any grade so as to exempt the master from liability to a servant who has been injured by its non-performance, cannot be questioned, nor that among these duties are not included the duty of a railroad company to keep its road-bed and track, rolling stock, tools, machinery, and appliances in good and safe condition, to cause as frequent and thorough inspection of these as can be done consistently with the conduct of its business for the purpose of discovering any defects that may occur from accidental causes, or the effects of wear and tear, or the progress of decay, to exercise care in the selection of its servants, and in their retention in its service, and to adopt such rules and regulations as are calculated to guard against accidents, and to make the servants in its employ reasonably safe. Our inquiry then is: Was the character of the act performed by the servant such an act as the law implies a contract duty upon the part of the master to perform? For if it was, then such servant, in respect to that act, ceases to be a servant, and becomes an agent or vice-principal. Now, the case presented is not negligence of a switchman in leaving a switch, safe and suitable as an appliance, open and misplaced, whereby a like accident would have happened, but negligence in failing to discover that a switch had been put out of order by some extraneous circumstances, so that it did not operate to adjust the line as it ought, and was supposed to have done. In one case the neg-

ligence consists in leaving a switch, sound and suitable for its purposes, open and misplaced; and in the other, in leaving the switch open and misplaced, because the switch, having been put out of order, did not operate, and that fact was not observed. But in either case the switchman would seem equally derelict or negligent, for the duties of his employment require him to see that the switch moves the rails, and puts them where it is designed that they should go for the operation of the trains; and this duty, when properly performed, necessarily includes the observance of any failure of the switch to operate or perform its office in adjusting the rail. Taking the view of the facts as claimed by the plaintiff, his position is that the switch was tampered with, or put out of order, before the Lebanon locomotive passed over it. Nor is it claimed that the switch was not originally a safe instrumentality, and suitable for its purpose, or that a sufficient length of time elapsed since the switch was disordered to charge the defendant with notice of its condition; but the claim is that the employee, upon whom was devolved the duties of a switchman, stood for the master in the performance of that duty, and that, when the Lebanon engine passed, the switch being out of order, if such employee had exercised ordinary care in the performance of this duty, he would have seen that the switch did not operate and adjust the rails, and examined the cause of it, and discovered its disordered condition, and prevented the accident. Counsel admit that such employee or servant may be a fellow-servant of Miller in the performance of some of his duties, but they say, "In the duty of maintaining a switch in order as a safe instrumentality for the performance by Miller of his duty within the line of his hazardous employment he was not a fellow-servant;" citing *Ford v. Railroad Co.*, 110 Mass. 260, in which the court say: "The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied upon, to be regarded as fellow-servants of those who are engaged in operating it." But can it be said that a switchman or employee upon whom is devolved the duty of a switchman is charged with the duty of maintaining a switch in order as a safe instrumentality; that is, if the switch is out of order, to repair it or to supply a new one when necessary? It is no doubt true that such a duty devolves upon the defendant as master, or any servant to whom it delegates the duty, to exercise care, not only in the construction, but the maintenance in repair, of its switches as well as its tracks, road-beds, bridges, and trestles, etc. The reason is that these are personal duties, which the company is legally bound to perform, and owes to its employees operating its trains over the road; but when the company delegates such duties to its servants it is liable for the negligent performance of such duties. Hence, as Mr. McKinney says: "A section boss in charge of a squad of hands working, altering, and repairing the road, or one of his subordinates, can in no sense be regarded as a fellow-servant of employees

operating trains over the road, so as to exempt the company from liability for their negligence in leaving the track defective. The company delegates to these employees the performance of a duty which the law makes it incumbent on the company to perform, *i. e.*, that of furnishing a reasonably safe track and road-bed, and keeping it in repair, and it is liable for the negligent performance of this duty." *McKinney*, Fel. Serv. § 136, and note of authorities.

If we take the character of the act performed by such servant to determine whether he is an agent or representative of the company or a fellow-servant, what is there in the act of operating a switch so as to properly adjust the rails for the passage of trains, which may be considered in any sense to impose or delegate the duty to such employee to furnish, construct, keep, or maintain in repair such switch? However liberally we may construe the rule as to co-servants, it is difficult to perceive, if the rule itself is to remain, that a servant engaged in the operation of a switch is a representative of the master, or other than a fellow-servant engaged in a common employment for the successful management of the trains. The act he performs involves no duty of construction or repair, or other duty in regard to the switches of the road if out of repair and unfit for use, whether by wear and tear or by the criminal interference of strangers, than to promptly notify the company of its condition, so that it may be repaired or its place supplied. It is the law, in the absence of express contract, that establishes the relation of the parties creating him agent or representative of the master who performs duties which the law itself makes it incumbent on the master to perform, and not the rules or regulations of the company, which are designed for the guidance of its servants, and to secure reasonable safety in the conduct of its business. The failure to make proper rules and regulations adapted to the proper management of a hazardous business might render a railroad company liable, but the object of the rules is not to alter or effect the legal relation of the servant. In this regard the defendant was not negligent; it had promulgated a rule designed to secure safety in the passing of trains, and to remind its servants of their responsibility, and to enforce the observance of care in the proper adjustment of its switches when used. "It may be conceded," said *JOHNSON, J.*, "that it is the duty of a railroad corporation to prescribe, either by means of timetables or by other suitable modes, regulations for running their trains with a view to their safety; but it is obvious that obedience to these regulations must be intrusted to the employees having charge of the trains. Such obedience is matter of executive detail, which, in the nature of things, no corporation or general agent of a corporation can personally oversee, and as to which employees must be relied on." *Rose v. Railroad Co.*, 58 N. Y. 221. It is not the rule, but the legal relation which the parties sustained to each other, whether co-servants or not, which deter-

mined the liability of the company. The case stands in this wise: As the switch was originally safe and suitable as an instrumentality, and the evidence indicating that it was tampered with and put out of order before the Lebanon train passed, and none tending to show that by the exercise of reasonable care and diligence the company knew or ought to have known that it was so disarranged, and not in proper working order, so as to affect it with notice of its condition, unless the employee upon whom was devolved the duty of a switchman represented the company, and is chargeable with notice of its disordered condition, the plaintiff has no standing ground. The necessities of the case require that such employees shall be considered as a representative of the company in the negligent performance of this duty to affect it with liability. It is therefore claimed that it was the duty of such employee to maintain the switch in good order as a safe appliance for the passage of trains, which, being the duty of the company, the company must be considered as constructively present in the person of the switchman when he operated it and left it misplaced, and is chargeable by reason thereof with notice of its condition, and his negligence in not discovering it was the negligence of the company. But we have already shown that no duty of constructing, repairing, or maintaining in good order such appliances is delegated to such employee, or that he is invested with any power or authority in the premises other than performing the duty of a switchman; and, there being no evidence to charge the company with notice of its disarranged condition, except through such employee, the company is entitled to be considered as having performed its duty, unless he was its agent or representative, so as to affect the company with notice, and render it liable for his negligent discharge of the duty of switchman. That a switchman is a fellow-servant to the employees on the train has been so frequently held as seems to admit of little doubt. *McKinney on Fellow-Servants* (section 138) says: "The co-operation of the switchman is necessary to the successful management of the trains, and employees upon the train in the common service assume the risk of the negligent discharge of his duty." In *Roberts v. Railroad Co.*, 33 Minn. 218, 22 N. W. Rep. 389, the train ran off the track in consequence of a misplaced switch, negligently left open by a switchman, thereby causing the death of a baggage-master on the train. The court held that the switchman and baggage-master were fellow-servants within the rule exempting the company from liability. In *Brown v. Railroad Co.*, 68 Cal. 174, 8 Pac. Rep. 828, the court say: "The engineer and switch-tender, although on duty in separate departments, were, in the discharge of their duties, under the same general employment; and for the negligence of the fellow-servant of the intestate the defendant is not liable." In *Harvey v. Railroad Co.*, 88 N. Y. 484, an engine attached to a train on defendant's road was thrown from the track by a misplaced switch, which the switchman had

neglected to close, he being engaged at the time in conversation with another. The plaintiff's intestate, who was the fireman on the engine, was killed. The court say: "This is a plain case. It is evident that the cause of the injury was the neglect of the switchman to properly adjust the switch after using it to pass the local freight. As the switchman must be deemed to have been the co-servant of the plaintiff's intestate, the plaintiff cannot recover, unless some neglect of the defendant as principal also contributed to produce the injury." In *Naylor v. Railroad Co.*, 33 Fed. Rep. 801, in an action against a railroad company for the death of the plaintiff's intestate, who was an engineer, it appeared that the death was caused by the negligence of a switchman, who left a switch open. Held, that the engineer and the switchman were fellow-servants. In *Randall v. Railroad Co.*, 109 U. S. 483, 3 Sup. Ct. Rep. 322, it was held that a brakeman working a switch for his train on one track in a railroad yard is a fellow-servant with the engineer of another train of the same corporation. Mr. Justice GRAY, who delivered the opinion of the court, said: "The general rule is now firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of the employment. \* \* \* Persons standing in such relation to one another as did this plaintiff and the engine-man of the other train are fellow-servants according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the house of lords and in the English and Irish courts, as is clearly shown by the cases cited in the margin;" citing numerous authorities. In *Slattery's Adm'r v. Railroad Co.*, 23 Ind. 83, it was held that a brakeman on a train and one whose duty it is to attend a switch are engaged in the same general undertaking, and the company is not liable to one for an injury caused by the negligence of the other. In *Railroad Co. v. Henry*, 7 Ill. App. 322, it is held that an engineer running a switch-engine and a switch-tender are engaged in common employment, and are fellow-servants. In *Walker v. Railroad Co.*, 128 Mass. 10, an engineer and fireman were killed by a misplaced switch, which had been negligently left open; and upon an action to recover damages the court below directed a verdict for the defendant, which was sustained, the court saying: "The cause of action in each of these cases was the misplacement of a switch through the negligence of a fellow-servant of the plaintiff's intestate;" citing *Farwell v. Railroad Corp.*, 4 Mete. (Mass.) 49; *Gilman v. Railroad Co.*, 10 Allen. 233. See, also, *Railroad Co. v. Troesch*, 68 Ill. 549; *Tinney v. Railroad Co.*, 62 Barb. 218; 7 Amer. & Eng. Enc. Law, 886, "Fellow-Servants;" McKinney, Fel. Serv. § 138. Nor is there anything decided in the cases to which our attention has been specially called in conflict with the principle we are deciding. In the case of *Davis v. Railroad Co.*, 55 Vt. 84, it appeared that through the negligence of the company's bridge builder in constructing and the road-master in repairing a

culvert it washed out, whereby a foreman was killed, and the court held that the company was liable, saying: "The bridge builder and road-master, while inspecting and caring for the defectively constructed culvert, were performing a duty which, as between the intestate and the defendant, it was the duty of the defendant to perform. Their negligence therein was the negligence of the defendant." This is but applying the rule that where the master has intrusted a duty to a servant which the law devolved upon him to perform such servant is his representative, and any negligence on his part is the negligence of the master. *Calvo v. Railroad Co.*, 23 S. C. 531, was decided on the same principle. There a locomotive engineer, while running his engine, was injured through the negligence of a section-master and supervisor of the track-laying force, who, in disregard of the appropriate signals, took up a portion of the track, and thereby derailed the engine. The court held that the true test was whether this section-master was employed to discharge the duties of the master, and also that it was the duty of the master to provide a suitable and safe place for his employees to work in and on, which duty in this case has been committed to the section-master. His negligence was therefore properly adjudged the negligence of the master. The same principle was recognized in the case of *Moon v. Railroad Co.*, 78 Va. 745. In that case the decedent was a brakeman on a material train. A section gang at work on the track failed to signal the train, although it had the rails misplaced. In consequence the train was derailed, and the decedent so badly injured that he died in a few hours. The court held that the section-men and the decedent were not fellow-servants, saying that "when a company delegates to an agent or employe the performance of duties which the law makes it incumbent on the company to perform, his acts are the acts of the company, his negligence is the negligence of the company." Here the section-master was in charge of a squad of men working, altering, and repairing the road,—duties personal to the master, and which he was legally bound to perform, and consequently for which the master was responsible, if negligently performed by the servant to whom he intrusted them. The cases cited by the court—*Brothers v. Carter*, 52 Mo. 372; *Flike v. Railroad Co.*, 53 N. Y. 549; *Corcoran v. Holbrook*, 59 N. Y. 517; *Mullan v. Steam-Ship Co.*, 78 Pa. St. 25; *Ryan v. Railroad Co.*, 60 Ill. 171—recognize the same principle, and it is not questioned. Among other cases affirming this doctrine are *O'Donell v. Railroad Co.*, 59 Pa. St. 239; *Railroad Co. v. Carroll*, 6 Heisk. 348; *Railroad Co. v. Holt*, 29 Kan. 149; *Slater v. Jewett*, 85 N. Y. 61. In all these cases the master intrusted a duty to the servant which the law made it incumbent on him to perform, and within the meaning of the rule as to liability for negligence he was a representative of such master in the performance of that duty, and not a fellow-servant. The duties of a switchman to operate the switch and to adjust it properly for

the passage of trains involve no delegation of authority to furnish or keep or maintain in repair the track or its switches, or any of its appliances. No duty of this kind was confided to such employe, or included in the character of the act he performed, and without which he cannot be made a representative of the company, so as to effect it with liability for negligence. It is unquestionably the duty of the master to every employe to provide suitable appliances, machinery, and instrumentalities, and a reasonably safe place to perform his labor, and his failure to do so, whether by personal negligence or negligence of a servant to whom he has delegated such duty, will render him liable; but the master cannot be held liable for the negligent performance of a duty by a servant which involves the performance of no such personal obligation. If the company is to be held liable for negligence, some other ground must be sought upon which to predicate it; for the books seem decisive to the point that such a servant, engaged in the performance of the duties of a switchman, is not a representative of the master, but a fellow-servant of the employe upon the train,—of the plaintiff's intestate,—who assume the risk of his negligent discharge of his duties. While some of the authorities extend the rule further than others, and embrace a more numerous and various class as fellow-servants engaged in a common employment,—and further than we are inclined to extend it,—yet none of them have so limited and restricted its operation as to destroy the relation of fellow-servants between a switchman and the servants on the train, and consequently the master cannot be held liable for the negligent discharge of his duties.

The next objection relates to the refusal of the court to admit as evidence the indictment and judgment of the conviction of W. A. Hill for the killing of the plaintiff's intestate by disarranging a switch on the defendant's railroad, and certain confessions it was proposed to prove that he had made to Dr. Davis. The court considered the evidence as *res inter alios acta*, and declined to admit it. It was shown by the evidence that Hill and his companions applied to Conductor Huston about one-half hour before he left Albany with his locomotive on that evening for the privilege of riding upon his locomotive to the farm at which they were working on the line of the Lebanon branch of the company's road, and that Huston refused to allow them to ride, as it was contrary to the rules of the company, and that they left and walked away in the direction of the switch. The evidence is offered on the ground, as stated by counsel, that "it is a matter of public notoriety that the switch mentioned in the pleadings was, on the evening of the day on which this accident occurred, tampered with and disarranged by one W. A. Hill and his accomplices, and that as a result the train was derailed, and the intestate and his fireman, Guthrie, were mortally injured; that Hill was convicted of the crime upon his own confessions, and sentenced to the penitentiary therefor; that his accomplices es-

caped because there was no witness to their acts except themselves, and their confessions were ruled to have been made under such circumstances as to exclude them from being given in evidence against them; that, as there was no witness of their general subsequent conduct with the breaking of the switch, there was no proof of it other than by the record of Hill's conviction," etc., of which a certified transcript was offered in evidence, and ruled out, and the defendant left without any evidence in support of its plea. Counsel say they "have searched the books in vain for a case in point," but they have been unable to find any bearing on the subject. Their argument in support of its admission is that the record of the conviction of a party of a crime by the public prosecutor is public property, and may be given in evidence whenever it becomes a fact material to be shown in connection with the issues joined in any other suit or action; that it is not conclusive evidence against whom it is offered, nor does it estop him to controvert or deny it, but that it is *prima facie* evidence of the facts thereby established. They cite *Maybee v. Avery*, 18 Johns. 352, and *Mead v. Boston*, 8 Cush. 404. The effect of the ruling in *Maybee v. Avery*, *supra*, can be best understood from Judge SUTHERLAND's statement of it in *People v. Buckland*, 13 Wend. 596, and from which we cite. He says that Judge SPENCER, "after stating the general rule that in order to render a verdict and judgment competent evidence it must be on the same point, and between the same parties or privies, and give the reason on which the rule is founded, he adverts to the exception to the rule which has already been noticed, to-wit, that where the matter in dispute is a question of public right all persons standing in the same situation as the parties are affected by it; and he remarked that in his opinion a verdict on an indictment formed another exception, and upon the same principle; that the public was the party aggrieved, the prosecution was carried on by their officer, and that any person might when necessary avail himself of a conviction. He observed that the plaintiff in the case could not complain, for he had an opportunity to cross-examine the witness, and to produce his testimony, and to reverse the judgment if erroneous; but that the verdict was not conclusive, and that the plaintiff should have been allowed to repel it." The evidence which was objected to in that case was a record of conviction for stealing two hens, but was admitted by Judge SPENCER, who tried the case. The plaintiff then offered to show that the evidence on which he was convicted was false, and that he in fact owned the two hens. This was objected to on the ground that the record of conviction was conclusive until reversed, which was sustained, and the evidence rejected. Upon a motion for a new trial it was held that the record of conviction was admissible in evidence, but that it was only *prima facie*, and that the plaintiff should have been allowed to disprove the fact, and to give evidence of the falsity of the testimony on which the conviction was founded. This case, as SUTHER-



ERLAND, J., observed, "only decides that a verdict and judgment on an indictment are competent *prima facie* evidence against the defendant in the indictment." but he adds that "the principle laid down \* \* \* makes them competent evidence upon the point involved even between strangers to the original proceedings, and this I am inclined to think is the true rule." In *Mead v. Boston*, 3 Cush. 406, SHAW, C. J., said: "The admission in a civil action of a conviction on an indictment founded on a plea of guilty is not an exception to this rule. That is received not as a judicial act, having the force and effect of a judgment, but as a solemn confession of the very matter charged in the civil action. 1 Greenl. Ev. § 537." But the record of conviction offered in this case was not founded on a plea of guilty, but Hill pleaded not guilty, and his confessions were proven, upon which he was convicted." In *Brownword v. Edwards*, 2 Ves. Sr. 245, it was held that a sentence in a criminal proceeding cannot be used as evidence in a civil action. The lord chancellor said: "On the trial the sentence was offered in evidence to prove that they were not married. The whole court were of the opinion that it could not be given in evidence, because, first, it was a criminal matter, and could not be given in evidence in a civil cause; next, that it was *res inter alios acta*, and could not affect the issue." In *Gibson v. McCarty*, Hardw. Cas. Temp. 311, a judgment of conviction for forgery was offered in evidence, but it was held that such record of a conviction in a criminal matter cannot be read as evidence in a civil suit. In *Rex v. Warden of the Fleet*, 12 Mod. 839, it was held that a conviction of battery would not be evidence in an action for the same battery, nor *vice versa*, and that records of conviction or verdicts could not be given in evidence whenever the benefit would not be mutual. See, also, *Patterson v. Gaines*, 6 How. 586; 1 Greenl. Ev. § 537; *Com. v. Lincoln*, 110 Mass. 410. The real ground is a want of mutuality arising from the parties not being identical; nor are the rules of decision and the course of the proceedings the same. While it is true there does seem to be some privity between the facts offered to be established by the records of conviction and the fact in issue which would make it relevant evidence, and receivable as such, yet it has been thought better for the administration of justice to preserve the general rule which excludes verdicts and judgments between other parties than to form an exception to it because of some particular circumstances. In excluding this record we are not prepared to say that the court erred; but for the reasons already stated the judgment must be reversed, and a new trial ordered.

GUTHRIE v. SOUTHERN PAC. R. Co.

(Supreme Court of Oregon. Jan. 6, 1891.)

Appeal from circuit court, Marion county; R. P. Boise, Judge.

Bronaugh, Northrup & McArthur, for appellant. R. & E. B. Williams and Chas. H. Carey, for respondent.

LORD, J. As this case involves the same ques-

tion decided in *Miller v. Railroad Co.*, ante, 76, the plaintiff being the fireman on the engine, we have not deemed it necessary to consider some other questions presented by that record, relied upon for a reversal of the case. The judgment must be reversed, and a new trial ordered.

(2 Wash. St. 117)

MCLEOD v. ELLIS.

(Supreme Court of Washington. Feb. 11, 1891.)

VENUE—CONVERSION OF TREES—INSTRUCTIONS.

1. Code Wash. § 47, provides that local actions shall be commenced in the county or district in which the subject of the action, or some part thereof, is situated; and section 48 provides that transitory actions shall be tried in the county or district where the cause of action, or some part thereof, arose. Held, that section 50, which provides that an action commenced in the wrong county may be tried therein, unless defendant, when he appears and pleads, demands that the trial be had in the proper county, applies only to the transitory actions enumerated in section 48, and not to the local actions enumerated in section 47, and that the failure of a defendant in an action involving injuries to land to demand a change of trial to the proper county does not confer jurisdiction on the district court of a county in which the land is not situated.

2. The provision in section 47, that local actions shall be tried in the "county or district" wherein the subject of the action is situated, does not extend the jurisdiction to the whole judicial district in which the subject of the action is situated, but the word "district" was intended to apply only to those cases where a county did not have the privilege of sessions of court within its limits, and was joined to another county for judicial purposes; and hence an action involving injuries to land must be tried in the county in which it is situated, and not in another county in the same judicial district.

3. A complaint alleged that defendant unlawfully cut trees on plaintiff's land, and thereby became indebted to plaintiff in the value of the trees. In another paragraph plaintiff prayed for treble damages under Code Wash. § 602, which relates to trespasses on land, and which allows treble damages where one person wrongfully cuts trees on the land of another. The action, however, was neither brought nor tried in the county in which the land was situated. Held, that, to uphold the jurisdiction of the court, the paragraph relating to treble damages might be rejected as surplusage, and the action regarded as transitory in its nature, for the conversion of the trees. HORT, J., dissenting.

4. Since the action must be treated as one for the conversion of the trees, in which only single damages can be recovered, an erroneous instruction that the jury may award treble damages is not cured by a verdict awarding a certain sum as "single damages," as some of the jurors, under the charge, may well have agreed to a large verdict for "single damages" if others consented to waive "treble damages."

Appeal from superior court, Thurston county.

Action by I. C. Ellis against Alexander McLeod for the conversion of trees. There was a verdict in plaintiff's favor, and defendant brings error. Code Wash. §§ 47, 48, 50, and 602, are as follows: "Sec. 47. Actions for the following causes shall be commenced in the county or district in which the subject of the action, or some part thereof, is situated: (1) For the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the title, or for any injuries to real property. (2) All questions involving the rights to the possession or title to any specific article of personal property, in which last-mentioned class of cases



damages may also be awarded for the detention and for injury to such personal property. Sec. 48. Actions for the following causes shall be tried in the district or county where the cause, or some part thereof, arose: (1) For the recovery of a penalty or forfeiture imposed by statute. (2) Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, shall do anything touching the duties of such officer." "Sec. 50. In all other cases the action must be tried in the county in which the defendants, or some of them, reside at the time of the commencement of the action, or may be served with process, subject, however, to the power of the court to change the place of trial, as provided in this act. If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and demurs or answers, files an affidavit of merits, and demands that a trial be had in the proper county." "Sec. 602. Whenever any person shall cut down, girdle, or otherwise injure, or carry off, any tree, timber, or shrub on the land of another person, or on the street or highway in front of any person's house, village, town, or city lot, or cultivated grounds, or on the commons or public grounds of any village, town, or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town, or city against the person committing such trespasses, or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be."

*Allen & Ayer*, for appellant. *J. W. Robinson*, for appellee.

STILES, J. This action was commenced in the territorial district court held in Thurston county for triple damages upon a complaint containing the following allegations: "(1) That between January 1 and September 1, 1889, the defendant entered upon the south half and the north-east quarter of the north-east quarter of section 33, in township 21 north, range 1 west of the Willamette meridian, in the state of Washington, being situated in the county of Pierce, and owned by this plaintiff, and in his possession; and did then and there, without leave of plaintiff, cut down, remove, dispose of, and convert to his own use the proceeds thereof, about — trees, containing fourteen hundred thousand feet of lumber, of the value of four thousand two hundred dollars. (2) That by reason of said removal and conversion the said defendant became and is indebted to plaintiff in the full sum of four thousand two hundred dollars, no part of which has been paid; and defendant has refused and does now refuse to pay the same or any portion thereof. (3) That by force of section 602 of the Code of Washington defendant became and is liable to plaintiff in the full sum of twelve thousand six hundred dollars." The land upon which the acts complained of were com-

mitted was in Pierce county. The defendant's demurrer to the jurisdiction of the court for the reason that the action was not commenced in the proper county was overruled, and the cause proceeded to judgment.

The Code, both by its express terms and by inferential provisions, seeks to reduce every private wrong to a dead level, so far as pleading is concerned, so that a complaint containing a plain statement of facts serves to lay the cause of action before the court, no matter what may have theretofore been the technical form or name of the remedy. Accordingly, chapter 49 of "Waste and Trespass" was adopted in furtherance of the general plan. The injuries to land which, when committed by persons lawfully in possession thereof, had been cognizable in the technical action of waste, were assembled in section 601, while those in which a stranger to the land was the wrong-doer, and which had been cognizable in the action of trespass, were collected and provided for in sections 602 and 603. The common-law remedies remained, although there made statutory, and the nature of each action continued as before, though they are now known as actions for injuries to real property, instead of waste in the one case and trespass in the other. Therefore, unless the last clause of section 50 applies as well to the actions included in section 47 as to those included in section 48, the Thurston district court had no jurisdiction of the cause if it was one for injuries to land. Section 47 pointedly says that actions for injuries to real property shall be commenced in the "county or district" in which the subject of the action, or some part thereof, is situated. If commenced there, they must be tried there, unless removed for reasons sufficient under section 51. But appellee contends that the last clause of section 50 shows that the requirement that these actions be commenced in the particular county or district is merely directory, and that, unless the defendant moves in the manner provided therein, the trial may be had in any county or district selected by the plaintiff. It is agreed that no affidavit of merits, and no demand for a trial in Pierce county, were made. We cannot agree with this contention, however. There is a marked difference between the language of section 47 and sections 48 and 50. The former refers to a peculiar class of actions, which were always local; while the latter only includes actions which were always transitory. The first named says the actions specified must be commenced in certain counties or districts; while the others only require the trial to be in the county or district where the property is or the defendant resides, as the case may be. Coming in the connection where it is, and in view of the difference in language, we are constrained to hold that the last clause of section 50 does not apply to the actions enumerated in section 47. Still another objection is raised, however, namely, that section 47 does not absolutely require actions for injuries to real property to be commenced in the county where the subject of the action

is situated, but extends the jurisdiction to the whole judicial district, which, in this instance, included both Pierce and Thurston, as well as many other counties; and, if that position is correct, the Thurston county court was fully authorized to entertain the action. But we are not satisfied that the term "district," as used in section 47, has the meaning claimed for it. The four judicial districts formerly existing under the territorial *régime* were merely divisions of the territory for the assignment of the judges, and for some purposes of United States jurisdiction. No jurisdiction of matters cognizable under the territorial laws merely was based upon those districts. Here, as in the states, counties were the units of jurisdiction, and to them reference was made when any action was spoken of as "local," as distinguished from one which was "transitory." But not every county had the privilege of sessions of the courts within its limits, and where two or more counties were joined for jurisdictional purposes they constituted a "district" in the sense in which the word was used in section 47, and action for injuries to real property could be commenced in the court of such a district only. The case of *Wood v. Mastick*, 2 Wash. T. 69, 3 Pac. Rep. 612, in a few words announced the same conclusion here expressed.

Under the construction thus adopted, were we to hold further that the action was one for injuries to the realty, the judgment would necessarily be reversed, and the action dismissed for want of jurisdiction in the court below. But the appellee contends, and, on the whole, we conclude, rightly, that his action was one for the value of his trees as personality merely, without any claim for injury to his land. The complaint was apparently drawn under the impression in the mind of the pleader that section 602 allowed triple damages for such a conversion, and the court below seems to have taken that view. To sustain that interpretation and secure that measure of damages, the complaint, in its third paragraph, alleged the conclusion "that by force of section 602 of the Code of Washington defendant became and is liable to the plaintiff in the full sum of twelve thousand six hundred dollars," which amount was three times the alleged damage, and the prayer was accordingly. The second paragraph was entirely impertinent to a complaint for injuries to land under section 602, and so was the allegation in the first paragraph, that the trees cut contained 1,400,000 feet of lumber, of the value of \$4,200, since the necessary and proper allegations of such a complaint were merely that certain trees had been cut down to plaintiff's damage. But if we allow paragraph 2 to stand, by which it was alleged "that by reason of the said removal and conversion [alluding to the trees, the quantity of lumber and the value] the said defendant became and is indebted to plaintiff in the full sum of \$4,200, no part of which has been paid" etc.; and if we entirely reject paragraph 3 as surplusage, there is a faulty, but still sufficient, complaint for a wrongful conversion of the trees. We confess that in

so holding, however, we have extended the liberality allowable in favor of pleadings to its furthest limit, being constrained thereto in part by the rules in favor of jurisdiction.

The judgment must be reversed, however, for the court charged the jury erroneously in two respects. In the *first* place, the jury were told that this was a case wherein triple damages could be awarded under section 602, unless the taking was casual or involuntary, etc.; and, *secondly*, that the jury could themselves assess the triple damages. Neither of these instructions was correct. We have already shown why the main charge was wrong; but, even if there had been a case for triple damage, the province of the jury, under the statute, went no further than to assess the actual damage, and find whether it was willful or excusable, leaving it to the court to triple the damage in its judgment. See section 602. The jury in this case awarded a certain amount "single damages," which, appellee claims, shows appellant not, in any event, to have been injured by the court's charge. But it will not do to presume no injury in a case where the whole charge was so clearly erroneous, based, as it was, on an altogether wrong theory of the case. Jurors, under the charge, might well have agreed to a larger verdict for "single damage," other jurors consenting to waive their view that the damages should be triple, and thus no just verdict would have been found. The cause must go back for a new trial, wherein the measure of damages will be the value of the trees at the instant when they first became severed from the real estate, without further manipulation. See 4 Amer. & Eng. Enc. Law, p. 123, and cases cited. The plaintiff will have leave to amend his complaint, if he desires. Cause remanded; costs to appellant.

ANDERS, C. J., and DUNBAR and SCOTT, JJ., concur.

HOYT, J., (*dissenting*.) I agree with the majority of the court that the judgment should be reversed. But I cannot thus agree as to the disposition of the case. I think that the plaintiff, having specifically stated in his complaint that he brought his action on a certain section of the Code, and claimed damage thereunder, should be bound by such statement, and that therefore the cause of action stated in the complaint in this suit was one of damage to lands, and should have been brought in Pierce county, and that the court below should be directed to dismiss the action.

SCHULTE v. SCHERING *et al.*

(Supreme Court of Washington. Feb., 1891.)

RIGHTS OF TENANTS—SALE BY LANDLORD.

Tenants who enter under a lease, sufficient except for lack of acknowledgment, and pay rent and erect improvements, cannot be ejected by a subsequent vendee of the landlord, who takes with knowledge of the facts; and the omission from the granting clause of the lease of the name of one of the lessors is immaterial.

Appeal from superior court, Pierce county; FRANK ALLYN, Judge.

*Judson, Sharpstein & Sullivan*, for appellant. *A. A. Knight*, for appellee Littlejohn.

SCOTT, J. The question raised in this case is in substance the same as that passed upon by us in *McGlauffin v. Holman*, at our May session, 1890. See 24 Pac. Rep. 439. There is an additional defect in this instrument in its not containing the name of one of the lessors in the granting clause, but this does not take it out of the principle recognized in the case cited. Judgment reversed, and cause remanded. The demurrer should be overruled, with leave to answer.

ANDERS, C. J., and HOYT, DUNBAR, and STILES, J.J., concur.

#### SCHULTE v. LITTLEJOHN.

(*Supreme Court of Washington*. Feb. 12, 1891.)

PLEADING—ORDER TO STRIKE OUT—WAIVER OF EXCEPTION.

A defendant's exception to an order to strike out his affirmative defense is not waived by his filing a substituted answer.

Appeal from superior court, Pierce county; FRANK ALLYN, Judge.

*Judson, Sharpstein & Sullivan*, for appellant. *A. A. Knight*, for appellee.

SCOTT, J. Appellee brought this action to obtain possession of certain land. Appellant, in his answer, denied some of the allegations of the complaint, and also set up as an affirmative defense that certain prior owners of the premises, of whom appellee subsequently purchased, agreed to lease the same to appellant for the term of two years from the 15th day of August, 1888, and that they, upon the 26th day of June in said year, executed to him an instrument, which he and they supposed to be a valid lease thereof accordingly, but that by a mutual mistake the lessors did not acknowledge the same, and the name of one of them was omitted from the granting clause therein; that appellant went into and continued in possession of the premises thereunder, made valuable improvements thereon, paid the rent stipulated, and complied with the agreement upon his part, and that appellee, when he purchased, had knowledge of appellant's rights therein. The action was brought before the term had expired. The court, upon appellee's motion, struck out the affirmative defense, to which exception was taken. Appellant then filed an amended or substituted answer, merely setting up the denials contained in the original answer. The trial resulted in a judgment for the plaintiff. Appellee claims the matters stricken constituted no defense or ground for relief, and, if otherwise, that appellant waived the same by filing his amended answer. The first point is disposed of on the authority of *McGlauffin v. Holman*, 24 Pac. Rep. 439, in a case just decided by us, submitted herewith, being an action brought by appellant against appellee and said lessors,

wherein the same instrument was involved. *Schulte v. Schering*, ante, 78. As to the second point, the filing of the substituted answer did not operate as a waiver of the exception to the order of the court striking the part aforesaid of the original answer. Judgment reversed, and cause remanded for a retrial. The order upon the motion should be vacated, and leave to reply granted.

ANDERS, C. J., and DUNBAR, STILES, and HOYT, J.J., concur.

#### McINTOSH v. FURTH et al.

(*Supreme Court of Washington*. Feb. 11, 1891.)

POLICE MAGISTRATES—COMPENSATION.

The charter of the city of S. provided that the city might designate one of the justices of the peace residing therein to act as police magistrate, and might regulate the compensation of its officers, "except when otherwise provided." Held, that the phrase, "except when otherwise provided," referred to the general statutes, and not to the ordinances of the city which fixed the compensation of the police magistrate; and that he was entitled only to the fees allowed by statute to other justices of the peace.

Appeal from superior court, Spokane county; J. M. KINNAIRD, Judge.

*S. G. Allen*, for appellants. *Turner & Graves*, for appellee.

HOYT, J. Under its charter the city of Spokane Falls was authorized to designate one of the justices of the peace residing therein as police justice of said city, and the said justice, when so designated, was authorized to try offenders for alleged violations of the ordinances of said city. There was a provision of said charter which authorized the city to establish and regulate the fees and compensation of its officers, except when otherwise provided. By virtue of these provisions, one of the defendants had been designated as such police justice, and his compensation for services rendered as such justice fixed at a salary of \$150 per month, and the sole question argued by counsel, and presented for our determination, is as to the power of said city to provide this compensation for such services. If the jurisdiction to perform the acts required of such officer under said charter is derived primarily from the fact that he has been designated as police justice, there would be strong reason for holding that, under said provisions of its charter, said city might provide as compensation therefor the above-stated salary. If, on the other hand, such jurisdiction arises from the fact that he is a justice of the peace, then it would be more reasonable to hold that his compensation should be governed by the general provisions of the statute, which provide certain fees for the several acts required to be performed by such justice of the peace. Unless the contrary intention was clear, it would be presumed that the legislature intended to provide the same compensation for like acts performed by justices of the peace throughout the state. And we do not think such intention sufficiently appears in the language of the charter of said city, as every word in the charter can

he given its full force as well by holding that the above-stated provision, allowing the city to fix the compensation of its officers "except as otherwise provided" meant "as otherwise provided by law," as by holding that it meant as otherwise provided in said charter. In fact, the words used would be the ordinary ones to express the former meaning, while the latter would be much more likely to be expressed by the limitation, "except as otherwise provided herein," or "in this charter." Plaintiff in error has evidently foreseen that the main contention must be as to the capacity in which said officer acted. Hence almost his entire argument has been to show that acts required of such officer were non-judicial in their character, and could therefore be conferred on other officers than those mentioned in the organic act as the only ones in whom could be vested judicial authority. With their contention in this regard we cannot agree, for, although there are some authorities to the effect that violations of the provisions of ordinances of cities can be tried by others than judicial officers, we think that under the organic act of the territory, and the legislation and practice thereunder, the proceedings had to punish for a violation of city ordinances were as purely judicial as any other proceedings before justices of the peace. The provisions of the charter in question tend strongly to establish such fact; for, if the acts required were non-judicial, why was the city required to fill such place of police justice by some one of the justices of the peace residing in said city? We think that every act of such police justice was the act of a justice of the peace, and that the only object or effect of his designation as such police justice was to provide a single officer before whom the causes under the city charter should be brought. Without such provision the business would be divided between the several justices of the peace residing in such city, which would not so well subserve the convenient and economical administration of the affairs of the city as would a single judicial officer. It follows that the compensation provided by general statute applies to the officer in question, and that the ordinance providing for a salary therefor is void, and the judgment of the lower court must be affirmed, and it will be so ordered.

ANDERS, C. J., and SCOTT, STILES, and DUNBAR, JJ., concur.

#### ORTEGA V. CORDERO. (No. 13,889.)

(*Supreme Court of California*. March 5, 1891.)

REVIEW ON APPEAL—TRIAL BY COURT—FINDINGS—ADMISSIONS IN PLEADINGS.

Where the answer in an action for the unpaid price of land admits the allegations of the complaint as to the terms of sale, and there is nothing in the record to affirmatively show that the parties have actually tried issues outside of the pleadings, a finding by the court establishing different terms of sale from those alleged and admitted will be disregarded on appeal. Explaining *Horton v. Dominguez*, 68 Cal. 642, 10 Pac. Rep. 186.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Thos. McNutta and S. W. Bouton, for appellant. W. C. Stratton, for respondent.

VANCLIEF, C. Action to recover balance of unpaid purchase money for land sold and conveyed by plaintiff to defendant. Judgment for defendant, from which plaintiff appeals on the judgment roll.

It is alleged in the complaint that on or about November 22, 1888, the plaintiff agreed to sell to the defendant, and the defendant agreed to purchase from the plaintiff, one undivided third part of a tract of land, described in the complaint, containing about 1,000 acres, of the value of not less than \$3,300, for the consideration and upon the terms hereinafter stated. That at the date of said agreement the plaintiff was indebted to various persons in various sums, amounting to about \$1,400. "That, as part of the consideration for said purchase, defendant agreed to pay off and discharge all of plaintiff's aforesaid indebtedness, amounting to about said sum of \$1,400, and, for the remainder of said consideration, to pay to plaintiff, over and above said indebtedness, the sum of \$1,500, and, in earnest of said agreement, said defendant then and there paid plaintiff the sum of \$25, part of said \$1,500, payable to plaintiff under said agreement. Plaintiff avers that he has in all respects fully performed on his part all the obligations of the agreement of purchase and sale above stated. That on or about the 25th day of January, 1889, he executed, acknowledged, and delivered to said defendant his (plaintiff's) deed, conveying the land above mentioned, in accordance with and pursuant to said agreement of sale." That said deed was a deed of grant, bargain, and sale, and was prepared, as he is informed and believes, under the direction of the defendant, and was recorded by request of defendant on the day of its date. Plaintiff avers that, notwithstanding the recital of full payment on said deed, no part of the said \$1,500 due and payable by defendant to plaintiff, under the aforesaid agreement of sale and purchase, has ever been paid plaintiff, excepting the sum of \$25 hereinbefore mentioned, and that the balance of said consideration, to-wit, the sum of \$1,475, is still due and unpaid to plaintiff from said defendant, who has neglected and refused, and still neglects and refuses, to pay the same, or any portion thereof, although requested to pay said sum." For want of information or belief, the defendant, in his answer, denied that the value of the land was not less than \$3,300. The answer then proceeds as follows: "Denies that the deed mentioned in the amended complaint herein was prepared under the direction of defendant. Denies that no part of the \$1,500 due and payable by defendant has ever been paid plaintiff, except the sum of \$25, and avers that he has paid to plaintiff the full amount of the purchase price of said land. Denies that the sum of \$1,475, or any sum, is due or unpaid to plaintiff from defendant.

Wherefore defendant demands judgment that plaintiff take nothing by this action, and for his costs." After finding the value of the property to have been \$3,300 at the time of the purchase, and at the time of the trial, as alleged in the complaint, the court made the following findings: "(2) That on or about the 25th day of January, 1889, the plaintiff agreed to sell to the defendant, and the defendant agreed to buy of the plaintiff, the plaintiff's one-third interest in said land for the sum of \$1,500, and the plaintiff thereupon executed, acknowledged, and delivered to defendant a deed of grant, bargain, and sale, conveying to the defendant his said one-third interest in said land, and the consideration stated in said deed was \$1,500. (3) That the defendant has fully paid to plaintiff said sum of \$1,500, and there is no part thereof now due or unpaid; that said sum of \$1,500 was paid in the following manner: the defendant liquidated and discharged debts due by plaintiff to various persons, amounting to \$1,625, said debts being paid by consent of plaintiff. (4) That the defendant did not at any time agree to pay or give to plaintiff any consideration, other than said sum of \$1,500, for his said one-third interest in said land. As a conclusion of law from the foregoing facts, the court finds that the defendant is entitled to judgment against the plaintiff that he take nothing by this action, and for his costs of suit, and it is ordered that judgment be entered accordingly."

The appellant makes the point that the findings of fact are inconsistent with, and contradictory of, the facts admitted and established by the pleadings; and this point seems to be well taken. The agreement, as stated in the complaint, is not denied or in any way qualified by the answer, nor is any other agreement set up in the answer; yet the fourth finding of fact flatly contradicts a material part of the agreement as alleged in the complaint. By the agreement established by the pleadings, the defendant was to pay debts of plaintiff amounting to \$1,400, and, in addition thereto, was to pay directly to plaintiff \$1,500; but the fourth finding, read in connection with the third, is that defendant never agreed to pay any other consideration for the conveyance than to pay debts of plaintiff amounting to \$1,500. This contradicts the admitted allegation of the complaint that the defendant agreed to pay directly to plaintiff \$1,500 in addition to the payment of \$1,400 to plaintiff's creditors. So far as the second finding sets forth an agreement of a different date and consideration from that alleged in the complaint, it is entirely outside of the issues made by the pleadings. The agreement to convey for a consideration of \$1,500, referred to in the second finding, seems to have been inferred from the recital of that consideration in the deed of January 25th, executed in pursuance of the agreement alleged in the complaint. But no such inference was justifiable, since it was averred in the complaint, and not denied in the answer, that the deed did not recite the full consideration. In *Burnett v. Stearns*, 33 Cal. 469, it is said: "The

findings should be confined to the facts in issue. The province of the court in respect to facts is to determine, but not to raise, issues. It is insisted on the other side that it will be presumed the court found the fact in question from competent evidence. The answer is, it would not be presumed that evidence was introduced to contradict the admission of record." This case is emphatically affirmed in *Gregory v. Nelson*, 41 Cal. 279, where, among other things, it is said: "This court cannot presume that the trial court required or permitted evidence to be introduced on the trial for the purpose of establishing or rebutting allegations of the complaint not denied by the answer; nor can it be presumed that any evidence was received by the trial court except such as was pertinent to the issues made or tendered by the pleadings, and evidence tending to rebut such legitimate evidence." To the same effect are the following cases: *Hicks v. Murray*, 43 Cal. 515; *Bradbury v. Cronise*, 46 Cal. 287; *Estate of McKinley*, 49 Cal. 152; *McDonald v. Association*, 51 Cal. 210; *Hill v. Den*, 54 Cal. 20; *Tracy v. Craig*, 55 Cal. 91; *Silvey v. Neary*, 59 Cal. 97; *Campe v. Lassen*, 67 Cal. 139, 7 Pac. Rep. 430. In *Re Doyle*, 78 Cal. 570, 15 Pac. Rep. 128, the court, by Mr. Justice McKINSTRY, said: "When a trial is had by the court without a jury, a fact admitted by the pleadings should be treated as found. \* \* \* If the court does find adversely to the admission, such finding should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings. \* \* \* In such case the facts alleged must be assumed to exist. Any finding adverse to the admitted facts drops from the record, and any legal conclusion which is not upheld by the admitted facts is erroneous." See, also, *Reinhart v. Lugo*, 75 Cal. 639, 18 Pac. Rep. 112, and *Gould v. Stafford*, 77 Cal. 66, 18 Pac. Rep. 879.

The class of cases cited by counsel for respondent, such as *White v. Railroad Co.*, 50 Cal. 417; *Tevis v. Hicks*, 41 Cal. 123; *Smith v. Penny*, 44 Cal. 161; and *Horton v. Dominguez*, 68 Cal. 642, 10 Pac. Rep. 186,—has no proper application to the facts of this case. In that class of cases it appears of record that the parties have actually tried issues outside of the pleadings without objection, and by tacit consent, as if the issues had been made by the pleadings, and under such circumstances that if one party had objected the other might have supplied or cured the defect by amendment of his pleading, or otherwise mitigated the effect of the objection. The principle upon which those decisions rest is that of equitable estoppel, it being held that a party who acquiesces and participates in the trial of an issue without objection, as if it arose from the pleadings, when he might have objected on the ground that the issue was not made by the pleadings in the trial court, where the objection might have been met by amendment of the pleadings or otherwise, so that it would have operated less injuriously on the other party than if first made on appeal, has thereby waived the objection and

misled the other party to understand that the issue was properly made, and therefore should not be heard to make it on appeal. To justify this application of the principle of estoppel it should appear from the record on appeal, among the other elements of an estoppel, that the issue was actually and intentionally tried by the introduction of pertinent evidence, and that the party against whom the estoppel is invoked consciously participated or acquiesced in such trial, as if the issue had been made by the pleadings, and in such manner as may have induced the other party to believe that the issue had been properly made, or diverted his attention from the fact that it was not made by the pleadings.

It would seem that some of the decisions in the class of cases under consideration have gone to the verge of the province of waivers and equitable estoppels, and press to encroach upon the domain of the law of pleading and evidence, particularly sections 462, 588-590, Code Civil Proc. Section 590 provides: "An issue of fact arises: (1) Upon a material allegation in the complaint controverted by the answer;" and section 462 provides: "Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken to be true." It is not within the discretionary power of any court to dispense with these provisions; yet they are not violated by a decision of the appellate court that a party, by his conduct at the trial, is estopped from asserting, on appeal, for the first time, that a fact found by the trial court was not within the issues made by the pleading, since such a decision assumes that the fact found was within the issues, and its propriety can be questioned only upon the ground that the facts of record are insufficient to create the alleged estoppel. Doubtless the facts should be of a nature and effect similar to those required to effect an estoppel *in pais* in other cases; but, upon a superficial view, there is a seeming conflict in the cases as to how the facts shall be made to appear. Must the conduct of the party which estops him positively appear upon the record? or, may it be presumed for the mere purpose of upholding the decision of the trial court? We have seen that the cases of *Burnett v. Stearns*, *Gregory v. Nelson*, and *In re Doyle* are expressly opposed to any such presumption; but, in the case of *Horton v. Dominguez*, 68 Cal. 642, 10 Pac. Rep. 186, cited by respondent, there is a *dictum*, at least, in favor of such a presumption. In this last case it was conceded that the agreement pleaded and relied upon by defendant, in his cross-complaint, was void, but the court found a subsequent agreement which was not pleaded, which is fully set out in the finding, and in accordance with which judgment was rendered. This court, by Mr. Justice THORNTON, said: "It is objected that the finding is not within the issues. As the record shows nothing to the contrary, we must presume that testimony was introduced to establish the facts

found by this finding. It does not appear that any objection was made by the plaintiff to the evidence that it was inadmissible under the pleadings, as not being within the issues joined. As the record stands, it appears that the cause was tried as if the agreement found was put in issue. Under such circumstances, we cannot permit the objection to be now made that this finding is of matters outside of the issues joined in the cause. It should not be permitted that the plaintiff should allow the cause to be tried as if issues are regularly joined, and, when the result is a judgment adverse to his claims, urge in this court that no such issue was made in the court below." This case was not fully reported. By referring to the original record, (Sup. Ct. Records, vol. 362, p. 198,) it will be seen that the subsequent agreement was imperfectly pleaded, and that the judgment roll contains a bill of exceptions showing that testimony sufficient to justify the finding of the subsequent agreement was introduced by the defendant without objection on the ground that the subsequent agreement was not pleaded, (pages 209, 210.) Therefore there was no occasion or room for a presumption that "testimony was introduced to establish the facts found," by the finding set out in the opinion, as to the subsequent agreement. Further on the learned justice says: "As the record stands, it appears that the cause was tried as if the agreement found was put in issue." This must be understood as referring to the evidence contained in the bill of exceptions. So understood, it shows that the learned justice did not rely upon any presumption to establish the fact that testimony was introduced, without objection, to prove the subsequent agreement on which the judgment rested. In the judgment roll of the case at bar there is no bill of exceptions nor anything to show that any evidence was introduced tending to prove a subsequent or other contract than that alleged in the complaint and not denied in the answer; or tending to show, contrary to the admission of the pleadings, that the deed of January 25, 1889, from plaintiff to defendant, correctly recited the full consideration for the conveyance. Perhaps the plea of payment, in the absence of a special demurrer, sufficiently tendered an issue as to payment; but the findings show that the only payment by defendant was \$1,500, made by liquidating and discharging debts due by plaintiff to various persons, amounting to \$1,625, by consent of plaintiff, thus leaving a balance of the contract price due the plaintiff of, at least, \$1,375. I think the judgment should be reversed, and the cause remanded for a new trial, with leave to the parties to amend their pleadings if they so desire.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial, with leave to the parties to amend their pleadings if they so desire.

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SWASEY v. ADAIR *et ux.* (No. 13,178.)

(Supreme Court of California. March 3, 1891.)

APPEAL—SUPERSEDEAS—REPLEVIN.

1. Under Code Civil Proc. Cal. § 943, providing that if the judgment appealed from direct the delivery of personal property, the execution cannot be stayed by appeal unless appellant enters into an undertaking to obey the order of the appellate court, the fact that defendant in replevin has given the redelivery bond described by section 514 does not entitle her to a stay of execution on her appeal from a judgment for plaintiff without giving a stay-bond.

2. Other grounds for staying execution than the taking of an appeal cannot be raised for the first time on motion in the appellate court.

In bank. Application for writ of *supersedeas* to superior court, city and county of San Francisco; JOHN F. FINN, Judge.

John F. Burris, (*N. G. Cobb*, of counsel,) for applicant. C. K. Royce, for respondent.

BEATTY, C. J. This is an action brought under section 509 et seq. of the Code of Civil Procedure, for the recovery of certain personal property, consisting of the furniture of a lodging-house. The plaintiff, at the commencement of the action, filed the necessary affidavit and undertaking, and demanded the delivery of the property to him. The defendants are husband and wife, but they appeared separately in the action, and the husband made no defense. The wife, Mrs. O. Adair, filed an answer, claiming the property as her own, and gave a bond conditioned as required by law, whereupon the property was redelivered to her. At the trial she and her husband both failed to appear, and judgment was entered against them jointly for the return of the property, or its value, \$2,500, and for costs. Subsequently, upon her motion, the judgment against her was set aside, and a new trial granted to her; but, apparently, the judgment as against her husband was allowed to stand. The case was thereafter tried upon the issues made by her answer to the complaint, and a second and separate judgment rendered against her for the return of the goods, or their value, fixed at \$2,000, and for costs. From this judgment, and from an order denying her motion for a new trial, she has appealed to this court, giving the ordinary undertaking for \$300, but no undertaking to stay proceedings. The plaintiff and respondent has caused execution to be issued, not upon the judgment appealed from, but upon the first judgment, entered, as above stated, against the appellant and her husband, and left to stand against him when set aside as to her. Under this execution the sheriff is threatening to take the property in controversy from the possession of a Mrs. Shaeffer, who claims it as a vendee of a party to whom it was sold and delivered by the appellant after its redelivery to her. Upon a verified petition showing these facts appellant now moves this court for a writ of *supersedeas* directing the sheriff to return said execution, and commanding a stay of all proceedings on said judgment pending the determination of her appeal. The case presents some anomalous features. There are two sepa-

rate judgments in favor of the plaintiff for the return of the same goods, or their value, fixed in one judgment at \$2,500, and in the other at \$2,000; one judgment being against C. H. Adair, the husband, and the other being against the appellant, Mrs. O. Adair, his wife. Execution is issued on the judgment against the husband, and under it the sheriff is threatening to take the goods in controversy from the vendee of the wife, to whom they were sold after redelivery to her upon her giving the statutory undertaking. Code Civil Proc. § 514. In aid of her appeal from the judgment against her, and for the protection of her vendee, appellant asks us to stay proceedings upon the judgment against her husband, from which there has been no appeal. Several questions arise upon this state of facts, but we shall confine ourselves to a discussion of those which we deem essential in the disposition of the motion before us. It seems impossible that the sheriff could rightfully take the goods from appellant's vendee under an execution issued upon a separate judgment against C. H. Adair, between whom and said vendee there is no sort of privity; but whether we can, on this appeal, interfere with the proceedings on that judgment, is a question not free from difficulty, and one which we do not care to decide unless it is clear that the appellant is entitled to a stay of proceedings on the judgment from which she has appealed. Is she, then, entitled to such a stay without having given a stay-bond? It is contended that in this respect the action of replevin differs from other actions, and that the defendant, having given the redelivery bond prescribed by section 514 of the Code of Civil Procedure, is entitled to retain the property until the final determination of the case on appeal without other security. In support of this proposition we are referred to the language of said section to section 1247 of Cobbey on Replevin, and to *Bank v. Blye*, 102 N. Y. 305, 7 N. E. Rep 49; but we find nothing in either of the citations to support the contention of appellant. The language of section 514 of the Code of Civil Procedure is not at all inconsistent with the proposition that a judgment for plaintiff, in an action for the recovery of personal property, is immediately enforceable by a return of the property *in specie*, unless the defendant gives an additional bond to stay proceedings pending his appeal. On the other hand, section 943 of the Code of Civil Procedure expressly provides that "if the judgment appealed from direct the delivery of \* \* \* personal property, the execution of the judgment cannot be stayed by appeal unless the things directed to be delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant \* \* \* to the effect that the appellant will obey the order of the appellate court upon the appeal." For these reasons we think the appellant is not entitled to an order of this court for a stay of proceedings on the judgment from which she has appealed. In other words, we consider that we can grant such relief on the mere motion of



an appellant, and as an incident of our appellate jurisdiction, in these cases only where the appeal has been so taken and perfected as to operate a stay according to the provisions of the statute. There are, of course, other grounds besides the taking of an appeal for staying execution of a judgment, and several other grounds are presented in this motion. But these, we think, should be presented in the superior court by some proper motion or proceeding there, and brought here, if at all, by appeal from the orders of the superior court. It is contended, for instance, that the redelivery bond given by the appellant extinguished plaintiff's property in the goods, and that it is a bar to a judgment for their return *in specie*. It is further alleged that suit has been commenced against the sureties on that bond, and that this estops the plaintiff from reclaiming the goods. It is contended that the judgment against C. H. Adair is no longer in force, being necessarily set aside by the order vacating it as to the appellant. But, whatever merit there may be in these propositions, we do not think they can be made the ground of an original motion in this court. The motion of the appellant for a writ of *supersedeas* is denied, and the order heretofore made for a temporary stay of proceedings is hereby vacated and annulled.

We concur: DE HAVEN, J.; MCFARLAND, J.; HARRISON, J.; SHARPSTEIN, J.; PATERSON, J.; GAROUTTE, J.

88 Cal. 217

GRIMSHAW v. BELCHER *et al.* (No. 14,078.)  
(*Supreme Court of California*. March 4, 1891.)

#### LICENSE—REVOCATION.

A license under which the licensee has constructed a levee on the licensor's land cannot be revoked, where the revocation would cause great and irreparable injury to the licensee's land; and a court of equity, on the ground of equitable estoppel, will enjoin the licensor from subsequently tearing down the levee.

In bank. Appeal from superior court, Sacramento county; J. M. WALLING, Judge.

J. C. Tubbs and A. L. Hart, for appellants. C. S. Denson and C. H. Outman, for respondent.

DE HAVEN, J. The findings of the court below show that the plaintiff is the owner of a tract of land situate on the bank of the Cosumnes river, and adjoining it is another tract, owned in common by the defendants Alice J. and Lucy E. Belcher, and the estate of J. M. Belcher, of which the defendant Sarah W. Belcher is the executrix; that to protect both of said tracts from overflow it is necessary to maintain a levee in front of both tracts; that just above the line dividing said lands, and on the land of the defendants, there is a depression, which renders it necessary that the levee there should be of greater height and strength than at other points. The plaintiff had completed her line of levee, and the defendants were engaged in the repair of their levee, the line of which connected with that of plaintiff, and, "it be-

ing feared that the floods would come and inundate the lands to be protected by said levee before the same could be finished, the plaintiff applied to the defendants for leave to enter upon their said land, and enlarge and repair that portion of the levee upon defendant's said land which extends across the said depression." The defendants consented, and gave permission to the plaintiff to repair, enlarge, and reconstruct the said section of levee at her own cost and expense. This the plaintiff did, the same being constructed mostly of earth hauled from the plaintiff's own land, and thus connected her own levee with that of the defendants, forming a continuous barrier against the waters of the river. The court further found that the defendants threatened and intended to tear down, remove, and dig away a portion of the said levee, and if they should do so it would subject the land of plaintiff to overflow, and would cause great and irreparable damage to her land. The court below gave judgment enjoining the defendants from doing the threatened acts. From this judgment, and an order denying their motion for a new trial, the defendants appeal.

The permission given plaintiff to construct the section of levee referred to in the findings was verbal. The appellants urge that the license, if ever given, is one which they have a right to revoke; that a license is always revocable when the act licensed is of such a nature that, if granted by deed, it would amount to an easement. To sustain this position the case of *Potter v. Mercer*, 53 Cal. 667, is cited, in which case it is said: "But the effect of an executed or partly executed license, though revoked, is to excuse the licensee from liability for acts done properly in pursuance thereof, and their consequences; but the revocation puts an end to the license, and no further act can be justified under it." This is undoubtedly true as a general rule, and was properly applied to the facts in that case. But the judgment in this case does not authorize the plaintiff to do any further act upon the land of appellants. It only restrains the appellants from removing or injuring a levee built by respondent at her own cost upon the land of appellants, and with their permission, such levee so constructed being necessary in order to protect the land of respondent from overflow and irreparable damage. Such a judgment does not, as supposed by appellants, confer upon "the respondent a permanent right in the property" of appellants. It gives her no right to enter upon the land of appellants for the purpose of repairing the levee, or to rebuild it in the event of its destruction. The distinction between the right of respondent, as fixed by this judgment, and a permanent right to maintain the levee in question, is clearly pointed out in the case of *Carleton v. Redington*, 21 N. H. 307. It is there said: "The authorities would seem to show that a license to erect a dam will give no right to repair and restore the dam when it has become ruinous and decayed. \* \* \* But if it be holden that a license to erect a dam implies also a license to repair the same at pleasure, it would seem, from



many authorities, that the license cannot be sustained." As to the right of the respondent to maintain this action upon the facts found by the court, there is a conflict in the decisions in the different states, many courts holding to the contrary. There are cases, however, which hold that such an action is maintainable, and we think these state the rule which is most in consonance with principles of equity. In *Veghte v. Water-Power Co.*, 19 N. J. Eq. 142, the court say that "in cases where the revocation would be a fraud, courts of equity give a remedy, either by restraining the revocation, or by construing the license as an agreement to give the right, and compelling specific performance by deed, as of a contract in part executed." In the case of *Clark v. Glidden*, 60 Vt. 702, 15 Atl. Rep. 358, it is held that "a license to lay an aqueduct to a spring of water on one's land is irrevocable during the existence of the aqueduct; and a court of equity, on the ground of equitable estoppel, will protect the licensee in the use of the aqueduct, and will grant and continue an injunction restraining the owner of the spring from interfering with the aqueduct until its decay; for a revocation of the license would operate as a fraud." And this same principle has been affirmed in the case of *Lee v. McLeod*, 12 Nev. 284. Appellants further insist that the findings are not sustained by the evidence, but we cannot say from the record that the court committed any error in this respect. Judgment and order affirmed.

We concur: PATERSON, J.; SHARPSTEIN, J.; GAROUTTE, J.

McFARLAND, J. I concur in the judgment, but I base my concurrence upon the particular facts of this case. A rule which applies to two coterminal owners of land, who unite in a continuous line of levee for the protection of both, would not apply to many other instances of parol license.

HARRISON, J. I concur in the judgment.

88 Cal. 207

WILSON v. MORIARITY. (No. 13,921.)

(Supreme Court of California. March 4, 1891.)  
LANDLORD AND TENANT—REFORMATION OF LEASE  
—MISTAKE—EVIDENCE.

1. In an action by the lessor to reform a lease for 10 years the evidence showed that plaintiff was unable to read or write, while defendant was a shrewd business man, on terms of friendship with plaintiff and her husband; that defendant drew the lease himself, but did not read it to plaintiff, though it was read to her by the notary before acknowledgment. Several witnesses testified that defendant had sent them to plaintiff to negotiate the lease, but she refused to make it for more than five years. Defendant testified, but was contradicted by plaintiff's husband, that he drew the lease under an agreement with him, and that he promised to notify plaintiff. Plaintiff testified that she intended to make a lease for five years only, and had refused to make it for a longer time. *Held*, that the lease should be reformed so as to run for five years.

2. Though the complaint alleged the weakness of plaintiff's mind, and inadequacy of consideration, it was only necessary to show the mistake of plaintiff, and that defendant knew of it, since

Civil Code Cal. § 3399, provides for reformation of a contract made through the mistake of one party, which the other party at the time of execution knew or suspected.

8. Under such section a suit to reform a contract cannot be defended on the ground that the mistaken party was negligent in not reading the contract, if it appears that the other party at the time of its execution knew of the mistake.

4. In an action by a landlord to reform a lease, the court's action, after reforming the lease, in dismissing the complaint in so far as it asked additional rent on account of improvements under an agreement subsequent to the lease, is not reversible error.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Stephen M. White and R. H. F. Variel, for appellant. Alderson, Fitzgerald & Anderson and Smith, Wiunder & Smith, for respondent.

VANCLIEF, C. This is an action to rescind a written lease by plaintiff to defendant of a house and lot thereon in the city of Los Angeles, on the ground of alleged fraud on the part of the defendant in procuring the lease; or, if a rescission thereof cannot be had, that the lease be reformed on the ground of alleged mistakes of the plaintiff, which the defendant knew at the time the lease was executed. The court denied a rescission of the lease, but reformed it. From the judgment reforming the lease, and from an order denying his motion for a new trial, the defendant brings this appeal.

The lease, as executed, was for the term of 10 years, at a rental of \$150 per month, with the privilege of a renewal for another term of 10 years at the same rent. As reformed, the lease is for the term of only five years, and without the privilege of renewal for any term. The ultimate facts upon which the revision of the lease was based are expressed in the sixth finding of the court, as follows: "That, when plaintiff executed said lease, she did not understand said lease to be a lease for ten years, with the privilege of ten years more, but she understood said lease to be for a single term of five years. And the defendant then and there, at the time of the execution of said lease by plaintiff, well knew that the plaintiff did not understand the same to be for ten years, with privilege of renewal, and well knew that she understood the same to be for a single term of five years; and the defendant fraudulently induced the plaintiff to so understand said instrument, and to execute the same under such misunderstanding." These facts, if justified by the evidence, undoubtedly support the judgment. Section 3399 of the Civil Code provides that "when, through \* \* \* a mistake of one party, which the other, at the time, knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done, without prejudice to rights acquired by third persons in good faith and for value." But counsel for appellant contend that the finding of the facts above quoted is not justified by the evidence.

The court found as evidentiary facts, which are not disputed, that the plaintiff is unable to read or write; that the defendant is a shrewd merchant and business man of plausible manners, and was on terms of friendship with the plaintiff and her husband, John Wilson; that the defendant drew the lease; and that the lease was not read to or by the husband, or read to the plaintiff, except by the notary at the time she acknowledged it. The testimony of the plaintiff and her husband was to the effect that during three or four months before the execution of the lease the defendant had been importuning them for a lease of the property for a term of five years. That plaintiff was unwilling to lease the property for a longer term than two years. That the defendant finally persuaded the husband to advise the plaintiff to execute a lease for the term of five years, which he did, on the ground that the defendant would be a good tenant, with whom they would have no trouble in collecting rent. Thereupon the plaintiff consented to the term of five years. That after the defendant drew up the lease he met the plaintiff on the street near her husband's blacksmith shop, and requested her to go with him to the notary's office and acknowledge it, and her husband then told her to do so, but did not accompany them. When they arrived at the notary's office the defendant offered to read the lease to her, saying it was in his handwriting; but the notary said the law made it his duty to read the instrument to her, as she was a married woman, and he did then read it to her; but, believing that the defendant had drawn the lease according to the agreement, and that she already knew that it was a lease for the term of five years only, she did not give sufficient attention to the reading by the notary to discover, and did not discover that it was a lease for ten years, or that it differed from the lease theretofore agreed upon; and that, when she acknowledged the execution, she understood and believed it to be a lease for the term of only five years, without any privilege of renewal. Thomas Leahy testified that about two years before the trial the defendant requested him to go to John Wilson and try to get a lease of the property to defendant for the term of five years; that witness went to Wilson, and tried to persuade him to give the lease for five years, but Wilson said: "No, I will not give it for five years; I will give it for three." Witness reported Wilson's answer to defendant. Michael Leahy testified that he "went, at Moriarity's request, to Mr. Wilson, to see if he could get a lease for ten years, and Mr. Wilson said he would not give it for so long. I took that answer back to him." H. Boettcher testified that in March, 1887, the rental value of the property, as leased to defendant, was \$250 per month. G. F. Conant testified that he had been a collector of rents for about six years, and knew the rental value of the property, and that the rental value of the building in March, 1887, "would be something like \$350. After the building was remodeled and put in shape as it is now, the store-room

would have brought about \$200 per month at least. I don't know how many rooms there are in the two upper floors, but they would have brought from \$8 to \$10 a room, taken as a whole." (It is stipulated that there are 21 rooms on the two upper floors.) There is no other evidence as to the rental value of the property than that of these two witnesses. This testimony as to the rental value of the property is cited and considered relevant for no other purpose than so far as it may tend to show defendant's motive for desiring a long term at the rent reserved in the lease. The defendant testified that he had never represented to plaintiff or to her husband that the lease drawn by him was for the term of five years, but that he drew the lease according to an understanding or agreement had with the husband, which the husband was to advise the plaintiff to accept; but he does not testify that the plaintiff ever agreed to a term of ten years, or that she was ever informed that the lease drawn by him was for a term of ten years, unless she understood the reading thereof by the notary. Nor does he testify that the husband ever read or saw the lease drawn by him, or that he ever informed the husband that it was for a term of ten years, but merely that he drew the lease according to a previous agreement with the husband, which agreement the husband, in his testimony, denies. Under the settled rule of this court as to conflicting evidence in cases of this kind, I think the finding as to plaintiff's mistake should not be disturbed. The mistake being established, I think the circumstances tend to prove that the defendant "knew or suspected" it; and that the finding to this effect should also be sustained. The alleged fact that the defendant knew or suspected the plaintiff's mistake was not susceptible of direct proof, except by the testimony of the defendant; and it may be of some significance that defendant failed to testify, on his own behalf, that he did not know or suspect the alleged mistake at the time of the execution of the lease.

2. Counsel for appellant contend that it is essential to the support of the judgment that the averments of the complaint to the effect that the plaintiff was of weak mind, that the consideration was inadequate, and that the defendant fraudulently concealed from the plaintiff a material part of the contents of the lease, or prevented her from understanding it, should have been proved and found. The only fraud necessary to sustain the judgment is such as may be inferred from the failure of the defendant to correct the mistake of the plaintiff known to or suspected by the former at the time of the execution of the lease. This is all that is required by section 3399 of the Civil Code. *Higgins v. Parsons*, 65 Cal. 280, 3 Pac. Rep. 881; *Cleghorn v. Zumwalt*, 83 Cal. 156, 23 Pac. Rep. 294. There is nothing inconsistent with this in the law of the case as laid down on the former appeal. 77 Cal. 596, 20 Pac. Rep. 134. That appeal was from a judgment for defendant on demurrer to the original complaint, which prayed for only a rescission of the lease; and it was merely decided that the complaint was

sufficient. After the cause was remitted the plaintiff amended her prayer by asking the alternative relief of revision of the lease, in case a rescission should be denied. The complaint contains several averments not essential to this alternative relief, and, among them, inadequacy of consideration, and weak-mindedness of the plaintiff. If plaintiff only intended to lease her property for a term of 5 years, instead of 20 years, and the defendant knew or suspected her true intention, it is quite immaterial, for the purpose of merely reforming the lease on the ground of mistake, that the plaintiff was not weak-minded, and that the monthly rent reserved was an adequate consideration for a lease of 20 years. *Higgins v. Parsons and Cleghorn v. Zumwalt*, supra. For the purpose of testing the sufficiency of the findings the case should be regarded simply as a case to reform the lease under section 3399 of the Civil Code, on the ground of a mistake of the plaintiff, known or suspected by defendant. In this view of it, all the objections on the ground of insufficiency of the findings not heretofore considered appear to be irrelevant.

3. Appellant's counsel contend that "the Code provision (section 3399, Civil Code) was not framed to benefit the indifferent, or those who are grossly careless, and must be construed as requiring the exercise of at least ordinary care;" and, therefore, that relief should be denied the plaintiff on the ground of her neglect to give such ordinary attention to the reading of the lease by the notary as would have enabled her to understand its contents. In support of this point the cases of *Hawkins v. Hawkins*, 50 Cal. 558, and *Association v. Esche*, 75 Cal. 513, 17 Pac. Rep. 675, are cited. Neither of these cases is in point. The former was an action to avoid a written contract on the ground that the plaintiff was induced to sign it by false representations of the defendants that "it was like the verbal agreement" which preceded it, and which it was intended to replace, the defendants knowing that the written contract was not like the verbal agreement; and the plaintiff, believing such representation of defendants to be true, signed the written contract without reading it, although he had full opportunity to do so. The lower court sustained a general demurrer to the complaint, and this was affirmed on appeal. The complaint made neither a case of mutual mistake, nor a case of mistake of one party which the other knew or suspected. The defendants were not mistaken, and it was not alleged that they knew or suspected any mistake on the part of the plaintiff. The object of the action was to annul a contract simply on the ground of such actual fraud as induced a mistake on the part of the plaintiff, which the defendants were not alleged to have known or suspected. So, in the latter case, when the defendants by cross-complaint sought to reform the bond on which the suit was brought, on the ground of mutual mistake of the parties, it was found that there was no mistake on the part of the plaintiff; neither was there any averment, finding, or pretense that the plaintiff knew or suspect-

ed any mistake on the part of the defendants.

4. As another distinct cause of action the plaintiff alleged that some time after the execution of the written lease, and while she was still ignorant that it was a lease for ten years, instead of five years, she was induced by defendant to add an additional story to the leased house, and to make other improvements, at a cost of \$13,200, in addition to the improvements required by the lease; that defendant verbally promised to pay a reasonable rent for such improvements, in addition to rent reserved by the lease; and that, when these improvements were completed, on or about January 5, 1888, the plaintiff endeavored to agree with defendant as to the increase of rent on account of said improvements, but defendant refused to agree upon or to pay any additional rent for said improvements, although the rental value of the property was thereby increased \$150 per month. The prayer as to this cause of action is that the lease "be so amended and reformed as to carry out the subsequent agreement with reference to the additional improvements put upon the premises, and to provide that the amount of monthly rental shall be increased so as to include a reasonable rental on account of said improvements, to-wit, the sum of \$150 per month." The defendant denied that he induced the plaintiff to make these additional improvements, or that he promised to pay any additional rent therefor. The court expressly declined to find upon the issues of fact as to these improvements, "for the reason that this court considers and adjudges the same to be immaterial, and not proper matter for adjudication in this case;" and, as a conclusion of law, further said: "The court does not decide whether or not the plaintiff is entitled to recover from the defendant any additional rental for additional improvements made upon said premises by the plaintiff after the execution of said lease described in the complaint, and the court decides this case without prejudice to the rights of either plaintiff or defendant in the matter of said additional improvements." Counsel for appellant insist that the court erred in thus disposing of that branch of the case relating to the additional improvements. It will be observed that this branch of the case has no connection with the lease, or with the cause of action to reform the lease, as it is founded upon an alleged subsequent parol agreement to pay reasonable rent for improvements additional to those required by the written lease, and not upon any agreement or promise to reform or alter the written lease. Nor does the judgment reforming the written lease in any degree depend upon the alleged subsequent agreement as to additional improvements and rent therefor, nor upon any fact alleged or denied in relation thereto. Therefore it would not be necessary or proper to reverse the judgment reforming the written lease for any error (conceding there was error) in disposing of the distinct cause of action resting solely upon the alleged subsequent agreement. It would seem that the effect

of the action of the court was a dismissal of the alleged cause of action based on the subsequent agreement, without prejudice to the rights of either party, for the reason that the court considered "the same to be immaterial, and not proper matter for adjudication in this case." It is not quite clear why the court so considered it. It may have been because it was thought to be improperly joined with the other cause of action, or, possibly, because the facts stated did not constitute a cause of action. If so, the court should have sustained defendants' demurrer on one of these grounds. But no point is made here on the overruling of the demurrer. If the plaintiff was entitled to any relief upon the alleged subsequent contract, it is clear that she was not entitled to the specific relief prayed for, viz., that the written lease "be so amended and reformed as to carry out the subsequent agreement with reference to the additional improvements;" for surely the lease could not have been amended or reformed by incorporating into it a distinct subsequent agreement. But, whatever may have been the ground upon which the court based its action in substantially dismissing this branch of the case without prejudice to the parties, and whether or not it erred in so doing, I think that it appears that the defendant was not thereby injured. I therefore think the judgment and order should be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

88 Cal. 300

EMERY *et al.* v. SYEA FIRE INS. CO. (No. 13,373.)

(Supreme Court of California. March 16, 1891.)  
FIRE INSURANCE—ACTIONS ON POLICY—PROOF OF LOSS—WAIVER.

1. In an action on an insurance policy, where there is an allegation that plaintiffs performed all the conditions of the contract, defendant cannot object that the complaint does not allege that there was a notice of loss as required by the policy.

2. Where an insurance company accepts the premium after notice of loss, it cannot, in an action on the policy, complain that plaintiffs did not give them the notice of the loss required by the policy.

Department 2. Appeal from superior court, city and county of San Francisco.

T. C. Van Ness, for appellant. Gray & Haven, for respondent.

DE HAVEN, J. This is an appeal from a judgment in favor of the plaintiffs against the defendant, for the sum of \$2,000, and legal interest thereon from December 8, 1885, and costs. The appeal is upon the judgment roll alone. The contention of the appellant is that the judgment should be reversed, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, because it appears therefrom that notice of the loss sustained by plaintiffs was not given forthwith, as required by the terms of the

policy of insurance upon which plaintiffs seek to recover. The complaint alleges that the building insured was destroyed by fire on July 25, 1885, and that upon October 8, 1885, the plaintiff gave to defendant due notice and proof of such fire and loss. The appellant insists that, as the notice was not given forthwith, the defendant is not liable; but there is also an allegation in the complaint "that the plaintiffs duly performed all the conditions of the said contract of insurance on their part," and if giving notice of the fire and loss forthwith was a condition of said policy to be performed by plaintiffs, then the complaint, in this general statement, alleges the due and timely performance of this condition. *Ferrer v. Insurance Co.*, 47 Cal. 416. If the other allegation, as to the exact date when such notice was given, is inconsistent with the general statement just quoted, then the most that can be said is that the complaint in that respect might be considered as ambiguous; but no such objection was pointed out in the demurrer which the appellant filed. But a conclusive answer to the position assumed by appellant is this: The complaint alleges that the appellant did have notice of the loss within five days after it occurred, and with full knowledge of said fire demanded and received from respondents the premium of \$50 due upon the policy sued upon, a credit therefor having been previously given by the appellant. Under these circumstances the appellant cannot be heard to say that the contract of insurance was not in full force on that day, and as it then knew of the fire and the loss of respondents nothing further was required of respondents in the way of giving notice, except to furnish, within a reasonable time thereafter, the preliminary proofs as to the particulars of the loss, and the complaint shows that this was done, even if not furnished before October 25, 1885. Judgment affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

88 Cal. 223

PEOPLE v. TRAVERS. (No. 20,750.)

(Supreme Court of California. March 5, 1891.)

HOMICIDE—GRAND JURY—CHALLENGES—INSTRUCTIONS—EVIDENCE.

1. A discharged grand jury cannot be summoned into court on trial of an indictment, and challenged and examined on their *voir dire*, on the ground that defendant was not called to answer before them when the indictment was found, and given an opportunity to challenge them.

2. In such case defendant has a remedy under Pen. Code Cal. § 995, which provides that an indictment may be set aside, when defendant was not called to answer when it was found, "on any ground which would have been good ground for challenge;" but the fact that he had ground for challenge must be shown either by examination of the jurors as witnesses or by other competent evidence.

3. On indictment for murder it is error to charge that the jury must not consider the fact that innocent men have been convicted of crime in determining the guilt or innocence of defendants. GAROUTTE, J., dissenting.

4. On indictment for murder the court charged the jury: "During the argument your attention has been called to cases in which it was claimed

that juries had improperly convicted the defendants. While it is true that innocent persons have been convicted in the past, there is no proof in this case of any such fact, and you are not justified in considering such matters. \* \* \* The guilt or innocence of this defendant must be determined from the evidence admitted in the case, and not from sympathy or prejudice. If all criminals must go free because there is a possibility of jurors making mistakes, society might as well disband." *Held*, that the instruction was objectionable because of its apparent hostility to defendant, and because it usurped the functions of the jury as the sole judges of the weight of the evidence. GAROUTTE, J., dissenting.

5. On indictment for murder the burden of showing insanity, relied on as a defense, is on defendant.

6. To constitute insanity caused by intoxication a defense to an indictment for murder it must be settled insanity, and not a mere temporary mental condition.

In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Thos. S. Ford, for appellant. W. H. H. Hart, Atty. Gen., for the People.

McFARLAND, J. The appellant was convicted of murder, and appeals from the judgment on the judgment roll and a short bill of exceptions, which shows certain proceedings had on a motion to set aside the indictment.

1. Appellant, upon his arraignment, moved to set aside the indictment upon the ground that he had not been held to answer when the grand jury which indicted him was in session, and that the grand jurors were prejudiced against him, and had unqualified opinions that he was guilty. He introduced on the motion an affidavit made by the county clerk, and one made by himself, which showed that he had not been held to answer when he was indicted, and had no opportunity to challenge the grand jury. No other evidence was introduced. The bill of exceptions states that "defendant then offered to leave the challenge to the said grand jurors who indicted him to prove the challenge good, and moved the court for reasonable time and opportunity to examine each juror on his *voir dire* in support of said challenge. The court overruled said motion and challenge, and defendant excepted." The first part of the language above quoted is obscure. It probably was intended to state that defendant moved for leave to challenge the grand jurors, and thus "prove the challenge good." At all events, the idea of appellant seems to have been that he had the right to have the discharged grand jurors reassembled in court, and to proceed to challenge them formally, and to examine them on their *voir dire*, just as he might have done before the indictment was found. But this is evidently a mistaken notion of the law. A challenge to a grand juror is a preliminary objection to the qualification of the juror, and its purpose is to prohibit the juror from sitting and inquiring into the charge against the party interposing the challenge; and, if the challenge be allowed, the juror "cannot be present or take part in the consideration of the charge against the defendant who inter-

posed the challenge, or the deliberation of the grand jury thereon." Pen. Code, § 900. It is clear that, after a grand jury has completed its work and been discharged, the conditions which make a challenge possible no longer exist. But a defendant who has been indicted without an opportunity to challenge the grand jury is not without remedy. Section 995 of the Penal Code provides that an indictment may be set aside, "when the defendant has not been held to answer before the finding of the indictment, on any ground which would have been good ground for challenge, either to the panel or to any individual grand juror." This language clearly contemplates that the time for challenges has passed, and provides that a defendant may still prove any fact which "would have been good ground for challenge" if he had had an opportunity to interpose it at a time when a challenge was possible. But the fact which would have been good ground for challenge must be proved in the ordinary way in which other facts are proven,—by the introduction of evidence,—either by the examination of the jurors, or by other competent evidence. For this purpose, of course, defendant is entitled to the process of subpoena to compel the attendance of his witnesses; but there is no process by which discharged grand jurors can be reassembled in their official character, and subjected to the original process of challenging. For the purpose of producing his evidence a defendant would, no doubt, upon a proper showing, be entitled to a continuance; but in the case at bar there is no such showing. The appellant did not make any affidavit of merits or diligence; nor did he, by affidavit or otherwise, show that he could produce a single item of evidence tending to show the disqualification of any grand juror. Indeed, he did not make a regular motion for continuance, but seemed to rely upon the supposed right to have the court reassemble the jury. In *People v. Beatty*, 14 Cal. 567, relied on by appellant on this point, the only question was whether a grand jury could indict at all for a crime committed during their session, and after they had been impaneled; and the remark of the justice who delivered the opinion about the right of challenge upon arraignment was evidently mere *dictum* used in the progress of his reasoning, and was not intended as the grave determination of a question not before him. There is nothing in the other two cases cited (*People v. Turner*, 39 Cal. 376; and *People v. Geiger*, 49 Cal. 650) which determines anything adversely to the views above stated. We therefore think that the court below did not commit any error in the matter of the motion to set aside the indictment.

2. The other points made by appellant relate to instructions to the jury, and the first one objected to is as follows: "(4) During the argument of this case your attention has been called to a number of cases in which it was claimed that juries had improperly convicted the defendants. While it is true that innocent persons have been convicted in the past, there is no

proof in this case of any such fact; and you are not justified in considering such matters in determining the guilt or innocence of this defendant. The guilt or innocence of this defendant must be determined from the evidence admitted in the case, and not from sympathy or prejudice. If all criminals must go free because there is a possibility of jurors making mistakes, society might as well disband." This instruction was clearly erroneous. In the first place, it is objectionable—although, perhaps, not fatally so—on account of its apparent hostility to the defendant. The jury would be very apt to get the impression from it that the court considered the defendant as one of the "criminals" alluded to, and feared that the jury would fail to convict him on account of "sympathy or prejudice." In the second place, it is objectionable as an argument in favor of the prosecution on the weight of evidence, and thus was an invasion of the province of the jury; for "to weigh the evidence and find the facts is in this state the exclusive province of the jury, and with the performance of that duty the judge cannot interfere without a palpable violation of the organic law." *People v. Dick*, 34 Cal. 666; *People v. Fong Ching*, 78 Cal. 173, 20 Pac. Rep. 396. In the third place, if it can be considered as a direction about law, and not an argument about facts, it is still clearly erroneous. It was probably founded on *People v. Cronin*, 34 Cal. 191; but the instruction which was approved in that case, although itself somewhat extreme, was far different from the one given in the case at bar. In the *Cronin* case the court, in its instruction on this point, after stating the fact that counsel for defendant had—as in the case at bar—alluded to cases where, upon circumstantial evidence, innocent men had been convicted, told the jury, among other things, that "the quotation of such cases is proper in order to make the jury careful in arriving at a proper conclusion from such (circumstantial) evidence." But in the case at bar the court told the jury, "You are not justified in considering such matters." But the jury had the right to consider that innocent men had been convicted; for the difference in the weight of evidence required in civil and criminal cases, and the doctrine of reasonable doubt itself, are founded upon the danger of destroying life or liberty upon evidence that does not produce thorough conviction, and that danger is based, in great part, upon human experience. The court seemed to think that the fact of former unjust convictions could not be considered because "there is no proof in this case of any such fact;" but that such cases have occurred is a matter of common knowledge, which the court itself admitted when it said, "It is true that innocent persons have been convicted in the past." If the court had simply told the jury that, if they were satisfied beyond a reasonable doubt, by the evidence before them, that the defendant was guilty, they should not be deterred from so finding merely because there had been some innocent man con-

victed, the instruction might not have been objectionable; but to tell them that in coming to their conclusion they should not consider the danger of convicting an innocent man was clearly erroneous. And it certainly does not appear that the whole instruction was not prejudicial to appellant. We think, therefore, that for the giving of this instruction the judgment should be reversed. (It may be remarked that the propriety of counsel reading to a jury from law books is not here involved. It does not appear whether that was done, or whether counsel merely alluded to the subject orally; but if there was such reading it occurred without objection.) As the case must be retried it is necessary to notice one or two other matters.

3. In the instructions given upon the subject of insanity there was no error prejudicial to appellant. They are somewhat voluminous; but the main proposition contained in them was that a person is presumed to be sane until the contrary is shown, and that the burden is on a defendant of showing insanity by a preponderance of evidence. This rule has been established in this state by a long line of authorities. *People v. Meyers*, 20 Cal. 518; *People v. Coffman*, 24 Cal. 237; *People v. McDonell*, 47 Cal. 134; *People v. Wilson*, 49 Cal. 18; *People v. Messersmith*, 61 Cal. 246; *People v. Hamilton*, 62 Cal. 377; *People v. Kernaghan*, 72 Cal. 609, 14 Pac. Rep. 566; *People v. Eubanks*, (Cal.) 24 Pac. Rep. 1014. And this long line of decisions cannot be held to have been overruled by *People v. Bushton*, 80 Cal. 160, 22 Pac. Rep. 127, 549, where the defense was accident; and *People v. Elliott*, 80 Cal. 296, 22 Pac. Rep. 207, where the defense was self-defense. In those cases the court was dealing entirely with those "circumstances" referred to in section 1105 of the Penal Code, which mitigate or justify or excuse an act done by a sane man who might commit a crime; and its attention was not called in any way to that unusual and peculiar mental condition called "insanity," which renders a man utterly incapable of committing crime at all. In the opinion of the court in *People v. Bushton* reference is made to *People v. Smith*, 59 Cal. 607, and *People v. Flanagan*, 60 Cal. 3, in which the very doctrine of the *Bushton* case was stated; but in those cases—where the defenses were self-defense and defense of property—the court certainly did not intend to overthrow the settled rule of the court on the subject of insanity. We are clear, therefore, that the undisturbed law of this state still is that the burden of showing insanity is upon a defendant who seeks shelter under it as a defense. In an instruction asked by defendant and given, there occur these words: "Or, if you have a reasonable doubt as to his sanity, you cannot convict him of any degree of crime, but should acquit him." This, of course, is conflicting with the other instructions on the subject of insanity; but, as it was favorable to defendant, the conflict would not, of itself, be good for reversal. At another trial this conflict can be avoided.

4. We see no error in the instructions given on the subject of intoxication. As to the instructions asked by appellant on the subject of *delirium tremens*, etc., it is sufficient to say that settled insanity produced by a long-continued intoxication, affects responsibility in the same way as insanity produced by any other cause. But it must be "settled insanity," and not merely a temporary mental condition produced by recent use of intoxicating liquor. And an instruction to that effect should be given on another trial, if asked, provided there be evidence to which such an instruction would apply. There are no other points necessary to be noticed. It may be remarked, in conclusion, that in nearly every instance where this court has solved a doubtful proposition in favor of the affirmance of the judgment, the decision has been made the basis and pretext for further excursions in the same direction into the realm of unquestionable error. The judgment is reversed, and the cause remanded for a new trial.

We concur. BEATTY, C. J.; DE HAVEN, J.; SHARPESTEIN, J.; HARRISON, J.

GAROUTTE, J., (*dissenting*.) The practical administration of justice should not be defeated by a too rigid adhesion to a close and technical analysis of the instructions of the court; and, conceding this instruction to be obnoxious to criticism, (of which fact I have some doubt) yet its weaknesses form too slight a basis for a reversal of the judgment in this case. I do not believe that the fact of innocent men having been convicted in the past was a matter to be considered by the jury in making up their minds as to the guilt or innocence of this defendant. Such fact could not add or take away one jot from the weight to be given every piece of evidence in the case. It was the duty of the jury to be convinced beyond a reasonable doubt from all the evidence in the case of the guilt of the defendant before they could convict, and the fact of innocent men having been convicted in the past should not and could not have impregnated itself into the question of reasonable doubt in any way. The jurors in this case, under their oaths, were bound to try this defendant in the same manner, under the same rules of law, and give him the full benefit of all the shields with which the law surrounds every defendant, whether as a matter of fact no innocent man ever had been convicted in the past, or whether such convictions by our courts of justice were an ordinary occurrence. I see nothing in the instruction to indicate hostility towards the defendant. The words "sympathy" and "prejudice," as used, applied equally as strongly in his favor as against him. If all "defendants" must go free I consider a more appropriate expression than if all "criminals" must go free; yet I do not think a jury would get the impression, and am sure that it ought not to get the impression, that by the use of the word "criminals," as used in the instruction, the court intended to refer to the defendant as one of that class. I think the judgment should be affirmed.

DEAN v. PARKER *et al.* (No. 13,338.)

(*Supreme Court of California*. March 10, 1891.)

COMMUNITY PROPERTY—ESTOPPEL—DEEDS—DELIVERY—EVIDENCE.

1. The statement by the husband in his petition for letters of administration on his deceased wife's estate, that certain land was her separate estate, does not estop the grantee of the husband from claiming that it was community property, in an action against the purchaser thereof as part of the wife's estate.

2. Delivery of a deed cannot be disproved by the testimony of a third person, with whom the grantor left it, that if he had afterwards called for it he would have given it to him, since it does not tend to show the grantor's intention.

Department 2. Appeal from superior court, Alameda county; E. M. GIBSON, Judge.

F. B. Ogden, for appellant. C. G. Dodge and J. A. Johnson, for respondents.

DE HAVEN, J. Action to determine conflicting claims to certain real property. In the court below the judgment was in favor of defendants, and from this judgment, and an order denying his motion for a new trial, the plaintiff appeals. The findings of the court show that the land in controversy was originally conveyed to the mother of the plaintiff,—that is, she was named as grantee in the deed conveying it,—but that the property was paid for with the community funds and property of the mother and her husband, who was the father of plaintiff. The mother, Mary Dean, died January 26, 1877, leaving surviving her her said husband and three children. On October 8d following the father died, but prior to his death, he, on the 5th day of February, 1877, filed in the proper probate court a petition signed by him, praying for letters of administration on the estate of his deceased wife, in which it was stated that the land in controversy was her separate property. The findings further show that this same property was afterwards, in 1882, in the matter of the estate of said Mary Dean, sold to one Thomas O'Donnel, which sale was confirmed by the court, and said O'Donnel conveyed to defendants. The court also found: "That before the death of said John Dean, he, (the said John Dean,) on the 14th day of May, 1877, made and executed a deed of said property described in the complaint to James P. Dean, the plaintiff herein, for a consideration of one dollar, but that said deed was never delivered, no consideration was ever paid by the grantee therein named, the said deed was never recorded, and the defendants herein never were aware of or had any notice of the existence of said deed until after their purchase of the property in dispute in this action; nor did the said John Dean have or own any interest in said property at the time he executed said deed, or at any time thereafter, by reason of said action in filing said petition." As a conclusion of law the court found "that the said act of John Dean in filing said petition, setting forth therein that the said property was his wife's separate property, and causing the same to be sold thereunder, forever estops said John Dean, his heirs or successors, from claiming the same, and has the



effect (even if it were community property) of making it the separate property of Mary Dean; that plaintiff neither has nor owns any right, title, or interest of any nature whatsoever in or to said property, but that the absolute title in fee thereto, and ownership thereof, is in the defendants."

1. If the latter part of what is termed the "conclusions of law" should be considered rather as the finding of an ultimate fact, the sufficiency of the evidence to justify it cannot be considered on this appeal, as there is no exception to it for this cause, or specification wherein the evidence fails to sustain it. But we think that, looking at the entire findings, this should be regarded simply as a conclusion, which the learned judge of the court below drew as one of law, from the specific findings of fact which preceded it, and that therefore we may review it, and if in law the conclusion is not properly drawn from such preceding facts, the error may be corrected.

2. It is apparent, that the court, in its sixth finding, above set out, does not use the word "executed" in its strict legal sense, and the proper construction of that finding is that the deed referred to therein was signed, but not, in fact, delivered.

3. The facts found by the court do not support the judgment. The court finds in effect that the property in controversy was community property of the husband, John Dean, and his wife, Mary Dean, and that the husband survived the wife. This being so, upon the death of the wife the property belonged to the surviving husband, without administration, (Civil Code, § 1401,) and the estate of Mary Dean never had any title to or interest in this property to convey to any persons; and the facts alleged in the answer of defendants as matter of estoppel, and found by the court, are not such as to estop the plaintiff here from showing that the property in controversy was never the separate property of the said Mary Dean, under whom the defendants claim. The facts necessary to be shown, in order to call into exercise the principle of equitable estoppel, are stated by FIELD, C. J., in *Biddle Boggs v. Mining Co.*, 14 Cal. 367, as follows: "First, that the party making the admission by his declarations or conduct was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such carelessness or culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and, fourth, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved." In referring to this quotation the court in *Smith v. Penny*, 44 Cal. 166, says: "This specification of the facts which are essential to the operation of the estoppel was approved in *Davis v. Davis*, 26 Cal. 23, and in many other cases in this court, except that in some of the cases the third specification was modified in one particular, it not being deemed requisite that the other party should be shown to be destitute of all possible means of knowledge of the true state of the title, but only

of convenient or ready means to that end." See, also, *Bigelow, Estop.* p. 437.

4. One of the questions to be determined was whether a certain deed, signed by the father of plaintiff and purporting to convey to plaintiff the land in controversy, was ever delivered, the evidence showing that it had been placed by the father in the custody of one Daniel O'Keefe, who was a witness upon the trial. While giving his testimony, the defendants put to O'Keefe this question: "Supposing the father had come in a year after he left the deed with you, or two or three weeks afterwards, and asked you for the deed again, would you have given it to him?" This question was objected to upon the grounds that it was immaterial, irrelevant, and incompetent. The objection was overruled, the plaintiff excepting to such ruling, and the witness answered, "Yes, sir." The objection to this question should have been sustained, as the evidence sought by it was clearly irrelevant. The matter to be determined was, what was the intention of plaintiff's father in leaving this deed with the witness? and for the purpose of arriving at this intention evidence of any declarations made or conversations had in relation to that subject by the said John Dean, at that or any subsequent time, would have been competent; but what the witness would have done if the deed had been afterwards called for can have no tendency to show whether the father did or did not intend in what he did to make a delivery of the deed for the benefit of his son.

5. The cause must be remanded for a new trial, and, as we cannot know that the evidence upon another trial, in relation to the delivery of the deed referred to, will be in all respects the same as appears in this record, we do not deem it proper to pass upon the question whether the sixth finding of the court is supported by the evidence. Whether there was a delivery for the benefit of the plaintiff is a question of fact to be determined by ascertaining the intention of the father in what he did, in signing it and leaving it with the witness O'Keefe. Any declaration made by him at the time of the alleged delivery, or at any subsequent time, as to his intention, is relevant to this inquiry. The evidence in this record, as to what he said during his last sickness in giving a reason for not making a will, is relevant. Judgment and order reversed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

87 Cal. 483

MOORE V. LONG BEACH DEVELOPMENT CO.  
(No. 13,789.)

(Supreme Court of California. Jan. 19, 1911.)

APPEAL—TRANSCRIPT—INNKEEPERS—BOARDERS.

1. Where there is but one notice of appeal, which is taken both from the judgment and the order denying motion for a new trial, and there is appended to the transcript a stipulation that it contains a full and true copy of all papers "necessary and proper to be used on this appeal," and that "the appeal may be heard thereon," the statement of facts on motion for new trial contained in such transcript may be considered



without any further identification as having been used at the hearing of the motion.

2. Plaintiff, who had no fixed home, with his family went to an hotel, expecting to remain there as long as his wife's health permitted, and in consideration of the probable length of his stay he was furnished board and lodging at a large reduction from the regular rates. He did not put any of his valuables in charge of the hotel-keeper. Soon afterwards a fire occurred, without any negligence on the part of the hotel-keeper or his employes, in which plaintiff's personal property was destroyed, and he sued the hotel-keeper therefor. *Held*, that plaintiff and his family were boarders, as to whose property defendant is not liable as an innkeeper and an insurer, and hence plaintiff cannot recover.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county, W. H. CLARK, Judge.

This was an action against the Long Beach Development Company, as an innkeeper, to recover damages for property of H. Edwin Moore and his family destroyed by a fire in defendant's hotel. The fire was shown to have occurred without any negligence on defendant's part, and the court found that plaintiff and his family were not guests as to whom defendant occupied the relation of innkeeper, but that they were boarders of whose goods defendant was not an insurer. There was judgment for defendant, and plaintiff appeals.

*Scarborough & Waterman and Chapman & Hendricks*, for appellant. *Lee, Gardner & Scott*, for respondent.

FOOTE, C. The respondent contends that the statement upon motion for a new trial, which appears in the transcript, cannot be looked into, for the reason that it is not identified as having been used upon the hearing of the motion. There is but one notice of appeal, and that is both as to the judgment and the order denying a new trial. The stipulation at the end of the transcript is to this effect: "It is hereby agreed that the foregoing transcript contains a full, true, and correct copy of all papers necessary and proper to be used on this appeal; that the appeal herein was duly perfected, and the requisite deposit in lieu of an undertaking was given within the time prescribed by law; that the foregoing is a full, true, and correct transcript of the record on appeal; and that the appeal herein may be heard thereon." If the word "appeal," as used in the stipulation, was intended to apply to both the order denying a new trial and the judgment, then it covers the statement of the case which appears in the transcript, which is in due form, and appears to have been settled by the judge, and filed on February 3, 1890. The order denying a new trial was made on the 17th of February, 1890. It is plain that the appeal was taken from both order and judgment, and the stipulation evidently refers to them both where the word "appeal" is used. Since the stipulation states that the "appeal herein may be heard" upon the record on appeal in the transcript, it is proper that the statement here, under all the facts appearing in the record, should be held as being one that can be looked into on the appeal from the order denying a new trial. The main argument for the re-

versal of the judgment and order, by the appellant, seems to be that the evidence is insufficient to show that the plaintiff was a boarder and not a guest of the innkeeper who was sued, and the former contends that, if a guest, he is entitled to recover, but not as a boarder. The case, as stated in the complaint, is that of an individual who goes to an inn, as a guest or transient traveler, and while he is there the inn burns down and he loses his baggage, containing wearing apparel, jewels, and other personal valuables, occasioned by the negligence of the defendant and his servants, and seeks to make the innkeeper responsible for the loss. The fire appears to have been purely accidental, and there is nothing to show that the goods lost were not under the control of the owner, kept in his rooms, or that they were ever in the manual possession of the innkeeper. Nor is it proved or found that the fire or loss occurred by any negligence of the defendant, its servants or agents. But the plaintiff contends that an innkeeper is an insurer of the goods of his guests placed in the inn, even as against loss by fire, as well as robbery and theft, and that, if they are lost or injured while there, by any of these agencies, that the innkeeper must make good the loss. It does not seem that any case as to such a loss by fire has been adjudicated by the appellate court of this state. But in *Mateer v. Brown*, 1 Cal. 221, and in *Pinkerton v. Woodward*, 33 Cal. 600, cases where the loss to the guest seems to have been occasioned by robbery, it was held that the innkeeper was an insurer of the property committed to his care against everything but the act of God or the public enemy, or the neglect or fraud of the owner of the property.

Conceding, therefore, without deciding, that the view urged by the appellant is the law of this state upon the matter in hand, the real question for determination here is whether the evidence shows the plaintiff to have been a guest or a boarder. Each case, as to this point, turns upon its special state of facts. There is no doubt in our minds, upon the facts here, that the plaintiff and his family were boarders whose time of remaining at their place of sojourn depended upon their own volition. They went to the inn to ascertain if it was a place where the health of the wife of the plaintiff would be benefited, with the determination to remain there indefinitely, perhaps for a very long time, if such should be the case; but with a view, if her health did not improve, to leave at any time. It was also shown that the plaintiff, before going there with his family, had made an arrangement for terms of entertainment at a great deal less than those for a transient traveler, and by the month, and they went prepared to stay, if they desired, for a considerable time, and to enjoy all the gayeties that might take place. They had no other place of residence, and for the time being this inn was to be such, subject, as to time of stay, to their volition, but at reduced rates of board by the month. It was evidently the hope and the expectation of the plaintiff and wife that her health would

be benefited at this inn, which was a pleasure resort, its principal business season being that of the summer. And it is fair to presume that they thought it would benefit her, and went prepared to stay as permanent boarders, rather than transient travelers. These facts were known to the defendant, and with this idea in the minds of both the contracting parties, together with the fact that the plaintiff had just been boarding at another inn at another place and had left there some of his goods, such as he did not expect to need at the defendant's inn, and had no fixed home, and that he got reduced terms of board, and did not place his valuables in the care of the innkeeper, are very persuasive that it was the intention of all the parties that he should be a boarder, and not a mere transient traveler or guest, and for the time being a resident in the place where he was intending to board. Under these facts and others appearing in the record, we cannot say that the findings of the court below are not sufficiently supported by the evidence. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

88 Cal. 290

FOREMAN *et al.* v. BOYLE *et al.* (No. 13,764.)

(Supreme Court of California. March 10, 1891.)

JOINDER OF ACTIONS—INJURIES TO WATER-RIGHTS.

The proprietors of two different tracts of land, who each own a separate irrigating ditch by means of which the waters of a creek, in different amounts, are conveyed to their land, cannot unite in an action for damages against one who, at a point above their lands, has wrongfully diverted the waters of the stream, as they have no common interest in the damages, and there is no legal basis on which they can be apportioned between them.

In bank. Appeal from superior court, Butte county; P. O. HUNDLEY, Judge.

*Gray & Sexton*, for appellants. *Lewis Freer and Jo. D. Sproul*, for respondents.

GAROUTIE, J. This is an action for damages for diverting the waters of plaintiffs, and for an injunction to restrain the defendants from the further diversion thereof. Among other things, the complaint in effect alleges that the West Branch of Canon creek and Canon creek were natural water-courses; the waters of the former flowing into the latter. That the plaintiff Foreman owns a tract of land situated upon the west branch of Canon creek, and also 15 inches of the waters of said creek for the purpose of irrigating her said tract of land. That the plaintiff Rogers owns a tract of land situated upon Canon creek, and also 35 inches of the waters of said creek, for the purpose of irrigating his said tract of land. That plaintiffs, by means of ditches erected by them, respectively, carried said waters from the aforesaid creeks over and upon their said tracts of land. That the defendants, at a point above the lands of

plaintiffs, diverted the said waters from their natural channel, depriving said owners thereof; and by such diversion plaintiffs suffered damages in the sum of \$1,000. A demurrer to the complaint was filed upon the ground that there was a misjoinder of parties plaintiff and a misjoinder of causes of action. The demurrer was overruled, issue was joined, and upon the trial the findings of the court were in consonance with plaintiffs' complaint, except as to the allegation of damages, and as to that allegation the court found that the plaintiffs had suffered damages in the sum of five dollars. The case comes before us upon the judgment roll.

It will be observed that the plaintiff Foreman owns a tract of land, 15 inches of water, and the ditch which carries the water from West Canon creek upon her land. Her co-plaintiff, Rogers, has no interest whatever in the land, the water, or the ditch. Likewise plaintiff Rogers owns a tract of land, (some distance from Foreman's land,) 35 inches of water, and the ditch which carries the water from Canon creek upon his land; and his co-plaintiff has no interest in such land, water, or ditch. These plaintiffs claimed in their complaint, and obtained by decree of the court, a joint judgment for damages against the defendants. It is impossible to see how the plaintiffs have any joint or common interest in the damages recovered, or upon what legal basis such damages could be apportioned between them. Respondents' counsel suggest that the plaintiffs are tenants in common, and the damages should be apportioned in proportion to the inches of water each owns. This cannot be the true rule, for it readily can be seen that for many reasons the diversion of the waters by defendants may have caused plaintiff owning 15 inches of water far greater damage than would be entailed upon plaintiff owning 35 inches of water. Tenancy in common in ditches and water-rights is no unusual estate, but the cases relied upon by respondents to establish a tenancy in common between the plaintiffs in this action in the waters of a natural channel, under the surrounding circumstances as depicted by the record in this case, are not in point, for the facts are essentially dissimilar. It seems to us that the demurrer to the complaint should have been sustained upon both of the grounds stated. There was a misjoinder of parties plaintiff; the plaintiffs seek a joint recovery of damages in which they have no joint interest. "Two or more owners of mills propelled by water are interested in preventing an obstruction above that shall interfere with the down flow of the water, and may unite in its restraint or abate it as a nuisance, but they cannot hence unite in an action for damages, for as to the injury suffered there is no community of interest." Bliss, Code Pl. § 76. There is a misjoinder of causes of action, and it is so held in *Barham v. Hostetter*, 67 Cal. 274, 7 Pac. Rep. 689. This question is carefully considered in *Blaisdell v. Stephens*, 14 Nev. 17, and in the case of *Miller v. Ditch Co.*, (Cal.) 25 Pac. Rep. 550. But, conceding the judgment for damages to be erroneous, the

amount is merely nominal, and too trifling to justify the reversal of the entire judgment. Let the judgment be modified by striking out the damages, without costs to appellant, and in all other respects let the judgment be affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.; McFARLAND, J.; HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.

88 Cal. 114

PEOPLE v. WHEATLEY. (No. 20,708.)

(Supreme Court of California. Feb. 25, 1891.)

BURGLARY—PRIOR CONVICTION—TRIAL—PLEADING—JURY—JUDGMENT.

1. An information charging burglary and prior conviction was assigned by the presiding judge of the superior court of the city and county of San Francisco to department 6 for trial, where defendant was arraigned, and pleaded not guilty. The record, without showing objection by defendant, simply shows that the cause was transferred to department 12, where, on arraignment, a plea of guilty of the prior conviction was entered. Afterwards a trial was had in department 12, resulting in a verdict of guilty of burglary. *Held*, that it will be presumed that the cause was properly transferred by the presiding judge.

2. In such case defendant will be considered as having pleaded not guilty in department 6 to both the burglary and prior convictions, and, on transfer to department 12, of having withdrawn his former plea as to the former convictions, and pleaded guilty thereto.

3. Where the oral charge of the court appears in full in the transcript of the record, it will be presumed that it was taken down by the shorthand reporter.

4. On trial for burglary, the fact that a juror left the others and went to the water-closet for a few minutes in company with the bailiff is no ground for a new trial if it appears that he conversed with no one, and heard nothing about the case, and that there was no discussion about the case in his absence.

5. A judgment of conviction of burglary and prior conviction, which recites that defendant, when called for sentence, was informed by the court of the information charging him with the crime of burglary and prior conviction of burglary, of his arraignment and pleas of not guilty as charged in the information, and guilty of the prior conviction, of the trial, and verdict of guilty of burglary, and that he was then asked if he had any legal cause to show why judgment should not be pronounced, is sufficient under Pen. Code Cal. § 1200, requiring that defendant, before judgment, must be informed of the nature of the charge, and of his plea, and the verdict, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him; and section 1207, requiring the clerk to enter the judgment on the minutes, stating briefly the offense for which the conviction was had, and the fact of prior conviction, etc.

6. On appeal in a criminal case it will be presumed that before proceeding with the trial the clerk read the information, unless the contrary appears from the record.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Section 1200 provides: "When the defendant appears for judgment he must be informed by the court, or by the clerk under its direction, of the nature of the charge against him, and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pro-

nounced against him." Section 1207 provides: "When judgment upon a conviction is rendered the clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had, and the fact of a prior conviction, (if one,) and must within five days annex together and file the following papers, which will constitute a record of the action: (1) The indictment or information, and a copy of the minutes of the plea or demurrer; (2) a copy of the minutes of the trial; (3) the charges given or refused, and the indorsements thereon; and (4) a copy of the judgment."

*Carroll Cook*, for appellant. *The Attorney General*, for the People.

**BEICHER, C.** The defendant was charged with the crime of burglary, and with having suffered prior convictions of burglary and petit larceny. The information was filed in the superior court of the city and county of San Francisco on September 19, 1889, and on the same day the presiding judge of the court assigned the case for trial to Hon. W. T. WALLACE, judge of department No. 6. The defendant was arraigned in department No. 6, on September 27th, and "pleaded not guilty of the crime charged in the information." The record then shows the following "[Title of court and cause.] Oct. 3, 1889. Cause transferred to department No. 12." "[Title of court and cause.] Department No. 12, October 9, 1889. Present, Hon. D. J. MURPHY, Judge. The defendant, having heretofore been arraigned and pleaded not guilty, came into court, and having been called upon and arraigned upon the prior convictions herein, now pleads guilty thereto." Subsequently, as the record states, the cause came on regularly for trial in department No. 12, the defendant and his counsel being present in court, and at the conclusion of the trial a verdict was returned by the jury, finding the defendant guilty of burglary in the second degree. Judgment was then entered that he be punished by imprisonment in the state-prison for the term of eight years. From this judgment and the order denying him a new trial he appeals.

1. The first point made for a reversal of the judgment is that the case was not properly tried in department No. 12. It is claimed that, inasmuch as the minutes of the court show that the cause was assigned to Judge WALLACE for trial, Judge MURPHY had no authority to try it, in the absence of a showing in the record of a reassignment by the presiding judge, and of consent on the part of Judges WALLACE and MURPHY that it be reassigned. But the minutes of the court do state that the cause was transferred to department No. 12; and they do not state that any objection was made by the defendant to the transfer or the place of trial. Under these circumstances it must be presumed, nothing appearing to the contrary, that the transfer was properly made by the presiding judge.

2. It is contended that when the defendant was arraigned in department No. 6, and pleaded "not guilty," his plea put in issue the prior convictions, and that, hav-

ing once pleaded, no other plea could be made or have place in the record, until the first was withdrawn or set aside. And it is said that the first plea was not withdrawn, and hence, as there was no verdict as to the prior convictions, the punishment imposed was greater than the law authorized. There can be no doubt at this time that one may be charged in an indictment or information with some particular offense, and with having suffered previous convictions of other offenses, and may be arraigned thereon under section 988 of the Penal Code. He may plead simply not guilty, and thus put in issue every material allegation of the indictment or information, (Pen. Code, § 1019,) or he may plead not guilty of the principal offense charged, and confess the previous convictions, (People v. Lewis, 64 Cal. 401, 1 Pac. Rep. 490; People v. Brooks, 65 Cal. 295, 4 Pac. Rep. 7; Ex parte Young Ah Gow, 73 Cal. 438, 15 Pac. Rep. 76.) If he confesses the previous convictions, then the clerk, in reading the indictment or information to the jury, must omit therefrom all that relates to such previous convictions, and no testimony in regard to them can be offered, or reference to them be made, during the trial. Pen. Code, § 1093, subd. 1; People v. Meyer, 73 Cal. 548, 15 Pac. Rep. 95; People v. Sansome, 84 Cal. 449, 24 Pac. Rep. 143. And there can also be no question that, when one is charged with a prior conviction, and has pleaded simply not guilty, he may be permitted afterwards, in the discretion of the court, to withdraw his plea as to that charge, and enter a plea of guilty thereof. In People v. Lewis, supra, the defendant was indicted for grand larceny, and charged with a previous conviction of a like offense. He was arraigned, and pleaded not guilty of the offense charged. On the trial he offered to plead guilty to the charge of previous conviction, and the court denied the offer. Speaking of this ruling, this court, by Mr. Justice THORNTON, said: "Having then regularly pleaded, the court was not bound afterwards on the trial to accept the plea of guilty of the previous conviction. It may be in its discretion to do so or not; not a discretion, however, to be arbitrarily exercised, but one in accordance with law and its analogies. If the court abuses its discretion in so ruling, a reversal would follow; but we cannot see that it went beyond what the law permitted." Here the record shows that the defendant, after pleading not guilty, came again into court, and pleaded guilty of the prior convictions. He had a right to do this, with the court's consent; and his action, so far as we can see, was voluntary, the object, doubtless, being to keep from the jury on the trial all knowledge of the prior convictions, and thus secure a better chance for an acquittal of the main charge. The case of People v. King, 64 Cal. 338, cited by appellant, cannot aid him. That case was decided upon the theory that, since the repeal of sections 969 and 1025 of the Penal Code, when a person is charged with a criminal offense and a previous conviction, his admission of the previous conviction is not sufficient,

but he must plead to both charges, and both must be proved on the trial and passed upon by the jury. That theory has not since been accepted by the court, and, in effect, the case has been overruled. See cases above cited.

3. It is said that the record shows affirmatively that the court charged the jury orally, and fails to show that the charge was taken down by the phonographic reporter. This is assigned as error, and urged as cause for a reversal of the judgment. But the presumption is that the reporter performed his duty, and took down the charge in shorthand; and that he must have done so very clearly appears from the fact that the full charge is brought here in the transcript, covering 10 printed pages.

4. It is claimed that defendant's motion for a new trial should have been granted, because the jury, after retiring to deliberate upon their verdict, separated without leave of the court. It appears from the affidavits read on the hearing of the motion for a new trial that when the jury left the jury-box and started for the jury-room, eleven of them went into the room, and one went into a water-closet adjacent to the court-room, accompanied by the bailiff. He was gone about five minutes, and, while absent from the other jurors, held no conversation with any person, and nothing was said about the case in his hearing. During his absence no discussion upon the case was had among the other jurors, and no ballot was taken. On his return he participated in all the deliberations of the jury and in finding the verdict. Upon this showing we see no error in the refusal of the court to grant the defendant's motion. People v. Symonds, 22 Cal. 349. But it is urged that the court could not consider the counter-affidavits read and filed on behalf of the people, because the deputy-clerk, before whom they were worn to, did not sign his principal's name to the jurat. It was not necessary for him to do this. Touchard v. Crow, 20 Cal. 150; Muller v. Boggs, 25 Cal. 175.

5. It is contended that the court had no right to pronounce judgment of imprisonment for eight years, because "there is not a word said in the judgment about any prior convictions, nor does the verdict say aught concerning the same." But the judgment recites that, when the defendant was called up to be sentenced, he was duly informed by the court of the information, charging him "with the crime of burglary and prior conviction of burglary in the first degree; of his arraignment and plea of not guilty as charged in said information, and guilty of said prior conviction; of his trial, and the verdict of the jury, on the 17th day of October, 1889, 'guilty' of burglary in the second degree. The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him." This was sufficient to meet the requirements of sections 1200 and 1207 of the Penal Code; and imprisonment for the term of eight years was authorized. Pen. Code, §§ 461, 666. It is also objected that the judgment is insufficient in form, because it orders and adjudges that the defendant be

punished by imprisonment in the state-prison, etc. In our opinion the judgment was sufficient in this regard, and the objection is without merit.

6. The point is made that it was error to proceed with the trial without the reading of the information by the clerk. But there is nothing in the record to show that the information was not read by the clerk to the jury, and we must therefore presume that it was.

7. It is earnestly contended that a new trial should have been granted the defendant on the ground that the verdict was contrary to law and to the evidence. It must be admitted that the evidence, as brought up in the record, does not seem to us to be very strong and convincing; and yet the jury, under proper instructions, which were very full and clear upon every point involved, found the defendant guilty. And the learned judge of the court, who saw the witnesses, and heard them testify, denied defendant's motion. Under the circumstances, we do not feel at liberty to say that the evidence was so insufficient as to justify a reversal on this ground.

8. In one part of its charge the court told the jury that under the allegations of the information, and under the proofs in the case, they must be satisfied of two things in order to warrant them in convicting the defendant, viz., entry into the building, and intent to commit larceny. It is claimed that another fact, viz., the ownership of the building as alleged, was equally necessary, and that the instruction as given was therefore misleading. But the court afterwards fully instructed the jury on this point, telling them that, of course, they must find the ownership of the building to be as set forth in the information. This was certainly sufficient, and it takes away appellant's last ground of complaint. It results that the judgment and order appealed from should be affirmed, and we so advise.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

88 Cal. 140

PEOPLE v. MCGREGGOR. (No. 20,775.)

(Supreme Court of California. Feb. 28, 1891.)

BURGLARY—FORMER CONVICTIONS—INSTRUCTIONS—VENUE.

1. On the arraignment of one informed against for burglary it is not error for the court to ask him whether he had suffered the prior convictions charged against him in the information.

2. Where defendant has confessed the former convictions the presumption is that the clerk, on reading the information to the jury, omitted that part relating to the prior convictions, as he is required to do by Pen. Code Cal. § 1098; and this presumption is not overcome by a statement in the record that the information charging defendant with the "crime" (not crimes) was read, and "plea" (not pleas) of not guilty stated to the jury.

3. The presumption is that the oral charge of the court was taken down by the short-hand reporter, as required by Pen. Code, § 1098, unless the record affirmatively shows the contrary.

4. Where the undisputed evidence shows that defendant committed the burglary in the night-

time, a remark by the judge in charging the jury that the testimony showed the crime to have been committed at 3 or 4 o'clock in the morning could not have prejudiced defendant; and hence the supreme court will not determine whether this language was the mere exercise of the constitutional power of the judge to "state the testimony," or a violation of the mandate that "judges shall not charge juries with respect to matters of fact." Const. Cal. art. 6, § 19.

5. On a trial for burglary, alleged in the information to have been committed in the city and county of San Francisco, evidence that the crime was committed in a house on "Grant avenue," which is in fact one of the principal streets of said city, is sufficient proof of the venue, without direct testimony that the avenue is in the city of San Francisco.

Department 2. Appeal from superior court, city and county of San Francisco; J. McM. SHAFTER, Judge.

Carroll Cook and J. E. Foulds, for appellant. W. H. Harr, Atty. Gen., for the People.

McFARLAND, J. The defendant was convicted of an attempt to commit burglary in the first degree, and appeals from the judgment and an order denying a new trial. Several points are relied on for a reversal of the judgment.

1. It was not error for the court to ask the defendant, upon his arraignment, whether he had suffered the prior convictions charged against him in the information. People v. Wheatley, ante, 95, (No. 20,708,) filed February 25, 1891, and cases there cited.

2. It does not appear that the clerk read to the jury that part of the indictment which charged defendant with prior convictions. As the defendant had confessed the former convictions, the presumption is that the clerk performed his duty as prescribed in section 1093 of the Penal Code, and omitted that part of the indictment which related thereto; and this presumption is not overcome by anything in the record, which merely states that "the information charging the defendant with the above crime [not crimes] was read, and plea [not pleas] of not guilty stated to the jury." No objection was made at the time: and it is quite clear that there is no affirmative showing of error on this point.

3. The sentence—10 years—does not exceed the maximum term of imprisonment, for the record shows that the defendant had suffered former convictions.

4. Assuming that the record must show a recital of the matters referred to in section 1200 of the Penal Code, and that the section is not merely directory, still it appears from the record in this case that the directions of said section were quite fully complied with.

5. It does not appear that the oral charge of the court was not taken down by the reporter; and where the contrary does not appear it will be presumed that the law<sup>1</sup> was obeyed.

6. The jury having first returned a verdict of "guilty as charged," the court informed them that it would be necessary to find the degree of the crime, and that, if the attempt was made in the night-

<sup>1</sup> Pen. Code, § 1098, requires oral instructions to be taken down by the phonographic reporter.

time, it would be an attempt to commit burglary in the first degree; and, in that connection the court told the jury that "the testimony was it was 3 or 4 o'clock in the morning." It is contended that this language last quoted was erroneous. It is not necessary to determine whether the use of this language was the mere exercise of the constitutional power of a judge to "state the testimony," or a violation of the mandate that "judges shall not charge juries with respect to matters of fact," (Const. art. 6, § 19,) for the only evidence upon which defendant could have been convicted at all showed without conflict that the attempt was made in the nighttime. Defendant, therefore, could not have been prejudiced by the remark of the court.

7. The gravest point made by appellant is the one based upon the alleged failure to prove the venue. Of course, there must be sufficient proof of the venue in every criminal case, and experienced prosecuting attorneys are generally careful to make such proof at an early stage of the trial. In the case at bar the prosecution seem to have entirely overlooked the necessity of asking any questions on that subject. But notwithstanding that oversight there was, we think, sufficient evidence to warrant the jury in finding that the crime charged was committed in the city and county of San Francisco, there being no evidence tending to show the contrary. The information was entitled in the superior court of said city and county, and charged that the crime was committed "at the said city and county of San Francisco, state of California," at a certain house on "Grant avenue." The jurors were citizens and residents of San Francisco, and the court-house in which they sat while defendant was being tried was near the center of the city. The principal witness for the prosecution testified that on the night of the alleged crime he was a police officer "on regular force;" that on said night he was on duty "on Grant avenue, from Market to Bush," and that territory was his "regular beat;" and that when he first saw defendant that night he was in an alley called "Stockton Place," "off Grant avenue, between Post and Sutter." And it was shown that the crime, if committed at all, was committed on said Grant avenue, at a certain house adjacent to said Stockton place. Thus a half dozen of the principal and best known streets of the city of San Francisco were named, between or upon which the crime was committed; and although, from a failure to ask them, the witnesses did not testify directly that these streets were in the prominent city of San Francisco in which the court was sitting, still we think that the evidence, taken in connection with the surrounding circumstances, was sufficient to justify the jury in finding as jurors what they well know as men, that the streets named by the witnesses meant the well-known streets so named in San Francisco. In *Brady v. Page*, 59 Cal. 52, and *Whiting v. Quackenbush*, 54 Cal. 306, this court seems to have held that judicial notice would be taken of the streets of San Francisco, although there may be some points of distinction

between those cases and the one at bar. In *People v. Manning*, 48 Cal. 335, the court says: "Another point made is that the venue was not proved. No witness testified in so many words that the killing occurred in the city and county of San Francisco; but the whole testimony, taken together, left no room for a reasonable doubt on this point. We think the venue sufficiently proved." In that case the killing was shown to have been done on Clay street, without any direct evidence that Clay street was in San Francisco; but it may be claimed that Clay street could have been located by reference to other named streets which were shown to be in the city. In *State v. Burns*, 48 Mo. 438, the witness spoke of the murder as taking place on Mullanphy street, but it was not expressly stated anywhere that Mullanphy street was in the county or city of St. Louis; and the supreme court of Missouri say: "If there was evidence to reasonably satisfy the jury that the crime was committed in the city, that was sufficient." \* \* \* The question of venue or jurisdiction is always a question of fact, and may be proved like any other fact. If the evidence raises a violent presumption that the offense for which the person is indicted was committed in the county where he was tried, it is sufficient. 1 Whart. Crim. Law, § 601." In *State v. Ruth*, 14 Mo. App. 226, it was testified that the stolen property was taken from a boarding-house, No. 1203 Washington avenue, and that defendant was seen with it in a shop on Christy avenue, and the court say: "It is true that no witness says, in so many words, that the offense was committed in the city of St. Louis. But this is not necessary. It is enough if the testimony was such as to satisfy the trier of the fact that the place of the offense was that laid in the information." And, speaking of certain cases referred to, the court continues as follows: "In neither case could there be any doubt in the minds of the triers of the fact, or of the judges of the appellate court, that the streets spoken of by the witnesses were St. Louis streets. We will not take judicial notice of all the streets of the city in which this court holds its sessions. But we need have no difficulty in judicially recognizing the fact that Washington avenue, Morgan street, and Christy avenue, are old, established, and well-known streets of St. Louis,—the city in which we sit as a court,—and that this knowledge prevails generally throughout the city, and must have been possessed by the trier of fact in the present case." *Bland v. People*, 3 Scam. 364, *Beavers v. State*, 58 Ind. 530, and *Cum. v. Costley*, 118 Mass. 3, are all to the point that inferential evidence is sufficient to establish venue. The foregoing cases are authorities which fortify the conclusion on this point which we have abovesated. The question here is not a strict question of judicial knowledge. The question is whether, under all the circumstances of the case, there was sufficient evidence to warrant the jury in concluding that the crime was committed in San Francisco, and, as before said, we think that it was sufficient.

8. We do not think that the evidence was insufficient to sustain the verdict upon the merits; nor do we think that the court abused its discretion in refusing to grant a new trial on the ground of newly-discovered evidence. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

88 Cal. 245

PREBLE *et al.* v. ABRAHAM'S. (No. 13,710.)  
(Supreme Court of California. March 6, 1891.)

VENDOR AND VENDEE—CONTRACTS—SPECIFIC PERFORMANCE—EVIDENCE.

1. A contract, signed by both parties, reciting that the vendor agrees to sell land, is also an agreement by the vendee to purchase.

2. Plaintiffs sued for specific performance of a written contract to purchase "40 acres of the 80-acre tract at Biggs," and offered evidence that defendant agreed to purchase the east half of the tract if plaintiffs would agree to sell the west half to one B., and that the west half had been sold to B. under a contract made at the same time as defendant's. *Held*, that the evidence was admissible, and showed an agreement by defendant to purchase the east half of the tract.

3. In such case defendant cannot object to a decree of specific performance on the ground that the land is incumbered, where the decree only authorizes a judgment against him on deposit by plaintiffs with the clerk of a deed free of incumbrance.

Appeal from superior court, Butte county; P. O. HUNDLEY, Judge.

R. H. Lindsay and Gray & Sexton, for appellants. John Gale, for respondents.

SHARPSTEIN, J. The plaintiffs in their complaint allege that on the 13th day of January, 1888, they and the defendant entered into an agreement of which the following is a copy: "Biggs, January 13, 1888. This agreement, made and entered into by C. S. Preble and C. S. Young, of Reno, Nevada, and A. Abrahams of the same place. Said Preble & Young agree to sell to A. Abrahams of Reno, for one hundred and twenty-five dollars per acre, for forty acres of the eighty-acre tract at Biggs, and upon the payment of the said sum said parties of the first part shall make, execute, and acknowledge, and deliver unto the said party of the second part a good and sufficient deed, vesting the title of said property in party of second part. PREBLE & YOUNG. A. ABRAHAM'S. Witness: M. BIGGS, Jr." Plaintiffs further allege that, when said agreement was written, it was understood between all the parties thereto that the same should contain a clause obliging said defendant to buy said land at said price of \$125 per acre, and the omission of said clause therefrom was wholly accidental and unintentional; that between the words, "said Preble and Young agree to sell to Abrahams of Reno," and the words, "for one hundred and twenty-five dollars per acre for forty acres of the eighty-acre tract at Biggs," in said contract, there should have been inserted the words, "and said Abrahams agrees to purchase;" that the omission was the result of a mutual mistake, etc. Plaintiffs further allege that they have kept and performed all the terms, covenants, and con-

ditions on their part to be performed, and that defendant refuses to keep or perform any of the terms, covenants, or conditions of said contract on his part, and refuses to purchase said land or pay plaintiffs therefor. Wherefore plaintiffs pray to have said contract reformed so as to make it obligatory upon defendant to purchase said land at the price agreed upon, and that, as so reformed, it be construed and enforced. In his answer the defendant denies all the material allegations of the complaint, except the making of the memorandum in writing, a copy of which is contained in the complaint. Evidence was introduced by the plaintiffs tending to prove the alleged mistake in the memorandum in writing of the agreement between the parties, and by the defendant tending to prove that there was no mistake. Upon all the material issues the court found in favor of the plaintiffs, and decreed the reformation of the contract, and a specific performance of it as prayed in the complaint. Defendant moved for a new trial upon a statement. The motion was denied, and from the judgment, and from the order denying the motion for a new trial, defendant appeals. Everything relating to the reformation of the contract may be eliminated from the case, because the contract, as reformed, means just what it did before it was reformed. Without any reformation, it obligated the defendant as strongly to buy and pay the price specified for the land as it did the plaintiffs to sell it for that price. Appellant contends that the agreement which it is sought to have specifically performed is "an agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable," and therefore cannot be specifically performed. Civil Code, § 3390.

The contention is that the agreement to sell "forty acres of the eighty-acre tract at Biggs" is not sufficiently certain to make the precise act which is to be done clearly ascertainable. This is the only agreement in writing between the parties for the sale or purchase of any real estate; and an agreement not in writing, for the sale or purchase of real estate, is void. And the description of the property in the written agreement is so entirely uncertain as to render the instrument inoperative and void, unless we can go beyond the face of it to ascertain its meaning. Parol evidence is always admissible to explain the surrounding circumstances and situations and relation of the parties, at and immediately before the execution of the contract, in order to connect the description with the thing intended, and thereby to identify the subject-matter, and to explain all technical terms and phrases used in a local or special sense. Pom. Cont. § 152. It appears by the written agreement that the parties intended a sale and purchase of land, and that it was "forty acres of the eighty-acre tract at Biggs." If the vendors owned an 80-acre tract at Biggs we would assume that they intended to sell 40 acres of the 80-acre tract owned by them at Biggs. Evidence was introduced which tended to prove the location and description of the 80-acre tract at



Biggs, and in what part of the tract the 40 acres which the plaintiffs agreed to sell to defendant were situated. The court, in effect, found that, at the date of said agreement, one Mrs. Biggs was desirous of purchasing one-half of said 80-acre tract, i. e., the western half, upon which there were valuable improvements. She offered to pay for that half \$5,000. Plaintiffs would not accept her offer, but offered to sell the entire 80-acre tract for \$10,000. Thereupon defendant agreed with plaintiffs that, if they would sell to Mrs. Biggs the western half of said 80-acre tract for \$125 per acre, he, the defendant, would purchase the other half of said 80-acre tract, and pay \$125 per acre therefor. The finding is justified by the evidence, and there is no specification of the particulars in which the evidence is insufficient to justify that finding. The contracts to sell to Mrs. Biggs one-half of said 80-acre tract, and to the defendant the other half thereof, were made at the same time and place. We think the evidence makes the subject-matter sufficiently certain, and that is all that is necessary. Prof. Pomeroy says: "It is not strictly accurate to say that the subject-matter must be absolutely certain from the writing itself, or by reference to some other writing. The true rule is that the situation of the parties and the surrounding circumstances, when the contract was made, can be shown by parol evidence, so that the court may be placed in the position of the parties themselves; and if then the subject-matter is identified, and the terms appear reasonably certain, it is enough." Pom. Cont. p. 227. This is in consonance with the maxim, *certum est quod certum reddi potest*. The evidence clearly shows that the parties perfectly understood that the sale and purchase was not of an undivided interest of 40 acres in a tract of 80 acres, but of 40 acres in severalty. The defendant does not claim in his answer, nor in his evidence, that he intended to purchase an undivided interest in the 80-acre tract. He denies that he intended or agreed to purchase any interest whatever. Nothing is made more clear by the evidence than that Mrs. Biggs, with the full knowledge of all the parties, purchased the 40 acres of said 80-acre tract upon which the improvements were located. This is clearly specified in the written agreement between her and the plaintiffs. They agreed to sell her 40 acres, including the buildings and orchards on the 40 acres, to be taken by her where the houses and barns and orchards were at that time, and the same place on which M. Biggs, Jr., and his family were residing. This, and the agreement to sell to the defendant, were contemporaneous. The defendant, if he agreed to purchase anything, agreed to purchase the 40 acres remaining after the 40 acres purchased by Mrs. Biggs had been segregated from said 80-acre tract.

By the judgment of the court below the plaintiffs are required "to execute, duly acknowledge, and deliver to said defendant a good and sufficient deed of conveyance in fee, and free and clear of all incumbrances, the form of the same to

be settled and approved by the judge or said superior court, if the parties differ respecting it, of the following described premises, to-wit: Forty acres of land, being the eastern half of said eighty-acre tract described in said complaint, and the part thereof not heretofore conveyed to M. Biggs, Jr., said eighty-acre tract being one of the tracts into which the ranch known as 'Biggs' Upper Ranch' is divided, and upon the western half of which the dwelling-house and buildings used in connection with said ranch are situated, all being situated near Biggs, in Butte county." And it is further adjudged that, if said defendant refuse to receive said deed, the plaintiffs file the same with the clerk of the court, and that upon such delivery or filing of said conveyance the defendant pay to the plaintiffs, or their attorney, the sum of \$5,000, the purchase price named in said agreement. It is urged on behalf of defendant that said premises are incumbered, and therefore he ought not to be compelled to accept a conveyance of them. He is not compelled to accept a conveyance which does not vest in him the fee free of all incumbrances. He was once tendered a conveyance, which he did not refuse to accept on the ground that it did not convey the premises free of all incumbrances, but on the ground that he had never agreed to purchase the premises. He is amply protected by the judgment against any incumbrances, and, until he is tendered a conveyance free of all incumbrances, he is not compelled to accept it, or to pay anything to the plaintiffs. The errors of law specified are such as could not have affected the substantial rights of the parties, and therefore must be disregarded. Judgment and order affirmed.

We concur: HARRISON, J.; McFARLAND, J.; DE HAVEN, J.; GAROUTTE, J.

88 Cal. 374

WREN V. MANGAN *et al.* (No. 13,424.)

(Supreme Court of California. March 7, 1891.)

PUBLIC LANDS—"SWAMP AND OVERFLOWED"—APPLICATION TO PURCHASE.

Pol. Code Cal. § 3441, prohibits the surveyor general from approving applications, for swamp and overflowed lands, until six months after they have been segregated. Section 3443 provides that a person desiring to purchase such lands must file his affidavit that there are no settlers on the land, or, if there are, that the same have been segregated for six months. *Held*, that an application to purchase "swamp and overflowed" land is void, if made before the lands have been segregated to the state as such.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Pol. Code Cal. § 3441, provides: "The surveyor general of the state must not approve any application, nor must the register issue evidence of title, for swamp and overflowed land, until six months after the same has been segregated by authority of the United States." Section 3443 provides: "Any person desiring to purchase swamp and overflowed or tide lands above low tide must make an affidavit \* \* \* that he does not know of any valid claim to the same, other than his own, and, if the



land is swamped and overflowed, that he knows the land applied for, and the exterior bounds thereof, and knows of his own knowledge that there are no settlers thereon; or, if there are, that the land has been segregated more than six months by authority of the United States. \* \* \* Section 3445 provides: "Any person desiring to purchase lands as provided in section thirty-four hundred and forty-three of this Code, which have been segregated by authority of the United States, but which have not been sectionized by the same authority, must apply to the surveyor of the county in which the land is situated to have the land which he desires to purchase surveyed. \* \* \*

*Justine Jacobs*, for appellants. *W. B. Wallace*, for respondent.

PER CURIAM. When this cause was pending in department an opinion was prepared by Commissioner BELCHER. After hearing in bank, and due consideration of the case, we are satisfied with that opinion, and with the conclusion therein reached. The opinion is as follows:

"This action was brought to determine a contest as to the right to purchase from the state a certain half-section of swamp and overflowed land, situate in Tulare county. The trial court gave judgment for the plaintiff, from which, and from an order denying him a new trial, the defendant Hyde appeals. The material facts of the case are as follows: On the 2d day of July, 1879, the defendant Mangan filed in the state surveyor general's office his application to purchase a section of land under the law providing for the sale of swamp and overflowed lands. At that time the township, in which the section applied for was situated, had not been surveyed, and the section had not been segregated as swamp and overflowed land by authority of the United States. In 1880 the township was surveyed in the field, and on the 9th day of February, 1881, the township plat was approved by the United States surveyor general, and filed in his office. On this plat the section was marked and designated as swamp and overflowed. At the time of filing his application Mangan was qualified to purchase swamp land from the state, and the application was verified, and stated all the facts required by law for that purpose. It also had attached to it a certificate of the county surveyor that he had surveyed the section, and a certificate of the register of the United States land-office of the district in which the land was situated that there was no pre-emption, homestead, or other filing of record in his office on the said section. The application remained unacted upon until the 22d day of September, 1883, when it was approved by the surveyor general, and thereafter, on the 24th of November following, a certificate of purchase for the land was issued to Mangan. Afterwards, by mesne conveyances and assignments, defendant Hyde became the successor in interest of Mangan in the land and certificate. In February, 1888, the plaintiff settled on the north half of the section, applied for by Mangan, and on the 17th day of March following he filed in the state

surveyor general's office his application to purchase the half section so settled upon. The application was properly verified, and stated, among other things, that the land applied for was suitable for cultivation, and that there were no settlers thereon other than the applicant, and that he was an actual settler thereon. Plaintiff also filed at the same time his verified protest against the issuance of any further evidence of title to the said half-section to Mangan or his successor in interest, on the grounds that the said land was not segregated by authority of the United States until the year 1881, and that the same was suitable for cultivation, and neither Mangan nor his successor in interest had ever been a settler thereon. The contest thus raised was referred for determination to the superior court of Tulare county, and this action was thereafter commenced in proper time. As conclusions of law from the facts, the court below found, as to the plaintiff, that he was entitled to purchase the land applied for by him, and to have his application approved by the surveyor general; and as to the defendants, that the application of Mangan, and the certificate of purchase issued thereon, in so far as they relate to the lands in controversy, were illegal, null, and void, and that neither of the defendants had any right to purchase the said land, or any right, title, interest, or estate therein.

"1. The first point made for a reversal of the judgment is that the evidence was insufficient to justify the findings, that the land in controversy, and each legal subdivision thereof, was suitable for cultivation, and that the plaintiff was an actual settler thereon when he filed his application. This point cannot be sustained. It is unnecessary to recite the testimony, but, in our opinion, it was amply sufficient to establish both propositions.

"2. The only other point presented is that one seeking to purchase swamp land may make his application to purchase the same before the land is segregated to the state as swamp and overflowed by authority of the United States, and that Mangan's application was therefore not prematurely filed. But in *Garfield v. Wilson*, 74 Cal. 178, 15 Pac. Rep. 626, this court held otherwise. In that case it was said that 'since 1874 no application to purchase swamp land has been authorized until after the land has been segregated as such, by authority of the United States;' citing sections 3441, 3443, 3445, Pol. Code. That decision, if correct, and we think it is, is decisive of the question. See, also, *Tubbs v. Wilhoit*, 73 Cal. 61, 14 Pac. Rep. 361."

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

88 Cal. 262

*In re VANCE.* (No. 13,594.)

(*Supreme Court of California.* March 7, 1891.)

CONTEMPT—APPEAL.

By the provision of Code Civil Proc. Cal. § 1222, that "the judgment and orders of the court or judge, made in cases of contempt, are final and conclusive," no appeal lies from a judgment of the superior court imposing a fine of more than \$300 for contempt. Following *Tyler v. Connolly*, 65 Cal. 80, 2 Pac. Rep. 414.

In bank. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

*Amos H. Carpenter*, for appellant. *Wilson & Wilson* and *A. L. Rhodes*, for respondent.

SHARPSTEIN, J. This appeal is from a judgment in a case of contempt, and the respondent moves to dismiss the appeal on the ground that an appeal does not lie in such case, because it is provided by the Code of Civil Procedure that "the judgment and orders of the court or judge, made in cases of contempt, are final and conclusive." In *Tyler v. Connolly*, 65 Cal. 30, 2 Pac. Rep. 414, the question is carefully considered, and the conclusion reached that no appeal lies from a judgment imposing a fine of more than \$300 for a contempt of court, expressly overruling *People v. O'Neil*, 47 Cal. 109. *Tyler v. Connolly* was followed in *Sanchez v. Newman*, 70 Cal. 210, 11 Pac. Rep. 645. We see no grounds for disturbing the rule laid down in *Tyler v. Connolly*, supra. Appeal dismissed.

We concur: BEATTY, C. J.; MCFARLAND, J.; DE HAVEN, J.; GAROUTTE, J.; HARRISON, J.; PATERSON, J.

(3 Cal. Unrep. 393)

**BURKE v. BOURS et al.** (No. 13,912.)<sup>1</sup>

(Supreme Court of California. March 9, 1891.)

PURCHASE OF PRINCIPAL'S LAND BY AGENT—CONCEALMENT—ESTOPPEL.

1. An agent, having charge of certain property for an absent firm, was directed to sell it for about \$5,000, and, wishing to purchase for himself, reported his acceptance, subject to approval of an offer of \$4,500 net, and sent a deed of the property with the grantee's name omitted. The owner executed the deed, and, returning it to the agent through the firm, accepted the agent's check for \$4,500, which was the full value of the land. The agent did not understand himself to be in the owner's employ, nor that a selling agent's name could not be written in a deed as grantee without the grantor's consent, but, intending no fraud, entered into possession. Held, that the heirs of the grantor could not set up fraudulent concealment as a ground for ejectment.

2. In any event, the grantee's possession could not be attacked without tendering back the purchase money.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

*George D. Collins*, for appellant. *Jas. H. Budd*, for respondent.

FOOTE, C. This action in ejectment was instituted to recover certain real property in the city of Stockton. The cause has been here before, (67 Cal. 447, 8 Pac. Rep. 49,) and it was then decided, among other things, that a certain deed made by one Arguello (whose wife's administrator is now the plaintiff here) to Bours, the defendant, was void and of no effect to convey title from Arguello, because at the time it was executed and acknowledged the name of Bours, the intending purchaser, was not inserted in the deed, and that instrument was a blank as to any grantee. The defendant in possession set

up, in defense to the apparent legal title of the plaintiff, facts which were claimed to constitute a perfect equitable title in the former. The court below, by its findings and decision, coincided with the defendant, and rendered judgment that the plaintiff take nothing by his action, and that the defendant recover costs. From that judgment this appeal is taken upon the judgment roll, and a bill of exceptions showing such of the evidence as is necessary, upon which is based the findings and decision which are attacked. It seems to be conceded by all the contestants that the property in dispute was owned and held by Jose Arguello at the time he signed the deed. The respondents claim, however, that on the 14th day of September, 1876, Arguello agreed to, and did afterwards, sell and convey the property to defendant Bours, on the 15th day of September, 1876. The appellant takes the position that no sale or conveyance ever took place; that the deed made in blank, as to the grantee therein, by Arguello, was void; and that there was no agreement or contract on the part of Arguello to sell to the defendant Bours, and that he never did sell to him.

The basis on which the appellant argues his theory of the case is that Bours was the agent of Arguello to find a purchaser for the property in dispute; that he informed Arguello that he had found a purchaser at the price Arguello was willing to take for the property, but that he did not inform Arguello that he, the agent, was the purchaser, and therefore both the deed and the attempted purchase of Bours was void; that the court below was in error in finding, against the evidence, that Bours was not the agent of Arguello, as also in other findings respecting the "material facts of agency and notice to the principal." The facts, as disclosed by the letters in evidence, appear to be about these: Arguello was the owner of this property on the 19th of August, 1876. Bours never knew him at all, but Falkner, Bell & Co., of San Francisco, seem to have been the agents for Arguello in the collection of rents and general management of the property here involved. Upon that day they wrote to Bours, who lived at Stockton, in which place the property, as we have seen, was situated, that Arguello thought of selling his real estate in that town, and had requested them to ascertain the price it would probably realize. At that time, according to the evidence of Bours, which is not contradicted, he was looking after the property at the instance and request and as the agent of Falkner, Bell & Co., "and for nobody else," as he had been doing before Arguello purchased it for one Mazes, the seller to Arguello. After Bours took charge of the property for Mazes he was instructed by him to make his returns to Falkner, Bell & Co. After Mazes sold to Arguello, Falkner, Bell & Co. sent the deed, showing that sale, to Bours, that it might be recorded and returned to them. After that he looked after the property for Falkner, Bell & Co., who instructed him to take charge of it, pay the taxes, and make returns to them. But he never received any instructions from Arguello

<sup>1</sup> Reversed in banc. See 28 Pac. 57, 92 Cal. 108.

respecting the property, or had any communication by word or letter with him. In this state of affairs, Bours replied by letter to this inquiry of Falkner, Bell & Co., that he did not think the property would sell for over \$5,000; that the tenant of it was dissatisfied with the present rents, which he, however, declined reducing. Falkner, Bell & Co. sent this letter of Bours to Arguello, at Santa Clara. Several days after that the latter wrote to Falkner, Bell & Co. that he agreed with Bours in his opinion of the property, and requested them "to communicate with Mr. Bours, and try to sell the property at a price as near as possible to \$5,000." This letter was sent to Bours by Falkner, Bell & Co., stating that it authorized the sale of Arguello's property "at or about your figures, namely, \$5,000." Bours replied to Falkner, Bell & Co.'s letter, stating that he had ordered an abstract of title to the property to be prepared, and had "placed the same in the hands of a competent broker," and hoped soon to report a sale of it. Bours testified in this connection that Mr. Cutting, the broker in whose hands he had placed the property, had been in the real estate business for about 25 years, etc. Cutting testified that he tried for several weeks to sell the property, but could not. The purport of the letter of Bours just mentioned was communicated by letter to Arguello by Falkner, Bell & Co. At or about this time Bours wrote to Falkner, Bell & Co. that the only offer he had received for the property, free of broker's commissions or costs of deed, was \$4,500, "which offer I have accepted, subject to the approval of the owner." He inclosed in that letter a deed for signature, with name of purchaser and amount blank. The letter of Bours was sent to Arguello by Falkner, Bell & Co., with the deed for Arguello's signature, should he approve of the terms mentioned. Falkner, Bell & Co. declined to advise as to the matter, because they knew nothing of the value of the real estate, but stated that they considered Bours a competent and reliable man. Closing, they wrote: "It remains for you to decide as to the price." Falkner, Bell & Co., after receiving the deed signed and acknowledged by Arguello, with the blank filled in by him as to the amount of the purchase price, \$4,500, but the name of the grantee omitted, sent the instrument to Bours, with a letter requesting, "Please advise us when the matter is settled." After that Bours sent to Falkner, Bell & Co. a check for the amount of balance due for rents, etc., and also a check for the \$4,500 "proceeds of the sale of the property, but did not state who was the purchaser of the property." Falkner, Bell & Co. acknowledged the receipt of the checks, and stated that they had placed them to the account of Arguello. They informed Arguello of these facts by letter also. Arguello acknowledged receipt of this letter, and appeared to approve of their acts in receiving the money and putting it to his credit. About two months after this it seems that Arguello died, and about two years and eleven months after that this action was brought.

The administration of the estate of Ar-

gnello was closed, and the estate distributed, but the money paid by Bours to Falkner, Bell & Co. placed to the credit of Arguello, and known and approved by him to have been received and placed there, has never been returned, or offered to be returned, to Bours. He went into possession as soon as he got the deed, and paid his money. The evidence shows that he paid all the property was worth; that he had no intention of committing any fraud whatever. The most that can be said is that he did not understand that the law would not authorize him, as he did, to have his name inserted by one Ingalls, a clerk, in the blank deed, and that he did not understand if he was really the agent of Arguello; that he could not be agent and purchaser without Arguello knowing it, or unless afterwards, when informed of the real facts, Arguello made no objection. It is plain that what Arguello wanted was to obtain his price for the property, and that he would not have objected to Bours as a purchaser at a fair price. It is manifest from the letters, and from the acts of Arguello in signing, acknowledging, and filing in the deed with the purchase price, and the acceptance of the money after it was sent by Bours to Falkner, Bell & Co., and placed to Arguello's credit, that the latter agreed to sell this property for \$4,500 to any one who would pay that amount of money for it. It further appears from the evidence that this amount of money was the full and fair value of the property; and that the agreement made by Arguello to sell this property for the sum of \$4,500, to any one who would pay that amount for it, was partially performed by Bours paying the money therefor, and entering into possession thereof. Conceding that Bours was Arguello's agent, and had no right to sell to himself, the evidence tends to show that Arguello knew, after he received the money by the check of Bours, that the purchaser who had gone into possession was Bours, and that Arguello did not object, but ratified his agreement to sell after the disclosure of the name of the intended purchaser, who was Bours, his agent. This being the case, and the sum paid having been the full and fair price for the land, the contract is not open to objection on the ground of fraudulent concealment. Certainly it could not be avoided by Arguello or his heirs, unless they return or offer to return the money paid, which they have not done. We therefore advise the judgment be affirmed.

We concur: HAYNE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

88 Cal. 152

NOONE v. TRANSATLANTIC INS. CO. (No. 12,928.)

(Supreme Court of California. March 2, 1891.)

INSURANCE—APPLICATION—PROOF OF LOSS.

1. In an application for insurance, covenanting that the representations therein were true so far as "known to the applicant and material," plaintiff represented her building as 90 feet from

the next nearest, without knowing the exact distance to be 72 feet. *Held*, that such statement was not a warranty, although the policy provides that the application shall be considered a part thereof, "and a warranty by the assured."

2. Where the nearest notary was in the employ of the company, and refused to furnish a certificate of actual loss without fraud, as required by the policy, and the certificate was furnished by another notary, Civil Code Cal. § 2637, providing that the insured should "furnish reasonable evidence to the insurer that such refusal was not induced by any just grounds of disbelief in the facts necessary to be certified," did not require plaintiff to send, to the company, evidence that the nearest notary was in their employ.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

T. C. Van Ness, for appellant. R. M. Fitzgerald, for respondent.

BELCHER, C. This was an action upon a policy of insurance. The plaintiff had a verdict and judgment for \$3,717.50, and the defendant appeals from such judgment, and from an order denying its motion for new trial. The grounds which are relied upon for a reversal are the following:

1. It is argued that there was a breach of warranty in relation to the distance of neighboring buildings from that which was covered by the insurance. The policy contained the following provisions: "Fourth. The application and survey upon which the issuance of a policy is predicated shall be considered a part of it, and a warranty by the assured. If the assured, by a written or verbal application for insurance, or by survey, plan, or description or otherwise, makes any erroneous representations, or omits to make known any fact material to the risk, \* \* \* then, and in every such case, this policy shall be void." The application upon which the policy was issued stated that the building insured was 90 feet from other buildings, but, after answering the various questions, contained the following: "And the applicant hereby covenants that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant and material to the risk." The evidence showed very clearly that the building insured was not 90 feet from other buildings, but was somewhat under 80 feet therefrom. And in relation to this the judge instructed the jury as follows: "The defendant in this action seeks to avoid its liability under this policy upon the ground, among others, that in the application originally made the applicant stated that the building nearest to the one destroyed was ninety feet away, whereas defendant now claims that it was but seventy-two feet distant, and that there was another building only seventy-four feet away. It is for you to determine from the evidence whether the distance was or was not ninety feet. If you find it was not, it is for you to determine whether such misrepresentation was or was not material, and upon this point you must consider all the evidence relating to the

materiality of the statement. If you find that the nearest building was not ninety feet away and that this was a material statement, it rendered the policy void, and the plaintiff could not recover unless the defendant waived its right to declare the policy void." If the provisions of the policy and application taken together amounted to a warranty that the building insured was 90 feet away from other buildings, the above instruction was both erroneous and injurious to the appellant. But in our opinion, although at first view there is some want of harmony between such provisions, they do not show that there was any such warranty as is contended for by the appellant. The application first states that the building insured was 90 feet from other buildings, but concludes with a covenant or agreement that the statements therein contained are true, "so far as the same are known to the applicant." The different provisions must be read together; and, when so read, we think it clear that there was no warranty that the building insured was 90 feet from other buildings. The case of *National Bank v. Insurance Co.*, 95 U. S. 673, is precisely like this case, except that the statement which was claimed to be untrue was as to the value of the property. It is true, as claimed by the appellant, that value depends a good deal upon opinion and probability, and is not, like distance, a matter which can be accurately ascertained. But the court expressly stated that its opinion did not proceed upon such a construction of the policy. It said: "We rest the conclusion already indicated upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty." If there was no such warranty as is claimed by the appellant, the charge was more favorable than it had a right to expect, and it could not have been injured thereby. There is nothing in the evidence tending to show that the plaintiff knew exactly what the distance was. The difference between 90 feet and 74 or 72 feet is not one which the plaintiff would be apt to know; and what evidence there is on the subject tends to show that she did not know it.

2. The policy provided that the loss, if any, was "to be paid within sixty days (if this company shall so elect) after due notice and proof thereof made by the assured, and received at the office in accordance with the terms of this policy hereinafter mentioned." It also contained a provision that in case of loss the assured should forthwith give notice of such loss, "and shall also produce a certificate under the hand and seal of a magistrate or notary public, (nearest to the place, not concerned in the loss as a creditor or otherwise, nor related to the assured,) stating that he has examined the circumstances attending the loss, knows the character

and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate or notary public shall certify." In this connection it may be stated that the Civil Code has the following provision, viz.: Section 2637: "If a policy requires, by way of preliminary proof of loss, the certificate or testimony of a person other than the insured, it is sufficient for the insured to use reasonable diligence to procure it, and, in case of the refusal of such person to give it, then to furnish reasonable evidence to the insurer that such refusal was not induced by any just grounds of disbelief in the facts necessary to be certified." The plaintiff produced to the company the certificate of one Ramo to the facts required to be stated. But it is conceded that he was not the nearest magistrate or notary, and that the person who was such (one Turner) had been applied to, and had refused to give the certificate. In connection with this refusal the plaintiff introduced evidence tending to show that her attorney had informed the company's adjuster that "the reason why the certificate was not signed by Mr. Turner was that he had been engaged by the companies or had been employed by the companies to take some affidavits for them, and for that reason, as I had been informed by Mrs. Noone, he had refused to sign them." There was also evidence tending to show that a few days after the fire Turner had given instructions to have measurements taken of the distance of the building insured from other buildings. And we do not see why he should have done so, unless he was acting in the interest of the company. The inference that he was so acting is not rebutted by any evidence; and, if he was employed by the company, it was not necessary for the plaintiff to produce evidence to the company of such fact. In relation to the foregoing, the court charged the jury as follows: "Evidence has been offered to show that at the time plaintiff furnished proofs of loss to the company the attorney for plaintiff stated that the reason why the certificate attached to the proofs was not made before the nearest notary was because Mr. Turner, the nearest notary, had refused to sign it, stating to the plaintiff that he had been engaged for the company, and could not do it. It is the duty of the court to determine whether by so doing the plaintiff furnished to the company reasonable evidence that the refusal of Mr. Turner was not induced by any just grounds of disbelief in the facts necessary to be certified. If you believe this evidence, the court instructs you that the reason given to the company for not producing the certificate of Mr. Turner, the nearest notary, was sufficient, and that the certificate furnished was a sufficient compliance with the requirements of the policy as modified by the law." There may have been a slight inaccuracy in the statement of the testimony in this instruction. But, as above stated, if Turner was employed by the company to take measurements, etc., as is to be inferred from the evidence, we think that of itself was a reason why

the plaintiff was relieved of the necessity of getting his certificate to the justice of her claim, and that it was not necessary to inform the defendant of the fact. In this view there was nothing to be waived, and all that part of the case relating to waiver may be regarded as surplusage. We do not see any conflict in the instructions, or any material error in relation thereto or in the record. Our opinion is that the judgment and order denying a new trial should be affirmed.

WE CONCUR: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

(88 Cal. 277)

CALIFORNIA SOUTHERN HOTEL CO. v. RUSSELL. (No. 13,837.)

(Supreme Court of California. March 9, 1891.)

CORPORATIONS—ORGANIZATION—LIABILITY FOR SUBSCRIPTIONS.

Defendant and others agreed to organize a hotel company, with a capital of \$100,000, divided into shares of \$100 each, and that a meeting of stockholders should be called to organize the corporation and elect directors whenever \$70,000 should be subscribed, the owners of a majority of the stock to constitute a quorum. One of a firm of general agents of a railroad and steam-boat company subscribed in the company's name, without authority, "for the amount of freight on furniture and material" shipped from certain ports, \$10,000. He also subscribed in his own name a certain block "for a site for a hotel, if accepted and used for that purpose, \$7,500, and in that case, cash \$5,000." When \$77,200 was subscribed, a meeting was had, and the agent voted those shares. Held, that since the agent's personal subscription was conditional, and the other unauthorized, the shares were illegally voted, and an independent subscriber, who did not take part in the organization, was not liable for his subscription, though the railroad and steam-ship company afterwards ratified the agent's subscriptions.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

J. M. Wilcoxon, for appellant. Venable & Goodchild & Graves and Turner & Graves, for respondent.

BELCHER, C. The facts of this case are as follows: Prior to August 17, 1887, the defendant and others signed a paper by which they agreed to and with each other that they would organize and form a corporation for the purpose of erecting and owning a hotel building in the city of San Luis Obispo, and of purchasing all real and personal property necessary to be used in connection with the said building; that the capital stock of the said corporation should be \$100,000, divided into 1,000 shares, of the par value of \$100 each; that they respectively subscribed for each number of shares of the stock of the corporation as were set after their respective names, and would pay for the same, up to the par value thereof, at such times and in such manner as might be determined by the board of directors of the corporation to be thereafter chosen. The paper then contains the following clause: "And we further agree that, whenever seventy thousand (\$70,000) dollars of said

capital stock has been subscribed for, a meeting shall be called for the purpose of electing a board of directors, and taking such steps as are required by law to form the said corporation, and that at such meeting the owners of a majority of said subscribed stock shall constitute a quorum; and are authorized to elect said board of directors, and transact any business necessary to fully complete the organization of said corporation." The defendant subscribed for 10 shares of the stock, and the paper showed subscriptions in the aggregate for 772 shares. The second and third subscriptions in the list were as follows: "Pacific Coast Steam-Ship Company, for itself and Pacific Coast Railway Company, for amount of freight on furniture and material shipped from ports south of Mendocino and north of San Diego, both inclusive. (This subscription is in place of and is a substitute for any and all other subscriptions made by or for or on account of the Pacific Coast Steam-Ship Company, or the Pacific Coast Railway Company, for stock of or in any proposed hotel company since the burning of 'The Andrews,' about April, 1886. Good all, Perkins & Company, General Agents.) Estimated about —; No. shares, 100.—Amount, \$10,000." "Edwin Goodall,—the block of land bounded by Higuera, Johnson, Marsh, and Essex streets for a site for a hotel, if accepted and used for that purpose, \$7,500; and in that case cash \$5,000.—No. shares, 125.—Amount, \$12,500." Subsequently Edwin Goodall, for himself and the Pacific Coast Steam-Ship Company, united with others in calling a meeting of the subscribers. The meeting was held, and Goodall was present and voted the full amount of stock subscribed for by himself and the steam-ship company, viz., 225 shares. The result was that on August 17, 1887, a corporation was organized in the name of the plaintiff with a capital stock of \$100,000, divided into 1,000 shares, of \$100 each. The defendant was not present at the preliminary meeting, and did not acquiesce in or agree that the corporation should be formed on the subscriptions which had been made, and he never at any time recognized the validity of the corporation. The articles of incorporation included the names of the Pacific Coast Steam-Ship Company for 100 shares of stock, and of Edwin Goodall for 125 shares, without conditions, and they left out the names of 5 of the subscribers, whose aggregate subscriptions were for 50 shares. The corporation proceeded to erect a hotel building, and has since opened and conducted the same as a hotel. The board of directors of the corporation made calls for the payment of the full amount of the subscriptions, in installments of 20 per cent. each. The defendant refused to pay the amount subscribed by him, or any part thereof, and this action was brought to recover the same. The case was tried by the court without a jury, and, among other things, the court found that the "subscription of the Pacific Coast Steam-Ship Company and Pacific Coast Railway Company was made by Edwin Goodall, a member of the firm of Goodall, Perkins & Co.,

general agents for said companies, and was not authorized by said companies." Judgment was then entered that the plaintiff take nothing by its action. From that judgment the plaintiff appealed, and has brought the case here on the judgment roll.

It is claimed for appellant that judgment should have been entered in its favor on the findings. We do not think so. Under the agreement the subscription of \$70,000 was a condition precedent to the calling of a meeting and forming a corporation. And until that condition was complied with the defendant incurred no obligation to pay his subscription. *Railroad Co. v. Schwartz*, 53 Cal. 106. See, also, *Amer. Law Reg.*, No. 7, and cases cited. But it very clearly appears that the condition was not complied with for two reasons: *First*. The second subscription for \$10,000, having been made without authority, was invalid, and could not be counted in making up the \$70,000. And, if the unauthorized act was afterwards ratified, still the rights of the defendant were not thereby affected, and could not be, without his consent. *Civil Code*, § 2313. *Second*. The second and third subscriptions, amounting to \$22,500, were both conditional and not absolute. Under these circumstances, we think that the proper judgment was entered, and we advise that it be affirmed.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

88 Cal. 263

LOGAN *et al.* v. ROSE *et al.* (No. 13,922.)  
(*Supreme Court of California*. March 7, 1891.)

#### DEDICATION OF STREETS—ACCEPTANCE BY USER.

1. The owner of a tract of land platted it and conveyed the lots with reference to the plat. The plat showed that the streets were 80 feet wide, except C. street, which occupied a space 150 feet wide. A part of C. street, comprising a strip 80 feet wide, had been used as a public street for 11 years, when the owner conveyed a portion of said strip. *Held*, that there had been such an acceptance of the dedication as to the part so used, that it could not be revoked by such conveyance.

2. Where one holds lands by a deed absolute, and sells part thereof with reference to a recorded plat with streets marked upon it, parol evidence that he took the land subject to a trust, but not showing the nature thereof, is insufficient to rebut the presumption that he had authority to thus dedicate the streets to the public.

Commissioners' decision. In bank. Appeal from superior court, Butte county: PHIL W. KEYSER, Judge.

A. F. Jones, for appellants. Lewis Freer, for respondents.

FOOTE, C. This action was for damages against Rose, as road-master, and the other defendants as his employers, advisers, etc., for the removal of embankments or approaches to the plaintiffs' warehouses. At the trial, on the conclusion of the plaintiffs' case, it appeared that neither Gray, Streeter, nor Smith, three of the defendants, had anything to do with

the matter, so that a nonsuit was granted to them. After the argument and submission of the case, the court, sitting without a jury, gave judgment in favor of the defendant Rose for costs, and dismissed the plaintiffs' complaint on its merits. From the judgment, and an order denying a new trial, the plaintiffs appeal. They claimed the right to use and possess the land in controversy under a lease from the Central Pacific Railroad Company, who had derived its title by deed from Charles Crocker, and he by deed from the Contract & Finance Company. The defendants claimed that the land was dedicated to the use of the public as a street in the town of Biggs, in Butte county, before the plaintiffs obtained their lease.

The main question at issue here is whether the tenth finding of fact in reference to that dedication is sustained by the evidence. The plaintiffs claim that the street was dedicated only to the extent of 60 feet in width, but admit that if the dedicated width was of as much as 80 feet, then the judgment and order should be affirmed. The theory of the case as presented by the appellants seems to be that Charles Crocker (in whom the legal title was vested by the Contract & Finance Company on October 26, 1875) by his deed of April 28, 1886, conveying to the Central Pacific Railroad Company a strip of land 90 feet wide, which was a part of the land he acquired by his deed from the Contract & Finance Company, revoked any offer of dedication of the land in controversy as a street which had been before made, and that this revocation took place prior to any acceptance by the public of the street. There was evidence which tended to show that as early as 1870-71, there was a map made of the town of West Biggs, by the then owner of the land, upon which there were laid out blocks and streets, which last were all indicated to be 80 feet wide, except the one in controversy, here called "California Street." Between the east line of the blocks of land, as laid out, and the track of the Central Pacific Railroad, that map shows a space of 150 feet wide, in which is written the words "California Street." While the Contract & Finance Company owned land in Biggs, they made deeds to V. Bunnell, J. R. Bufington, M. Rosenberg, T. R. Fleming, of certain portions of it described as being in certain "blocks" as laid down on that map. When Crocker became the owner he made deeds of other lands so described, with reference to that map, to T. R. Fleming, Benjamin McVay, Sylvanus Shurtleff, S. Stockwell, William Bolt, and Barney Mushholt. The map as originally made contained the words, between the front of blocks on the west side of the railroad track, "California Street." A line in pencil running along the space between the front row of blocks on the west side and the railroad track, and running through the written words "California Street," indicated the street as 60 feet wide. This line was run in pencil just before the deed of Charles Crocker to the Central Pacific Railroad Company, which deed was not made until April 28, 1886, many years after the map was made, and the deeds to the

various parties to whom Mr. Crocker and the Contract & Finance Company had sold blocks or parts of blocks of land with reference to the map; the first deed of the latter having been made as early as August 18, 1873, and the earliest of the former having been May 15, 1878, the last of these deeds to individuals having been made by Mr. Crocker on October 11, 1884. The evidence introduced by the defendant tended to show that the public had used this strip marked "California Street" as a highway or street for about 15 years before the commencement of this action, to the extent of 80 feet wide, and that the encroachments removed by the defendant were upon the line of the street, taking it at 80 feet. It is apparently claimed by the plaintiffs that even if a dedication of the street at 80 feet wide had been offered by the making of the map and the sale of the land with reference thereto, when Charles Crocker, in 1886, deeded the 90-foot wide strip to the Central Pacific Railroad Company, this was a revocation of the offer, and up to that time the public had never accepted the dedication by user. It was said in *People v. Reed*, 81 Cal. 79, 22 Pac. Rep. 474: "Conceding that a platting of property and sale of lots constitutes a dedication, as between the owner and purchasers under him, of the streets delineated on the map, in order to constitute a dedication which can be taken advantage of by the public authorities of a city the offer of dedication must have been accepted by such authorities, either by user or some formal act of acceptance." And at page 80, 81 Cal., and page 477, 22 Pac. Rep., it is said: "Such acceptance must be within a reasonable time after such offer of dedication, and, if not accepted, the owner may resume the possession of the property, and thereby revoke his offer." Tested by these rules, (which seem to have been approved in *City of Eureka v. Croghan*, 81 Cal. 527,<sup>1</sup> and *City of Eureka v. Armstrong*, 83 Cal. 623, 22 Pac. Rep. 928 and 23 Pac. Rep. 1085,) it appears to us that in this case there existed a sufficient offer of dedication by the making of the map and the sale of lands with reference thereto. The user by the public for a long time prior to what is claimed to have been a revocation by the deed of Charles Crocker to the Central Pacific Railroad Company, under whom the plaintiffs claim by lease of the premises, is a sufficient acceptance of such offered dedication to make it complete before the attempted revocation, at least to the extent of a street 80 feet in width, which is enough for the purposes of this matter.

The further point is made that Charles Crocker, as trustee of the Central Pacific Company, had no authority to dedicate the land for a street. It does not appear distinctly from the record whether the Contract & Finance Company, or Mr. Crocker, first made the map, but they both sold land with reference to it, and the land was accepted by the public in using it as a street and highway as against both of them. But, in addition to this, there is nothing in the record to show any

<sup>1</sup> 22 Pac. Rep. 693.



trust expressed in the deed from the Contract & Finance Company to Crocker. On the face of the deed, it must be presumed that he took the fee-simple title to the land. Code Civil Proc. § 1105; *Mabury v. Ruiz*, 58 Cal. 11-15. There is nothing in the evidence sufficient to rebut this proposition, or to show any kind of a trust capacity which Crocker bore inconsistent with the right to dedicate the land. At the most, the parol evidence was a declaration or opinion of the witness that Crocker held the land in a trust capacity; but as to the character of that trust no evidence whatever is given. We think the evidence sufficient to sustain the finding, and advise that the judgment and order be affirmed.

I concur: VANCLIEF, C.

HAYNE, C. I concur in the conclusion.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(88 Cal. 230)

TOWNSEND V. BRIGGS. (No. 13,727.)

(Supreme Court of California. March 5, 1891.)

NEW TRIAL—DISCRETION OF COURT—INADEQUATE DAMAGES.

In an action for personal injuries, where plaintiff recovered a verdict for \$500, it was not an abuse of discretion to grant a new trial, where he was wrongfully assaulted by defendant, was then 46 years old, and in good health, and able to earn \$60 per month, and the injury inflicted resulted in the loss of his arm, and the verdict was wholly inadequate to compensate him for the damage sustained.

Commissioners' decision. Department 1. Appeal from superior court, Ventura county; B. F. WILLIAMS, Judge.

*Brousseau & Hatch*, (*Blackstock & Shepherd*, of counsel,) for appellant *Burnes & Selby* and *H. L. Poplin*, for respondent.

BELCHER, C. The plaintiff brought this action to recover damages in the sum of \$20,000 for personal injuries alleged to have been wrongfully, wantonly, and maliciously caused by the defendant. The case was tried by a jury and a verdict returned in favor of the plaintiff for \$500, on which judgment was entered. In due time the plaintiff served notice of his intention to move for a new trial upon the following grounds: "(1) Insufficiency of the evidence to justify the verdict; (2) that the verdict is against law; (3) errors in law occurring at the trial, and excepted to by the plaintiff." The notice stated that the motion would be made upon a bill of exceptions to be thereafter settled, and such a bill was thereafter settled and filed. The court granted the motion, but upon what ground does not appear, and the defendant appeals from the order. It is claimed for appellant that the bill of exceptions shows no errors in law committed at the trial, and contains no sufficient specification of the particulars in which the evidence is alleged to be insufficient to justify the verdict, and hence that the new trial was improperly granted. The bill of exceptions states that the plaintiff except-

ed to the verdict of the jury upon the ground of the insufficiency of the evidence to justify it, and it contains specifications to the effect that, as shown by the evidence, plaintiff was wrongfully assaulted and beaten by the defendant; that he was then 46 years of age, and up to that time in good health, and able to earn \$60 per month; that the injuries so inflicted resulted in the loss of his left arm, causing him great physical and mental pain, and in rendering him unable to earn his support; that "the verdict of five hundred dollars returned will not compensate plaintiff for the detriment proximately caused by said injury, and is not equivalent to the amount plaintiff will lose in one year as wages in earning capacity alone;" and that "the amount of the verdict, five hundred dollars, is wholly inadequate and insignificant as compensation for the damage sustained from said injury." We think the specification sufficient. *Du Brutz v. Jessup*, 54 Cal. 118; *Bennett v. Hobro*, 72 Cal. 178, 18 Pac. Rep. 473. The evidence showed very clearly that, without any sufficient cause, defendant struck plaintiff on the head with a mallet several times; that plaintiff was knocked down, and fell on a cutting-machine; that his left elbow joint was badly cut, and the principal arteries, veins, and nerves of the arm severed; that he had one scalp wound, an inch and a half long, cut through to the bone; that to save his life it was necessary to amputate his arm above the elbow, and that he suffered great pain both before and after the amputation. Under such a showing of the facts, the court may well have thought that \$500 was a grossly inadequate sum to compensate the plaintiff for the injuries received, and may have granted the motion on that ground. And the rule is well settled that an order granting a new trial will not be reversed on appeal, if it can be justified on any of the grounds upon which the motion was made. *Nally v. McDonald*, 77 Cal. 284, 19 Pac. Rep. 418; *Harnett v. Railroad Co.*, 78 Cal. 31, 20 Pac. Rep. 154; *Curtiss v. Starr*, 85 Cal. 376, 24 Pac. Rep. 806. We are unable to see that the court abused its discretion in granting the new trial, and we therefore advise that the order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

ADAMS V. ANDROSS. (No. 13,006.)

(Supreme Court of California. March 10, 1891.)

Department 1. Appeal from superior court, city and county of San Francisco; W. F. VAN REYNES, Judge.

*Whittemore & Sears*, for appellant. *Roger Johnson*, for respondent.

PER CURIAM. This cause was submitted without argument, and there are no briefs on file. We do not know, therefore, upon what points appellant relies for a reversal. The ruling of the court below in sustaining the demurrer appears to be right. The judgment is affirmed.



88 Cal. 273

MOORE v. MOODY. (No. 13,618.)

(Supreme Court of California. March 7, 1891.)

REVIEW ON APPEAL—SUFFICIENCY OF EVIDENCE.

A judgment depending upon a finding which is fully sustained by the evidence will not be disturbed.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; F. T. BALDWIN, Judge.

Joshua B. Webster and L. W. Elliott, for appellant. Davis & Hill, for respondent.

BELCHER, C. This is an action to recover the sum of \$450.80, balance of account, for goods alleged to have been sold and delivered by C. E. Williams & Co., plaintiff's assignors, to defendant. The answer denied all of the material averments of the complaint. The court below found upon all the issues against the plaintiff, and gave judgment for the defendant, from which, and from an order denying a new trial, plaintiff appeals. It is claimed for appellant that the findings of fact were not justified by the evidence, and that the judgment should therefore be reversed. No brief has been filed on behalf of respondent. The seventh finding reads as follows: "The said C. E. Williams & Co. did not sell to the defendant any of said merchandise, and defendant did not purchase the same, and the defendant was not at the time of the commencement of this action and is not indebted to the plaintiff in any sum." This finding, if justified, is conclusive of the case; and, after carefully reviewing the testimony brought up in the record, we think it is justified, and must be sustained. No useful purpose would be accomplished by stating the probative facts at length, and we therefore omit to do so. We advise that the judgment and order appealed from be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in foregoing opinion the judgment and order appealed from are affirmed.

88 Cal. 258

ELLEN v. LEWISON et al. (No. 13,601.)

(Supreme Court of California. March 6, 1891.)

GIFTS—AMENDMENT OF PLEADING—EVIDENCE.

1. In an action by the guardian of a person claimed to have been *non compos mentis* to recover a gift, an amendment of the complaint to allow evidence of undue influence is not a surprise entitling defendants to a continuance, if it reasonably appeared from the complaint that undue influence was relied on.

2. An objection that the court required an amendment to the answer to be filed at once is without merit, where it appears that it was easily made.

3. Where defendant in such case seeks to show that the gift was made by her father because her brother-in-law had previously stolen a large sum of money from him, evidence that a large sum was carried to her father's house is inadmissible without proof of the time it was taken there.

In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Fred. Searls and H. L. Gear, for appellants. Thos. S. Ford, for respondent.

PER CURIAM. This action was brought by the plaintiff against the defendants as the administrators of the estate of Emma J. Regil, deceased. The plaintiff obtained a verdict and judgment against the defendants in their representative capacity as prayed for, and from that judgment this appeal is taken, on the judgment roll and a bill of exceptions.

The facts set up in the complaint were, in brief, that Elle Ellen, an incompetent person, who sues by his guardian, had been induced by his daughter, Mrs. Regil, to make her a gift of \$15,850, which gift, "by reason of the premises, is utterly void, and the conversion of the said money was wrongful, and without consideration." The grounds which the plaintiff claims that he relied on to sustain his contention are that the gift was made by an incompetent person while being unduly influenced. Upon the trial, when evidence was sought to be introduced as to the fraud and undue influence claimed to have been exercised by Mrs. Regil, in her life-time, and to have induced the gift, the defendants objected that such evidence was inadmissible under the pleadings; that no such issue was tendered by the complaint; and that the only issue tendered was "that of mental incompetency to make the alleged gift." The court agreed with the defendants, and allowed the plaintiffs at once to amend the complaint, which was done in a few lines. Counsel for defendants insisted on being allowed 10 days in which to answer, but did not ask for any less number of days. The court ruled them to an immediate answer, which was made at once, and briefly, though sufficiently; and, as appears to us, this was easily done, and without any inconvenience. Whereupon they moved for a continuance on an affidavit alleging surprise, and that they must now adopt a different line of defense by reason of the amendment, and stated that they expected to be able to obtain proof upon "all of said new issues now tendered which is not now at their command," and that they needed further time, etc. The court refused to grant the continuance, and the trial proceeded, against the objection of the defendants. It is claimed that the court below was guilty of an abuse of discretion in not allowing time to file the amendment to the answer, and in refusing to grant a continuance. As to the first matter, it is plain that the amendment was easily made and filed as requested, and there certainly was no abuse of discretion in requiring this to be done. As to the other point, it is clear to us, from an inspection of the complaint, that it was the intention of the pleader to charge both that the gift was made when Elle Ellen was incompetent to make it, and also that he was induced to make it by the fraudulent acts and undue influence of Mrs. Regil. It is true that the pleading is not to be commended as a model in this respect, but we think it was sufficient. Out of abundant caution, apparently, the trial judge had the complaint amended and answered; but he was evidently of the opinion that there was no surprise sprung

upon the defendants, and we agree with him.

It is further assigned for error that the court erred in refusing to allow the witness Schaffer to testify that Ellen, since the year 1868, and before his stroke of paralysis, was in the habit of keeping large sums of money in his house, and that the witness helped Ellen to carry \$15,000 there. The purpose of this, we suppose, was to show that when Mrs. Regil, as testified to by Graham, had in the fall of 1886 upbraided her father with having willed his property to her sister, and that her sister's husband had come up to the father's place, after his attack of paralysis in the spring of that year, opened his safe, and carried "down his papers and money, and they had stolen \$21,000," that she was speaking the truth, and that Joseph Sanders, the husband of her sister, had in his account of the matter sworn falsely. The evidence on this head sought to be elicited, just alluded to, as well as that the witness had helped "Mr. Ellen to carry \$15,000 over to his house in gold coin," was not admissible, for the reason, if no other, that it does not appear at what definite time it would be shown that such money was kept or carried to Ellen's house. It might have been, for all that the evidence would have shown to the contrary, many years before the time when Sanders had gone to Ellen's house and taken away the money, as he is claimed to have done. It might have been in the year 1869, and Sanders took what money he carried to San Francisco in 1886. It is further objected that the witness was not allowed to state in contradiction of Sanders' statement (that he had taken away only about \$5,080.50 in gold coin from Ellen's safe in 1886, and that he had the money in a hand-satchel, and the books and papers in a large satchel) "that Sanders was weighed down by two large satchels, which appeared to weigh 75 pounds each." The witness had just stated, without objection, that "when Sanders went to San Francisco he had two big valises, about 18 inches in length, and a foot in diameter, and they appeared to be very heavy." This was substantially what it was proposed he should again testify to, with a guess as to the weight of the satchels added. We do not think the action of the court resulted in prejudicial error. It was proposed, with a view to lay a foundation for Sanders' impeachment, to ask him whether, in the month of July, 1887, in the presence of various parties, Mr. Ellen had not used language to him indicating that Ellen believed Sanders and his wife had taken the money of the former. We suppose that if the witnesses had declared, as was evidently expected, that such had not been the case, the defendants would have introduced evidence to show that Ellen was angry with Sanders and wife, and that the cause of this anger was his belief that they had stolen his money. Admitting that the question had been answered by Sanders in the affirmative, or that, if he had not so answered, the defendants could have shown, as they proposed, that Ellen was angry at Sanders and wife, and

because he believed that they had stolen from him, still the evidence could not have aided the defendants. There was nothing in it or the record which tended to show that Ellen had any belief as against the honesty of Sanders and wife, or anger at them on that account, except as derived from the statement of Mrs. Regil to him that they had stolen money from him. It was already proved that he was angry with them on that account, and further proof of the existence of such anger or bias would not have helped the defendants unless there was something to show that it had proceeded from some cause independent of Mrs. Regil's statements to him. So that, if the evidence was admissible, it was immaterial.

Admitting that the question put to Kruger was objectionable, yet the answers of the witness in reference to that and other questions on that line did not tend to support, but rather to negative, the counsel's theory of the plaintiff's mental incompetency, and no harm was done, nor do we think there was any misleading of the jury by the court allowing the question to be put.

McGlashan, a witness for defendants, who had testified to the check given by Ellen to Mrs. Regil, was asked this question: "Did he deliver that as his own voluntary act?" and an objection by plaintiff was sustained. Defendants then offered to prove by the witness that the check was signed and delivered voluntarily, and an objection to the offer was sustained. These rulings are assigned as reversible error. The objections were that the witness was attorney for Ellen at the time, and for that reason should not be allowed to testify; and that the testimony sought was mere expression of opinion about a matter which was for the determination of the jury, and was irrelevant, immaterial, etc. We doubt whether the question was admissible as a strict question of law. Certainly neither *People v. Sanford*, 43 Cal. 29, nor *People v. Montelth*, 73 Cal. 7, 14 Pac. Rep. 373, (relied on by appellants,) is closely in point. In the former case it was merely held proper for a witness to testify to the condition of the mind of a person at the time he made a dying declaration,—that is, "whether it was clear or confused;" and in the latter case, where there was a question as to the intoxication of the defendant, it was merely held proper for a witness to testify "what appeared to be his condition as to sobriety." But in the case at bar it was sought to prove by the opinion of the witness what the motive was which induced the third party to do a certain act, that is, whether he did the act "voluntarily." Such evidence might be admissible under peculiar circumstances, but we doubt if it was admissible in the case at bar. But if it be admitted that the court erred on this point, the error was not of sufficient importance to work a reversal of the judgment. When a case like this one has been upon the whole fairly submitted to a jury, a mere abstract error doing no injury will be disregarded. The witness McGlashan had testified very fully to the condition of Ellen's mind at the time the check was

given. He had said "that his mental condition was as sound as he ever knew him to be, as he had every opportunity of testing it; that he talked very intelligently on business matters; that he was present when the check was given to Emma Regill, about the 25th of March; that Ellen signed the check in his presence, and stated his reasons for making the gift, and he saw the check delivered to Mrs. Regill by Mr. Ellen; that others were present at the time; and that he himself drew the body of the check at Mr. Ellen's request; and [testified] to all the circumstances that occurred at the time." Now, this testimony was just as clearly to the point—and must have been so understood by the jury—that, in the opinion of the witness, the check was signed and delivered voluntarily, as if the word "voluntary" or "voluntarily," had been expressly used by the witness; and it would be an unjust thing to reverse the case because the witness was not allowed afterwards to add the word "voluntary." It is quite clear that no substantial injury was done by the ruling of the court on this point. The judgment is affirmed.

88 Cal. 184

WOODROOF *et al.* v. HOWES *et al.* (No. 13,939.)

(Supreme Court of California. March 2, 1891.)

CORPORATIONS—STOCKHOLDERS—FRAUDS OF MAJORITY—RIGHTS OF MINORITY—PLEADING.

1. A purchase of lands from a corporation by one of the directors, at one-tenth of its real value, raises a presumption of fraud against him, and he must show affirmatively that the transaction was perfectly fair.

2. The owners of a majority of the stock of a corporation, who persuade their "implements and representatives" on the board of directors to convey to them the property of the corporation for a grossly inadequate consideration, in fraud of the minority stockholders, must be held to have participated in the fraud of the directors.

3. A complaint which alleges that plaintiffs and defendants are stockholders in a corporation; that the directors are the "implements and representatives" of defendants, who own a majority of the stock; and that the directors conveyed to defendants land of the corporation at one-tenth of its real value, in fraud of the other stockholders,—states facts constituting actual fraud, and is sufficient on demurrer.

4. Defendants acquired a large tract of land, agreeing to pay the deferred purchase money in annual installments, but reserving to themselves the right to pay the whole of it "at any time before maturity." They then organized a corporation, conveyed the land to it, received stock in exchange, and agreed with the corporation to pay the unpaid purchase price of the land "at maturity." To secure the performance of this agreement, 10,000 shares of the stock issued to defendants were placed in escrow, but subsequently the corporation permitted such stock to be delivered to defendants, on condition that it should be sold by them at a specified rate, and that the proceeds, "as received," should be applied by them to the extinguishment of the debt. *Held*, that a complaint which alleges that defendants applied the cash proceeds to their own use, in violation of the conditions on which the stock was delivered to them, is not demurrable for its failure to allege that the deferred purchase price of the land had become due, as defendants had it in their power to pay at any time before maturity, and the conditions on which the stock was delivered to them made it their duty to so apply the proceeds "as received" by them.

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5. The allegation in the complaint that defendants applied the cash proceeds of the stock to their own use, and did not pay the debt, is a sufficient showing of the non-performance of their contract, as the court will not presume that some third person paid the debt, or that the corporation was substituted as the debtor on the transfer of the land to it.

6. The fact that defendants, on the sale of the stock, received only part of the purchase price in cash, and that the complaint contains no allegation that they converted to their own use the notes given for the balance, does not give rise to the presumption that they turned such notes over to the corporation in satisfaction of the agreement, as such agreement provides that the proceeds shall be applied by defendants in extinguishment of the debt to the original owners of the land, and not that they shall be turned over to the corporation.

7. The complaint is not rendered defective by its failure to allege that the corporation has paid out any money or sustained any damage by defendant's failure to perform their agreement to pay the deferred purchase price of the land, as such payment is essential to the protection of the corporation's right to the property.

8. After selling the stock, and converting the cash proceeds to their own use, defendants induced the corporation, without consideration, to assume the debt for the deferred purchase money of the land. They then purchased back the stock, which had greatly depreciated in value, and by means of their control over the corporation sold to it the stock at a price greatly exceeding its market value. *Held*, that the approval of such sale at a stockholders' meeting will not affect the rights of the minority stockholders, who did not consent thereto.

9. The right of the minority stockholders to attack these various transactions between defendants and the corporation is not affected by the fact that they are completely "executed," as such transactions were not merely beyond the powers of the corporation, but procured by the fraud of defendants, who controlled it; nor need the minority stockholders offer to place defendants *in statu quo*.

10. The fact that the stock transferred by defendants to the corporation had originally been regarded as sufficient security for the performance of defendants' agreement to pay the deferred purchase price of the land is no defense to an action for their fraudulent sale of it to the corporation, where it is shown that such stock had greatly depreciated in value in the mean time.

11. Since the directors of the corporation were only defendants' "implements and representatives," and since it was not shown that they received or had any interest in the fruits of defendants' transactions, it was not necessary to join them as defendants.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

*Wicks & Ward*, for appellants. *Wilson & Lamme*, *M. T. Allen*, and *Barclay, Wilson & Carpenter*, for respondents.

HAYNE, C. This was a suit in equity by three stockholders of the Semi-Tropic Land & Water Company for relief against certain transactions of the company with the defendants, F. C. Howes, George H. Bonebrake, and Samuel Merrill. The trial court gave final judgment for the defendants upon demurrer to the complaint, and the plaintiffs appeal. The complaint consists of 75 printed pages, and is exceedingly prolix and involved. It contains three causes of action separately stated. The demurrer was to the whole complaint and to each separate cause of action.

1. The substance of the material facts alleged in the first division of the complaint is as follows: At the period in question two of the plaintiffs and the defendants, Howes, Bonebrake, and Merrill, were stockholders of the corporation. The third plaintiff acquired his stock somewhat later than the others, but this is not material, in the view we have taken. The defendant Howes was a director of the company, and it is alleged that the other members of the board "were only nominal directors thereof for the purpose of carrying out the plans and subverting the individual interests of the defendants, Howes, Bonebrake, and Merrill, and had no interest in the management and conduct of its affairs, except as the implements and representatives of the interests and wills of defendants, Howes, Bonebrake, and Merrill." In this condition of affairs the "said board of directors, disregarding the interests and rights of all stockholders of said company other than said Howes, Bonebrake, and Merrill, and for the purpose of defrauding such stockholders, and through the connivance of said Howes, Bonebrake, and Merrill, and for the purpose of subverting the individual interests of said Howes, Bonebrake, and Merrill," sold to them for the price of \$30 per acre certain specifically described lands, which "carried with them, as incident or appurtenant thereto, their *pro rata* proportion of all the waters owned by the Semi-Tropic Land & Water Company." At the time of this transaction the land sold was worth the sum of \$300 per acre, which was known to all the parties. Subsequently the three defendants named became directors of the company, and were so at the commencement of the suit. The plaintiffs demanded that a suit be commenced in the name of the corporation; but, this demand not having been complied with, the plaintiffs brought the present suit on behalf of themselves and the other stockholders, joining the corporation as a defendant.

In addition to the foregoing facts much unnecessary matter is alleged, as, for example, the representations which the defendants made to the plaintiffs at the time the latter acquired their stock. The suit is not for relief against the contract under which they acquired said stock, and hence the representations referred to are immaterial. So, too, it is immaterial to the case stated in this division of the complaint how the corporation acquired its rights to the property, though it may be permissible to state such facts to show that the three causes of action grew out of the same set of transactions. In support of their demurrer to this part of the complaint the defendants make the following points:

(a) It is said that a main foundation of this part of the case is inadequacy of price, and that "inadequacy of price does not even raise a presumption of fraud." This may be true as to persons who do not stand in a fiduciary relation towards each other; but it is not true as to persons whose relations are fiduciary. A trustee is not ordinarily allowed to make money out of his *cestui que trust*. If he does, the presumption is against him, and he must show affirmatively that the transaction

was perfectly fair. Inadequacy of consideration in such a case is one of the facts constituting the fraud. *Golson v. Dunlap*, 73 Cal. 157, 14 Pac. Rep. 576. And it is hardly necessary to say that the relation which a director sustains to his corporation is fiduciary within the meaning of the rule. In the present case it is not necessary to consider whether the inadequacy of consideration alleged is sufficient to make a case of constructive fraud, because, as will be shown below, there are other allegations, which, in connection with the one mentioned, make a case of actual fraud.

(b) It is urged at this time Howes only was a director, that the other four constituted a majority of the board, that it is not shown that Howes took any part as director in the act complained of, and that the mere fact that the three defendants persuaded the disinterested majority of the board to do the act complained of does not amount to fraud. "Persuasion," say the learned counsel, "is never fraudulent." In one sense it may be true that persuasion is not fraudulent. In the same sense it may be said that persuasion is not theft. Yet if a man persuades his "implements and representatives" to steal, and knowingly shares the booty, he is certainly guilty of theft; and so, if he persuades his implements and representatives to commit a fraud, and knowingly takes the fruits thereof, he is guilty of fraud. In the case before us it is admitted for the purposes of the demurrer that the directors were the implements and representatives of Howes, Bonebrake, and Merrill, and acted with their "connivance," for the purpose of defrauding the other stockholders in the interest of said defendants. Such conduct was clearly fraudulent on the part of the directors; and, as said defendants connived at such fraud, and received the fruits thereof, they must be held to have participated therein.

(c) It is contended that the charges of fraud are too general. All that is necessary for the pleader to do in this regard, however, is to set forth the facts constituting the fraud in ordinary and concise language. Now, what are the facts constituting the fraud? In the first place, there is the fact of the relation of the parties, viz., that the plaintiffs and defendants were stockholders of the corporation, and that the directors were the implements and representatives of Howes, Bonebrake, and Merrill. This is set forth with sufficient particularity. It was not necessary to state the means by which said defendants induced the directors to act as their implements and representatives. It is sufficient to the case made by the complaint that they did so act. In the second place, there is the fact that the land was worth \$300 per acre, and was sold to said defendants for \$30 per acre. It was surely sufficient to allege this in terms; and the criticism made upon it does not seem to be that the fact is not stated with sufficient particularity, but that it is not true. "An allegation," say the learned counsel, "may be so absurd that not even a demurrer will admit it, and in this case the court is presumed by the counsel for

the appellants to assume that this property had increased in value from April to August, 1887, something like two thousand per cent. There are some things that even courts are presumed to know, one of which is that unimproved property in such vast tracts does not increase in value from four to five thousand per cent. per annum." The basis of this position is stated by counsel to be that the land was purchased from Howes, Bonebrake, and Merrill at \$15 per acre in April, 1887. The allegation of the complaint, however, is that it was purchased for 29,995 shares of stock of the par value of \$100 per share. It does not appear what the actual value of the stock was at said time, nor even what was the price agreed to be paid to the original owners of the property. Nor does this division of the complaint show what was the size of the tract. But, aside from all this, the value of the land at the time of the sale complained of is alleged to have been \$300 per acre. This is the allegation of a fact, and, being such, was admitted by the demurrer; and after having been so admitted its truth cannot be questioned for the purposes of the demurrer. Finally, the complaint alleges that this transfer to Howes, Bonebrake, and Merrill for one-tenth of the value of the property was made knowingly, and for the purposes of defrauding the other stockholders. In *Moss v. Riddle*, 5 Cranch, 357, Chief Justice MARSHALL says: "Fraud consists in intention, and that intention is a fact which ought to be averred, for it is the gist of the plea, and would have been traversable." The fraudulent intent or purpose, therefore, is one of the facts constituting actual fraud; and we think that an allegation of such fact in terms is sufficient. No amount of circumlocution or amplification can convey the meaning better than to say that a transfer by the directors of a corporation for one-tenth of the value of the property was for the purpose or with the intent of defrauding the stockholders. It may be necessary to add other facts. But, so far as this fact is concerned, the mode of statement is sufficient. All that the Code requires is to state the facts in ordinary and concise language.

The foregoing facts, taken together, constituted actual fraud, and were sufficiently alleged. It may be added that it was not necessary to specify the particular water-rights which were attached to the land conveyed. The several tracts were sufficiently described. And it was not material to the case to specify what rights were "carried with them as incident or appurtenant thereto."

2. The second cause of action begins by stating in detail how the corporation acquired its rights to the property, and shows, in substance, the following facts: Before the corporation was organized, Howes, Bonebrake, and Merrill had a contract of purchase from one Henry Pierce and associates for 28,414.63 acres of land for the sum of \$426,219.45. This contract was executed on October 15, 1886, and \$50,000 was paid thereon in cash. The remainder of the price was to be paid in annual installments of \$50,000 each, bearing interest at 5 per cent. per annum. But it

was provided by said contract that "said Howes, Bonebrake, and Merrill might pay the whole or any part of the purchase money at any time before maturity." It is not expressly stated when the conveyance was to be made, but the presumption from what is stated is that it was not to be made until the price was fully paid. The said defendants also acquired a smaller tract, known as the "Morse Place." But it is not necessary to dwell upon that. In February, 1887, the defendants, Howes, Bonebrake, and Merrill, caused the Semi-Tropic Land & Water Company to be incorporated, and on April 16, 1887, they conveyed to it "the properties" above referred to, and agreed to "pay off and satisfy at maturity the debts then existing against the property. \* \* \* such debts being then owing by Howes, Bonebrake, and Merrill upon the above-described land and water-rights purchased from Pierce and associates, and from Morse, on account of the unpaid purchase price of said properties." In consideration of the foregoing transfer and agreement the corporation transferred 29,995 shares of its stock; but only 19,995 were transferred directly to Howes, Bonebrake, and Merrill. The remaining 10,000 shares were transferred to one S. B. Hunt, to be held as security for the performance by said Howes, Bonebrake, and Merrill of their agreement to pay off said unpaid purchase money. After this the plaintiffs acquired their stock, and it is alleged that certain representations were made to them by defendants; but we do not consider such representations material in the case. This division of the complaint goes on to allege that "the directors of said corporation other than said Howes owned only one share of the stock of said company, and were only nominal directors thereof, and had no interest in the management and conduct of its affairs, except as the implements and representatives of the interests and wills of defendants, Howes, Bonebrake, and Merrill." In this condition of affairs it is alleged that said defendants effected an arrangement with the directors whereby the 10,000 shares held by the trustee as security for the performance by said defendants of the agreement to pay off the unpaid purchase money above mentioned was allowed to be withdrawn by them upon condition that the same should be sold at not less than \$40 per share, and the proceeds (less 5 per cent. commission) applied "as received" to the extinguishment of the debts affecting the property. The statement of this agreement or condition is somewhat loose; but the counsel for the defendants have not made any criticism upon it, but have assumed that it is a sufficient statement of the condition or agreement upon which the stock was given up to said defendants; and, following the lead of counsel, we have so assumed for the purposes of this opinion. This arrangement was made on August 27, 1887. Previously to that date Howes, Bonebrake, and Merrill had negotiated a sale of said stock at \$42.50 per share, and it was finally sold at that price, making an aggregate of \$425,000 for the 10,000 shares. Of this sum said defendants re-

ceived \$125,000 in cash on October 15, 1887. The remainder was to be paid in installments, drawing interest at 8 per cent. per annum. It does not appear whether these installments were ever paid, or what was done with the evidences of the indebtedness. Howes, Bonebrake, and Merrill did not comply with the condition upon which they obtained said stock. Prior to the receipt by them of the \$125,000 they had made the following payments on account of the purchase money of the property transferred to the company, viz., \$50,000 on the execution of the contract of purchase from Pierce and associates, \$42,000 on August 31, 1887, and \$34,800 on September 19, 1887. On the day of the receipt of the \$125,000 they made a further payment of \$29,189.48. Now, as the first three payments were made before the \$125,000 was received, it is manifest that they could not have come out of that sum. And it is expressly alleged that "all of said \$125,000 received by said Howes, Bonebrake, and Merrill, saving and excepting the said \$29,189.48, or thereabouts, has been appropriated and used by said Howes, Bonebrake, and Merrill for their own individual use and benefit, in violation of the rights of said corporation and the stockholders thereof." And it is further alleged that "no other or further sums of money than those above mentioned have ever been paid by said Howes, Bonebrake, and Merrill, or either of them, to said Pierce and associates on account of the purchase price of said premises." The plaintiffs further allege the refusal of the corporation to sue, etc., and that the suit is commenced by them on behalf of all the stockholders.

In support of their demurrer to this division of the complaint, the defendants make the following points:

(a) It is said that the sums which are admitted to have been paid on account of the purchase money on the property were sufficient to pay the first two annual installments thereof; that it is not alleged that the other installments were due at the time of the commencement of the action; and that the court will not compel the defendants to pay them before maturity. But the defendants had the privilege of paying all of such installments "at any time before maturity," and the condition on which they received the stock was that they would apply the proceeds in the way mentioned, "as received."

(b) It is said that the plaintiffs have not alleged that any installment of the purchase money remains unpaid; and that, under the rule that pleadings are to be construed against the pleader, it must be presumed that such installments have been paid, or satisfied in some collateral way. It is to be observed that it does not appear that the corporation was legally bound to pay the unpaid purchase money, although its rights would be impaired by non-payment; and it is to be further observed that Howes, Bonebrake, and Merrill were not guarantying to pay the debt of another. They were the persons—and the only persons—who were bound to pay said purchase money. They agreed with the corporation, in the first instance, that

they would pay their own debt; and in the second, that they would apply the proceeds of the stock to such payment. They did not so apply said proceeds, but converted them to their own use; and it is alleged that they did not pay the debt. This is sufficient showing of non-performance of their obligation. The court will not presume that some benevolent third person has paid the debt. And if, on the failure of the defendants to apply the proceeds of the stock to the debt, as agreed, the corporation paid it, that would not relieve said defendants from liability. Nor will the court presume that there has been any novation or accord and satisfaction by which the debt to the original owners of the property has been satisfied. If any such arrangement has been had it is matter to be set up by way of defense. The presumption against the pleader applies in certain cases; as, for example, where the pleading is silent as to an essential fact which must have occurred one way or the other, or where the language used is fairly susceptible of two constructions. But it is not carried to such an extent as to require the pleader to anticipate matters of defense, or to negative the existence of all other facts whatever. Even at common law that was not required; and much less is it required under a system where pleadings are required to be liberally construed with a view to substantial justice. Code Civil Proc. § 452.

(c) It is said that it does not appear what was done with the evidence of debt representing the balance of the proceeds of the sale of the 10,000 shares of stock; and that it must be presumed either that they were turned over to the persons to whom the debt was due, (which is sufficiently answered by what we have just said,) or that they were turned over to the corporation itself, and received by it in satisfaction of the agreement of the defendants. But such agreement was not that the proceeds of the stock were to be turned over to the corporation. They were to be applied to the extinguishment of the debt to the original owners; and the court will hardly presume that some entirely new arrangement was made.

(d) It is said that it is not shown that the corporation has paid any money on account of said debts, or that it has sustained any damage by reason of the alleged non-performance by said defendants of their agreement. But the payment of the purchase money on the original contracts of purchase is essential to the protection of the corporation's right to the property, and if said defendants have not paid said money as they agreed to do, and have converted the cash proceeds of the stock to their own use, the corporation (or a stockholder, in a proper case) has the right to come into equity to compel the defendants to perform their agreement with the corporation.

3. The third division of the complaint contains the substance of the second division, and in addition thereto shows the following facts: Of the sum due to the original owners of the property the defendants, Howes, Bonebrake, and Merrill, paid no more than \$155,989.48. But prior

to the transaction to be mentioned they had induced the board of directors to pay on account of said debt the sum of \$25,000, which, it is alleged, "was paid on account of defendants, Howes, Bonebrake, and Merrill, and at their instance and request," which, if true, entitles the corporation to recover it back. These payments left due to the original owners of the property the sum of \$272,441.63, for which said defendants were personally liable. In order to get rid of such liability, it is alleged that they induced their creatures in the board of directors to have the corporation assume the debt without consideration. The allegations in this regard are as follows: That the directors, "for the purpose of defrauding the other stockholders of said company other than said Howes, Bonebrake, and Merrill, and for the purpose of incumbering the property of said corporation with debt, without any consideration moving in favor of said corporation, or in favor of any other of the stockholders of said corporation other than said Howes, Bonebrake, and Merrill, and with the intent of relieving and releasing Howes, Bonebrake, and Merrill from their obligation to pay off and discharge the debts upon the lands and waters of said corporation, did, by connivance and collusion with said Howes, Bonebrake, and Merrill, and with their consent, and at their request and instigation," issue notes of the company to the original owners of the property in an aggregate sum of \$272,441.63, bearing interest at 7 per cent. per annum, and mortgaged the property of the corporation to secure the payment of such notes, and that "such notes were given without any consideration in favor of said corporation, or of any of the stockholders thereof other than Howes, Bonebrake, and Merrill, and solely for the benefit of Howes, Bonebrake, and Merrill, and with the intent to relieve said Howes, Bonebrake, and Merrill from their obligations to pay off and satisfy at maturity the indebtedness upon the lands and waters of said corporation, for which debts said Howes, Bonebrake, and Merrill were bound and obligated." It is further alleged that in and about the above transaction the directors unlawfully paid an attorney's fee of \$5,000, which sum "was paid for the sole benefit of defendants Howes, Bonebrake, and Merrill." The complaint goes on to allege that prior to September 20, 1888, Howes, Bonebrake, and Merrill bought up the 10,000 shares of stock which they had sold about a year previously, (the proceeds of which sale they had converted to their own use,) and sold the same to the corporation at a grossly exorbitant price,—the consideration being a credit of the \$272,444 assumed by the corporation as above set forth, the conveyance by it of \$50,000 worth of land, and the issuance of its promissory notes for the remainder of the price. In relation to this transaction it is alleged that about four months after the assumption by the corporation of the debt above mentioned it was proposed by Merrill, at a stockholders' meeting held September 20, 1888, that the corporation should buy said stock

at \$37 per share, payment to be made in the manner above stated, viz., that a credit of \$272,444 should be allowed the company for having assumed the debt of Howes, Bonebrake, and Merrill; that the company should assume a debt of \$14,440, due from said defendants on the Morse property, and another debt of \$850; that the sum of \$50,000 be paid in lands of the company, to be deeded to three trustees representing the parties to whom the 10,000 shares of stock had been formerly sold," and that "the balance of said purchase price of \$370,000 be paid in notes of the company;" that this proposal was accepted at said stockholders' meeting, and that a resolution to that effect was passed, said defendants and others voting in favor thereof; and that immediately thereafter the arrangement was carried out by the directors. It is further alleged that "such 10,000 shares of stock were then and there, at the time of such stockholders' and directors' meeting, the property of said Howes, Bonebrake, and Merrill, having been obtained by them from the former purchasers thereof," and that "at the time such stockholders' and directors' meeting was held, and such 10,000 shares of stock purchased by said corporation, the said stock was not worth in the open market, and could not have been sold for, more than \$25 per share, all of which facts were well known to said Howes, Bonebrake, and Merrill;" that all of the acts in relation to the transaction above mentioned "were done while said Howes, Bonebrake, and Merrill were the owners of a majority of the corporate stock of said corporation," and while said Bonebrake and Merrill were directors of said corporation, and "at the actual instance, request, and instigation of defendants, Howes, Bonebrake, and Merrill, and for their own personal interest and benefit," and that at said stockholders' meeting "1,910 shares of the capital stock of said corporation were not represented either in person or by proxy; that the stock of plaintiffs herein named was not represented or voted at such meeting, and that plaintiffs did not appear or ratify such action of such stockholders' meeting." It is further alleged that the corporation has paid the sum of \$17,150 as interest upon the debt assumed by it as above mentioned, and that subsequent to the transactions above set forth it has borrowed the sum of \$250,000 from a third person, and mortgaged its property to secure the payment thereof, and with the moneys so raised, and its note for \$50,000, it has paid off the debt to the original owners of the property, assumed by it as above stated. In support of their demurrer to this portion of the complaint the defendants make the following points:

(a) They renew the points as to the presumption of payment or satisfaction in some other way, made in relation to the second cause of action. These have been sufficiently considered.

(b) They urge that the corporation had power to purchase its own capital stock, and that the resolution at the stockholders' meeting was sufficient warrant for the terms of the purchase. It is not necessary



to decide upon this appeal whether the corporation had power to purchase its own stock. Such a power even would not excuse the fraud of the defendants. That they were guilty of fraud is plain, if the allegations of the complaint are true. They were personally liable for the debt to the original owners of the property, and agreed with the corporation that they would pay such debt. They obtained the stock put up as security for their performance of said agreement, upon condition that they would apply the proceeds of such stock "as received" to the extinguishment of said debt. Instead of so doing they converted the cash proceeds to their own use, leaving the debt unpaid, and induced their creatures in the board to have the corporation assume the debt without consideration. This action on the part of the board was in the interest of said defendants, "and for the purpose of defrauding the other stockholders." Such conduct on the part of the directors was unquestionably fraudulent, and the persons who instigated such fraud and reaped the fruits thereof must be held to have participated therein. In order to cover up this fraud it is alleged that they committed another. About four months after the assumption of the debt by the corporation as above set forth, they bought up the 10,000 shares of stock which they had sold a year previously at \$42.50 per share, (the cash proceeds of which they had converted to their own use,) and by means of their control over the corporation sold said stock to it at \$37 per share,—it then being worth only \$25 per share. At this time Bonebrake and Merrill were in the board, and the other directors were the mere creatures of the three defendants. We do not think that any argument is required to show that this transaction was fraudulent. It certainly does not help the fraud first mentioned. Nor is the resolution at the stockholders' meeting of any consequence; for, since the defendants held a majority of the stock and voted at the meeting, they controlled the meeting, and the resolution was in effect but their formal consent to their own fraud. It cannot affect the rights of the stockholders who did not consent.

(c) It is urged that the transaction was "executed," and therefore cannot be disturbed. But, whatever color of force this might have, if the objection was merely that the transaction was *ultra vires*, it has no application to a case where there is fraud.

(d) It is objected that there was no offer to place Howes, Bonebrake, and Merrill *in statu quo*. But the suit is not for a rescission of the contract whereby the plaintiffs acquired their stock, and therefore no such action on their part was required. So far as the 10,000 shares sold to the corporation are concerned, it is sufficient to say that, aside from any other reason, the three defendants constitute a majority of the board, and must be presumed to have control of such stock. So far as concerns the \$300,000 evidences of debt (the balance of the proceeds of the first sale of the 10,000 shares of stock) which the counsel say "have vanished from view," it is sufficient

to say that, aside from any other reason, such evidences of debt are not shown to have ever come to the possession of the corporation. If they did, it must be under the control of the defendants.

(e) It is argued that, if the theory of the plaintiffs be correct, the result is that the original contract of Howes, Bonebrake, and Merrill is still in force, and that it must be presumed that they will perform it; that is to say, it must be presumed that they will pay off the debts to the original owners of the property. As the corporation has mortgaged its property to raise money to pay off such debts, and has actually paid them off, this position is somewhat singular.

(f) It is said that "the whole effect of the transaction mentioned has been that the corporation is vested with a perfect title to the identical stock which it originally regarded as sufficient collateral, and taken by the corporation at a sum far less than the amount of the indebtedness to which it was originally regarded as a sufficient security. There is no damage shown, and there could be no action without damage." That is to say, that because the corporation originally regarded the 10,000 shares of stock as sufficient security for the performance of the defendants' agreement, they could sell the stock at \$42.50 per share, and convert the cash proceeds to their own use in direct violation of their agreement to apply it to the debt affecting the corporation's property, and about a year afterwards buy up the same stock, and by fraudulent means induce the corporation to purchase it at \$37 per share when it was only worth \$25 per share in the market, and then say to the other stockholders: "Well, the corporation has the stock, which it originally regarded as sufficient collateral. How is it injured?"

(g) It is said that "all the parties have permitted the transaction to rest for more than a year, and that to permit a rescission would be to do a violence to every principle of law and equity." But we do not think that the doctrine of laches applies.

4. The demurrer takes the ground that there is a defect of parties defendant, a misjoinder of parties, and a misjoinder of causes of action. The first ground is the only one which is argued. It is said that the other members of the board of directors should have been joined as defendants. So far as the corporation's interests are concerned, it is itself a defendant. As to the rest, Howes, Bonebrake, and Merrill are the only persons interested in the transactions complained of. The other directors were only their "implements and representatives," and are not shown to have received or to have any interest in the fruits of said transactions. It was not necessary to join them as defendants. The other grounds mentioned have not been argued. The fact that there was a demurrer on these grounds is mentioned in the statement of facts; but there is not a word of argument in either of the briefs for respondents in relation to the grounds, or anything to give rise to the inference that they are relied upon. Under these circumstances, the grounds mentioned should be considered as waived.



5. We do not think that it is necessary for the court to determine at this stage of the case the precise measure of equitable relief to be awarded. A court of equity molds its relief according to the particular circumstances of the case. *Heinlen v. Martin*, 53 Cal. 342, 343. And it is better to reserve the question mentioned until all the circumstances shall have been disclosed by the evidence. It is sufficient for the disposition of the demurrer to say that in our opinion each division of the complaint states a cause of action, and requires an answer to the charges made. We therefore advise that the judgment be reversed, and the cause remanded, with directions to overrule the demurrer, with leave to the defendants to answer.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to overrule the demurrer, with leave to the defendants to answer.

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WOODY *et al.* v. BENNETT *et al.* (No. 14,070.)

(Supreme Court of California. March 6, 1891.)

SALES—BREACH OF WARRANTY—DAMAGES—EVIDENCE.

1. Defendants sold plaintiffs a horse, and agreed to exchange him for any other horse they might have, if certain blemishes, which they guaranteed would disappear on the use of proper remedies, did not do so. *Held* that, in an action for breach of the contract in that the blemishes did not disappear, evidence of the expenses of plaintiffs in treating them is admissible to show their good faith.

2. In such case, evidence of the amount paid for the horse is admissible on the question of damages.

3. It is competent on the question of damages to show how the blemishes affected the value of the horse.

4. Where defendants told plaintiffs to use any ordinary simple remedies, they cannot show by a witness that the blemishes could have been removed by use of a remedy known only to himself.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

J. M. Damron and Charles G. Lamberton, for appellants. Davis & Allen, for respondents.

HAYNE, C. The defendants sold and delivered to the plaintiffs a stallion called "Lord Roxbury," for the sum of \$3,000, and gave to them the following contract: "Tulare, Cal., Feb. 7, 1887. This is to certify that we, E. Bennett & Son, have this day sold Lord Roxbury (1) to J. H. Woody, James Twaddle, I. N. Wright & Irwin Brothers, and we guaranty that the two small thickens on the hocks shall go off if said parties use proper applications and rubbing, and, in the case said bunches do not disappear, we will exchange with said parties for any horse of the same price we may have. E. BENNETT & SON." The plaintiffs gave evidence tending to show that they used the applications recommended by the defendants, but

that the bunches were hereditary and irremovable. On these points the evidence is conflicting. But there is no dispute about the fact that the bunches did not disappear. And after a time the plaintiffs requested that an exchange be made for another horse, as provided by the contract. The defendants at first expressed a willingness to make the exchange, and the plaintiffs thereupon selected a horse called Lord Roxbury, Second, then in Kansas. But, after some correspondence on the subject, the defendants annexed a condition to the right of exchange, which will be considered below. The plaintiffs thereupon brought the present action. The jury found a verdict in their favor for \$1,500, and the defendants appealed.

We are somewhat inclined to think that the contract contains two separate and distinct undertakings, viz.: (1) That the blemishes should disappear if proper treatment was used, and (2) that if they did not disappear the defendants would exchange the horse for another of the same price; and that, since the undertakings were separate, it was not necessary to an action on the first to show that plaintiffs had offered to exchange, and not necessary to an action on the second to show that proper treatment was used. But we shall assume in favor of the defendants that it was necessary to any recovery by plaintiffs that they should show both that they had used proper treatment, and that they had made a proper offer to exchange.

1. There was evidence tending to show that the defendants told the plaintiffs "to use on these bunches any ordinary simple remedies that is usually used for that purpose," and that the plaintiffs used remedies which were ordinarily used for such purpose, and afterwards employed a veterinary. There was evidence contradicting the foregoing. But at this stage of the case the evidence in support of the verdict must be presumed to be true, and if true it was sufficient. It must be taken to be the fact, therefore, that the plaintiffs used proper treatment.

2. It is argued that in their letter announcing their selection of another horse (then in Kansas) the plaintiffs made it a condition that he "should arrive all right" at Tulare, and that they had no right to impose such a condition. It might, perhaps, be suggested in this connection that the defendants' senior partner admitted on the stand that it was his understanding that the exchange should be made at Tulare. But it is not necessary to express an opinion upon the merit of the above contention, for the reason that after some correspondence the defendants refused to consent to any exchange, except upon a condition which was entirely unwarranted. In a letter to the attorney in whose hands the plaintiffs had placed their claim, the defendants' senior partner says: "We are ready and willing to change, but those parties must take the imported English coach mare that we imported expressly for them, on their order, at \$2,000. That was the price I told them she would cost them delivered at Tulare, and they ordered us to bring her at that price. We are ready and willing to live

up to our contract on the horse, and they must do the same on the mare; or, if they do not want to take the mare, they must relieve us from the contract to exchange the horse." And in his final letter on the subject he says: "We will most willingly exchange, but remember we will send the mare with the horse." Now, even if it were assumed that the defendants could make the performance by plaintiffs of a separate and distinct contract a condition of the right of exchange, the fact was that there was no contract on the part of the plaintiffs in reference to a mare, and this was admitted at the trial. This conduct on the part of the defendants amounted to a refusal to comply with their contract, and superseded any question as to the place of delivery of the new horse.

3. The evidence justifies the amount of damages awarded. There was evidence tending to show that the plaintiffs purchased the stallion for breeding purposes, and that the defendants knew this; that without the blemishes mentioned he was worth the sum paid for him, viz., \$3,000; but that the blemishes were hereditary, and injured his value for breeding purposes, and that with them he was worth under \$500. A foundation was laid for this evidence in the complaint, and we think that it was admissible, and sufficient to justify the verdict.

4. There are several other matters which may be briefly disposed of:

(a) It was not error to admit evidence of the expenses incurred by the plaintiffs in treating the horse's legs. It was expressly stated by the court that such evidence was not admitted for the purpose of increasing the damages, but only for the purpose of showing an effort in good faith to remove the blemishes.

(b) There was no attempt to alter or add to the written contract by parol. The conversations proven bore upon the condition and value of the horse at the time he was sold.

(c) The evidence as to what plaintiffs paid for the horse was admissible upon the question of damages.

(d) It was proper to prove that the blemishes affected the horse's success for breeding purposes.

(e) Evidence as to the nature of the blemishes, their cause and probable duration, had relation to his value, and consequently was admissible on the question of damages.

(f) The defendants having told the plaintiffs to use any ordinary, simple remedies, and the plaintiffs having done so, it was immaterial whether the witness Dickenson thought he could have removed the blemishes by some remedies known only to himself.

(g) The evidence of the witness Edwards was more favorable to the defendants than otherwise.

(h) The instruction as to the propriety of the remedies recommended by the defendants was proper. (See first head of this opinion.)

(i) Evidence of readiness to make the exchange in Kansas was irrelevant, for the reasons stated in the second head of this opinion. We therefore advise that the

judgment and order appealed from be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

88 Cal. 231

*Ex parte* VANCE. (No. 20,812.)

*Ex parte* CARPENTER. (No. 20,811.)

(Supreme Court of California. March 14, 1891.)

CONTEMPT—WHAT CONSTITUTES—ADVICE OF ATTORNEY.

1. A defendant who interferes with the possession of plaintiff's tenant by driving his cattle from the land, and offering to lease to another, when a decree prohibits him or his attorneys from entering upon the land, or interfering with plaintiffs or their tenants in the possession, control, or ownership thereof, is guilty of contempt of court.

2. In such case, defendant's attorney is guilty of contempt in advising such interference.

In bank. Applications for *habeas corpus*. C. H. Clement, for petitioners. A. L. Rhodes and Geo. Lezinsky, for respondent.

PER CURIAM. These two proceedings were heard on Monday, March 9, 1891, on returns of the sheriff of Sacramento county to the writs of *habeas corpus*. The conclusions of this court, remanding the petitioners to the custody of said sheriff, were on the same day announced; but through some inadvertence the proper orders were not delivered to the clerk, and were therefore not entered by him. The petitioners are in custody by virtue of an order of the superior court of Sacramento county,—Judge A. P. CATLIN, presiding,—punishing them for contempt, which consisted in violating a decree rendered in said court—ex-Judge J. W. ARMSTRONG then presiding—in a certain action in that court entitled "James C. Pennie, Administrator, et al. vs. Sebastian Fisher et al." The petitioner, Vance, was a party defendant in that action, and the decree enjoined and restrained him, and his agents, attorneys, employees, etc., from entering upon any of the lands described in the complaint therein, and from interfering with the plaintiffs in said action or either of them, or their tenants, grantees, or agents in the possession, control, or ownership, of such lands. The other petitioner, Carpenter, was Vance's attorney in said action. The findings of the superior court in the contempt matters are very full, and show that the petitioner Vance violated the decree by interfering with the possession of one Evans, who was a lessee of plaintiffs of part of said lands, by preventing the sheep of said Evans from grazing on said land and driving them away from said land, and assisting in the building of a fence on said land to prevent the grazing of said sheep thereon, and offering to lease said land in opposition to the lease thereof given by the successors in interest of the plaintiffs in said action; and that the other petitioner, Carpenter, had counseled and advised with and aided

and abetted said Vance in so interfering with the said tenancy and occupation of said Evans. All the other facts necessary to the validity of said order punishing for contempt are fully found. We see nothing in the contention that the court had not jurisdiction in the said action of Pennie v. Fisher, and there is no reason why the petitioners should be discharged. Let an order be entered in each of said proceedings in *habeas corpus* that the petitioner be remanded to the custody of the sheriff of Sacramento county, and that the proceedings be dismissed.

88 Cal. 294

PEERS *et al.* v. McLAUGHLIN *et al.* (No. 13,196.)

(Supreme Court of California. March 18, 1891.)

EQUITABLE MORTGAGE—MINORS.

Where a father, for himself, and as guardian for his minor children, purchases land, and takes a deed to himself and them, agreeing to give a mortgage for the purchase money, the mortgage is good in equity against the minors, who appear by guardian *ad litem*, and do not disclaim the title to the land vested in them.

Department 2. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

*Chase & Chase* and *C. Y. Brown*, for appellants. *J. B. Reinstein* and *J. M. Seawell*, for respondents.

DE HAVEN, J. The court below adjudged that defendant Thomas McLaughlin is indebted to the plaintiffs in the sum of \$1,615.24, and that said indebtedness is a lien upon the land described in the complaint, and directed that it be sold to satisfy said lien. All of the defendants appeal from this judgment. There is no bill of exceptions in the record. The findings show the following facts: The defendants John Thomas Edward McLaughlin and Margaret McLaughlin are the minor children of the defendant Thomas McLaughlin. In March, 1884, the plaintiffs and the defendant Thomas McLaughlin made an agreement, the plaintiffs to convey to said Thomas McLaughlin and his said minor children the land described in the complaint for the sum of \$2,500, and at the same time the defendant Thomas McLaughlin paid to plaintiffs on account of said purchase the sum of \$1,300, and the balance of \$1,200 was to be paid October 1, 1884. On October 10th following this balance was still unpaid, and it was then agreed between plaintiffs and the defendant Thomas McLaughlin, "for himself and his said children, \* \* \* that plaintiffs should execute a deed \* \* \* of said \* \* \* land to Thomas McLaughlin and his said children, and that the said balance of said purchase price \* \* \* should be secured by a mortgage upon said lot of land." Thereupon plaintiffs conveyed said land to the defendant McLaughlin and his said minor children, at the same time receiving back a note for \$1,200 and a mortgage to secure it upon the land conveyed. The mortgage recited that "Thomas McLaughlin, John Thomas Edward McLaughlin, and Margaret Mc-

Laughlin" are parties thereto of the first part, and was signed: "THOMAS McLAUGHLIN, [Seal.] THOMAS McLAUGHLIN, [Seal.] Guardian of the persons and estate of John Thomas Edward McLaughlin and Margaret McLaughlin, minors." The note was also signed by Thomas McLaughlin for himself, and also below as guardian for the said minors. The court further finds "that said deed and mortgage were drawn by one Oliver Walcott, an attorney at law, who represented to said plaintiffs that said mortgage was sufficient to create a lien for said sum of \$1,200 upon the interests of said children, as well as upon the interest of said Thomas McLaughlin in said lot of land, and that said plaintiffs, when they executed said deed and received mortgage, believed that said mortgage was sufficient and effective" for that purpose. It is claimed by the defendant minors that the judgment is erroneous, in so far as it makes the said indebtedness of the defendant Thomas McLaughlin alien upon their interest in the land so conveyed to them. There is nothing in the case showing that any portion of the money paid by the defendant Thomas McLaughlin belonged to said minors, or whether he was or was not in fact the guardian of their estates.

We are of the opinion that, upon the facts appearing here, the mortgage referred to may be enforced as an equitable mortgage upon the whole land, and whatever interest the defendant minors may have acquired therein by virtue of the deed referred to is subject to its lien. The principle is well settled in equity that a mortgage defectively executed, or an imperfect attempt to create a mortgage upon specific property for the purpose of securing a debt, will create a specific lien upon the property so intended to be mortgaged. *Daggett v. Rankin*, 31 Cal. 327; *Love v. Mining Co.*, 32 Cal. 652. In *Remington v. Higgins*, 54 Cal. 620, which was an action against husband and wife, the facts were that the husband bargained for land, agreeing that a mortgage should be given to secure the purchase price, and at his request the deed was made to his wife, and she executed the mortgage. This mortgage was, however, invalid, because, by the conveyance to the wife, the property became community property, and as such was not subject to mortgage by the wife. In dealing with that state of facts, the court uses this language: "Admitting that the transaction did not create a mortgage in law, and not deciding but that plaintiff may have waived his lien of a vendor, we are of the opinion that plaintiff has a lien upon the premises by way of equitable mortgage to recover the unpaid portion of the purchase money and interest. The husband, in bargaining for the premises, agreed that a mortgage should be given. A paper was executed in pursuance of that agreement, which was supposed by the parties to have accomplished that object. It now appears that that paper is invalid as a mortgage. Equity will treat that as done which the parties agreed to have been done." So in this case the father agreed that the balance of the purchase price

should be secured by a mortgage of the land conveyed and we presume that the one under consideration was executed by him in good faith to carry out that agreement, and the court below finds that the plaintiffs accepted it under the belief that it was a valid lien upon the whole land they were conveying, and it was because the plaintiffs so relied upon it that the defendants were enabled to acquire any interest in the land. We have not overlooked the fact that in all the cases above cited the persons against whom the imperfect instrument was enforced had the capacity to make a valid contract, while by the judgment here it is the land of minors who were and are incapable of contracting for land, and, in a general sense, of ratifying such a contract against which this mortgage is enforced. But this fact ought not, under the circumstances here disclosed, to prevent the application of the equitable rule which lays at the foundation of these cases. It must be borne in mind also that the agreement of the father and his assumed agency in accepting a deed in pursuance of the agreement is the source or foundation of all the right, legal or equitable, which these minors have in the land. The deed was made to them solely by direction of the father. That was the form which the transaction took, and in equity the agreement that the purchase price should be secured by a mortgage upon the land the conveyance and the mortgage must be regarded as one transaction, and no person, whether minor or adult, can be permitted to adopt that part of an entire transaction which is beneficial and reject its burdens. This commanding principle of justice is so well established that it has become one of the maxims of the law. The father acted for the children, and they must either accept or repudiate the entire contract which he made. They cannot retain its fruits and at the same time deny its obligations. "A party cannot apply to his own use that part of the transaction which may bring to him a benefit, and repudiate the other, which may not be to his interest to fulfill. Thus it has been held that an infant cannot avoid a mortgage and affirm a deed, when both are made at one and the same time, relate to the same property, and go to make up one transaction. If the mortgage be avoided under the plea of infancy, the deed becomes of no effect." *Heath v. West*, 28 N. H. 108. In this case the minors are before the court, and have filed an answer by their guardian *ad litem*. They have not disclaimed the title vested in them by the deed procured under the circumstances stated, but seek to defeat the lien of plaintiff's mortgage, so far as their title is concerned, by the plea "that they have not ratified any contract relating to the sale of said lot, and that they are incapable of ratifying the same." But what the rules of equity would not permit them to do if they had attained their majority they cannot be permitted to do now through their guardian *ad litem*. Judgment affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

# JONES v. WOOLLEY et al.

(Supreme Court of Idaho. March 16, 1891.)  
CONTRACT OF CORPORATION—LIABILITIES OF STOCKHOLDERS.

The following instrument in writing was issued by the president and manager of a corporation: "Montpelier, Idaho, April 29, 1884. Be it known by these presents, that I, as manager and president of this institution, do agree to refund to Jacob Jones the sum of \$928 80-100 dollars at one year's notice from date of said notice. It is the understanding that this money shall draw what interest it makes in proportion to all the shares in the institution. [Signed] H. S. WOOLLEY." Held, that it was the obligation of the corporation, and that an action could be maintained thereon by the payee named therein against the stockholder under section 2609 of the Revised Statutes of Idaho.

(Syllabus by the Court.)

Appeal from district court, Bear Lake county.

Smith & Smith, for appellant. R. S. Spence, Kimball & White, and Hawley & Reeves, for respondents.

HUSTON, J. This is an action instituted by the plaintiff against the defendant and several others as stockholders in "The Montpelier Co-operative Institution," alleged to be organized and existing under the laws of Idaho territory, under the provisions of section 2609 of the Revised Statutes. The answer denies any indebtedness by the defendant. Certain other defenses set up in the answer were stricken out on demurrer. The action is based upon a paper writing, as follows: "Montpelier, Idaho, April, 29, 1884. Be it known by these presents, that I, as manager and president of this institution, do agree to refund to Jacob Jones the sum of \$928 80-100 dollars at one year's notice from date of said notice. It is the understanding that this money shall draw what interest it makes in proportion to all the shares in the institution. [Signed] H. S. WOOLLEY." Upon the trial the above paper was introduced, its execution proven, as was also the giving of the notice provided for therein, and the plaintiff then rested. Thereupon the defendant moved for a nonsuit, which was granted by the court. We are left to conjecture upon what principle of law, equity, or justice the court based its decision, as no reason is given in the record. The whole defense seems to be based upon the construction of the paper copied above, and this court is presented with a lengthy dissertation upon the word "refund," as defined by the various lexicographers. No attempt is made to disprove the paper or its contents, or to do away with the plain and palpable obligation to repay the money borrowed or received, upon compliance with the conditions prescribed in the paper writing. It is claimed by the defendant that "the instrument in question is a *prima facie* certificate of stock." An inspection of the paper is all that is necessary to show the absurdity of this proposition. In support of this latter contention the counsel of respondent cites *Daniel, Neg. Inst.* (8d Ed.) § 406, and *Blanchard v. Kaull*, 44 Cal. 440. A careful examination of these authorities fails to develop anything in support of the position of the respondent.

On the contrary, they militate strongly against such a view; nor is this position supported by the authority quoted from Thompson on Liability of Stockholders. The paper writing does not make the plaintiff a stockholder in any sense. While the provision that "it is the understanding that this money shall draw what interest it makes in proportion to all shares in the institution" may have been intended by its author to place the plaintiff in the unfortunate position of a stockholder, the object fails when tested by the plain rules of justice, unaided by revelation. The corporation had the money of the plaintiff. They gave their legal written obligation to pay it, and, as the answering defendants appear from the evidence to have absorbed the assets of the corporation, it is only simple justice that they should "refund" their proportion of the money so received. The objection of respondent to the consideration of the evidence, which appears in the transcript by this court, we do not think is well taken. The evidence appears in the bill of exceptions, which was prepared, settled, and served in due time, and is properly before us. Judgment of the court below reversed, and cause remanded for new trial.

SULLIVAN, C. J., and MORGAN, J., concur.

(3 Idaho [Habb.] 7)

GOODNIGHT v. MOODY, Auditor.

(Supreme Court of Idaho. Feb. Term, 1891.)

STATE LEGISLATURE—COMPENSATION—MANDAMUS.

1. Section 8, art. 3, of the constitution, designates the different sessions of the state legislature, as follows: *First*, the first session; *second*, sessions to be held biennially after the first session, commencing on the first Monday after the 1st day of January, and every second year thereafter; *third*, sessions convened by the governor.

2. The first paragraph of section 23, art. 3, of the constitution, applies to the regular or biennial sessions only as to the *per diem* compensation of members, and the aggregate of *per diem* allowances.

3. The second paragraph of said section 23 fixes the *per diem* of each member, except the presiding officers, for the first session of said legislature and for sessions convened by the governor, and does not limit the aggregate *per diem* allowances for said first session.

4. A writ of mandate will issue to compel the state auditor to issue his warrant to pay the *per diem* of each member for each day's attendance upon the first session of said legislature, regardless of whether such member has already received, in the aggregate, \$300 for *per diem* allowances for said first session or not. HUSTON, J., dissenting.

(Syllabus by the Court.)

Application for writ of mandate.

Littleton Price and T. J. Jones, for applicant. George H. Roberts, Atty. Gen., for defendant.

SULLIVAN, C. J. On the 23d day of February, 1891, J. L. Goodnight, the plaintiff, made his application to this court for a writ of mandate to the Hon. Silas W. Moody, auditor of the state of Idaho, commanding said auditor to issue his warrant upon the state treasurer for the sum of five dollars, in payment of the *per diem* for the applicant's attendance as a

member of the house of representatives of the state of Idaho for the 21st day of February, 1891. The facts stated in said application are substantially as follows: That said applicant was, on the 1st day of October, 1890, duly elected as a member of the house of representatives of the legislature of the state of Idaho from the county of Nez Perces, state aforesaid, for the term of two years; that on the 8th day of December, 1890, he duly qualified as such representative, and that ever since said 8th day of December he has been, and now is, a duly-qualified and acting member of the house of representatives of said Idaho legislature for the county aforesaid; that on said 8th day of December the legislature of the state of Idaho was convened in its first session by a proclamation of the governor, and began its duties under and by virtue of said proclamation and the constitution of the state of Idaho, and remained in continuous session from said 8th day of December, 1890, to the 20th day of December, 1890, at which last-mentioned date said legislature adjourned to the 5th day of January, 1891, and on said 5th day of January reconvened, and remained in continuous session since said 5th day of January; that on the 21st day of February, A. D. 1891, the said legislature was in lawful session at the capitol of the state, and that the applicant, as a member thereof, as aforesaid, was present and attended the session on that day, and performed all duties required to be performed by him as such member by the laws and constitution of the state of Idaho: that there was due and payable to said applicant from the state of Idaho for said day's services the sum of five dollars; that on said 21st day of February, Hon. Frank A. Fenn was the duly elected, qualified, and acting speaker of said house of representatives, and as such speaker made out and delivered to the applicant his certificate, in due form of law, showing and certifying that the applicant had attended said day's session of the house of representatives aforesaid, and was entitled to the sum of five dollars for said day's services; that the defendant, Silas W. Moody, is the duly elected, qualified, and acting auditor of the state of Idaho, and that it is the duty of the said auditor to issue warrants to all members of the said legislature for their *per diem* for attendance for each day that the members of said legislature are legally entitled thereto; that there is a lawful appropriation of funds in the state treasury for the payment of the *per diem* of all members of the legislature for said day; that on the 21st day of February, 1891, the applicant presented to said auditor, at his office in Boise City, Idaho, the said certificate of the said speaker of the house of representatives, issued to the applicant as aforesaid, and the applicant then and there requested and demanded that he, the said state auditor, issue to the applicant a state warrant on the state treasury of the state of Idaho for the sum of five dollars, the amount due the applicant for the services rendered by him, as aforesaid, on the 21st day of February, A. D. 1891; that the said Hon. Silas W. Moody refused without any just

cause to issue and deliver to the applicant his warrant on the treasury of the state of Idaho, as by law it was his duty to do, and that said auditor still refuses, although often requested so to do, to issue and deliver to the applicant an Idaho state warrant for said sum of five dollars; that said Hon. Silas W. Moody, auditor, as aforesaid, stated as his reason for refusing to issue the warrant aforesaid that the applicant, J. L. Goodnight, had heretofore been paid the sum of three hundred dollars as *per diem*, in state warrants, as representative in the first session of the legislature of the state of Idaho, the same being the sum limited by the constitution of the state of Idaho. The applicant prays that a writ of mandate issue to compel the said auditor to issue to the applicant his warrant, in due form of law, upon the state treasurer, for the sum of five dollars, in payment of the *per diem* provided by law for his attendance as a member of the house of representatives of the state of Idaho for the 21st day of February, A. D. 1891. The defendant, Hon. Silas W. Moody, interposes his demurrer to said application, and alleges as the ground thereof that said application does not state facts sufficient to constitute a cause of action against him. This cause came on for hearing upon said demurrer. The defendant, by his demurrer, admits the facts set up in the application to be true. It is therefore admitted that the defendant refused to issue his warrant to the plaintiff, for the reason that said plaintiff had theretofore been paid the sum of \$300 for *per diem* allowances as a member of the state legislature of Idaho for the first session thereof; that being the sum to which each member is limited for *per diem* allowances by the constitution. If it be true that the constitution limits the *per diem* of each member of the legislature to \$300 for the first session thereof, then the writ of mandate should not issue; but if the constitution does not limit the aggregate amount which each member shall receive at this session for *per diem* allowances, the writ should issue.

To determine the question involved we must turn to the constitution. Section 8, art. 3, of the constitution is as follows: "The sessions of the legislature shall, after the first session thereof, be held biennially at the capitol of the state, commencing on the first Monday after the first day of January, and every second year thereafter, unless a different day shall have been appointed by law, and at other times when convened by the governor." This section mentions the first session of the legislature, the sessions to be held biennially after the first session, and sessions convened by the governor. The first session of the legislature is the session provided for by section 14, art. 21, of the constitution. This section directs the governor of the state, immediately upon his qualifying and entering upon the duties of his office, to issue a proclamation convening the legislature of the state at the seat of government on a day to be named in said proclamation, which shall not be less than 30 nor more than 60 days after the date of said proclamation. The

biennial sessions are those fixed by said eighth section of the constitution to be held at the capitol of the state, commencing on the first Monday after the 1st day of January, biennially, after the first session, and every second year thereafter. The other sessions of the legislature referred to in section 8 are those convened by the governor. The last-mentioned sessions are those referred to in section 9, art. 4, of the constitution, which section empowers the governor, on extraordinary occasions, to convene the legislature by proclamation. The present session of the legislature is the session designated in said section 8 of the constitution as the "first session." Section 23, art. 3, of the constitution, among other things, fixes the pay of the members of the legislature, and is, upon that point, as follows: "Each member of the legislature shall receive for his services a sum not exceeding five dollars per day from the commencement of the session, but such pay shall not exceed for each member, except the presiding officers, in the aggregate three hundred dollars for *per diem* allowances for any one session; and shall receive each the sum of ten cents per mile each way by the usual traveled route." "When convened in extra session by the governor they shall each receive five dollars per day; but no extra session shall continue for a longer period than twenty days, except in case of the first session of the legislature;" and also provides that they shall receive such mileage as is allowed for regular sessions. This section is divided into two paragraphs. In the first paragraph it is declared that no member, except the presiding officers, shall receive for his services a sum exceeding five dollars per day, and in the aggregate, for *per diem* allowances, not more than three hundred dollars for any one session, and shall receive the sum of ten cents per mile each way by the usual traveled route. The second paragraph fixes absolutely the *per diem* which each member shall receive when convened in extra session by the governor, and what each member shall receive at the first session, and declares that no extra session shall continue for a longer period than 20 days, except in case of the first session; and further declares that each member shall receive such mileage as is allowed for regular sessions. There is no provision of the constitution fixing the mileage for regular sessions, except said first paragraph of section 23, and that part of said paragraph referring to mileage is separated from the remaining part of said paragraph by a semicolon, as shown by the original enrolled copy of the constitution, filed in the office of the secretary of state, and not by a period, as shown by the printed (pamphlet) copy of the constitution. As the second paragraph of said section clearly refers to the first paragraph thereof as fixing the mileage of members for regular sessions, and as that part of said first paragraph fixing such mileage is separated from the remaining part by a semicolon only, we are of the opinion that that part of said first paragraph which declares that no member except the presiding officers shall receive

more than \$300 for *per diem* allowances for any one session applies to biennial or regular sessions,—sessions directed by section 8, art. 3, of the constitution to be held biennially after the first session, commencing on the first Monday after the 1st day of January,—and every second year thereafter, and does not apply to the first session of the legislature. The framers of the constitution, and the people who adopted it, certainly recognized the fact that the first session of the legislature would necessarily, from the amount of legislation required, be a prolonged one. United States senators were to be elected; laws passed to carry into effect the provisions of the constitution; the laws amended so as to conform to the conditions of statehood; and much other needed legislation. In view of these facts, and, as we think, the clear intent of the provisions of the constitution, we are of the opinion that the members of the legislature at the present session (this being the first session) are not limited in the aggregate to three hundred dollars for *per diem* allowances, but that each member, except the presiding officers, is entitled to the sum of five dollars per day for each day's attendance during the present session. The demurrer is therefore overruled, and it is ordered that a peremptory writ of mandate issue as prayed for by the plaintiff.

MORGAN, J., concurs.

HUSTON, J., (*dissenting*.) I find myself unable to agree with the majority of the court in the conclusion they have reached in this case. Whether the first session of the legislature be called a regular or an extra session or a session *sui generis*, it seems to me that the provision in the first subdivision of section 23 of the constitution, limiting the *per diem* compensation of members to \$300 "for any one session," is so clear, distinct, and unequivocal, as not to necessitate the invocation of any rule of construction. My view is strengthened when I consider the consequences involved in the construction given by the majority of the court to section 23. I am unwilling to believe that the framers of the constitution intended to place no other limit upon the amount of *per diem* compensation to members of the legislature than that of their full term of two years, at five dollars per day.

#### WALKER v. CAMPBELL.

(*Supreme Court of Idaho. Feb. Term, 1891.*)

##### FINDINGS OF REFEREE—SETTING ASIDE.

Where a cause has been submitted by agreement of parties, and on order of the court to a referee to hear the testimony and report his findings of fact thereon, it is error for the court, upon its own motion, to set aside such findings, make findings of fact of its own, and enter judgment thereon.

(*Syllabus by the Court.*)

Appeal from district court, Bingham county.

J. T. Morgan and T. M. Stewart, for appellant. J. Ed. Smith and Hawley & Reeves, for respondent.

HUSTON, J. This is an action for the dissolution of a copartnership between plaintiff and defendant, and for the adjustment of the accounts of the firm. The pleadings in the case are various, multitudinous, and voluminous, too much so in fact to be inserted; nor is it necessary they should be, in the view we take of the case. The record, aside from the copies of the pleadings, is incomplete and unsatisfactory. Suffice to say that on the 10th day of December, 1887, the case was, upon agreement of parties, by order of the court, referred to a referee "to hear the testimony and report his findings of fact thereon." On the 14th day of February, 1888, the referee filed his findings of fact, and on the 20th day of July, 1888, the referee, by leave of the court, made and filed additional findings. It does not appear from the record that any exceptions were taken to the findings of the referee, or that any motion for a judgment was made. The next entry upon the record is a motion by the attorney for the plaintiff to modify and set aside the findings of the court made and filed on the 2d day of August, 1889. We next have the amended and supplemental "findings by the court," from which it appears that the court had previously made findings of fact in the case, but that, "the attention of the court having been called to the necessity of a review of its previous action, such review has been had," etc. These last findings by the court were filed on February 6, 1890, and judgment entered thereon in favor of the defendant, from which judgment this appeal is taken. The record does not show any motion to amend or set aside the report of the referee, nor does it appear that any motion was made for a resubmission. The record simply shows that the court, upon its own motion, or of its own volition, assumed to set aside the findings of the referee, and make findings of its own, and enter judgment thereon. This action of the district court, we think, was error. In the making up of the record there may have been omissions; but of this we cannot, of course, take cognizance. We must deal with the case as it is presented to us by the record. We can find no warrant, either in the statutes of the state or the decisions of the courts, for the action of the district court in this case in setting aside the findings of the referee. The judgment of the district court is reversed, and the cause remanded with directions to the district court, to make conclusions of law, and enter judgment upon the findings of the referee.

MORGAN, J., having been of counsel, took no part in the hearing or decision of this case.

SULLIVAN, C. J., concurs.

#### TERRITORY v. MCKERN.

(*Supreme Court of Idaho. Feb. Term, 1891.*)

##### ROBBERY—EVIDENCE—FORCE NECESSARY.

1. Defendant was indicted for robbery. H., a witness for prosecution, testified that he saw defendant scuffling with Miles, (the party alleged to have been robbed;) saw defendant hand



something to McLouthlin, co-respondent, and alleged accomplice of defendant. Witness said "he thought" defendant took what he handed to McLouthlin from the person of Miles; did not see him take it, but "thought he did, because he thought he did." Motion to strike out latter part of testimony, as to what witness "thought," denied. *Held*, such denial was error, as it was not a matter upon which the opinion of witness was permissible.

2. The statutes of Idaho define "robbery" as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Under an indictment upon this statute, the trial court charges the jury as follows: "As to the force, the court instructs you that, if a man stealthily flich from the pocket of another, the force necessary to remove the property is all the force that the statute requires." *Held* error.

(*Syllabus by the Court.*)

Appeal from district court, Bingham county.

*T. M. Stewart*, for appellant. *Atty. Gen. Roberts*, for the Territory.

**HUSTON, J.** The defendant was indicted and convicted at the May term, 1890, of the district court for the county of Bingham of the crime of robbery. "Robbery," as defined by the statutes of Idaho, "is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." The evidence in this case, as shown by the record, is as follows: "One W. D. Hood testified that he was in Pocatello on or about the 28th day of January last. Knows the defendant. Saw him there about that time. Started to go into a saloon, when witness met this man and one McLouthlin. Afterwards saw them get into a scuffle. While they were scuffling, saw defendant hand McLouthlin something. He took this something, and dodged into next room. Didn't see what it was that he handed him. He got it from an old man that he was scuffling with. Didn't see him get it from him. Wouldn't swear that he got it from him. Thought he got it from him, because I thought so." On cross-examination this witness testified, in response to the question what he saw: "I think he got it from this man, and I saw him pass it to McLouthlin. Didn't think he would get into a scuffle without some object. The old man was very drunk. Think the defendant was sober." James Criswell, a witness on the part of the prosecution, testified, as appears by the record, in substance as follows: "Was in Gundecker's saloon at five o'clock on the morning of that day, [January 28, 1890.] Saw this man and a man by the name of Miles standing close together, and defendant had his right arm over his shoulder, and while he was standing there he took something from Miles' pocket, and it was handed to this man McLouthlin, and he left the room. Witness was not more than two or three feet away when defendant took, and saw him take it from his pocket." (On cross-examination, this witness testified, as appears by the record: "That there was no scuffle at all. That there were in the saloon only witness, Hood,

and the bar-tender. This occurred about five minutes after witness entered the saloon. Don't know what the parties were doing before. Defendant and Miles stood in position described some time. When witness entered they were standing close to the window. McLouthlin's whereabouts, when he saw the defendant put his arm around the old man, unknown to the witness. They were not standing in that position when witness entered. The old man was drunk,—very drunk. Didn't seem to know what was going on. Don't think he realized what was going on. Question. You say you saw no scuffling? Answer. Yes, sir; that is what I say. McLouthlin took what the defendant handed him, and left the room." Samuel Gundecker, a witness for the prosecution, testified: "That he was a machinist residing at Pocatello, Idaho. Was there on the 28th day of January last. Was keeping the People's saloon. Saw the defendant on that day, after the occurrence in the saloon, in the jail at Pocatello. Witness, having learned what had occurred, thought he would look up the case, and found the man, and he acknowledged to him that he got the money, and when witness asked him what he did it for he said that it was to get out of town. Didn't state what he did with the money, or what was the amount." On cross-examination, this witness testified that when he called on this man in jail he asked him what he did with what he took, and what he took the money for; and he said he didn't take any money; and after witness made him believe that he was going on his bond, and told him that it was no use to deny it, for that he knew that he was the man,—after that, he said he was the fellow who done it, and that he didn't know what he was doing. Witness is sure that he said this. It was previous that witness made him believe that he would go on his bond. This witness, proceeding, testified that he took the man McLouthlin with him to the jail, and that he was present at the conversation already related. "Witness is a detective, and so told the defendant. Has no interest in securing the conviction of the defendant. Hope to be a partner of the district attorney." There was no testimony offered by defendant.

The above is the substance of all the evidence in the case. There were several requests to charge on the part of the defendant, which were refused by the court, to which exceptions were taken. The first error assigned by the defendant is the refusal of the court to strike out so much of the testimony of the witness Hood as states "what he thought." It is not proper to permit a witness, except in the case of an expert, to testify as to his opinion in regard to a fact, or the occurrence of a fact. The witness had already stated what he saw. He had detailed the facts and circumstances upon which his opinion, or his "thought," as he expresses it, was based; but we cannot say what weight the opinion or "thought" of the witness may have had with the jury. The rule as given by Prof. Best, in his work on Evidence, (page 494, note 1,) is as



follows: "The opinion of a witness is not in general to be received. Facts should be stated, and not inferences made." In the same note he says: "Where, therefore, it is both desirable and possible that the jury should draw an inference from the facts upon which the witness must necessarily base his opinion, and these facts can be placed before the jury, the opinion of the witness is not to be received." Best, *Ev.* p. 495, and cases cited in note 1. This would seem to exclude the statement of an opinion in such a case as that under consideration. The witness had already stated all the facts within his knowledge, and we think the inference to be drawn from these facts should have been left to the jury, unaided by the "thought" or opinion of the witness. Defendant's motion to strike out so much of the testimony of the witness Hood as stated what he thought defendant did, should have been allowed. *Abbott v. People*, 86 N. Y. 471. We do not think the second assignment of error is well taken. The confessions of the defendant to the witness Gundacker were not made to a person or under circumstances that would exclude them as evidence. Gundacker was not, nor did he pretend to be, acting under authority at the time the confession was made. The fourth assignment of error is as to the oral charge of the court, in the following words: "As to the force, the court instructs you that, if a man stealthily filch from the pocket of another, the force necessary to remove the property is all the force that the statute requires." We think this was error. Subdivision 6, § 7855, *Rev. St. Idaho*, provides that, in criminal cases, the charge of the court "must be reduced to writing before it is given, unless by mutual consent of the parties it is given orally." It does not appear that any such consent was given. Again, the charge does not correctly state the law. It virtually abolishes all distinction between robbery and larceny from the person. Larceny from the person is made grand larceny by our statute. *Rev. St. Idaho*, § 7048, subd. 2. There are other assignments of error which we do not deem it important to consider. The judgment of the court below is reversed, and it is ordered that said defendant be discharged.

SULLIVAN, C. J., and MORGAN, J., concur.

STUFFLEBEAM *et al.* v. MONTGOMERY *et al.*  
(*Supreme Court of Idaho*. Feb. Term, 1891.)

PUBLIC NUISANCE—ACTION FOR SPECIAL DAMAGES  
—BILL OF EXCEPTIONS.

1. If a bill of exceptions is presented for settlement after the trial of the cause, and is certified to as correct by respondent's attorneys, and such bill is thereafter settled by the judge and used on the hearing of the motion for a new trial, it is too late for the respondents to raise the objection for the first time in this court that such bill was not settled in time.

2. To maintain an action for special damages caused by an obstruction of a public street constituting a public nuisance, a plaintiff must allege in his complaint and establish facts showing that he has sustained special damages,—damages of a

different kind and character than the damages sustained by the public.

(*Syllabus by the Court.*)

Appeal from district court, Bingham county; C. H. BERRY, Judge.

*John T. Morgan and T. M. Stewart*, for appellants. *Hawley & Reeves*, for respondents.

SULLIVAN, C. J. This action was brought by the respondents to abate a public nuisance, which it is claimed plaintiffs had created by the erection of a certain building on certain lands lying between the west side of West Main street and the Utah & Northern Railway track, in the town of Blackfoot, Bingham county, state of Idaho. The plaintiffs allege in their complaint and amendment thereto substantially as follows: That plaintiffs are husband and wife, and have been such during all the times mentioned in said complaint, and are living together as such; that they are the owners and in the possession of lots 1 and 20 in block 28 in said town of Blackfoot; that there are situated upon said lots certain buildings owned by and in the possession of plaintiffs, and used by them for hotel and restaurant purposes; that said property is situated on the west side of West Main street in said town; that said street extends in a northerly direction through said town, and is 100 feet in width throughout its entire length, and was and has been for more than 12 years prior to the commencement of this suit used, appropriated, and dedicated as a public street; that the Utah & Northern Railway Company own a strip of land 200 feet wide, extending through said town, and bordering on the easterly side of said West Main street, on which strip of land are situated the road-bed, track, depot, and other buildings of said company; that said corporation is a common carrier, and its trains stop at the depot in said town of Blackfoot, to receive and discharge mail and passengers; that said depot and other buildings of said railroad company are situated easterly of the above-described lots, and that there are no obstructions or impediments to travel or to the sight between said points, except those placed there by the defendants; that in the year 1890 the defendants commenced the erection of a frame building easterly and southerly from said lots and buildings of plaintiffs and the said depot and place where passengers leave and enter the cars running upon said railroad, and continued to erect said building, and have maintained the same thereon; that by reason of said building so erected by the defendants travel in and upon and across said street has been impeded and obstructed, and communication made more difficult between said railroad depot and grounds and that part of said town situated west of said West Main street; that all the people of said Bingham county residing in and about said town of Blackfoot have been delayed and damaged by reason of the erection and maintenance of said building by the defendants as aforesaid; that, beside being injured and damaged

thereby, and in common with other people and residents of said town of Blackfoot, the plaintiffs have been specially injured and damaged by reason that travelers visiting said town are unable to readily see and determine the location of plaintiffs' said hotel and restaurant, and in consequence thereof such travelers have become the guests of other hotels, to plaintiffs' damage in the sum of \$100; that in consequence of said building erected and maintained as aforesaid, the said property of plaintiffs has become lessened and depreciated in value, to their damage in the sum of \$100, and that the erection and maintenance of said building is a nuisance to the people of said town of Blackfoot and vicinity; that plaintiffs have requested defendants to remove said buildings, and they have refused to do so; that plaintiffs are without adequate remedy at law; that no pecuniary damages would be adequate compensation to plaintiffs, and that defendants are insolvent. Plaintiffs demand judgment for \$200 damages and costs of suit, and that defendants be perpetually restrained from maintaining said building, and that the same be declared a nuisance, and that an order for its abatement be made. The defendants deny that West Main street in said town of Blackfoot is 100 feet wide, or is, or ever was, of any greater width than 66 feet. They aver that the store building and warehouse of W. H. Danilson is 10 feet and 5 inches upon the 34 feet which plaintiffs aver to be a part of said street; that said store has been so located during 11 years last past; and denied each and every allegation in said complaint; and aver that said building, erected as aforesaid, is situated on defendants' private property, and that said ground on which said building is situated was never claimed as a part of said West Main street to their knowledge, and that plats of said town, made for W. C. Lewis, W. N. Shilling, and W. H. Danilson, (each for portions of said town,) show the streets of said town to be but 66 feet wide; and that the stock-pen of said Utah & Northern Railway Company has stood for 18 months immediately prior to the commencement of this suit 22 feet upon the 34 feet claimed by plaintiffs as a part of said West Main street. This cause was tried by the court without a jury on the 19th day of July, 1890. Judgment was entered in the court below in favor of the plaintiffs on the 29th day of July, 1890. Thereupon the defendants moved for a new trial, which motion was overruled, and from the order overruling said motion this appeal was taken. The appeal is presented on a bill of exceptions and statement.

The first assignment of error contained in appellants' brief is as follows: "First. The order of the court overruling defendants' objections to the introduction of any evidence, for the following reasons, to-wit: (1) That the complaint does not state any cause of action in favor of the plaintiffs and against the defendants. (2) That the plaintiffs have no suit for the town of Blackfoot at large, and no right to introduce evidence for damages to it, and have no action for special damages to themselves." The respondents contend

that said assignment of error cannot be considered by this court, for the following three reasons: "(1) That this is an appeal from the order refusing a new trial alone; (2) that no reference is made to such alleged error in the notice of motion for a new trial; (3) that the bill of exceptions herein cannot be entertained here, and is not before the court, as it was not filed in time, and no extension of time was granted for said bill of exceptions." It appears from the record that the bill of exceptions was served on the attorneys for the respondents on November 14, 1890, and on the 3d day of December, 1890, was certified to by said attorneys as correct, and was on said date settled by the district judge. The record further shows that said district judge made the following order overruling appellants' motion for a new trial, to-wit: "Now, upon this 3d day of December, 1890, the motion of the defendants for vacation of decision and granting of new trial herein coming regularly on to be heard before the judge at chambers upon their statement and bill of exceptions heretofore settled and on file herein, said motion being submitted for decision, and the judge being fully advised thereon, it is hereby ordered that said motion for vacation of decision and for new trial be, and the same is hereby, overruled. D. W. STANROD, Judge. Filed December 3, 1890." It is thus shown that the respondents had full knowledge of the contents of said bill of exceptions, and certified to it as correct on the 3d day of December, 1890, and on that date said bill was settled and signed by the district judge. On the same date the motion for new trial was submitted for hearing on said bill of exceptions and statement. The record contains no objection or exception by respondents to the settlement of said bill of exceptions, nor to its being submitted to the judge at the hearing of the motion for new trial. The respondents had knowledge of the fact that appellants would apply to the judge to have said bill of exceptions settled. Respondents' attorneys certified to the correctness of said bill of exceptions, and permitted it to be used on the hearing of appellants' motion for new trial, without objection. The respondents, by said acts, waived their right to said objection. Hayne, New Trial & App. §§ 27, 145; Higgins v. Mahoney, 50 Cal. 444. We think that section 4443 of the Revised Statutes is conclusive in this matter. Said section enumerates the papers that constitute the record on appeal, to-wit, the judgment roll and affidavits, or the records and files in the action, or bill of exceptions, or statement used on hearing of the motion for new trial. The order overruling the motion for a new trial recites the fact that said bill of exceptions was used on said hearing, and is therefore properly before this court for consideration.

The first error assigned by the appellants is the order of the court overruling the objection to the introduction of any evidence whatever, for the reason that the complaint does not show any cause of action in favor of the plaintiffs and against the defendants. To entitle plaintiffs to

recover for injuries sustained from a public nuisance they must first allege in their complaint facts clearly showing that they have sustained special or peculiar damages, damages different in kind and character from the rest of the public, so that such damage cannot fairly be said to be a part of the common injury resulting from such nuisance. *Wood, Nuis. § 646; Bigley v. Nunan, 53 Cal. 403.* Will the complaint in this action, when measured by the rule above indicated, bear the test? The only allegation of special damage or injury contained in said complaint is as follows, to-wit: "That, besides being injured and damaged thereby and in common with other people and residents of said town of Blackfoot, these plaintiffs herein have been specially injured and damaged by reason thereof in this: that on account thereof travelers visiting said town of Blackfoot are unable to readily and easily see and determine the location of said hotel and restaurant of the plaintiff, and in consequence thereof such travelers have and still continue to become the guests of other hotels and restaurants in said town of Blackfoot situate and being, instead of the guests and patrons of the plaintiff, and that in consequence thereof the plaintiffs have been damaged in the sum of one hundred dollars; that, in consequence of said building being erected and maintained, the said property has become lessened and depreciated in value, to their damage in the sum of one hundred dollars; that the erection and maintenance of said building aforesaid is a nuisance to the people in the said town of Blackfoot and vicinity generally, in this: that it is an obstruction to the free passage and use in the customary manner of said West Main street." This allegation shows that said obstruction is a public nuisance, but does not show that respondents have sustained an injury different in kind or character from that sustained by the public or other business men located in the vicinity of respondents' hotel. The allegation of special damages would equally apply to other business men situated in said vicinity,—that by reason of the erection of said building the merchants and other dealers have sustained special damages because passengers leaving the trains could not as readily and easily see their places of business, and by reason thereof go to other places of business. We are of the opinion that, if said allegations of special damage were fully established by the evidence, the respondents would not be entitled to any relief in this action. In cases of this kind the authorities are very numerous which hold that no person can maintain an action for damage from a common nuisance, where the injury and damage are common to all. The reason for this rule is that, if private persons were permitted to maintain suits to abate a public nuisance, it would lead to a multiplicity of suits. *Wood, in his excellent work on the Law of Nuisances, (section 646,) says: "Therefore the courts very wisely have unwaveringly adhered to the rule that an individual, in order to be entitled to a recovery for injuries sustained from a public nuisance, must make out a*

clear case of special damages to himself, apart from the rest of the public, and of a different character, so that they cannot be fairly said to be a part of the common injury resulting therefrom. It is not enough that he sustained more damage than another; it must be of a different character, special and apart from that which the public in general sustain, and not such as is common to every person who exercises the right that is injured." The respondents allege that said building is in a public street, and is a public nuisance. If this allegation be true, the Revised Statutes, § 960 et seq., provide the method and manner for the removal of such obstructions. Section 961 provides the manner of giving notice to the person causing such obstruction to remove the same. Section 962 fixes the penalty for failure to remove such obstruction; and, in case that the encroachment upon such street is denied, section 963 directs the road overseer to commence an action in the proper court to abate the same as a nuisance. This statute was enacted for the purpose of removing obstructions from highways, and such obstructions as are public nuisances, and was intended to prevent a multiplicity of suits. We are of the opinion that the complaint does not state a cause of action in favor of the plaintiffs. With this view of the case it is not necessary for this court to consider any other questions raised on this appeal. The cause is reversed, and remanded for dismissal.

MORGAN, J., having been of counsel for the defendants in the court below, took no part in the hearing or decision of this case.

HUSTON, J., concurs.

(3 Idaho [Hash.] 23)

SNYDER v. VIOLA MINING & SMELTING CO.

(Supreme Court of Idaho. Feb. Term, 1891.)

INJURY TO SERVANT—FELLOW-SERVANTS—CONTRIBUTORY NEGLIGENCE.

1. S. was a miner engaged in under-ground work. G. was a blacksmith engaged in same mine, in sharpening tools for use of miners, and whose duty it was to deliver such tools, after being sharpened, to miners at work in mine. *Held*, that S. and G. were fellow-servants; and *held, further*, that for carelessness in delivering such tools to miners by G., whereby S. was injured, defendant was not liable, defendant not being shown to be in fault.

2. Where the evidence shows that the defendant had furnished safe and convenient machinery and appliances for the performance of the required labor, and either the plaintiff or his fellow-servant, or both, for their own convenience, had seen fit to use other means or appliances than those furnished by defendant, and injury results therefrom, the defendant is not liable, and in such case plaintiff is guilty of contributory negligence.

(Syllabus by the Court.)

Appeal from district court, Lemhi county.

*Stewart & Morgan*, for appellant. *Hawley, Reeves & Quarles*, for respondent.

HUSTON, J. This is an action brought by plaintiff against defendant corporation to recover damages for injuries alleged to have been received by the plain-

tiff while in the employ of the defendant, as a miner, working in the Viola mine, owned and operated by defendant, in Lemhi county, in this state, which injuries plaintiff charges were the result of and attributable to the negligence of defendant. We are called upon *in limine* to pass upon the motion of respondent to strike out the statement and dismiss the appeal in this case, first, because it does not appear by the record that the judge of the district court, in allowing an extension of the time for defendant to prepare and serve its statement, made such allowance upon good cause shown, as provided in section 1932, Rev. St. Idaho. We do not think it necessary that the record should contain the evidence upon which the action of the district judge was predicated. The presumption of law is that good cause was shown, and such presumption can only be overcome by proof. No attempt at such proof is shown.

The next objection by the respondent is that this court cannot review the exception of defendant to the charge of the court, for the reason that such exception was not taken in time, and is too general to entitle it to consideration on appeal. We do not think this case comes within the purview of the rule laid down in *Black v. City of Lewiston*, (Idaho,) 13 Pac. Rep. 80. The following language by Mr. Justice MILLER in the case of *Railroad Co. v. Reeves*, 10 Wall. 189, seems to us to be more applicable in this case: "As to the charge given by the court, the language of the exception is more general than we could desire; and if the errors of this charge were less apparent, or if there was any reason to suppose they were inadvertent, and might have been corrected if specified by counsel at the time, we would have some difficulty in holding the exception to it sufficient. But the whole charge proceeds upon a theory of the law of common carriers, as it regards the effect of loss from the act of God on the contract, so different from our views of the law on that subject that it needs no special effort to draw attention to it, and it is so clearly and frankly stated as to have made it the turning point of the case. We are of opinion, then, that both the refusal to charge as requested and the charge actually given are properly before us for examination." So, in this case, we think the exposition of the law of negligence, as applicable to the evidence in this case, given by the district court in its charge to the jury, was so erroneous as to bring it clearly within the rule laid down by the supreme court of the United States in *Railroad Co. v. Reeves*, above cited. No point is sought to be made by the respondent against the exceptions of defendant to the refusal of the court to give instructions 1 and 2, asked by defendant. We will consider those instructions further on.

The facts in this case, as shown by the evidence,—and there is but little conflict in the testimony,—are briefly as follows: The appellant defendant below, was on the 15th February, 1889, the owner of and engaged in working and operating the Viola mine, in Lemhi county, Idaho; that on that date the respondent, plaintiff be-

low, was in the employ of defendant as a miner in said mine; that on the date last aforesaid the plaintiff was at work in a drift about 110 feet below the surface of the ground; that he had been thus employed for some months, and on this day it became necessary for him to ascend to the surface for some purpose. There was a shaft some four or five feet square, sided up with lumber, extending from the surface to the level where plaintiff was at work, and below. Through and up this shaft, ore, etc., was hoisted to the surface from below by means of a steam-hoist, located on the surface, and near the mouth or entrance of the shaft. As is usual in such cases, there was a ladder at the side of the shaft, presumably for use in ascending or descending the shaft, whenever the exigencies of the work or the convenience of the workmen required. Extending from the surface to the level below, there was at the time last mentioned a large rope. The evidence shows that the steam-hoist had not been used regularly for a period of several months. There was also a wire attached to a bell on the surface, and extending down the shaft, which was used as a signal, by those working below to those above, of the presence of some person in the shaft. The blacksmith, one Goodall, employed by the defendant in sharpening the picks, drills, and other tools used by the miners, had been in the habit, as he testifies, and he is undisputed on this point, for a long time, when the steam-hoist was not being run, of lowering the drills, picks, etc., sharpened by him, to the level below, by attaching them to the large rope above referred to by means of a smaller rope, the end of which he held in his hand, and allowing them to slide down the large rope to the level, while descending himself by the ladder, and delivering the said tools to the miners in the drift where they were at work. This was the condition of things on the 15th day of February, 1889, when the plaintiff attempted to ascend the shaft from the level by means of the ladder aforementioned. He had proceeded but a short distance up the ladder when he was, as he testified, struck upon the head and arm by a drill then being lowered by the blacksmith down the rope as above described, and received thereby the injuries complained of, and for which he seeks to recover damages of the defendant.

The first question for our consideration is, was there negligence on the part of the defendant in a failure to furnish sufficient and safe appliances and machinery for the performance of the labor upon which the plaintiff was engaged? It is nowhere assumed, or attempted to be proven, that there was any defect in any of the machinery or appliances in or about the mine, nor that the injury of plaintiff resulted from or was in any way attributable to a want of proper machinery or appliances, or to any defect in the machinery or appliances provided by defendant. In fact, the case seems to have been tried wholly upon the theory that the accident which resulted in the injury to the plaintiff resulted entirely from the negligence or want of care of the blacksmith Goodall,

and that, Goodall not being a fellow-servant of plaintiff, defendant is liable for any injury resulting from such negligence or want of care on his part. The plaintiff alleges in his complaint "that at the time plaintiff entered into the employment of the defendant, and from then up to the time said injury occurred, the regular and usual mode of letting all tools used in said mine down into the same was by means of a hoist and buckets." It is further shown by the testimony of the plaintiff himself that there was another shaft located about 700 or 800 feet, on the surface, from the shaft in question; that said shafts were connected underground; and that at the other shaft there was a hoist which was running at the time. It was as easy for Goodall to let the tools down by one shaft as by the other, except that in one case a walk of some 700 or 800 feet on the surface, and a corresponding distance below, was involved. Every means necessary or requisite for the safe transmission of tools from the surface to the miners at work below, as well as for their safe entry to and exit from the mine, had been provided by the defendant. How, then, could the defendant be said to be guilty of negligence? We think the evidence in this case entirely fails to establish negligence on the part of the defendant. Mr. Beach, in his work entitled *Contributory Negligence*, says: "It is the common law in every state and territory of the Union, and in the federal courts, that a master or employer is not responsible to those engaged in his employment for injuries suffered by them as the result of negligence, carelessness, or misconduct of other servants in his employ, engaged in the same common or general service or employment, denominated 'fellow-servants' or 'co-employees,' unless the employer himself has been at fault;" and he adds: "This rule is so undisputed that it is sufficient to cite one leading or recent decision in point in each jurisdiction;" and he cites innumerable cases in support of the text. We think the district court erred when it assumed that the defendant had provided the means used by Goodall for getting the tools into the mine for any such purpose. On the contrary, we think the evidence clearly shows that the means employed by Goodall for getting the tools into the mine, to-wit, by tying or fastening them to the large rope, was not the means provided by the defendant for that purpose. There was a bucket attached to another large rope, which, had it been used by Goodall, would doubtless have prevented any accident. If it is claimed that the hoist to which this rope was attached was not then running, we answer that there was another shaft easy of access, in which there was a rope and bucket, and which was running at the time, and the neglect of either the plaintiff or Goodall to avail themselves of such safe appliance cannot be attributed or charged as negligence on the part of defendant. We think the district court erred in its statement of the law as to what constitutes a fellow-servant. Says Mr. Beach, in his work above referred to on *Contributory Negli-*

*gence*: "In the present state of the law, the essence of common employment is a common employer and payment from a common fund. The weight of authority is to the effect that all who work for a common master, or who are subject to a common control, or derive their compensation from a common source, and are engaged in the same general employment, working to accomplish the same general end, though it may be in different departments or grades of it, are co-employees, who are held in law to assume the risk of one another's negligence." Beach, *Cont. Neg.* § 109, and cases cited in note 4. If this is the correct rule, and we so accept it, can there be any doubt that plaintiff and Goodall were fellow-servants? The plaintiff having failed to show negligence on the part of defendant, it seems to us that the defendant's motion for a nonsuit should have been granted. Under the rule of law applicable thereto, as quoted by us above from Beach on *Contributory Negligence*, which seems to have been very generally, if not uniformly, recognized by the courts of this country, we think that the fourth instruction asked by the defendant, and refused by the court, should have been granted. It seems to us that the plaintiff, in not availing himself of any of the precautions usual, and which in the exercise of ordinary care would have been adopted by a prudent person in his situation, to-wit, by signaling to those at the surface, either by ringing the bell, calling up the shaft, or carrying a light, was guilty of contributory negligence; and his only excuse for not so doing is that "there was not supposed to be anybody there, and nobody was supposed to be around there;" and yet it seems from the evidence that there were at least two persons there at that time, *i. e.*, Goodall and Ruhl. The plaintiff cannot act upon his suppositions, and then, when he is injured by reason of their being unfounded, make it the predicate of a charge of negligence on the part of either the defendant or his fellow-servant. The judgment in this case is reversed, and the cause remanded for a new trial.

MORGAN, J., having been of counsel in this case, took no part in the hearing or decision thereof.

SULLIVAN, C. J., concurs.

WALLEY v. PLATTE & DENVER DITCH Co.  
*et al.*

(*Supreme Court of Colorado*. Feb. 20, 1891.)

MUNICIPAL CORPORATIONS—DITCHES IN STREETS—  
ABUTTING OWNERS—SPECIAL DAMAGES.

1. Since the city of Denver acquired its streets subject to the prior lawfully acquired right of a ditch company to construct and maintain a ditch in some of them, one who, long after the construction of the ditch, purchased land abutting on such a street, cannot recover from the ditch company for the maintenance of the ditch, unless he suffers special damages thereby. Following *City of Denver v. Mullen*, (Colo.) 3 Pac. Rep. 693, and *Ditch Co. v. Anderson*, (Colo.) 6 Pac. Rep. 515.

2. Allegations in the complaint that the ditch is dangerous to the public health and safety, that it is a public nuisance, and that it is dangerous

to the health and safety of all who have occasion to transact business in the vicinity, do not authorize the recovery of special damages.

Commissioners' decision. Error to district court, Arapahoe county.

*Browne & Putnam*, for plaintiff in error. *Markham & Dillon* and *E. A. Clark*, for defendants in error.

RICHMOND, C. In this action plaintiff in error sought to recover damages alleged to have been done to his premises by the waters in the ditches of the defendant companies. The complaint, answers, and replications constitute the pleadings in the action, and the following stipulation was entered into by and between the respective parties: "It is stipulated and agreed by and between the parties to this suit that the title of the premises in the complaint described is in the plaintiff, that the city of Denver was incorporated in 1861, and has ever since remained a corporation, with a city government charged with the duty and provided with the power to grade, open, improve, keep in repair and free from obstruction the streets, alleys, and highways in said city; and that said premises were and are within the limits of said city; and that the right of way for said ditch at the point complained of was never procured by any condemnation proceedings in any court. It is further stipulated and agreed that the Platte & Denver Ditch Company was incorporated and organized October 7, 1864, for the purpose of constructing the said ditch for milling, manufacturing, and irrigating purposes, and that the said Platte & Denver Ditch Company did so construct said ditch in 1864 and 1865, and that it was used for the purposes aforesaid; that the defendant company was incorporated and organized on the 1st day of October, 1884, for the same purposes as the Platte & Denver Ditch Company; that on the 4th day of October, 1884, being a few days after the organization of the defendant company and a few days before the expiration of the charter of the Platte & Denver Ditch Company, sold, transferred, and conveyed said ditch and all of its right, title, and interest to and in said Platte & Denver ditch, with its rights, privileges, and appurtenances, right of way and easements, to the defendant company: the plaintiff, however, not admitting hereby, but protesting, as a matter of law, against, the right of said company to sell and convey to the defendant company the said ditch or anything connected therewith, beyond the period of the corporate existence of the said Platte & Denver Ditch Company; that the water from said ditch is still used for the same purposes for which it was intended to be used by the company organized to construct the said ditch,—that is, for milling, manufacturing, and irrigating purposes. It is further agreed that the lots and premises, streets and alleys, in the complaint mentioned are a part of the tract of land known as the 'Congressional Grant,' and which tract of land was by act of congress of May 28, 1864, entered by the probate judge of Arapahoe county in trust for the inhabitants as a town-site; that the cer-

tificate of entry thereof was issued May 8, 1865, and a patent therefor issued June 8, 1868. It is further admitted that all that part of the ditch anywhere near the premises mentioned was constructed upon the same tract of land known as the 'Congressional Grant.' This stipulation to be considered as admissions in the pleadings. Dated October 21, 1887." Upon the pleadings and stipulation defendants in error moved for judgment on the grounds that the plaintiff could not recover damages for the lawful construction, maintenance, and operation of the ditches; *second*, that the allegations in the complaint as to any special damages occasioned by any acts or doings of the defendants were so vague and indefinite that no recovery could be had on these allegations, and that no negligence whereby any special damage was done to the plaintiff was alleged against the defendants.

The case at bar is precisely similar to *Ditch Co. v. Anderson*, 8 Colo. 131, 6 Pac. Rep. 515; therefore we deem it unnecessary to further extend the statement of this case. The principal questions presented to the court below, and rediscussed in the briefs on this appeal, are identical with the questions discussed in *City of Denver v. Mullen*, 7 Colo. 345, 3 Pac. Rep. 693, and *Ditch Co. v. Anderson*, before referred to. In view of the fact that these two cases practically decide every issue presented in the case at bar we may be pardoned for abbreviating our opinion. In the case of *City of Denver v. Mullen*, this court determined that the ditch company had acquired a prior right as against the city to use the street for its ditch. In other words, they held that the city accepted the dedication of the street subject to the prior lawfully acquired right of the ditch company to construct and maintain the ditch where it runs, and for the purposes to which it was applied. Following this decision, and reaffirming in most unmistakable language the doctrine therein announced, this court in the case of *Ditch Co. v. Anderson* says no recovery can be had for damages incident to the construction and maintenance of the ditch within the scope of the lawful authority under which said ditch was constructed and is maintained. In other words, the ditch existing by lawful authority, its proprietors are not liable for damages resulting from such existence of the ditch *ipso facto* merely. It is conceded by the stipulation and by the pleadings in this case that the plaintiff in error occupied the said lot while it was a part of the congressional grant, and that his title did not accrue until after the appellees' rights and privileges accrued by the statutory concessions of congress to ditch companies. The plaintiff in error purchased his lots bordering upon the street which was then and for a long time prior thereto had been burdened with the easement lawfully acquired of the ditch in question.

The plaintiff in error by his complaint does not aver that the damages for which he seeks to recover resulted from an unlawful, improvident, or negligent manner in the use of the said ditch. To use the language of the complaint, it is averred

that it is dangerous to public health and safety, and is a public nuisance, and is dangerous to the health of all who have occasion to transact business in its vicinity; and that the damages resulting are from the maintaining and operating of the said ditch. It can be said without fear of contradiction that there is not a single averment in the complaint which sets forth any improper or negligent manner in the use of the ditch by the appellees. It being a conceded fact that it was constructed prior to the purchase of the premises by the plaintiff in error, no special damages being averred, no special damages could be recovered. We deem it sufficient to say without further comment that the two cases heretofore cited are conclusive of the case at bar. The contention that the Platte & Denver Ditch Company had no right to transfer the ditch, with its rights, privileges, and appurtenances, to the defendant company beyond the period of its corporate existence is not discussed by plaintiff in error, but, if it were, this court by its conclusion in the case of *Bailey v. Milling Co.*, 12 Colo. 230, 21 Pac. Rep. 35, has conclusively settled the question. We therefore think the judgment of the court below should be affirmed.

REED and BISSELL, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

#### MACKEY v. BRIGGS.

(*Supreme Court of Colorado*. Feb. 27, 1891.)

##### LIABILITY OF AGENT—UNDISCLOSED AGENCY.

1. Where defendant bought wood for another without disclosing his agency, he thereby rendered himself liable for its value, at plaintiff's option.
2. Although it appeared that plaintiff made a demand on another agent, who was settling the principal's debts, defendant cannot complain of a failure to charge that this was an election to hold the principal, when he made no request therefor.
3. On appeal from the county to the district court, (in which the case might have been begun,) it was too late to object to the jurisdiction, because the record failed to show the taking of the statutory steps on appeal, after the parties appeared without objection and tried the issue by a jury.
4. By Code Colo. 1887, § 346, depositions of witnesses residing in the state, but outside the county where the case is tried, may be taken under a *dedimus* with interrogatories, without service of an affidavit, and in the same manner as the testimony of a witness residing out of the state.
5. The court will not disturb a judgment where there is evidence to support it, and no passion or prejudice on the part of the jury is shown.

Commissioners' decision. Appeal from district court, Gilpin county.

*Patterson & Thomas*, for appellant. *W. C. Fullerton*, for appellee.

BISSELL, C. In 1887 Leonard Briggs brought suit against the defendant, Richard Mackey, in the county court of Gilpin county, to recover \$75.62 as a balance due

him for wood furnished at the Post Hole mine in Gilpin county. The case seems to have been tried in the county court, although the record is silent as to the rendition of a judgment in that tribunal. It ultimately got into the district court, and there pleadings were filed by the respective parties, and the case was tried upon the issues thus formed, counsel appearing for both parties. The regularity of the appeal is questioned, and the jurisdiction of the district court is attacked here because the record fails to show the taking of the various steps prescribed by the statute to bring the case by appeal from the county court to the district court. It is urged, and apparently with some degree of confidence, that the acquirement of jurisdiction by the district court, through the appeal, must regularly appear, and that without it that court would be entirely without jurisdiction to hear and determine the cause. However true this principle might be when applied to courts having an exclusively appellate jurisdiction, it is inapplicable to the determination of the jurisdiction of the district court when a case is brought there upon appeal from the county court. The district courts of this state are courts of general jurisdiction, and, as is apparent from the record, that court, sitting in Gilpin county, had jurisdiction both of the subject-matter of the suit and of the parties to the action. When the case was brought to the district court, the parties appeared in person and by counsel, and the case was tried to a jury without objection from the defendant. Under these circumstances he cannot be heard to complain. This court has decided that wherever the appellate court has original jurisdiction of the subject-matter, and the parties voluntarily appear and go to trial on the merits without exception, their conduct amounts to a waiver of the objection, and they cannot afterwards object. *Todd v. De la Mott*, 9 Colo. 222, 11 Pac. Rep. 90.

The remaining errors assigned and discussed relate to matters occurring during the progress of the trial. It appears that prior to the hearing the plaintiff sought to take the testimony of one Richter, who was residing in Denver. For that purpose he sued out a *dedimus*, and thereunder, upon interrogatories filed, the deposition of the witness was taken. A motion was made to quash this deposition because the witness was a resident of the state, and no affidavit was served as provided by section 368 of the Code. The objection to the deposition was very properly overruled by the court. The objection was not well taken, since it was not sought to take the deposition of the witness in the manner and form provided for by the chapter which contains the provisions making the service of an affidavit of the party essential to its regularity. The deposition of witnesses residing in the state, but outside of the county where it is to be tried, may be taken under a *dedimus* with interrogatories, in the same manner precisely as the testimony of a witness residing out of the state may be taken. Section 346, Code 1887. To entitle parties to proceed in that manner they are re-



quered by the statute to take only those steps prescribed for the taking of testimony of witnesses residing out of the state. The service of the affidavit then becomes unnecessary. It was not error for the court to refuse to quash the depositions for the reasons assigned.

The only other objections relied upon by counsel for appellant are based upon the instructions given by the court, and its refusal to grant a new trial upon the case as made to the jury. The instructions which are complained of relate to the right of the vendor of property to hold either the undisclosed principal, or the agent to whom the property is sold. The court observed the law in the instructions which it gave, and very properly told the jury that if the defendant, at the time that the wood was delivered, failed to disclose the fact that he was acting as an agent, he rendered himself liable for its value, and the plaintiff, being without notice or knowledge of the agency, was at liberty to elect to hold him, even though he might afterwards ascertain that one Richter was the principal in the transaction. That the agent may be held, under such circumstances, there can be no doubt. The appellant likewise complains that the court failed to instruct the jury that they were at liberty to find from the demand made by the plaintiff upon another agent of the undisclosed principal, who was there for the purpose of settling the claims against the mine, that he had made his election, by which he was bound. No instruction upon this subject was asked by the appellant. If an instruction embodying that idea was desired by the appellant, he should have requested the court to instruct the jury specifically upon that subject. It would not have been error for the court to have refused upon the case as made to modify its instructions according to appellant's present contention. There is nothing whatever in the record which either proves or indicates that the plaintiff intended to make an election when he requested payment of the individual, who was there apparently to settle the accounts of the Post Hole mine. The request, under the circumstances under which it was made, would not amount to an election binding upon the plaintiff.

The only remaining error discussed is the one based upon the refusal of the court to grant a new trial upon the case as it went to the jury. The case seems to have been fairly tried. There is evidence enough in the record to support the verdict, and there is nothing which discloses either passion or prejudice on the part of the jury. Under these circumstances, when the verdict is abundantly supported by the testimony, this court will not disturb the judgment, whatever their opinion may be in regard to its weight or its preponderance. There is no error apparent upon the record. The judgment should be affirmed.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

# JACKSON V. ACKROYD.

(*Supreme Court of Colorado.* Feb. 30, 1891.)

TRIAL—INSTRUCTIONS—MATTERS NOT IN ISSUE.

In an action for damages to property abutting upon a street, the complaint alleged that an embankment had been constructed by the receiver in addition to one already built in the middle of the street prior to the time plaintiff acquired title and claimed damages for such addition. The court instructed the jury as to the measure of damages for the injuries caused by the construction of the embankment in the first instance. *Held* that, as the only issue was upon the question of damages caused by the construction of the addition, the instruction was erroneous.

Commissioners' decision. Error to district court, Arapahoe county.

Defendant in error commenced this suit on the 23d day of February, 1886, by filing a complaint in which it is alleged that she then was, and at all times since January 17, 1883, has been, the owner in fee-simple of certain property, describing the same, and of the buildings and improvements thereon, "which but for the injuries herein-after complained of would be of the value of, to-wit, fifteen thousand dollars, but which, because of said injuries, are only of the value of seven thousand five hundred dollars." "(2) That the property abuts on Sixth street, in the city of Denver, which street has at all times since November, 1861, been one of the public streets of the city of Denver," etc. "(3) That long prior to the appointment of said defendant, as receiver of said railroad company, the said railroad company entered upon said street in front of the premises of the plaintiff, and near the center of said street, and constructed a grade or embankment thereon six feet high, and wide enough for a double-track railway, which it then laid down on said grade, and continued to occupy the same for railroad purposes from thence until the appointment of said receiver, and for the running of cars propelled by steam, leaving a space of only about eight feet between their said embankment and the outer edge of the sidewalk. That since the appointment of defendant as receiver of said company, and on, to-wit, the 1st day of September, A. D. 1884, he, as such receiver, entered upon that portion of the street lying between the said embankment in front of plaintiff's premises and the sidewalk, and built thereon another or an addition to the said railroad grade to the height of six feet, and of the width of eight feet, thereby occupying all of said street not previously occupied by said grade adjacent to plaintiff's said premises except the sidewalk, and encroaching on said sidewalk two feet; so that by the wrongful acts of said receiver all ingress and egress to and from her said lots have been wholly cut off for vehicles of all kinds, except upon the sidewalk, the safety of her said property endangered, the comfortable and profitable enjoyment thereof invaded, the rental values decreased one-half, and the actual value thereof decreased in the sum of seven thousand five hundred dollars; and that all of said acts of the said receiver were committed against the will of plaintiff, and without compensation to her. (4) That at all times since the construction of said addi-



tional embankment by the said receiver he has been charged with the sole management of said railroad, and has been running trains of cars on and over said railroad in front of plaintiff's said premises, at all hours of the day and night, and has been and is now occupying the said embankment for railroad purposes, to the exclusion of the public and of the plaintiff from the use of said street, and the special damage of the plaintiff as aforesaid. (5) That the said William S. Jackson was duly appointed receiver of the said railroad company by the circuit court of the United States on the 9th day of July, A. D. 1884, and qualified and took control and sole management of the said railroad property and equipment thereof on the 11th day of the same month, by virtue of the order and decree of said honorable court, made in a certain cause then and now pending in said court, wherein Elias L. Frank et al. are complainants, and the Denver & Rio Grande Railway Company et al. are defendants, and that he is now operating, controlling, and managing all of the affairs and business of said railway by virtue of his said appointment. Wherefore plaintiff demands a judgment against said William S. Jackson, as receiver as aforesaid, for the sum of seven thousand and five hundred dollars, her damages as aforesaid, and for the costs of this suit."

A demurrer was filed on the ground that the complaint did not state a cause of action, which was overruled. Defendant answered specifically, denying the allegations of the complaint, and as a special defense alleged the corporate character of defendant; the granting of the right of way to defendant by the city by an ordinance of June, 1871, through the street in question, and in front of the premises of plaintiff, authorizing it to build, maintain, and operate the railway along and over the street, "together with the right to lay down a single or double tracks, switches, crossings," etc.; setting out the ordinance *in hæc verba*, in which it is provided that the established grade of a railway through the street in front of plaintiff's property should be regarded as the grade of the street; alleges the construction of the road upon an embankment in the street; the continual operation of the same, without objection on the part of plaintiff, until it went into the hands of the receiver on the 12th day of July, 1884; and continues as follows: "And this defendant further alleges that the said embankment on which said railway is situated, along and at the side of the premises of the plaintiff, has not been raised or widened since the year 1880; that the grade line of railway along said street is still the established grade of said street as such; that ever since the construction of said railway, and of said embankment, the same have been situated, operated, and used in the same manner as at the time of the institution of this suit; that the same have been so situated and so operated for more than six (6) years prior to the beginning of this action, during all of which said time plaintiff has made no complaint and raised no objection to the existence or operation of the same;" and for a further defense pleads

that the cause of action did not accrue within six years. The special defenses were traversed by a replication. On June 8 and 9, 1887, trial was had to a jury.

The defendant, among others, prayed the court to give the following instructions: "(4) The defendant is not liable to the plaintiff for any depreciation of the value of the property mentioned in the complaint prior to the purchase of the same by the plaintiff. (5) If you find from the evidence that the defendant's railroad had been constructed and operated before the plaintiff's purchase of her property, substantially the same as it has been since, and that the plaintiff bought the property with knowledge of the existence and operation of the railroad in front of same, then she is not entitled to recover from the defendant by reason of the continued operation and maintenance of said railroad. (6) Where one buys a city lot bordering upon ground set apart or dedicated to any public use, he takes it subject to all the annoyances incident to the purpose of the dedication; and in this case, if Sixth street, in front of plaintiff's premises, was occupied by the defendant for railroad purposes by authority of the city of Denver, the plaintiff in purchasing said premises took them subject to the annoyances of the proximity of the railroad and its operation;" which were refused, and exceptions saved to the refusal of each. The court, upon its own motion, instructed the jury as follows: "The only question to be submitted to you for consideration is, how much is this plaintiff entitled to, by way of compensation, for any diminution in value of the property owned by her which has been described to you in the testimony? If the defendant company built its railroad along the street adjacent to the property belonging to the plaintiff, for the purpose of operating the same in the manner usual with railroad companies, then the plaintiff is entitled to recover the difference between the value of the property as it was before the railroad company took the street for the purpose of its road, and the value after it had been taken for that purpose, and the operation of its road as a railroad. \* \* \* The question then will be simply as to the difference in value by reason of the building and operating of the road upon the established grade, as compared with the value of the property before the construction of the road. \* \* \* If the jury find from the evidence that the property of the plaintiff has received permanent injury and damage from the maintenance and operation of defendant's railway, then the measure of her compensation is the actual diminution in the market value of her premises for any use to which they may reasonably be put." Defendant excepted to the charge. The jury found a verdict for the plaintiff for \$500. A motion for a new trial was overruled, and judgment entered upon the verdict.

*Wolcott & Valle*, for plaintiff in error.  
*Elizabeth Ackroyd*, pro se.

REED, C., (after stating the facts as above.) The case here presented for examination and review is peculiar. The case made by the complaint is one against

the receiver, who was appointed July 9, 1884, and entered into the possession and assumed the management of the property on the 11th of the same month, for special damages and injury to the property of defendant in error by acts alleged to have been committed by him, commencing on, to-wit, September 1, 1884. It is alleged in the third paragraph of the complaint that at that date the receiver entered upon the street between the former embankment and the sidewalk in front of the premises, built another embankment eight feet wide and six feet high, using all the street upon that side and two feet of the sidewalk, "so that by the wrongful act of said receiver all ingress and egress to and from her said lots have been wholly cut off for vehicles of all kinds, except upon the sidewalk, the safety of her said property injured, the comfortable and profitable enjoyment thereof invaded, the rental values decreased one-half, and the actual value thereof decreased in the sum of seven thousand five hundred dollars." In the former part of the same paragraph it is stated, as a necessary part of the history of the case, that long prior to the appointment of the receiver the road had been built; that there was in the middle of the street an embankment six feet high, wide enough for two tracks, etc.; and that from the time of its construction to the appointment of the receiver the railroad company had continued to operate the road, etc. There is no allegation of damage and diminution of value of the property by reason of its original construction and operation from its inception down to September 1, 1884,—no complaint or claim for damage. It seems to have been conceded that defendant in error bought the property subject to all the inconveniences arising from the former building and subsequent operation of the road, as it had been built and was being operated at the time of such purchase. The only acts complained of, and for which damages were sought, were those of the receiver, as shown in paragraphs 3 and 4 of the complaint. These allegations in the complaint were specifically denied in the general answer, and again in the second defense, where it is said: "And this defendant further alleges that the said embankment on which said railway is situated, along and at the side of the premises of the plaintiff, has not been raised or widened since the year 1880; that the grade line of railway along said street is still the established grade of said street as such." The issues so made were the only ones that could have been properly tried under the complaint. But plaintiff in error, after specifically traversing the allegations in the complaint, did not deem it sufficient, but pleaded the right of way obtained from the city, and alleged the original building and operation of the road in front of the property in nearly the same language that the fact was stated in the complaint, and adding the plea of the statute of limitations. The extent and scope of the suit seem to have been misconceived by plaintiff in error, and regarded as a proceeding to recover damage for the original construction,—on no oth-

er theory can we understand its defenses, —and the eminent judge before whom the case was tried seems to have fallen into the same error. The case, as made by the pleadings against the receiver for alleged injuries to the property after September 1, 1884, was not tried at all. Some testimony in regard to the alleged injuries was introduced by plaintiff in error, which we shall have occasion to refer to hereafter. The inquiry to which the testimony was directed was that propounded to the first witness, and runs through the entire testimony of defendant in error, viz., the value of the property in its present condition, and what its value would have been if the railroad had never been constructed and operated. And the same question is distinctly submitted to the jury by the first paragraph of the instruction given by the court, and afterwards condensed, and again given in these words: "The question, then, will be simply as to the difference in value by reason of the building and operating of the road upon the established grade, as compared with the value of the property before the construction of the road." The instruction, aside from not being directed to any issue in the case, is hard to be understood and applied. It was alleged and conceded that the road was constructed in 1871. We can find no testimony in the record to show what the value of the property was before the construction of the road, or for some years afterwards. It will be observed that no instruction whatever was given by the court regarding the alleged wrongful acts of the receiver, and special damage by reason of the alleged further use and appropriation of the street by the receiver after September 1, 1884, for which the suit was brought, and upon which the issues were made. It is ably contended in argument by counsel for plaintiff in error that defendant in error, who became the purchaser of the property in 1883, could not maintain an action for damages to the property for the building and operation of the road, as it had been built and operated some 12 years before she became the owner, and cite numerous authorities in support of the proposition. They also contend that the instructions asked in support of their position, numbered 4, 5, and 6, should have been given, and that the refusal was error. In a proper case, where the question was properly raised and necessary to be determined, we might agree with counsel, and hold that a refusal to so instruct was error. *Ditch Co. v. Anderson*, 8 Colo. 131, 6 Pac. Rep. 515; *Railroad Co. v. Loeb*, 118 Ill. 203, 8 N. E. Rep. 460; *Railroad Co. v. McAuley*, 121 Ill. 160, 11 N. E. Rep. 67; *Railroad Co. v. Maher*, 91 Ill. 312; *Bizer v. Power Co.*, 70 Iowa, 145, 30 N. W. Rep. 172; *Railroad Co. v. Strange*, 63 Wis. 178, 23 N. W. Rep. 432. But this would not preclude the owner from recovering special damages for unwarranted acts further diminishing the value of the property after he or she became the owner. Counsel for defendant in error urge that the judgment should be affirmed, and say, in speaking of the cause of action stated in the complaint: "She alleges the construction of the railroad as

originally constructed long prior thereto, but only by way of inducement. \* \* \* She then shows the appointment of Jackson as receiver, and that on September 1, 1884, and subsequently, he caused the damage complained of; reiterating the allegations of the complaint. Then adds: "It was for this additional burden thus imposed that plaintiff sued and recovered after a trial before a most careful and learned judge. \* \* \* The recovery was limited to the damages sustained between the date of the addition to the embankment, September 1, 1884, and the service of the summons, February 19, 1886. \* \* \* The injuries complained of could not have accrued to the grantor of the plaintiff, because they arose long after her title accrued." Again, counsel say: "We do not sue for the operation of the railroad constructed and in use at the date of our purchase, but for the invasion of our right to the occupancy and use of a part of a public thoroughfare open to public use at the date of our purchase, and taken afterwards by the defendant for railroad purposes, whereby we were entirely foreclosed of the use of the street on which our lots abut." The statement of counsel in regard to the scope, intent, and object of the suit, as stated in the complaint, is correct. But we cannot agree with their conclusion that the recovery was limited to damages accruing after September 1, 1884. We can find no testimony introduced on the part of defendant in error (plaintiff below) in support of the allegations in the complaint of the wrongful acts of the receiver after his appointment. Two or three witnesses testified to an increased use of the street by widening and raising the embankment and the addition of tracks between the date of its construction and bringing suit, but no dates are given except by the witness Eckels, who says: "The change was made in the spring of 1881." The whole inquiry on the part of defendant in error on the trial seems to have been predicated upon the supposed right to recover damage for the original construction and subsequent operation of the road. On the part of the defendant (plaintiff in error) two or three witnesses testified that, after the appointment of the receiver, only changes of slight importance were made; consequently the case attempted in the complaint fails for want of evidence, and the judgment was erroneous. But, as shown above, there was an entire departure, and the trial of another and different case. The judgment should be reversed, and the cause remanded.

RICHMOND and BISSELL, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed, and the cause remanded.

(15 Colo. 567)

LONDONER v. PEOPLE *ex rel.* BARTON.

(Supreme Court of Colorado. Feb. 6, 1891.)

ELECTIONS—FRAUD—QUO WARRANTO—PARTIES—PRACTICE.

1. Where the judges of election fraudulently admit illegal and exclude legal votes to an ex-

tent that cannot be shown with reasonable certainty, the entire return will be rejected.

2. In a contested election case, where an order is made, on motion of respondent, to require relator to furnish a list of the names of persons alleged to have voted illegally, he may give names of persons, legally registered, whose ballots were cast by others whose identity cannot be shown.

3. Const. Colo. art. 13, § 1, provides that every person holding a civil office in a municipality shall, unless removed according to law, exercise the duties of such office until his successor is duly qualified. *Held*, that where a candidate for mayor is by the proper canvassing board declared elected, and, filing his oath, enters upon the discharge of his official duties, the outgoing mayor vacating the office without objection, the court may, on the election being contested and adjudged illegal, order him to yield the office to the president of the board of supervisors, since Laws Colo. 1885, p. 90, § 11, provides that in case of a vacancy in the office of mayor the president of the board of supervisors shall act.

4. Under Civil Code Colo. § 239, providing that an action may be brought by the district attorney in the name of the people, on relation and complaint of a private party, against any one unlawfully holding an office, or, in case of his neglect, by such private party on his own relation, in the name of the state, such action may be brought by the defeated candidate, though he may not be entitled to the office.

5. In such action the court may, against respondent's objection, call a jury, and submit special issues to them to aid him in his finding of facts, under Civil Code Colo. § 173, which provides that in actions other than for the recovery of property, or money due on contract, or for damages for breach of contract, or for injuries, the issues of fact must be tried by the court, subject to its power to order any issue to be tried by a jury.

6. Where, in *quo warranto* proceedings, in which the sheriff was relator, to determine the right to an office, a special venire for jurors was issued, respondent's challenge to the array, on the ground that the regular panel was not exhausted, was properly overruled.

7. Jurors sworn to well and truly try the matters at issue may make any special findings of fact raised under the pleadings, and need not be resworn during the trial, if the pleadings are not changed.

Error to district court, Arapahoe county.

At a municipal election held in April, 1889, relator, Barton, and respondent, Londoner, were opposing candidates for the office of mayor of the city of Denver. The returns showed an apparent majority for respondent, who was duly declared elected, received his certificate of election, took the requisite oath, and entered upon his official duties. Relator at once instituted the present proceeding, and a demurrer to his complaint or petition was sustained; but on a former review by the supreme court (22 Pac. Rep. 764) it was held that while an election contest proper was, under the circumstances, not maintainable, the pleading in question contained averments sufficient to lay the foundation for a proceeding in the nature of *quo warranto*, and that in pursuance thereof the title of respondent might, on behalf of the people, be thus investigated. The cause went back to the district court, the issue mentioned was made, and, upon trial, judgment of ouster was rendered against respondent. To reverse this judgment the present writ of error was sued out.

The special findings of the court contain the following, among other, conclusions of fact: "That with respect to the conduct of said election upon said 2d day of April, 1889, in the 18th, 19th, and 30th precincts of said city, and in each and every of said three precincts, upon the evidence introduced upon the trial of said cause, and upon the findings made by the jury with respect thereto, the court finds that certain persons combined and confederated together to procure the casting of illegal ballots for the defendant for said office of mayor; that such persons did procure to be cast for the defendant for the office of mayor fraudulent and illegal ballots in the 18th precinct, to the number of about 210, in the 19th precinct about 220, and in the 30th precinct about 250; that it is not possible to estimate or calculate with reasonable certainty the number of illegal ballots cast in either the 18th, 19th, or 30th precincts for the defendant for the office of mayor; that fraud was practiced in each of said three precincts in the conduct of said election, and such fraud culminated in the deposit of illegal votes in the ballot-boxes in each of said precincts, and the same were counted, returned, and canvassed; that such illegal votes amounted to about the following in number, to-wit: In the 18th precinct, to about 100 illegal votes; in the 19th precinct, to about 100 illegal votes; and in the 30th precinct, to about 150 illegal votes; that the casting, counting, and returning of said illegal votes was done with the knowledge of some of the election judges in each of said precincts, and the acts of such judges of election in so receiving, counting, and returning such illegal votes were knowingly, willfully, and deliberately done; that the conduct of the judges of election at each of said three precincts was not fair or faithful in receiving legal votes, and rejecting illegal votes; that fraud was practiced in the conduct of said election in each of said three precincts, and some of the judges of election participated in such fraud in each of said three precincts; that the judges of election receiving ballots in each of said three precincts connived at, consented to, acquiesced in, and knowingly permitted the casting of illegal votes at said election for the office of mayor; that the judges of said election, receiving ballots in each of said three precincts, negligently and carelessly permitted the casting of illegal ballots for the office of mayor; that the judges of election, receiving ballots in each of the said three precincts, intentionally disregarded challenges offered against illegal votes, and such disregard led to the deposit of illegal votes in each of said three precincts; that the judges of election, receiving ballots in each of said three precincts, received votes without challenging the persons offering them, or requiring such persons to be sworn after receiving reasonable and credible notice that such persons were not entitled to vote, or that they were voting upon the names of other persons, or that they had voted before; that votes were cast at said election for the defendant for mayor by persons on the names of persons other than themselves, in each of said three precincts, to

the number of about 100 in the 18th, and about 100 in the 19th, and about 150 in the 30th, precincts; that the judges of election in the 30th precinct refused to permit persons entitled thereto to inspect the register list of said precinct for the purpose of preparing a challenge book; that the police officers, or some of them, who were present at the polling places in each of said three precincts, connived at the casting of illegal votes for mayor, and interfered to prevent the challenging of illegal voters, and by force or threats prevented the challenging of illegal votes at said election; that the polling place in the said 30th precinct was so boarded up that the voters, when casting their ballots, could not see the ballot-box or the persons in the room other than the judge who was receiving the ballots, nor could the bystanders or citizens immediately in front of the polling place see the ballot-box or the persons in the room other than the judge who was receiving the ballots, nor could the voters when voting, nor the bystanders or citizens immediately in front of the polling place, see what disposition was made of the ballots after they were handed to the election judge; that said polling place was so boarded up by the order of the then chief of police of the said city of Denver, and in the interest of the candidacy of the defendant for mayor; that the public registry list in said 30th precinct was torn down and taken away by a police officer of said city of Denver, and working at said election in the interest of defendant, for the purpose of preventing persons from making a challenge book to be used at said election; that Matthew Finehart and one ——— Wenning acted as clerks of election at said election in said 30th precinct, and neither said Finehart nor said Wenning was an elector in or of said 30th precinct; that in said 18th precinct, during the progress of said election, the said Elias R. Barton, as a candidate for said office of mayor, presented to one of the judges of election in said precinct, and who was then receiving ballots thereat, a written request, addressed to the judges of election at said precinct, that J. N. Douglas, a friend of said Barton, be permitted to be present within the polling place while the ballots were being received and counted, and said judge peremptorily refused and denied such request."

Civil Code Colo. § 173, provides: "An issue of law shall be tried by the court, unless it be referred, as provided in the title in regard to references. In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due on contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived or a reference is ordered, as provided in this Code. In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this Code." Section 289 provides: "An action may be brought by the district attorney in the name of the people of this state, upon his own information, or upon the relation and complaint of a private

party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, within his district in the state; and it shall be the duty of the district attorney to bring the action whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the governor; and, in case such district attorney shall neglect or refuse to bring such action upon the complaint of a private party, such action may be brought by such private party upon his own relation, in the name of the people of the state."

*Lucius P. Marsh and L. C. Rockwell, for plaintiff in error. Pence & Pence and Sam P. Rose, for defendant in error.*

HELM, C. J., (*after stating the facts.*) The extraordinary conclusions of fact embodied in the findings of the trial court were predicated upon a solemn, fair, and extended judicial investigation, and are in substantial accord with the answers of the jury to questions propounded. We are bound to regard them as amply sustained by the proofs—*First*, because only a small portion of the evidence is before us, and inquiry on our part into its sufficiency is therefore precluded; and, *second*, because this sufficiency is admitted, the record reciting that "respondent makes no point, and does not claim, that the verdict of the jury is contrary to the evidence." The findings mentioned refer to frauds perpetrated in three specified election precincts within the city of Denver. The following is a brief epitome of these findings in so far as they bear upon one branch of the subject in hand: That the conduct of the election judges was neither fair nor faithful; that they knowingly, willfully, and deliberately received, counted, and returned illegal votes for respondent; that they purposely disregarded challenges offered against fraudulent votes; that they refrained from challenging or swearing, as required by law, persons tendering ballots, after reasonable and credible notice that such persons were not entitled to vote, or that they were voting on the names of other citizens, or that they had voted before, and were therefore repeaters; that they refused to permit persons entitled thereto to inspect the registry list for the purpose of preparing a challenge book; and that, in defiance of statute, they deliberately denied the request of relator, who was a candidate, to have a friend admitted into the polling place to witness the receiving, depositing, and counting of votes; that the police officers of the city, acting in the interest of respondent, connived at the casting of illegal votes; wrongfully interfered, and by force or threats prevented the challenging of illegal voters; boarded up one of the polling places so that persons offering their ballots, and citizens immediately in front, could not see the ballot-box, or know the disposition made of the ballots when handed to the election judges; tore down and took away the registry list in order to prevent the preparation of chal-

lenge books; and otherwise obstructed an honest election. In addition to the foregoing, it further appears from the findings in question that although "about" 350 votes were shown to have been fraudulently cast for respondent by individuals upon the registered names of other persons, yet it was not possible to estimate or calculate with reasonable certainty the whole number of illegal ballots which, through the official misconduct mentioned, were deposited and counted, or the number thus received and returned for respondent. Upon the record thus made, the court declined to consider the returns from the precincts in question; and, respondent's election being thereby defeated, a judgment of ouster followed.

If it be proper under any circumstances to reject the entire poll of an election precinct, this would seem to be a case justifying such action. In large cities illegal votes will frequently find their way into the ballot-box, despite the utmost vigilance and honesty of election officials; but, with strict integrity in the management of elections, the danger in this regard may be reduced to the minimum, and a reasonably fair expression by the qualified electors be secured. When, however, the men whose sworn duty it is to superintend and conduct the receiving, depositing, counting, and returning of votes become active participants in a conspiracy to secure dishonest and fraudulent results, confidence in the potency and purity of the ballot can no longer exist. Considered with a view to the public weal, this offense cannot be characterized with sufficient severity, nor can the magnitude of the threatened danger be fully realized. The crime of the illegal voter is venial, and his act harmless, in comparison. Such conduct renders futile the attempt to express the popular will through the ballot-box. Elections thus conducted become the medium whereby corrupt and designing men, almost with impunity, carry out their conspiracies against the rights of the people and the public interests. The exigency calls for a more radical and effective remedy than is furnished by provisions for punishing the corrupt officials. If, despite serious and discouraging difficulties, convictions be sometimes secured, the public injury inflicted is not repaired, and the menace to the public welfare loses but a small part of its gravity. The existence of the power to discard the entire return is a public necessity, and its exercise under proper circumstances is sanctioned by the overwhelming weight of judicial authority. But since the employment of this power always results in the nullifying of legal, as well as illegal, votes, unless the legality be shown by proof outside the return it should be invoked with caution, and as a *dernier resort*. The injury suffered by the legal voter is tolerated for the public good alone; and then, only, when the integrity of elections cannot be otherwise assured. The presumption that officers charged with the duty of conducting elections have in good faith fulfilled the resulting obligation, always obtains until the contrary is shown; and the fact that illegal ballots

have been cast, or that irregularities in the management of the election have taken place, does not ordinarily warrant the application of this remedy. But when it is clearly established that frauds subversive of the purity of the ballot-box, and tending to nullify the popular will, have been perpetrated by election officers, or have been perpetrated by others with their knowledge, connivance, and consent, and the extent of such frauds cannot be disclosed with reasonable certainty, the integrity of the entire return is destroyed, and it should be rejected. Judge McCrary states the proposition even more broadly. He says: "The safe rule, probably, is that where an election board are found to have willfully and deliberately committed a fraud, even though it affect a number of votes too small to change the result, it is sufficient to destroy all confidence in their official acts, and to put the party claiming anything under the election conducted by them to the proof of his votes by evidence other than the return." McCrary, Elect. (3d Ed.) § 541 et seq., and cases cited. And he declares the same rule applicable when the integrity of returns is destroyed by misconduct of the officials, consisting in "a reckless disregard of the law, or in ignorance of its requirements," though no corrupt purpose be affirmatively shown. Id. § 540. "The returns will not be rejected until they have been shown to be so tainted with fraud, or so radically defective or incomplete, that the truth cannot be deduced from them. Where this is shown, however, the returns will be ignored." Mechem, Pub. Off. § 227, and cases cited.

It is not necessary, after what has been said, to further comment upon the sufficiency of the facts before us to justify the application of the foregoing rule. In consulting authorities upon the subject, including decisions not cited by McCrary or Mechem, we have found no instance where the extent of the official misconduct surpasses that disclosed in the case at bar. But the rejection of the returns from the three precincts named did not necessarily defeat respondent's election. The burden of proof then shifted, and it devolved upon him to establish, by evidence *alibunde*, that, notwithstanding the illegal voting and other frauds proven, a sufficient number of legal ballots were cast for him to insure his success. Mechem, Pub. Off. § 229; McCrary, Elect. § 535. We are not advised, however, that he offered any extrinsic proofs whatever for the purpose of discharging this burden.

Counsel for respondent, both in their printed brief and in oral argument, assert that respondent is not shown to have been in any way connected with the illegal and disgraceful conduct disclosed in this case. The assertion is not controverted by opposing counsel. And in justice to respondent we should state, before leaving this branch of the case, that there is nothing in the 75 answers of the jury to as many questions prepared by counsel for relator, or in the 27 findings of fact by the court, or in the pleadings, or in any other part of the record before us, which shows that he himself assisted in or sanctioned the

frauds proven, or that he had any knowledge thereof. Although these frauds were perpetrated in his interest, so far as it appears from this record, he may have believed, until the contrary was proven at the trial, that his election was conducted in a fair and honorable manner, and that he had received the legal majority appearing on the face of the returns. But these facts, while tending to establish a personal vindication, cannot change the result of the judicial inquiry; for the impeachment and repudiation of the returns do not depend upon the guilt or innocence of the candidate. Mechem, Pub. Off. § 227.

But counsel for respondent earnestly and ably contend that, by virtue of certain irregularities and rulings precedent to and connected with the trial, their client's interests were so prejudiced as to render necessary a reversal of the judgment. We shall consider these objections as briefly as may be consistent with a fair response to the arguments adduced in their support. Before the trial commenced, respondent filed a motion asking that petitioner be required to furnish a list of the names of those persons, in each of the precincts mentioned, alleged to have illegally voted for him. This motion was sustained, and an order accordingly entered. In response thereto, relator furnished the names of persons, legally registered, upon which ballots for respondent were cast by men falsely personating the voters thus registered. During the trial, testimony was admitted, over respondent's objection, showing that "about" 350 of the votes polled for him in those precincts were received from this class of fraudulent voters. It is claimed that this was error; that the notice given was not in compliance with the court's order, and was wholly insufficient to justify the admission of these proofs. If counsel's contention in this regard be correct, such frauds as the one in question might be perpetrated with impunity; for, when the illegal voter has cast his vote in the name of a legally registered elector, it will generally be impossible to learn his true name. In elections like the one now under consideration, where thousands of votes are polled, and where most of the men who perpetrate frauds of this kind belong to the criminal class, or are transients, and have no regular place of abode, it is practically impossible to discover their whereabouts and make known their identity. The purpose of the court's order in the premises was to inform respondent what particular votes were regarded by relator as fraudulent, so that he might prepare himself with the requisite testimony, if existing, to disprove the averment; and, when the names upon which illegal votes had been polled were given, the information was as complete as the nature of the particular fraud reasonably allowed. With this notice, respondent could not have been greatly surprised, and his facilities for investigation were but little, if any, inferior to those of relator. The order was sufficiently complied with; and, had the court refused to receive the evidence in question, error would have been committed.

The judgment directed that respondent

"do forthwith yield and deliver up to the president of the board of supervisors" the said office of mayor, together with all books, papers, keys, furniture, etc., belonging thereto. This mandate is challenged as erroneous. It was undoubtedly made in obedience to the supposed requirement of section 11, p. 90, Sess. Laws 1885, which reads: "In case of a vacancy in the office of mayor, or in case the mayor shall for any reason be temporarily unable to perform the duties of the office, the president of the board of supervisors shall act as mayor." The charter of Denver provides that the mayor shall hold his office for the period of two years. Sess. Laws 1885, p. 88; Sess. Laws 1887, p. 85. It contains no clause directing that he continue until his successor qualifies. Counsel for respondent are mistaken in assuming that section 1, p. 98, Sess. Laws 1885, applies to the case in hand. The language therein, providing for the holding over of municipal officers, is expressly limited to those serving or elected in 1885. The constitution (article 12, § 1) is, however, broad enough to include this position. It says, *inter alia*: "Every person holding any civil office under the state or any municipality therein, shall, unless removed according to law, exercise the duties of such office until his successor is duly qualified." Under this constitutional provision, the incumbent of the office at the time of respondent's installation was entitled to remain until his successor was "duly qualified." It appears that respondent was by the proper canvassing board declared duly elected; that he filed his oath of office, took all the formal steps necessary to constitute the prescribed "qualification," and entered upon the discharge of his official duties. It may be that thereupon the constitutional requirement was satisfied; but if the fact, since revealed, that respondent was not duly elected, vitiates, by virtue of the constitution, the alleged "qualification," still we cannot say that the judgment of the court in the premises is fatally defective. The preceding mayor is not a party to this action, and is not complaining. The record affirmatively shows that he not only voluntarily issued to respondent the proper certificate attesting his election, but also, in like manner, vacated the office, and turned over to respondent all papers, books, documents, furniture, etc., belonging thereto. Relator, who was the opposing candidate, could not be installed. *People v. Londoner*, 13 Colo. 303, 22 Pac. Rep. 764. Under these circumstances, there is, in our opinion, no question but that upon entry of the judgment of ouster, upwards of a year later, the clause of the charter above mentioned became operative. A vacancy, within the meaning of this provision, then existed, to be filled, for the time being, at least, by the president of the board of supervisors. Had the outgoing mayor been a candidate for reelection, and had he refused to turn over the office or recognize his successor until forcibly dispossessed, the situation would perhaps have been different, and a different question might be presented. But even under such circumstances this case would

not be parallel to that of *U. S. v. Addison*, 6 Wall. 291, relied on by respondent; for it appears in that case that the relator, Crawford, was found to have been duly elected by the proper canvassing board, and that the city council of Georgetown, in violation of law, refused him recognition, illegally assumed to examine or recount the vote, declared Addison, his opponent, elected, and installed him into the office; whereupon Crawford instituted the proceeding in which the decision was rendered, by information in the nature of *quo warranto*. It appears, further, that the statute thereunder consideration not only provided that the incumbent should hold until his successor had qualified, but contained also the further declaration that he should remain until his successor was "duly elected." Had the court rendered a judgment of ouster simply, the statute would have supplied an incumbent. The fact that the judgment mentions the statutory successor does not destroy its validity. Relator cannot complain; and, if one not a party to the record believes himself injured, he is not estopped from asserting his claim in the proper legal forum. The objection now under consideration must be declared invalid.

Relator was a resident, a tax-payer, and an elector within the city; and upon refusal of the district attorney to institute this proceeding, when requested by him, relator was undoubtedly authorized to do so himself. Civil Code, 289. The subsequent discovery of the fact that he could not be installed into the office did not render him incompetent to continue the suit as relator, or permit such continuance. It is true, he admitted upon the trial that he was not then employing counsel or advancing costs, and did not expect to incur any further liability in the case, but, in response to a question, he indicated that he was still interested personally "as any other citizen." And it does not appear that he requested a discontinuance, declined to allow the further use of his name, or in any legal way attempted to relieve himself from the responsibility connected with his position as the original moving party, or from the financial liability resulting. The motion interposed, after the former judgment by this court, to dismiss the action on the ground that there was no proper party complaining, and hence no warrant or authority of law for its further prosecution, was correctly denied.

Respondent objected to the calling of the jury, and insisted upon a trial by the court. The court ultimately, as we have seen, made his own findings of fact, and entered judgment accordingly. It is doubtful, therefore, if respondent could have been so prejudiced by the participation of the jury as to justify us in now listening to his complaint in this regard. *Pfeiffer v. Riehn*, 13 Cal. 643. But we do not consider the court's action in the premises improper. Our constitution does not declare that a jury may either be demanded or denied as a matter of course in the trial of civil cases; hence this is a proper subject for statutory regulation. The present proceeding clearly belongs to one of the classes of actions referred to



in the last clause of section 173, Civil Code. This Code provision expressly recognizes the power to refer any specific issue or question of fact to a jury for trial. To this extent those proceedings at law covered by the statute are thus made similar to suits in equity; and the court possessed authority to invoke the assistance of a jury.

A special *venire* for jurors was issued, and respondent challenged the array on the ground that the regular panel was not exhausted, and there remained in attendance "more than sufficient" to try the cause. This challenge was overruled, though no issue of law or of fact was formally tendered in writing. We must regard the ruling as based upon a demurrer *ore tenus* to the petition, and as predicated upon the issue of law thus raised. In considering the sufficiency of the petition, the court doubtless took judicial notice of the statutes pertaining to the subject involved, and also that relator, one of its officers, was the sheriff. *Coon v. Rigden*, 4 Colo. 275. The record recites that, "the sheriff of said county being relator herein, the court ordered an open *venire* to issue to the coroner," etc. By statute, the sheriff is required to assist in drawing from the box provided the names of jurors to constitute the regular panel. It is also, in like manner, made his duty to serve the regular *venire* then issued, as well as special *venires* under which his choice is generally uncontrolled. By statute, also, the coroner is directed to serve all processes when the sheriff is a party to the cause. Had respondent, under the circumstances, objected to the regular panel, and moved for a special *venire*, the court might properly have sustained the objection and motion; though we do not say that, had he overruled the same, his action, in the absence of fraud or misconduct, would necessarily have been error. But the order in question was calculated to secure a more impartial investigation; and the people, being a party to the record, and profoundly interested in the result, were entitled to consideration as well as respondent. It must be remembered that the jurors were not called upon to try the case, as in ordinary legal actions. Their findings, as already indicated, were simply advisory, and did not control the decision. Moreover, the fact is perhaps worthy of mention in passing, though of course not decisive, that there is no averment in the petition, nor any pretense otherwise, that respondent was in the slightest degree prejudiced by the issue of the special *venire*. We shall decline to reverse the judgment upon this objection.

The jurors were summoned "for the trial of such issues as might thereafter be submitted to them by the court;" but the ordinary oath, "to well and truly try the matters at issue, \* \* \* and a true verdict render, \* \* \*" was administered. This oath is prescribed by statute, and under it a general or special verdict may be returned; or, in cases where general verdicts are rendered, special findings of fact may also be required, the latter controlling the general verdict, if inconsistent therewith. Civil Code, §§ 198, 199. "The

usual oath taken by jurors includes any issue between the parties submitted to them on the trial of the cause." *Thomp. & M. Juries*, § 292. There was in the present case no amendment of the pleadings after the trial began; hence the issues were not changed, and no necessity existed under any of the decisions, so far as we have examined them, for reswearing the jury. *Id.* and cases cited. The cases of *Kerschbaugher v. Slusser*, 12 Ind. 453, and *Hoot v. Spade*, 20 Ind. 326, mentioned by counsel for respondent, differ from the one at bar in this important particular, and therefore have no application.

The complaint upon which the trial took place unquestionably states a cause of action. The averments are sufficient to sustain the findings and judgment. If a few of its numerous paragraphs incidentally allege conclusions of law, or contain matters touching relator's eligibility and his claim to the office, such matters may be regarded as surplusage. They did not affect the substantial rights of respondent; and, while they might have been stricken out, we do not deem their presence of sufficient importance to warrant interference by us at this stage of the proceedings. The case seems to have been tried with unusual care, and we find nothing in the record that justifies a reversal. The judgment is accordingly affirmed.

#### CARPENTER V. INNES.

(*Supreme Court of Colorado*. Feb. 27, 1891.)

##### REPLEVIN—AGAINST OFFICER—JURISDICTION.

Replevin will lie in any state court of competent jurisdiction, in favor of the owner of goods seized by an officer on a writ against a third person, in an attachment suit pending in any other court of the state.

Commissioners' decision. Error to district court, Mesa county.

*Bucklin, Staley & Safely* and *Byron Millett*, for plaintiff in error. *Richard A. Thompson*, for defendant in error.

**BISSELL, C.** This was an action begun in June, 1885, in the county court of Mesa county, to recover of the defendant Innes the possession of certain personal property said to have been wrongfully taken by him and withheld from the plaintiff, with damages for the taking and detention. The defense interposed was a justification by the defendant under a process of attachment issued out of the county court of Arapahoe county, in a suit by *W. A. Hover & Co.* against one *J. C. Kennedy*. The goods in controversy were in the possession of the plaintiff Carpenter, but had been seized by the sheriff under the attachment issued against defendant Kennedy in the other suit. Upon the trial in the county court the issues were found for the defendant sheriff, and from that judgment an appeal was taken to the district court. When the case came on for trial in that court a stipulation was filed by the attorneys for the respective parties setting up the doubt that existed as to the jurisdiction of the court in an action of replevin brought against an officer who had taken goods under a writ issued



against a third person, and stipulating that the sole question which should be tried at that time should be the one relating to the jurisdiction. The stipulation reserved all other questions for ultimate determination. Under this stipulation the hearing was had, and testimony was introduced which established the pendency of the other suit, the seizure by the sheriff of the goods claimed by the plaintiff, and evidence was tendered to show the plaintiff's ownership and title. The record was permitted to be offered, but proof of title was rejected. The decision was rendered upon the hypothesis that the property was *in custodia legis*, and followed what was erroneously supposed to be the rule laid down in *Parks v. Wilcox*, 6 Colo. 489. Since this decision by the district court, however, the precise question involved has been adjudicated by this tribunal. The rule has been established that replevin will lie in any state court of competent jurisdiction in favor of one who is the owner of goods which had been seized by the sheriff, or any other officer, upon a writ against a third person, where the suit in which the writ issued has been brought in any other of the courts of the state. The decision proceeds upon the principle that the taking by the officer is without authority, and wrongful, and that the process will afford him no justification if the proof establishes that he has taken property which did not belong to the person against whom the process runs. *Wilde v. Rawles*, 18 Colo. 588, 22 Pac. Rep. 897. Under this authority it is evident that the decision of the court, holding that it was without jurisdiction, was erroneous, and that the case must be reversed for further proceedings.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed and the cause remanded.

(15 Colo. 593)

*In re* HOUSE BILL NO. 165.

(Supreme Court of Colorado. March 12, 1891.)

CONSTITUTIONAL LAW—QUESTIONS SUBMITTED TO SUPREME COURT.

As a general rule questions submitted under section 3 of article 6 of the constitution should be specific, and when the inquiry concerns the constitutionality of a bill the provision or provisions of the constitution supposed to be in conflict therewith should be indicated.

(Syllabus by the Court.)

The opinion of the court is in response to the following communication from the honorable the house of representatives: "Whereas, there has been introduced in this body a bill known as 'House Bill No. 165,' entitled 'A bill for an act to provide for the creation of districts to be benefited by certain public improvements, and of a bonded indebtedness for the purpose of making such improvements,' a copy of which is hereto attached: Therefore be it resolved by the house of representatives that the supreme court of this state be requested to give its opinion of the constitutionality of said bill."

PER CURIAM. The bill of which the opinion of the court is requested, contains 18 sections, several of which are quite lengthy, and much involved. Its provisions are novel, and out of the ordinary channel of legislation in this state. If the bill should be adopted by the general assembly it would doubtless give rise to controversies involving various constitutional questions. The request for the opinion of this court by the vote of the house implies the existence of doubt in the minds of members as to the constitutionality of the proposed measure, and yet neither the preamble nor resolution gives any intimation as to what provision or provisions of the bill and of the constitution are supposed to be in conflict. We are not informed, therefore, of the particular matter to which our attention is invited; nor can we determine the direction in which to pursue an investigation. The points of contact, and perhaps of conflict, between a bill of such proportions and peculiarities and a constitution containing hundreds of sections may be numerous. It would be quite impossible for us to anticipate, much less to decide, all of them upon a general question submitted *ex parte*. See senate resolution, *In re* Irrigation, 9 Colo. 621, 21 Pac. Rep. 470. Should we attempt to give our views upon the constitutionality of the bill submitted, without more specific inquiry, we might devote a great deal of time and space to matters about which the honorable members of the house have no doubts, and still omit to consider the very question or questions upon which our opinion is desired. When the constitutionality of a statutory enactment is challenged in this court in ordinary litigation our attention is uniformly directed to some specific constitutional provision, and our opinion is limited accordingly. For these reasons we respectfully request that the honorable house favor us by indicating the particular provision of the constitution which they desired considered in connection with the bill submitted.

(15 Colo. 595)

*In re* HOUSE BILL NO. 165.

(Supreme Court of Colorado. March 12, 1891.)

UNIFORMITY OF TAXATION—CONSTITUTIONAL LAW.

When the principal provisions of a bill with which the remaining provisions are inseparably connected in substance cannot be upheld as constitutional, the bill as a whole must be held invalid. A bill providing for public improvements by special taxes levied upon districts having territorial limits different from the municipal corporation levying the tax, and without limiting the rate of taxation or amount of indebtedness for such purposes, held unconstitutional. *Quære*, whether certain duties and responsibilities contemplated by the bill can be properly devolved upon district courts.

(Syllabus by the Court.)

STATEMENT AND OPINION UPON FURTHER INQUIRY.

Upon the announcement of the foregoing opinion the honorable house of representatives made further inquiry concerning the constitutionality of house bill No. 165, designating the following provisions of the constitution as bearing upon the subject, to-wit: Section 3 of article 10,

section 8 of article 11, section 35 of article 5, and section 1 of article 7. The following synopsis of the bill is necessary to an understanding of the opinion: The bill provides, among other things, that the board of public works, city council, or board of trustees of any incorporated town or city, or the board of county commissioners of any county, may establish and define the territorial boundaries of a district of lands to be benefited by any public improvement, such as the establishing, widening, grading, paving, or otherwise improving any road, street, or alley, or the constructing, enlarging, or completing of any bridge or viaduct, or the establishing or improving of any public park, of peculiar benefit to the lands lying within the territorial jurisdiction of such board or council, and in the vicinity of the proposed improvement. That the district court of the county in which such district or proposed improvement or any part thereof is to be situated, shall upon petition of such board or council, or of any persons interested, declare and constitute such district, or several contiguous districts lying in different towns, cities, or counties, a single public improvement district for the purposes in said order expressed, and shall give the same a suitable name or number. That the district court shall call an election of certain property holders residing within said district for the purpose of voting upon the question of creating a bonded indebtedness wherewith to make the proposed improvement; the court to designate the time, place, and judges of said election. Provision is made for giving notice of the election and the manner of conducting the same; that, if a majority of the votes shall be cast for the bonds, then the bonded indebtedness shall be considered as duly authorized; that the judges shall make a verified report of the proceedings of said election to the district court; and that the court may approve or disapprove the report of the judges, and, in case of disapproval, may order a new election. Provision is also made for protesting against the approval of such report; but that, if it shall appear to the court, from such report or otherwise, that the proceedings at such election were substantially regular and fair, the court shall approve of said proceedings, and declare the location, nature, character, and uses of the proposed improvement, and further declare what amount of bonded indebtedness, if any, was duly authorized at said election; and in case the improvement district includes territory lying within the corporate limits of different towns, cities, or counties, the court is required to apportion the indebtedness between them. The bill also provides for the issue of district improvement bonds by the town, city, or county in convenient denominations, payable out of revenues to be derived from special taxes to be levied and assessed on all the taxable property in said improvement district by the proper board or boards of county commissioners; that such bonds shall constitute a lien upon such of the lands lying within such public improvement district as are

also within the territorial jurisdiction of the corporate body issuing the same; and that it shall be the duty of the board of county commissioners of such county, and of each county in which said public improvement district, or any part thereof, is situated, annually to levy and assess a special tax on all the taxable property within said county and district for the payment of the interest or principal to accrue during the next calendar year according to the tenor and effect of said bonds. The collection of said special taxes for the use aforesaid by the county treasurer is also provided for.

**PER CURIAM.** Upon further request for an opinion as to the constitutionality of house bill No. 165, specific inquiries relating to several sections of the constitution in connection with the proposed enactment have been submitted. We have been favored with a brief argument *ex parte* in support of the constitutionality of the proposed measure. Upon consideration of the various matters involved in the questions submitted, we are of the opinion that the principal provisions of the bill, with which the remaining provisions are inseparably connected in substance, cannot be upheld as constitutional; and hence the answer to the legislative inquiry must be that the bill as a whole is unconstitutional. Cooley, Const. Lim. p. 178. In addition to the constitutional objections indicated by the specific inquiries, it has been suggested as doubtful whether certain of the duties and responsibilities contemplated by the bill can properly be devolved upon the district courts. See Const. arts. 3, 6.

(16 Colo. 162)

**BURLOCK et al. v. CROSS et al.**

(Supreme Court of Colorado. Feb. 27, 1891.)

PRINCIPAL AND AGENT—UNAUTHORIZED ACT—RATIFICATION—INSTRUCTIONS—APPLICABILITY.

1. A contract, made by an agent without authority or subsequent ratification, to cancel a debt due from the firm, of which defendant was formerly a member, in consideration of his buying goods for his present employer from plaintiff, was not a defense to an action for the debt.

2. Where it was shown that a former member of a firm offered to pay one-half of the partnership debt for an individual release from the other portion, but there was no evidence of a legal tender of the amount, it was erroneous and misleading to charge that a tender was an offer to pay the amount due in cash.

**Commissioners' decision. Error to Fremont county court.**

**A. Macon, for plaintiffs in error. Joseph H. Maupin, for defendants in error.**

**BISSELL, C.** This action was originally brought before a justice by Burlock & Co. against the defendant Cross, to recover \$265 for goods sold and delivered in the state of Wisconsin. The trial resulted in a judgment, from which an appeal was taken to the county court of Fremont county, where judgment was again rendered for plaintiffs for \$122. The action was tried without written pleadings, and simply upon the statement of the cause of action which was originally made before the justice. There was no contention

whatever concerning the substantial facts out of which the plaintiffs' cause of action grew. As already stated, the action was brought to recover the price and value of certain goods sold by Burlock & Co. to Cross & Hambright. The sale of the goods, and the amount and value, were conceded. The principal defense rested on an agreement said to have been made years after the sale with a traveling agent who represented Burlock & Co. Substantially, it was that, if the defendant Cross would purchase for the house in which he was then clerking what his employers needed in the line of goods carried and sold by the plaintiffs, the debt of Cross & Hambright would be forgiven. Cross testified that, in pursuance of the agreement, he gave an order for goods to be furnished to his firm, and subsequently, when he went into business for himself, continued to purchase goods from the same parties. Whether such an agreement, without more, can be said to be based upon a sufficient consideration to support it as a release of an existing debt, is a thing which in this opinion need not be determined. According to the proof in the case, the agreement was of so value for the purposes of a defense. It was made with a traveling salesman representing Burlock & Co., and as such he would be without authority to enter into any convention of that description which would bind his employers. In order to make the defense available, it was incumbent upon the defendant to show original authority in the salesman, or else a subsequent ratification of the act or agreement by the firm. It was conceded that there was no original authority. In order to support an agreement made by an agent who possesses no original authority, the ratification proven must be of the agreement originally entered into, and it must be shown to have been made with full knowledge of the thing to be ratified, and the intention of the principal must either be proven or necessarily inferable from the language and terms of the transaction between the parties. Nothing of this sort appears in the record. It is therefore apparent that this agreement, as originally made with the salesman, was not good as a defense, nor was it sustained by the proof offered of a subsequent ratification. An equally fatal error was committed by the court in the instructions which it gave to the jury. During the progress of the trial some testimony was offered by the defendant tending to show an offer on his part to pay one-half of the debt due from his firm, providing he could be released individually from the obligation to pay the other portion. On this testimony the court attempted to instruct the jury upon the law of tender. The court told them, in substance, that a tender was an offer to pay the amount due, and an offer to pay over the amount in cash. It should not have been given to the jury, for there was no evidence in the case that the plaintiff ever made any tender. It was not an accurate statement of the law, for the obligation to keep the tender good is as essential to the legal efficacy of a tender as the offer of the money itself. Neither having been

done by the defendant, he was not entitled to have any instruction on that subject given to the jury. Evidently, the instructions must have misled them, and they must have regarded the offer to pay as the equivalent of a payment, for upon no other hypothesis could they have rendered the judgment for plaintiffs for less than one-half of the sum admitted to be due as principal on the original debt. The want of evidence to support the recovery, and the error committed by the court in its instructions to the jury, render it impossible to sustain the judgment. It should be reversed, and the cause remanded.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed.

# WILLIAMS V. HACKER.

(*Supreme Court of Colorado.* Feb. 27, 1891.)

## RES JUDICATA—IDENTITY OF ISSUE.

Plaintiff brought an action against defendant for damages resulting from the forcible removal of a boundary fence, alleging in his complaint that he was the owner in fee of the ground from which the fence had been removed, and of that on which it had again been placed, and that the premises were then in possession of his tenant. Defendant admitted the doing of the acts charged, but denied plaintiff's title, and tendered issue of title in himself. *Held*, that a judgment in plaintiff's favor was conclusive as to the title of the disputed strip, as the issue of title in fee was indispensable to enable plaintiff to recover for the removal, and that in ejectment subsequently brought by him for the same land the judgment in the former action was admissible to show title in himself.

Commissioners' decision. Appeal from district court, Boulder county.

O. F. A. Green, for appellant.

BISSELL, C. In September, 1886, Benjamin M. Williams brought this action against Rudolph H. Hacker to recover a strip of ground on the east side of lot 5, in block 147, in the town of Boulder. This block was bounded on the north by Hill street, and on the west by Fourteenth street. The strip was about seven feet wide, and ran the length of the north half of lot 5 as the town was originally platted. The defendant claimed that it was a portion of lot 4. The strip adjoined lot 4 on the west, and lot 5 on the east, and was a part of one or the other according to the determination of the lines or boundaries of the two lots. The town was laid out in the early days of the history of Colorado, and the monuments by which the exact location of the various lots and blocks might be determined had disappeared, and at the date of the trial could neither be found nor located. Neither side was able to introduce proof which would establish with certainty the boundaries or lines of either of the lots according to the original survey, and which would exactly determine the *locus* of the strip which both claimed. Testimony was offered by both parties upon the subject, but it is unnecessary to decide what the facts may be, in order to reach a satis-

factory conclusion. The application of a well-established principle to the ascertained facts of this controversy will settle the rights of the parties.

During the progress of the trial, and at a proper time to maintain the issue on his part, the demandant offered in evidence the record in a case previously tried in that court between these parties. The testimony was rejected, and upon this ruling error is assigned. Whether it was error for the court to refuse to admit the testimony rests solely upon the conclusion which may be reached concerning the identity of the parties to the two actions, and concerning the subject-matter of the issue joined in the other suit. In the accurate and forcible language of Lord ELLENBOROUGH in the *Outram Case*, it is the law that a recovery in any one suit upon issue joined on matter of title is conclusive upon the subject-matter of such title. According to that learned authority, it was of little concern in what sort of a suit the issue might be presented. If the issue was tendered, accepted, tried, and determined, the adjudication was conclusive. The rule was based on the broad ground of estoppel; not an estoppel proceeding from the recovery, but growing out of and created by the matter alleged by the party, and upon which the recovery proceeded. The estoppel was the legitimate fruit of the tree which the pleader had planted and cultivated. The only inquiry was as to the identity of the parties and the issues. Whenever it was apparent from the record that they were one and the same, the record afforded conclusive evidence in relation to the title in any subsequent litigation over the original subject-matter of controversy. They were adjudged concluded from contending to the contrary, because the fact had been once distinctly put in issue, and solemnly adjudged. *Outram v. Morewood*, 3 East, 346; *Small v. Haskins*, 26 Vt. 209; *Burt v. Sternburgh*, 4 Cow. 559; *Dunckle v. Wiles*, 6 Barb. 529, 11 N. Y. 420. In nearly all the cases which uphold this rule the former action was in trespass, and much learning was employed to establish either the universality of the rule, or its right application to the facts of the particular controversy. Whether the former suit and judgment were pleaded in bar, or offered as evidence of title, the result was the same, and it was competent testimony in either case. They were all agreed that the estoppel arose, and furnished conclusive evidence of title, wherever the title was at issue. Of course, it was conceded that in an action of trespass the question of possession, or rather the right of possession, was often the only basis upon which the right of action rested; and that the title, therefore, was not necessarily concerned. But, as Lord ELLENBOROUGH said, this fact makes no difference whatsoever in the application of the doctrine to cases in which the title was involved. He held, broadly, that the judgment in every species of action was final for its own proper purpose and object; and that every species of judgment, from one in an action of trespass to one upon the right of property, was equally conclusive upon its own subject-matter by way

of bar to future litigation for the thing decided. If the issue in the suit raised the question of title, and the fact was found against them, this finding created an estoppel which bound the parties and their privies.

It remains, then, to determine whether the record which was offered showed that the issue of title had once been tried between the parties, and that the plaintiff, therefore, had the right to tender it as evidence, or as conclusive evidence, upon the question. The record of the former action, according to the offer as preserved, contained the complaint, answer, replication, and the judgment. The offer as made by the plaintiff was broad enough to include the tender of proof of the identity of the premises in controversy, regardless of the issue raised in the record itself. In the case before us the identity of the premises is clearly apparent from the papers themselves. That suit was brought by Williams, the plaintiff in this action, against the present defendant, Hacker, to recover the damages resulting from the forcible removal of the boundary line fence previously erected along the eastern boundary, which was thus made a new eastern boundary for lot 5. Williams set up in his complaint that he was the owner in fee of all the ground from which the fence had been removed, and of that upon which it had again been placed. He deraigned his title from the United States by a chain of mesne conveyances ending in himself. He averred that, at the time of the injury complained of, the premises were in the possession of one Snell, who was his yearly tenant in its occupation. After setting out the method of the removal, the digging of the post-holes, the injury to the freehold, and the waste committed thereby, he prays damages. The defendant, Hacker, accepted the issue, denied Williams' title, but admitted the doing of the acts which the plaintiff alleged as his particular injury. Not content with this, the defendant tendered a further issue of a title in himself to the particular strip of ground, which belonged to either one lot or the other, and therefore either to Hacker or to Williams, as the line might be found to run. The replication took issue upon Hacker's title thus asserted. Upon these issues there was a finding for the plaintiff, Williams, and a judgment followed in his favor, which stands unreversed. That this judgment adjudicated the title to the strip of ground can scarcely be disputed. The boundaries of the strip are given by metes and bounds in the complaint in the original suit, and these are identical and concurrent with the description of the same ground which is contained in the complaint in the present action. Further proof of the identity of the *locus in quo* in the one suit would hardly have been necessary, though under the offer it might have been made, had it been deemed at all essential; but the identity is so far apparent to the court from the inspection of the two records that it is impossible to do otherwise than hold that the trial court committed error in the refusal of these proofs. Had it been permitted to go to the jury with such proofs as might have

been requisite to establish the absolute identity of the *locus in quo*, it would have been conclusive upon the question of title. That the plaintiff had the right to use the judgment averse of his own title is apparent from the authorities heretofore cited.

It is wholly unnecessary in this opinion to further refer to the elaborate discussions which have resulted in the establishment of the doctrine that estoppel will arise even in an action of trespass, provided the question of title has therein been made the subject-matter of an issue. Trespass would not have lain in favor of the plaintiff, Williams, when he brought his action against Hacker to recover for the damage which he had sustained by reason of the removal of the line fence. It is apparent from the record in that case that at the time of the institution of the suit the property was in the possession of a tenant under lease for a term. Under these circumstances the rule is that the landlord cannot maintain trespass against a stranger for an entry upon the property. The only injury for which the landlord may recover against a stranger is an injury to the inheritance; and his action must be an action of waste, or an action upon the case for the injury to his freehold. 2 Wat. Tresp. p. 392, § 948; Davis v. Nash, 32 Me. 411; Smith v. Felt, 50 Barb. 612; 2 Wat. Tresp. § 950, note. It is thus apparent that not only was the issue of title in fact made as between the parties, but also that this issue was indispensable to the recovery. It should therefore not have been permitted to be again litigated between them, but the judgment should have gone to the jury as conclusive evidence of the plaintiff's title. For the errors committed by the court with respect to this matter the judgment should be reversed, and the cause remanded for further proceedings in conformity with this opinion.

RICHMOND and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed.

#### *In re* HOUSE RESOLUTION NO. 25.

(Supreme Court of Colorado. March 13, 1891.)

#### STATE FISCAL YEARS—REVENUES—APPROPRIATIONS.

1. The fiscal year of 1891, in Colorado, began December 1, 1890, and will end November 30, 1891.

2. The general assembly may properly appropriate to the support of the state government for the fiscal years 1891 and 1892 any surplus remaining after the payment of previous appropriations, and all revenues coming into the state treasury for those years, including taxes for such years to be hereafter levied.

Three questions are embraced in the resolution. The first has reference to the fiscal years from the revenues of which the appropriation for the support of the state government for the next two years may properly be made. The second relates to the right of the state treasurer to credit county treasurers with moneys paid out

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by the latter for scalps, under "An act for the destruction of wolves, coyotes, bears, and mountain lions, and providing a premium therefor," approved April 18, 1889. By the third, information is asked in reference to the salary of the state treasurer, the house being in doubt as to whether or not the present treasurer is entitled to the increase in salary provided by an act of the general assembly approved January 13, 1891.

PER CURIAM. The present fiscal year, which in our judgment may appropriately be called the fiscal year of 1891, commenced on December 1, 1890, and will end on November 30, 1891. The general assembly may properly appropriate to the support of the state government for the fiscal years 1891 and 1892 any surplus remaining after the payment of previous appropriations, and all revenues coming into the state treasury for those years, including the amounts to be derived from the taxes hereafter to be levied for said years, as provided by that body. For example, the taxes to be levied for the present fiscal year may be applied to the payment of appropriations for the fiscal year of 1891, although such taxes will not be delinquent until the year 1892. An answer to either the second or third inquiries would involve a determination of constitutional questions in reference to existing laws. Private rights are based upon these laws, which ought not to be determined upon an *ex parte* application such as this is. As a general rule, such rights should only be decided in due course of litigation, after the parties to be affected by the result have been accorded a full hearing. In re District Attorneys, 12 Colo. 466, 21 Pac. Rep. 478. Under the circumstances, we do not feel at liberty to express an opinion upon the matters embraced in such questions, and therefore respectfully request your honorable body to withdraw the same.

#### COLLINS v. BURNS.

(Supreme Court of Colorado. March 6, 1891.)

#### COMPETENCY OF JURORS—ATTACHMENT—WAIVER OF DEFECTS—DISSOLUTION.

1. Where a juror heard "some of the facts," and formed "a slight opinion" at the time, but afterwards forgot even the facts, and another "heard of the case," and formed a conditional opinion, not, however, on the merits, and each swore on his *voir dire* that he thought he could try the case fairly and without regard to his previous opinion, it was not error to disallow challenges thereto, inasmuch as such opinions were not "unqualified \* \* \* as to the merits of the action" within Civil Code Colo. § 182.

2. A writ of attachment was issued at the commencement of an action, and the affidavit being traversed, the attachment was sustained in the county court. On appeal to the district court appellant allowed the case to be tried on its merits, without insisting on a disposition of his attachment traverse. *Held*, that the attachment issue was thereby abandoned.

3. An appeal-bond does not operate to release property taken on attachment.

Appeal from district court, Pitkin county.

Markham & Dillon, for appellant. Aaron Helms, for appellee.

HELM, C. J. The court did not err in overruling the challenges for cause to the jurors Hewitt and Tourtelotte. Hewitt had heard "some of the facts." Tourtelotte had "heard of the case." Hewitt, at the time he learned of the matters involved, formed "a slight opinion," but had since forgotten even the statements made to him. Tourtelotte formed and expressed a conditional opinion, which, however, did not concern the real merits of the controversy. Each swore upon his *voir dire* that he thought he could try the case fairly upon the evidence introduced at the trial, regardless of the opinion previously entertained. The statute does not make the forming, or even the expressing, of an opinion a decisive test as to the juror's competency, unless such opinion be "unqualified \* \* \* as to the merits of the action." Civil Code, § 182. The object of the law in this as in all other respects is to secure fair and impartial trials. Intelligent citizens are sure to hear of cases, both civil and criminal, involving the public interest or welfare; and they are equally certain to base some sort of an opinion upon what they hear. It would be a travesty upon the administration of justice if every intelligent man were thus disqualified from sitting as a juror in such cases. The law fortunately does not involve this absurdity. It takes notice of the fact that intelligence, even when coupled with preconceived impressions, may award more impartial justice than ignorance, too often swayed by impulse or prejudice, and perhaps incapable of logical discrimination. Hence a large discretion, to be carefully exercised for the purpose of insuring equitable results, is lodged with the trial judge in the selection of jurors,—a discretion that must be governed largely by the characteristics of the juror and the special circumstances connected with each particular challenge; and where no positive provision of the statute is disregarded, unless there appears to have been a gross abuse of discretion in determining the question of enmity or bias, courts of review will not interfere. *Railroad Co. v. Moynahan*, 8 Colo. 56, 5 Pac. Rep. 811.

A writ of attachment was duly issued at the commencement of the action, and levied upon certain property of defendant. Plaintiff's affidavit in attachment was traversed by defendant, and an issue thus made, as permitted by law. This issue was tried by the county court, and judgment was rendered sustaining the attachment. When the cause was afterwards appealed by defendant to the district court, it stood for trial from the beginning *de novo*. The application to dissolve the attachment upon the traverse of the affidavit might have been first retried, but the record before us is entirely silent upon the subject, and from this silence we must presume that the attempt to dissolve the attachment was not renewed. It was not the duty of the judge to retry this collateral issue, unless requested to do so; and for aught we know he may not have been aware of its existence. By appearing in the district court, and retrying his cause on the merits without insisting upon a

disposition of his attachment traverse, appellant must be held to have abandoned the dissolution proceeding. He cannot now be heard to complain because the court below did not formally dispose of the attachment issue. When the present appeal was taken, the act (Sess. Laws 1889, p. 78) authorizing a review of judicial orders subsequent to final judgment was not in force. But, had it been, the objection in this case, predicated upon a subsequent ruling, is not well taken. Attachment proceedings are purely statutory, and must throughout substantially conform to the statutory requirements. As we have already seen, the act prescribes a method for procuring the dissolution of attachments and a return of the property taken. Civil Code, §§ 96, 113. It also provides for the release of personal property attached, and its redelivery to defendant upon the giving of a forthcoming bond. *Id.* §§ 111, 112. If these remedies be not invoked, there seems to be no legal alternative but for the levy to remain in force, and for the sheriff to retain possession of personal property taken under his writ. We find nothing in the statutes giving an appeal undertaking the force or effect of a forthcoming bond, or permitting such an instrument to otherwise alter the *status* of attached property. The district judge ruled correctly in denying appellant's petition for a discharge of the attachment, predicated upon the undertaking on appeal from the county court. The judgment of the district court is affirmed.

#### MCDONALD *et al.* v. THOMPSON *et al.*

(*Supreme Court of Colorado.* Feb. 27, 1891.)

EQUITY—EFFECT OF FEIGNED ISSUE—LOST DEED—EVIDENCE.

1. The verdict of a jury on a feigned issue out of chancery is not binding on the chancellor, and he may disregard it, and decide the cause according to his own judgment.

2. The record title to a homestead, occupied by a mother, was in some of her children. After her death her other children filed a bill against those having the record title, alleging that defendants had conveyed the homestead to the mother during her life; that the deed had never been recorded; and that after her death they had destroyed it. Two of the complainants testified to having seen the deed, but neither of them could give its date, its language, its manner of execution, nor swear definitely as to the description of the land. Defendants denied the execution of the deed, and testified that they had permitted the mother to occupy the premises from filial affection. No declarations by the mother indicating that she ever claimed to be the owner were shown, nor was any reason given why the deed, if in existence, was not recorded during her life-time. *Held*, that a finding by the chancellor against the execution and existence of the deed would not be disturbed, as the rule is that the proof as to execution of a lost conveyance and its contents must be clear before the record title of the alleged grantors will be divested.

Commissioners' decision. Error to district court, Arapahoe county.

*Browne & Putnam*, for plaintiffs in error. *Perry & Carpenter*, for defendants in error.

RICHMOND, C. This action was brought on a complaint in the nature of a bill in

equity to restore a lost deed. Plaintiffs in error and complainants below allege that they are the heirs at law of one Mary A. Thompson, and interested as heirs at law in the estate of said Mary A. Thompson, who died intestate. That Emma G. Speed, daughter of said Thompson, did by her deed of conveyance transfer all her interest in the real estate of said Thompson to said Sarah E. McDonald. That on the 18th day of February, 1875, Salathiel Thompson, father of the plaintiffs and defendants, except William C. Clows, executed and delivered to the defendants a mortgage on the north one-half of the undivided one-half of the center one-third of lot No. 11 in block No. 2 in the west division of the city of Denver, to secure the payment of his promissory note. Said note being unpaid, defendants filed a bill in chancery in the county court of Arapahoe county to foreclose said mortgage. That on the 21st day of March, A. D. 1876, a decree was entered of record in said cause in said court against Salathiel Thompson for the sum of \$1,508.08 and costs, and for the sale of the said property. That the special master in chancery made sale of said property on the 4th day of May for the sum of \$1,545.80 to the defendants, and by his deed of the 7th of February, 1877, the master conveyed to defendants the said premises. That some time after the date of the master's deed, about the latter part of the year 1879, the defendants conveyed for a valuable consideration the property above described to Mary Ann Thompson, and delivered the deed of conveyance to her, but that she failed to record the same. That said Mary Ann Thompson remained in possession of the premises for two years after date of deed, continuing to collect the rents up to the time of her death, December 7, 1885. That at the time of her death she had possession of the property and of the deed of conveyance, and that said deed was deposited with Mary C. Cullen for safe-keeping, and has been, with other valuable papers, abstracted and carried away without her knowledge and consent, and is either lost or destroyed. That after the abstraction of said deed the defendants pretended to be the owners of said premises in fee, and are and have been exercising acts of ownership over the same, and refuse to supply said lost deed, and thereby establish title to said premises in the estate of said Mary Ann Thompson. To the complaint defendants answer, denying that they ever made a deed of conveyance, or ever in any manner conveyed the property described in the complaint, or any part thereof, to said Mary Ann Thompson; or that at the time of her death, or at any time, she ever had any such deed of conveyance; or that such deed was ever deposited with Mary C. Cullen, or any other person; or that said deed has been abstracted, carried away, or destroyed. They admit that said Mary Ann Thompson, with her husband, Salathiel Thompson, resided in and upon the premises mentioned in the complaint, and enjoyed the use thereof during their lifetime, together with the rents and profits thereof; but aver that this occupation

and enjoyment of the rents and profits of the premises was by consent of the defendants in consideration of love and affection which they bore to them as their parents. From the foregoing it will be seen that the issue in the court below was whether or not the defendants had ever executed a deed of conveyance of the premises to Mary Ann Thompson. The cause was tried to the court in the first instance, and, at the time being unable to reach a conclusion, the court directed the trial of the issue to a jury, to whom was submitted the following questions: "First. State whether, on December, 7, 1885, there was in existence a deed conveying in fee all the north one-third of lot No. 11 in block No. 2 in the west division of the city of Denver, in Arapahoe county, Colorado, from William N. Thompson and George A. Thompson to Mary Ann Thompson. Second. If such a deed was in existence, state whether it has been delivered by the grantors to the grantee Mary Ann Thompson." The jury answered both of these questions in the affirmative. The court thereupon, notwithstanding the verdict, entered judgment in favor of the defendants, and dismissed the complaint. To reverse this action of the court this writ of error is prosecuted. The errors assigned are that the court erred in setting aside the verdict and dismissing the complaint; that the finding of the court is contrary to the evidence, and contrary to the law.

Plaintiffs in error urge—*First*, that the findings of the jury on the issues of fact were binding on the judge; *second*, that the evidence was sufficient to entitle them to a decree. Upon the first proposition we are inclined to think that the law in this state is well established. In *Abbott v. Monti*, 3 Colo. 562, it is said: "Whether the chancellor shall direct or refuse an issue rests wholly in his discretion, and we fail to discover any valid reason why it should not so rest. If an issue be directed, the verdict of the jury thereon is not binding upon the chancellor's conscience. He is not only at liberty to disregard it, but it is his duty to decide the cause according to the dictates of his own judgment, and the convictions of his own conscience. In an action at law, the verdict of the jury is of higher and more solemn import. It is the foundation upon which the judgment of the court must rest. In a suit in equity, the verdict is not necessarily the foundation of the decree. It is merely incidental, and may be, and, if the chancellor's conscience is not satisfied with it, must be, wholly unheeded." The same doctrine is laid down in *McGan v. O'Neill*, 5 Colo. 58; *Hall v. Linn*, 8 Colo. 264, 5 Pac. Rep. 641; *Kirtley v. Mining Co.*, 8 Colo. 279, 6 Pac. Rep. 920; *Tabor v. Sullivan*, 12 Colo. 136, 20 Pac. Rep. 437.

Accepting, then, the doctrine in this state to be that the verdict of the jury in such a case is not binding upon the chancellor, the sole question remaining for consideration is: "Was the evidence sufficient to warrant a decree as prayed for by the complainants, or was it insufficient, and the court therefore warranted in dismissing the complaint, and rendering judgment accordingly, notwithstanding the



findings of the jury?" We think it may be said that if the court had accepted the verdict of the jury, and entered judgment in accordance with such verdict, we should not have disturbed such judgment; but it does not follow from this that the judgment as rendered ought to be disturbed.

There is some conflict in the testimony of the witnesses on behalf of the plaintiffs and defendants. The two defendants positively swear that they never executed the deed to the property, as claimed by the plaintiffs; and, in opposition to this positive assertion of the two defendants, the testimony on the part of the plaintiffs' witnesses is not very definite and certain. The testimony of Mary C. Cullen is to the effect that she received several deeds, with other papers, from her sister, Mrs. Speed, and was told that they pertained to the estate of Mary Ann Thompson. She never examined the deeds, or compared them with the numbers of the lots; did not know what lots they had reference to, and did not know even the number of the home place, but that she noticed that the deeds were signed by William and George,—recognized the handwriting. In her cross-examination she says: "I saw the deed from defendants to mother among the papers left in my charge by Mrs. Speed. Can't remember how many deeds there were. Know they were deeds with brothers' names to them, because I recognized the handwriting. Do not remember the notary; but know it was a deed by the shape it was in. Do not remember if the face of the deed was blank, like Exhibit A. All I do remember is their names inside, both together,—down here somewhere." Mrs. Speed claims that she saw the deed purporting to convey this property to her mother. She does not give the language of the deed, or its date, or its manner of execution, but in an indefinite way testifies positively that she saw the deed to this property. Her testimony, however, was by deposition, and that of the other witnesses was before the court. There is no reason given why this deed, if in existence, was not placed upon the record in the life-time of Salathiel Thompson or Mary Ann Thompson. There is no conversation detailed by any of the witnesses on the part of the plaintiffs which indicates that Mary Ann Thompson ever claimed the property as her individual property. The occupation and possession of the property with the enjoyment of the rents during the life-time of the father and mother are certainly consistent with the declarations of the defendants in their answer and in their testimony. The rule as laid down in such cases is that "a title to land duly authenticated by written evidence ought not to be set aside on the assumption of a previous lost conveyance, except upon clear proof by the claimant of the execution and existence of the supposed deed, and so much of its contents as will enable the court to determine the character of the instrument." *Metcalf v. Van Benthuyzen*, 3 N. Y. 424; *Edwards v. Noyes*, 65 N. Y. 125. Under this rule we can readily see how the chancellor trying the cause, hav-

ing before him the witnesses and the depositions, and twice having heard all the testimony, could readily say that the existence of the alleged lost instrument, notwithstanding the finding of the jury, was not sufficiently established by the testimony. The defendants' testimony, excepting so far as it conflicts with that of Mrs. Speed and Mrs. Cullen, stands entirely unimpeached. They positively swear that they never executed the instrument, and never intended in any manner or form to part with the title; and, in reality, there seems to have been no necessity for their doing so, inasmuch as they, in consideration of the relation of parents and sons, permitted the father and mother to enjoy during their life-time the possession and rents and profits of the property. This, coupled with the failure to record the deed, and the inability of any of the witnesses who are interested in establishing the existence of the deed to satisfactorily prove that they had ever examined the deed to ascertain whether or not it contained an accurate description of the premises, and the additional failure of Mrs. Cullen to deliver the deed of the property to the administrator, and the fact that there were several deeds in existence pertaining to the estate, and one in particular relative to mining property in Boulder county, which had been executed by one of the defendants, renders it a matter of extreme doubt as to whether any such deed as is described in the complaint was ever in existence, and, in our judgment, was sufficient to create in the mind of the chancellor a well-founded belief that such a deed had never been executed and delivered. Accepting the doctrine that the chancellor must act upon the convictions of his own judgment and conscience, and that it is his province ultimately in cases of this kind to find the facts, pass upon the weight of the evidence and the credibility of the witnesses, we feel convinced that this court would not be warranted in disturbing the action of the court below. The judgment should be affirmed.

REED and BISSELL, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

COBY v. HALTHUSEN.

(*Supreme Court of Colorado*. Feb. 27, 1891.)

APPEAL FROM COUNTY COURT—WAIVER OF NOTICE.

The presence of appellee's counsel in the district court at the first term after a case has been appealed thereto from the county court, when he objected to proceeding to trial, and procured a continuance for two terms, during all of which time his name appeared on the docket as attorney in the cause, without objection, constitutes an appearance in the district court, and is a waiver of all objections to appellant's failure to give written notice of the appeal within five days after it was perfected, as required by *Sess. Laws Colo.* 1885, p. 159, and such waiver will be recognized, though the appearance is shown by extrinsic evidence, and does not affirmatively appear on the record.

Error to district court, El Paso county. T. A. McMorris, for plaintiff in error.



*J. L. Williams and A. E. Pattison*, for defendant in error.

**PER CURIAM.** The present writ of error is prosecuted for the purpose of reversing the action of the court below dismissing an appeal thereto from the county court. The appeal in question was not taken during the day on which the judgment was rendered, nor was a notice in writing served upon appellant's attorney of record within five days after the appeal was perfected. The action of the district court in dismissing the same was had in pursuance of the statute. Section 4, p. 159, Sess. Laws 1885. The statutory right in question is a personal privilege, which may be waived by appellee. *Robertson v. O'Reilly*, 14 Colo. 441, 24 Pac. Rep. 560. But, unless such waiver in some way took place, the judgment of the district court should be sustained. The record proper before us does not recite all the orders and proceedings of the trial court after the taking of the appeal, and prior to the motion to dismiss. We find nothing in the portion presented decisive upon the question of waiver. The bill of exceptions, however, contains affidavits by each of the two opposing counsel. The affidavit of counsel for appellant recites certain facts relied upon by him as showing an abandonment of the right to dismiss the appeal. Among the matters thus recited are a number tending to establish a general appearance in the court below by counsel for appellee, and participation in proceedings connected with the cause, before interposing his motion to dismiss. The counter-affidavit of appellee's counsel contains no positive denial, specific or general, of these matters. It simply states that his first appearance in the district court was when he filed his motion to dismiss the appeal. This is merely counsel's legal opinion as to what constituted an appearance,—the very question the court was to consider and determine upon the proofs. For the purposes of the present review, we must therefore assume that the specific matters in question stated by appellant's counsel are true. Acting upon the foregoing assumption, we find that at the first term of court subsequent to the taking of the appeal counsel for appellee was present, and objected to proceeding to trial, on the ground that it was not the custom of the court to try causes at the term at which they had been docketed; also that thereupon, in deference to counsel's further declaration that he did not want to try the cause at that term, it was continued; that at the second term subsequent to the appeal, when the cause was called, counsel for appellee stated to the court that it would be for trial in its order when reached, but, since no civil actions were reached for trial, it went over that term. Again, that at the third term, and prior to interposing his motion to dismiss, counsel for appellee stated to the court, when interrogated with reference to setting the cause for trial, that it would not require a jury, and by consent of counsel for appellant it was thereupon left to be tried by the court before its adjournment. We also find that during all

this time the name of counsel for appellee stood upon the judge's docket as attorney in the cause without objection. The foregoing admitted facts unquestionably establish such an appearance in the court below as constituted a waiver of the right to insist upon a motion to dismiss, under the statute. It would no doubt be more regular and satisfactory if matters relied upon as showing a general appearance were in some way evidenced by the record proper or files of the cause; but we cannot say that the absence of such authentication should in all cases be held decisive of the question. Some of the facts above stated, touching the conduct of counsel for appellee in open court before interposing his motion, and others that might be mentioned, are of such a nature that they would not necessarily appear upon the judge's docket, the clerk's record, or the files. The judge himself cannot be expected always to remember the conduct relied on as constituting a waiver. And this is especially true where, as in the present case, the participation of counsel for appellee extends through different terms of court. If, therefore, it is clearly shown by extrinsic proofs that an unqualified appearance in open court was made and action taken or participated in, or rules or orders submitted to by counsel for appellee without interposing his motion to dismiss, we think the waivers should be recognized, though the fact of the appearance, participation, or submission does not affirmatively appear of record. In the present case, counsel's laches in failing to interpose his motion, until towards the close of the third term of court after the appeal was taken, is an important additional consideration. Such motions as the one in question must be presented at the earliest reasonable opportunity. Counsel does not deny that he knew of the appeal, and also knew that his name appeared for appellee upon the docket, and he gives no valid excuse for not sooner submitting his application to dismiss. The judgment of the district court is reversed.

**PEOPLE ex rel. PORTEUS v. BARTON, Sheriff, (two cases.)**

(*Supreme Court of Colorado.* Feb. 27, 1891.)

**RIGHTS OF MINORS—JURISDICTION OF DISTRICT COURT—NE EXEAT.**

1. Courts should, so far as possible, in cases before them, protect the rights of minors, although such rights may be but imperfectly claimed.

2. The jurisdiction of the county courts of this state in matters of probate, settlements of estates, appointment of guardians, and settlement of their accounts, is not made exclusive by the constitution.

3. Under section 1804, Gen. St., authorizing the district courts of the state to remove guardians upon the complaint of any person in behalf of the minor, and to make all orders necessary in the premises to compel the guardian to account, etc., the writ of *ne exeat* may be issued, if necessary, to protect the rights of such minor.

4. It appearing that the sole surety upon the bond of the guardian had become insolvent; that the guardian had squandered, misappropriated, and embezzled the trust-estate; that he had failed to comply with the statute requiring him to file a report; and that he is about to depart from the

state for the purpose of cheating and defrauding his ward,—a proper case for the issuance of the writ of *ne exeat* is presented.

(Syllabus by the Court.)

**Application for *habeas corpus*.**

The petitioners, Hercules S. Porteus and Denyse Rose Porteus, were required by order of the district court of Arapahoe county to furnish bail upon a writ of *ne exeat republica*, and, upon failing so to do, were placed in custody of the sheriff of Arapahoe county. For the purpose of testing the legality of the imprisonment, they now apply to this court to be discharged upon *habeas corpus*. There are two separate applications. The causes, however, were consolidated for the purposes of argument and determination. The admitted facts, so far as the same are necessary to a proper understanding of the present controversy, may be briefly stated as follows: On the 12th day of the present month of February, Clara E. Bostwick, a minor of the age of 11 years, by her next friend, filed a complaint in the district court of Arapahoe county against Hercules S. Porteus and Denyse Rose Porteus, defendants. In this pleading it is alleged, *inter alia*, that the mother of said minor departed this life in Denver, Colo., on the 24th day of July, A. D. 1885, intestate, leaving as her sole heirs at law the plaintiff and the defendant Hercules S. Porteus, her step-father; that in the month of October, 1886, said defendant was by the county court of Arapahoe county, Colo., duly appointed guardian both of the estate and person of the plaintiff, and that letters of guardianship were accordingly to him issued, and the bond of such guardian fixed at the sum of \$60,000. It is also alleged that the court accepted as the sole surety upon such bond one William Porteus, who was then well worth the amount of the penalty named therein, but that he has since become, and is now, insolvent. It is further alleged that by order of said district court certain lands of which the intestate died seised had been sold by the said guardian some time in the year 1886; and the proceeds thereof, to the amount of about \$13,000, belonging to the plaintiff, the defendant Hercules S. Porteus had appropriated to his own use. And plaintiff further charges the fact to be that said Hercules S. Porteus has squandered, embezzled, and misappropriated the said sum of \$13,000, the property of plaintiff, derived from the sale of the real estate as hereinbefore set forth, and that he has never at any time made any report to any court whatever of the state of Colorado of his acts and doings as such guardian, although required by the laws of this state to make such a report at least once in each year. Plaintiff further shows that the defendant Denyse Rose Porteus, the present wife of Hercules S. Porteus, has received from him, and has now in her possession and under her control, personal property of the plaintiff's, from the estate of the said Margaret L. Porteus, of the value of \$5,000. The insolvency of the defendants is shown, and plaintiff charges that the said defendants, being so indebted to the said Clara E. Bostwick, are about to depart from the

state of Colorado, and from the jurisdiction of the court, and take up their permanent residence in the kingdom of Great Britain and Ireland, taking with them out of the jurisdiction of this court the moneys and property of the plaintiff. It is also alleged that the defendants, in departing from the state of Colorado, do so for the purpose of cheating and defrauding the plaintiff out of her inheritance. The prayer of the complaint is for the issuance of a writ of *ne exeat republica*, directed to the defendants, detaining them, and each of them, within the jurisdiction of the court until such time as they shall give bond, with sureties to be approved by the court, and for general relief. Upon this complaint a summons and writ of *ne exeat* were issued in the usual form, the bail upon the writ being fixed at \$13,000. The defendants, failing and refusing to give bail, were detained by the sheriff of Arapahoe county, from whose custody they seek to be discharged upon the present application.

T. B. Stuart and C. P. Butler, for petitioners. Sullivan & May, for respondent.

HAYT, J., (after stating the facts as above.) Plaintiff's case, as made by the bill filed in the court below, presented a strong appeal for the exercise in her behalf of the chancery power of that tribunal to its utmost limit. The case of an orphan child of tender years seeking the aid of the court to preserve to her the estate descending from her deceased parent is certainly one in which a chancellor should be diligent in endeavoring to extend all relief proper in the premises. The settled policy of the law requires this to be done even in cases in which the guardian or *prochein ami* does not properly claim such rights. *Hutchinson v. McLaughlin*, 16 Colo. —, 25 Pac. Rep. 317. Petitioners, upon this application to be discharged upon *habeas corpus*, contend, however, that the district court was without jurisdiction to issue the writ of *ne exeat republica* for the following reasons: *First*, as the acts of which complaint is made relate to the settlement of an estate, it is claimed that the county court had exclusive jurisdiction to hear and determine the same; *second*, because of the constitutional inhibition against imprisonment for debt; *third*, because the writ of *ne exeat*, it is said, cannot be issued in any case before final judgment. It must, of course, be admitted that the matters of which complaint was made in the district court arose out of the settlement of the estate of the deceased parent; but counsel are in error in assuming that the county court has exclusive jurisdiction of all such matters. Section 23, art. 6, of the state constitution does not so provide. It reads as follows: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates, appointment of guardians, \* \* \* and settlement of their accounts. \* \* \* It is not provided, however, that such jurisdiction shall be exclusive. Had this been intended, we have no doubt language would have been employed that would have placed the matter beyond controversy."

*Crain v. Barnes*, 1 Md. Ch. 151; *Darling v. McDonald*, 101 Ill. 370. So far as legislative construction bears upon the question, it may be said that the legislature has never treated this provision as conferring exclusive jurisdiction upon the county courts; for, while it has enacted a very complete system of procedure to be followed in the administration of estates, appointment of guardians, and settlement of their accounts, etc., and has generally provided that such matters shall be adjudicated in the county court, many exceptions to such general rule are made by statutes expressly conferring jurisdiction upon the district courts. See Gen. St. §§ 484, 1594, 1604. In the case at bar the guardian came into possession of the trust fund as the result of the sale of the lands of the ward made by order of the district court; and it would be strange indeed if the power of the district court in the premises was exhausted in making the order of sale. By section 20 of the chapter of the statutes entitled "Guardian and Ward," it is expressly provided that guardians appointed under the provisions thereof shall be subject to removal by the district court of the proper county upon the complaint of any person on behalf of the minor. See Gen. St. § 1604. The guardian in this case was most certainly appointed under the provisions of said chapter. By the sections referred to, the district court is given ample power not only to remove him, but to appoint another in his stead, and to make all such orders in the premises as may be necessary. This section disposes of the claim of exclusive jurisdiction in the county court, and, as it does not appear to be obnoxious to any constitutional objection, it must control here.

This brings us to the objection based upon the constitutional provision in reference to imprisonment for debt. The section reads as follows: "That no person shall be imprisoned for debt, unless upon the refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law, or in cases of tort, or where there is a strong presumption of fraud." Article 2, § 12, Const. The facts stated in plaintiff's complaint, upon which the *ne exeat* proceedings are based, certainly show a strong presumption of fraud on the part of both respondents; thus bringing the case within the exceptions expressly made by the constitution. Aside from this, by the weight of authority, although a contrary doctrine has been announced in Illinois, and perhaps some other states, an arrest and detention upon a writ of *ne exeat* to prevent a person from going out of the state until he shall give security for his appearance is held not to constitute imprisonment for debt, within the meaning of the constitutional inhibition. *Dean v. Smith*, 23 Wis. 483; *Brown v. Haff*, 5 Paige, 235; *McNamara v. Dwyer*, 7 Paige, 239; *Fuller v. Emeric*, 2 Sandf. 626; *Bushnell v. Bushnell*, 15 Barb. 399; *Malcom v. Andrews*, 68 Ill. 100.

The objection founded upon the fact that the writ in this case was issued before final judgment is not well taken. The writ of *ne exeat regno*, from which au-

thority for our present writ is derived, was at first only applied to great political objects and purposes of state, and no doubt had its origin in the fact that every male subject was bound to defend the king and his realm, and therefore the king might at his pleasure command him to stay within the realm; and although, at a later date, it was resorted to in cases where purely private rights were involved, it has been said by English chancellors that it should be applied to such cases with great caution and jealousy. In this country, however, it seems to have been regarded from the first as writ of right in those cases in which it is properly grantable; and, wherever used, it has always been regarded as a mesne, rather than a final, process. 2 Story, Eq. Jur. pp. 716, 717; *Adams v. Whitcomb*, 46 Vt. 708; *Myer v. Myer*, 25 N. J. Eq. 28. While, in general, the writ lies only upon equitable demands and claims, there are some exceptions to the general rule, as in actions for an accounting or for alimony; and with us these matters are also regarded as of equitable cognizance. *Porter v. Spencer*, 2 Johns. Ch. 169, is authority for the use of the writ when an action at law was pending for a balance of an account in which the defendant has been held to bail, the plaintiff in his bill in chancery alleging these facts, and also that in the action at law the defendant had pleaded the general issue for delay merely, and that he and his bail were both preparing to leave the state, neither leaving any property behind; and Chancellor KENT, upon allowing the writ of *ne exeat*, said, among other things: "In the present case, I have some doubts whether the bill states a matter of account on which the jurisdiction of the court can attach. To sustain a bill for an account, there must be mutual demands, and not merely payments by way of set-off. A single matter cannot be the subject of an account. There must be a series of transactions on one side, and of payments on the other. I place my interference on the necessity of the case. From the facts charged and sworn to, it appears to me that the remedy in the suit pending at law would be absolutely defeated without the interposition of the court. The books assume and admit principles that will justify the allowance of the writ under the peculiar circumstances of the present case. The remedy sought is indispensable to prevent a failure of justice; and this creates a marked difference between this and the ordinary cases. I should think it would reflect discredit on the administration of justice if the plaintiff could find no relief from the impending mischief arising from a failure of the remedy at law by the immediate removal of the defendant and his bail." The case of *McNamara v. Dwyer*, supra, is authority for requiring a foreign administrator to give equitable bail upon a writ of *ne exeat* issued in a suit pending against him in chancery, brought to compel him to account for the trust funds which he had received abroad, and brought with him into the state of New York. In *Samuel v. Wiley*, 50 N. H. 353, it was held that independent of statute, and as an

incident to the power of enforcing the orders and decrees of the supreme court, any justice thereof was empowered to issue an order, in the nature of a writ of *ne exeat*, upon evidence satisfactory to him of a party's intention to leave the state. In the case at bar, unless the authority of the district court in issuing the writ can be sustained, the infant plaintiff will be practically remediless. If the facts stated in her complaint are true,—and for the purposes of these applications they must be so taken,—of what benefit to her would the ordinary citation, requiring the respondents to appear and show cause, etc., at a future day, be? Before the return-day the defendants might be without the jurisdiction of the court, and well on the way to Great Britain. As said by Chancellor KENT in *Porter v. Spencer*, supra: "It would reflect discredit on the administration of justice if the plaintiff could find no relief from the impending mischief." In the opinion of this court the district court, with its enlarged jurisdiction, had ample power in carrying out the provisions of section 1604 to issue the writ of *ne exeat* upon which respondents are held.

In answer to the argument of counsel based upon alleged defects in the prayer of the complaint filed in that court, we are of the opinion that all proper relief may be afforded under the prayer for general relief contained in the petition. In addition to this, it should be remembered that the complaint may be amended in this as in other causes; and under our practice the writ of *habeas corpus* cannot be substituted for a writ of error. *Bassett v. Bratton*, 86 Ill. 152; *Ex parte Brandon*, 49 Ark. 143, 4 S. W. Rep. 452; *Ex parte Parks*, 93 U. S. 18. The demurrers to the separate returns of the sheriff will be overruled, the writ of *habeas corpus* discharged, and the prisoners remanded.

#### CHARTRAND *et al.* v. BRACE.

(*Supreme Court of Colorado.* Feb. 13, 1891.)

MUTUAL LIFE INSURANCE COMPANY—ANCIENT ORDER OF UNITED WORKMEN—CERTIFICATES—VESTED RIGHTS.

1. The society known as the "Ancient Order of United Workmen," so far as it is engaged in the business of life insurance, must be treated in law as a mutual life insurance company.

2. The certificate of insurance is to be regarded as a written contract, and, so far as it goes, it is the measure of the rights of all parties.

3. It is the policy of the law to favor vested, rather than contingent, estates.

4. A policy of life insurance is in the nature of a testament, and, although not a testament, in construing it the courts will so far as possible treat it as a will.

5. Under a certificate providing that upon the death of a member the insurance shall be paid to his wife, and in case of her death to his children, the right to the fund vests in the surviving wife immediately upon the death of the husband, and upon her death the fund passes to the administrators as a part of her estate.

ELLIOTT, J., dissenting.

(*Syllabus by the Court.*)

Appeal from district court, Boulder county.

It appears from the record in this case that in September, 1886, the Ancient Order of United Workmen, a secret society organized and established for the purpose, among other things, of insuring the lives of its members, issued to one Sterling D. Rouse, a member of the order, a certificate of insurance in the following words and figures, omitting the formal parts, to-wit: "This certificate, issued by the authority of the Supreme Lodge of the Ancient Order of United Workmen, witnesseth, that Brother Sterling D. Rouse, a master workman degree member of Centennial State Lodge, No. 8 of said order, located at Boulder, in the state of Colorado, is entitled to all the rights and privileges of membership in the Ancient Order of United Workmen, and to participation in the beneficiary fund of the order to the amount of two thousand dollars, which sum shall at his death be paid to his wife, Ella A. Rouse, and, in case of her death, to Mary E., Clara D., and Anna L. Rouse, children. This certificate is issued upon the express condition that said Sterling D. Rouse shall in every particular, while a member of said order, comply with all the laws, rules, and requirements thereof." On December 30, 1886, said Sterling D. Rouse died, leaving his said wife and children him surviving. In less than one month thereafter, January 28, 1887, and before any portion of the insurance money had been paid to the wife, she also died. Appellee, Brace, having been appointed administrator of said Ella A. Rouse, commenced this suit in the county court against the Order of United Workmen, to recover the insurance, as part of said Ella's estate. The children named in the certificate also claimed the benefit of the insurance. The defendant appeared, and requested to be permitted to deposit said sum of \$2,000, "subject to the order of the court, according to the very right of the case;" and it was accordingly so ordered, and the defendant was dismissed as a party. Mary E. Chartrand, formerly Mary E. Rouse, Clara D. Rouse, and Anna L. Rouse, minors, (said last two appearing by John H. Nicholson, their guardian,) were substituted as parties to the action in place of defendant, for the purpose of enabling them to assert in this action their claim to the insurance money. Judgment having been rendered in the county court, the action was appealed to the district court, where an amended answer was filed in behalf of said children and their guardian, claiming the insurance money. The amended answer shows, *inter alia*, that the children named in the certificate of insurance are the children of said Sterling D. Rouse by his first wife, who died many years before; that they were his only children, and with his said wife, Ella, were the only members of his family dependent upon him for support; that his said wife, Ella, was, and had been for years, an invalid, and left no surviving children. The amended answer further shows: "That said Grand Lodge of the A. O. U. W. is a voluntary beneficiary association, not incorporated; that its constitution and laws in force at the time said Sterling D. Rouse became a member, and when he died, provided, among

other things, that the beneficiary or beneficiaries named in the certificates issued to members should be confined to one or more of the family of the members, or some person or persons related to him by blood, or who shall be dependent upon him; that the amount of the beneficiary certificate upon the death of its members shall be collected by assessments upon its members, the assessment to be made upon the first day of the next month after receiving notice from the recorder of the lodge of which the deceased was a member, and payment by the members is voluntary, and cannot be enforced, except by suspension of the members; that notice of the death of said Sterling D. Rouse was received by the grand recorder of the said Grand Lodge of the A. O. U. W., January 11, 1887; that the assessment to pay the beneficiaries named in his certificate was not in fact made until and on March 1, 1887, and the money to pay the same was not collected and in the treasury of said grand lodge, and proper officers ready to draw warrant and pay the same, until the 27th day of March, 1887." Upon motion of the administrator, the district court rendered judgment upon the pleadings in his favor, from which judgment this appeal is taken.

*Chas. M. Campbell and James M. North, for appellants. O. F. A. Green, for appellee.*

HAYT, J., (after stating the facts as above.) The amended answer admits, by failing to deny, the facts as stated in the complaint, and, for the purposes of this appeal, the new matter set up in this answer must also be taken as true. Upon these facts, the position of appellee is that upon the death of the insured the right to the fund vested absolutely in the wife, Ella A. Rouse, and that upon her death the right to the uncollected fund passed as part of her estate to her administrator, to be by him disposed of as other assets of the estate. The contention of appellant is that, as the fund had not been paid over or collected at the time of the death of the wife, the right thereto became vested in the children, under the terms of the policy. The certificate is, in legal contemplation, a policy of life insurance, and to be construed as such. That the amount can only be collected by assessment upon members of the association, after due notice of death, and the payment of such assessment is purely voluntary, can make no difference. The association, so far as it is engaged in the business of life insurance, must be treated in law as a mutual life insurance company. The certificate is to be regarded as a written contract, and, so far as it goes, it is the measure of the rights of all parties. *Bolton v. Bolton*, 73 Me. 299; *Com. v. Wetherbee*, 105 Mass. 149; *State v. Association*, 18 Neb. 281, 25 N. W. Rep. 81; *Wiggin v. Knights of Pythias*, 31 Fed. Rep. 122; *Knights of Honor v. Nairn*, 60 Mich. 44, 28 N. W. Rep. 826; *Insurance Co. v. Horner*, 14 Colo. 391, 23 Pac. Rep. 788.

Turning to the policy executed in this case, we find the disposing clause to be couched in the following language: "Which sum shall, at his death, be paid

to his wife, Ella A. Rouse, and, in case of her death, to Mary E., Clara D., and Anna L. Rouse, children." It would be difficult to find language to more clearly and definitely fix the time at which the right to this money vested in Ella A. Rouse than the words "at his death." It is claimed, however, that the words following, "in case of her death, to Mary E., Clara D., and Anna L. Rouse, children," qualify the words immediately preceding, and that, when construed together, they give to the children a right to the fund so long as the same is capable of practical identification and control, and has not been otherwise appropriated by the wife, although the wife in fact survives the husband. But the plain intent of the language of the policy is against such construction. The words, "which sum shall at his death," fix the time at which the right to the fund is to be determined, and the words following provide for the payment to the children in case the wife shall not be living at that time. The children were only to receive the money upon the happening of certain contingencies. The risk taken by the association was upon the life of the assured. By his death the policy became fixed, and the right to the fund vested. The wife having survived the husband, her right became absolute by the express terms of the policy. This construction finds support not alone in the language of the contract, but is also in accordance with the settled policy of the law, which is to favor vested, rather than contingent, estates; the first, rather than the second, taker. *King v. Trick*, (Pa.) 19 Atl. Rep. 951; *Smith's Appeal*, 23 Pa. St. 9; *Womrath v. McCormick*, 51 Pa. St. 504; *Felton v. Sawyer*, 41 N. H. 202; 2 Redf. Wills, \*253; *Association v. Montgomery*, 70 Mich. 587, 38 N. W. Rep. 588.

A policy of life insurance is in the nature of a testament, and, although not a testament, in construing it the courts will so far as possible treat it as a will. *Bolton v. Bolton*, supra. In *King v. Trick*, supra, an absolute devise was made by a father to his son, followed by a proviso to the effect that, in case the devisee should die without children, grandchildren, or wife, living, the estate should go over. The words "die without children," etc., were held to refer to the death of the son in the life-time of the testator, and the son, having survived the testator, was declared the owner of the fee. The case of *Association v. Montgomery*, supra, is in some respects quite analogous to the case at bar. It was provided by the certificate issued in that case that the insurance should be paid to the son and daughter of the insured equally, if living, and, if not living, to his heirs; in case of the death of either the son or daughter, the full amount was to be paid to the survivor; and the court held the provision as survivorship related to the time of the death of the donor. And it appearing that both beneficiaries were living at that time, although one had died before the payment of the benefit, his executor was entitled to the share, and not the survivor. In the course of the opinion the court said: "The scheme of the corporation is to raise

a fund which shall pass to designated beneficiaries at the death of a member. The right, which before was inchoate and contingent, becomes upon the death of the member fixed and certain in the beneficiary. \* \* \* The time of payment provided for, namely, 90 days after the death of the member, has no reference to who shall take as survivor." So, in the case at bar, we are of the opinion that, by the express terms of the policy, the right to the fund became vested in Ella A. Rouse upon the death of her husband. Consequently, upon her death, the fund should pass to the administrator as a part of her estate. There is nothing in the constitution or by-laws of the association, as pleaded, to change this result. Whatever rights, if any, may have been reserved to the society by these instruments, have been waived by it, and the fund deposited subject to the order of the court. While we feel that our conclusion as to the party entitled to the fund must necessarily follow as a matter of law, in answer to the argument of counsel based upon the duty of the deceased father to provide for his children, it may be said that it was equally his duty to provide for his invalid wife. She was the person having the strongest claim upon his estate and bounty. If the construction contended for by counsel be adopted, the wife could not use the fund, no matter to what extremity she may have been driven in the final sickness intervening between the death of her natural and legal protector and her own death. She could not, by anticipating the payment of the legacy, surround herself with the things that might have been absolutely necessary to sustain her life from day to day. In addition to this, it would place the beneficiary primarily entitled to the fund to a great extent within the power of the insurer. For instance, by withholding payment, the beneficiary would be compelled to bring suit for the money, the ultimate decision of which might be delayed for years; and if, during the time, the wife should die, others would receive the reward of her endeavors without sharing the expense. Under such circumstances, it is easily to be seen that the insurance corporation or association could compel the wife in many instances to accept less than the face of the policy, rather than institute a suit, no matter how clear her right of recovery might be. We think the judgment of the district court is right, and it is accordingly affirmed. The former opinion of the court, delivered by Mr. Justice ELLIOTT, is withdrawn.

ELLIOTT, J., (*dissenting*.) I cannot concur in the foregoing opinion. In the original investigation of this case the various questions involved in the record were carefully considered. By the reargument nothing essentially new has been presented. Hence I now feel constrained to refile the former unanimous opinion of this court as an expression of the reasons for my present dissent. The part relating to the construction of the certificate was as follows: "While the certificate is to be construed as a contract, nevertheless, it being in the nature of a policy of insurance,—a *post mortem* provision for the

benefit of those dependent upon the assured for support,—it is, like the provisions of a will, to be liberally construed in favor of those who may naturally be presumed to have been the objects of their father's bounty. In order to correctly understand and give effect to the contract over which this controversy has arisen, certain rules for the interpretation and construction of written instruments will be noticed. Primarily to be considered is the intention of the husband and father in effecting the insurance, and this is to be ascertained from the language of the certificate itself, construing its words according to their common and reasonable signification, so as to give effect to the entire instrument as far as practicable; *secondly*, the language of the instrument is to be construed in the light of extrinsic circumstances attending its execution, considering the situation and relations in life of the several parties therein mentioned, and the objects and interests to be thereby secured. We are not unmindful of the rule which excludes the proof of contemporaneous oral language to vary the terms of valid written instruments. 2 Bl. Comm. pp. 379-381; 1 Redf. Wills, pp. 421, 663; 1 Greenl. Ev. §§ 275-277; Mining Co. v. Tierney, 5 Colo. 582; Ballou v. Gile, 50 Wis. 614, 7 N. W. Rep. 561; Clarke v. Boorman, 18 Wall. 502, 503; McDermott v. Association, 24 Mo. App. 73; Walker v. Douglas, 70 Ill. 445; Society v. Fletsam, 97 Ill. 474. What, then, was the intent of the assured in causing to be inserted in the certificate of insurance the provision that the money should, 'at his death be paid to his wife, Ella A. Rouse, and, in case of her death, to Mary E., Clara D., and Anna L. Rouse, children?' It is claimed by counsel for the administrator that by the terms of the certificate the right to the insurance money vested in Ella A. Rouse immediately upon the death of her husband. This claim is based upon the words of the certificate that the money shall 'at his death be paid to his wife, Ella.' But these are not the only words of the instrument relating to that subject. It also contains the words, 'case of her death;' that is, it is further provided that in case of the death of the wife, Ella, the money shall be paid to Mary, Clara, and Anna, children of the assured. In argument, however, counsel have sought to maintain the administrator's claim by construing the certificate—*first*, as though the children were not named therein as beneficiaries; and, *second*, as though they were only entitled to the insurance in case the wife should die before the death of the assured. The argument is not well founded. It violates an elementary rule for the construction of contracts, in that it does not give effect to the whole language of the instrument. In the first instance it omits, and in the second adds, important words. The effect of the addition, as well as the omission, is to defeat the clearly expressed intention of the assured. It is true the certificate was framed so that the wife's right vested immediately upon her husband's death, but such right was not indefeasible. On the contrary, it was subject to be divested by her own death. The certificate expressly provides that, in case of the wife's death,

the insurance shall be paid to the children; and thus provision was made for the vesting of the children's rights just as surely as for the vesting of her own. This last provision is in no way limited or qualified as to the time of her death; it is direct and unequivocal to the effect that, in case of the wife's death, either before or after the death of the assured, the money shall be paid to the children named in the certificate. The intention is clear that, in the event of the wife's death at any time while the insurance money should be unpaid, so as to be capable of practical identification and control, it should be paid to the children; thus giving them the greatest advantage that could arise from such a contingency, so long as the fund should not be otherwise appropriated by the wife. Thus effect is given to the entire certificate without doing violence to its obvious meaning or to any of its words; and thus a construction is reached in accordance with well-settled legal rules, as well as in harmony with the dictates of reason and humanity. The adjudicated cases cited in behalf of the administrator's claim do not necessarily militate against the foregoing construction. In the case of *Richmond v. Johnson*, 28 Minn. 447, 10 N. W. Rep. 596, the wife only was named as the beneficiary in the certificate. In the case of *Insurance Co. v. Burroughs*, 34 Conn. 305, the policy was made payable to the children only in case the wife should die before her husband's death should occur; and in *Chapin v. Fellowes*, 36 Conn. 132, the policy contained a similar provision. In each of the Connecticut cases the wife died before the husband. In the former case the wife had made an absolute assignment of her interest in the policy for a valuable consideration, but the children nevertheless were allowed to recover against the claim of the assignee. In the latter case the children were protected against the claims of the creditors of the husband. Thus it appears how jealously the rights of beneficiaries of such insurance, even in the second degree, are guarded by the courts. Our attention has not been called to any case where the provisions of the policy or certificate of insurance were identical, or so nearly analogous to the one under consideration as to affect our conclusion. It is always safer to be guided by legal principles, founded on justice and equity, than to attempt to follow case precedents based on facts or circumstances not strictly analogous or controlling. In this connection we quote the language of an eminent author upon the construction of instruments of this character: 'Precedents ought never to be allowed an arbitrary and unbending control of any case not precisely analogous; we might say, not strictly identical. And while all analogies, however remote, must be, and should be, allowed to have their just and proper weight, and the more weight, in proportion to the nearness of the analogy, in determining future cases, we ought never to forget that mere analogies never rise above the character of assistants. We should not, therefore, allow ourselves to become slaves to them.' Again, after adverting to the fact that the English

courts follow precedents in matters of this kind more strictly than do the American tribunals, the same author adds: 'But, at the same time, when cases occur, as will always be the fact in regard to the largest proportion, which have to be determined upon their peculiar circumstances, the English courts manifest no reluctance to grapple with the difficulties which present themselves, however formidable or embarrassing, and to place all cases upon their proper basis of truth and justice, without regard to the entire want of precedent to maintain them.' \* \* \* And the same tendency is observable in decisions of the American courts.' 1 Redf. Wills, p. 423. Reading the certificate in the light of the extrinsic circumstances as shown by the amended answer, and considering the condition of the assured and of the different members of his family, and the relations they sustained to each other at the time of effecting the insurance, no one can doubt for a moment that it was the father's intention that the insurance money should be paid to his infant daughters in case his invalid wife should die either before his own death should occur, or before the money should be paid to her. These children were his legitimate heirs, dependent upon him for support, and, next after his wife, the natural objects of his bounty. They were not the children of his wife, Ella, and could not inherit from her; hence we perceive his prudent foresight, as well as fatherly care, in causing their names to be inserted as beneficiaries in the certificate, contingent upon his wife's expected death. If anything further were needed to strengthen the construction we have given this instrument, the objects, purposes, rules, and regulations of the benevolent order from which this certificate of insurance emanated might be considered. But it is scarcely necessary to invoke cumulative authority to confirm the view that it was the father's intention, in case of his wife's death, that the insurance money should go to his doubly orphaned minor children, instead of the administrator of the deceased wife, either for the payment of her debts, or for the benefit of her heirs, who were to him as strangers, having no special claim upon his fortune, his benevolence, or the fruits of his labor." *Henry v. Thomas*, 118 Ind. 27, 20 N. E. Rep. 519.

In the opinion on the rehearing, the majority of the court place great reliance upon the case of *Association v. Montgomery*, 70 Mich. 587, 38 N. W. Rep. 588. That case, to use the language of Judge Redfield, quoted in the former opinion, is neither "precisely analogous" nor "strictly identical" with the one now under consideration. In that case the certificate was for \$1,500 upon the life of Edward C. Franklin, payable 90 days after satisfactory proof of his death, and the concluding clause was as follows: "The said Union Mutual Association agrees to pay to his son and daughter, N. Lyon and Charlotte A. Franklin, equally,—in case of death of either, full amount to go to the survivor,—one thousand five hundred dollars, if living; if not living, to the heirs of said member." Both beneficiaries were



living at the death of the assured. Satisfactory proofs of the death of the assured were made, and both beneficiaries claimed payment of their respective moieties; but before the money was paid one of the beneficiaries died leaving a will by which his interest in the certificate was disposed of. The court held that the words "if living" and "if not living" refer to living at the time of the assured's death; and that the share of each beneficiary vested absolutely at the death of the assured, for the reason that the policy of the Michigan statutes favors vested estates in preference to contingent, unless an intention appears to the contrary, and that the share of the deceased beneficiary could be disposed of by his last will.

It is unnecessary to question the correctness of the Michigan decision in construing the instrument before us. In that case it was necessary to construe the words "if living" and "if not living" with reference to some particular date or event connected with the vesting of the fund specified in the certificate. No such necessity exists in the case before us. The certificate does not contain the words "if living" or "if not living," or other equivalent words; but, as was said in the former opinion, the provision in regard to the children's interest, "is in no way limited or qualified as to the time of the wife's death;" so that, whether the wife be living or not living at the death of the assured, the direct and unequivocal provision of the certificate is that, "in case of her death," the money shall be paid to the children named therein. It does not appear in the record before us that the wife, either by will or otherwise, ever attempted to dispose of the insurance money, or of her interest in the certificate. If she had needed the fund to provide for her necessities while living, and had actually disposed of or hypothecated it for that purpose, as indicated in the present opinion of the majority of the court, and such fact had been properly pleaded, perhaps the claim of the children might have been defeated in whole or in part for that reason. But it is vain to speculate as to matters not set forth in the record.

Much stress is laid upon the rule that the law favors vested estates in preference to contingent, unless an intention appears to the contrary. It will be noticed that the rule thus stated is pregnant with two very important and significant admissions: *First*, that contingent estates may be created; and, *second*, that the intention of the parties creating an estate is to be considered in determining its character. Let us test the certificate in the light of this rule. It cannot be denied that a contingent estate is contemplated by its express terms; indeed, a series of contingencies are contemplated. In the first place, the very object of procuring the certificate of insurance was to provide for the family of the assured in the contingency of his own death while they, or some of them, were living. The first contingency was that the insurance money should be paid to his wife. Thus far there is no dispute. It is also undisputed that in a certain contingency the insurance should be

paid to his children. What was the latter contingency? It is plainly stated in the certificate to be the contingency of the wife's death,—no more, no less. There are no other words limiting or qualifying the latter contingency. *First*, then, the husband, anticipating his own death, procures the insurance for his wife's benefit. *Second*, knowing that his wife, according to the course of nature, must certainly die some time, he provides that, in case of her death, the insurance shall be paid to his children. The wife being an invalid, and presumably older than his minor children, it is reasonable to presume the assured expected them to survive her death. In the light of such facts and circumstances, what intention is conveyed by the terms of the certificate? The entire operative words have been considered. Nothing has been added thereto or subtracted therefrom. Legitimate facts and circumstances only have been taken into consideration in construing the language of the written instrument. The reasonable legal inference to be drawn from such language, under the circumstances, is that the father intended the insurance should go to the invalid wife for her use while living, with remainder to his own children in the contingency of the wife's death whenever it should occur; and so he used the unlimited words, "in case of her death to be paid to the children," inasmuch as they could not inherit from their step-mother. Words might have been inserted in the certificate providing for the payment of the insurance to the children only in the contingency of the wife's death before the death of the assured. If such words had been inserted, they would necessarily have controlled the interpretation of the instrument. But such words were not inserted, and they certainly should not be supplied by implication, when, from all the facts and circumstances legitimate to be considered in construing the instrument, the obvious effect of supplying them, as contended by appellee, would be to defeat, not to effectuate, the intention of the assured.

In the many elaborate briefs and arguments of counsel for the administrator it is nowhere claimed that Sterling D. Rouse could or did have any intention of making provision for strangers to the exclusion of any member of his own dependent family. But the contention is that a certain "formula of words" used in the certificate has been construed by the courts to have a certain and definite signification, and that this court should feel itself bound by such precedents. As heretofore shown, no case has been cited in which the language was "precisely analogous" or "strictly identical" with the certificate under consideration; nor has any case been cited where the circumstances and relation of the parties to be affected by the instrument were either precisely or substantially analogous to those under consideration. It has been before observed, and it can scarcely be made clearer by repetition, that the courts, especially the American courts, will not allow themselves to become slaves to "arbitrary and unbending" precedents, when the effect of such servility

is to do manifest injustice. But they will rather "grapple with the difficulties which present themselves, however formidable and embarrassing," in each particular case, and determine the same with reference to its "peculiar circumstances," placing the decision "upon the proper basis of truth and justice, without regard to the entire want of precedent." 1 Redf. Wills, supra. The law is not, and in the nature of things cannot be, an exact science, like mathematics. Long ago able jurists gave up the idea of formulating specific rules adapted to the exigencies of each particular case. At the best, the law is but a rational science, founded on general principles of right and justice. Experience has shown that these principles, when intelligently and conscientiously applied, insure substantial justice in the larger proportion of litigated controversies. In mere matters of procedure, which are but the means to the end, specific rules of comparative uniformity may be formulated, and many precedents may be thereby established, though, even in this branch of the law, much must necessarily be left to sound judicial discretion. But in the great field of jurisprudence, relating to rights of persons and rights of property, arbitrary and unbending precedents have ever been found too narrow for the multitude of vexatious and complicated controversies arising from the varied transactions of an enlightened and progressive people. Precedents are valuable aids to those who can utilize them with intelligent discrimination; but to those who are dependent upon such assistants, precedents are liable to become uncertain and misleading guides.

*In re* CONSTITUTIONALITY OF SENATE BILL No. 69.

(*Supreme Court of Colorado. March 6, 1891.*)  
CONSTITUTIONAL LAW—SPECIAL LEGISLATION—RAILROAD COMPANIES—REGULATION OF CHARGES.

Const. Colo. art. 15, § 7, provides that no railroad company in existence at the time of the adoption of the constitution shall have the benefit of any future legislation without first filing with the secretary of state an acceptance of the provisions of the constitution. The C. C. R. Co., incorporated in 1865 under a special charter, which provided that the legislature might, after 25 years, prescribe the rates to be charged for transportation, never accepted the provisions of the constitution. *Held*, that it is not entitled to protection under the constitutional provision against special legislation, and senate bill No. 69, prescribing freight and passenger rates for the road, is constitutional.

The following statement sufficiently explains the question propounded: The Colorado Central Railroad Company was incorporated in 1865 under a special charter, and at once proceeded to the construction and operation of its railroad. One section of the special charter provided that "the legislative assembly \* \* \* may, after the expiration of twenty-five years from the passage of this act, and at the expiration of each period of twenty years thereafter, prescribe rates to be charged and collected by said corporation for transporting passengers and freight over said road and the branches thereof."

The 25 years mentioned having expired, the bill submitted to the court for its opinion was introduced for the purpose of prescribing rates for the carriage of freight and passengers in accordance with the power expressly reserved by the provision mentioned.

PER CURIAM. The court is asked, generally, if the bill referred to in the interrogatory propounded be constitutional. The question is indefinite, in not specifying some particular provision or provisions of the constitution under which the honorable senators doubt the validity of the contemplated legislation. But upon oral argument by counsel, *amici curiæ*, the following sections of that instrument were alone relied on, viz.: 2 and 3 of article 15, and 25 of article 5. Our answer is accordingly limited. The special legislative charter of the Colorado Central Railroad Company remained in force after the adoption of the constitution; and we are advised that the company has never signified its acceptance of the provisions of the constitution in the manner specified by section 7, art. 15, of that instrument. The proposed legislation is undoubtedly special; but, under the circumstances here presented, we do not think its validity will be affected by the constitutional inhibitions mentioned, two of which deal with this subject. The question propounded is therefore answered in the affirmative.

NICHOLS *et al.* v. LEE.

(*Supreme Court of Colorado. March 6, 1891.*)  
HUSBAND AND WIFE—DESCENT AND DISTRIBUTION—RIGHTS OF CREDITORS—ADMINISTRATOR'S SALE.

1. Though, under the Colorado statutes, the surviving husband inherits half of the estate of his wife, he takes it subject to the payment of her debts, and where the estate is insolvent the purchaser of land belonging thereto under an execution against the husband acquires no title as against a creditor of the wife who purchases at the administrator's sale.

2. Where the only personal estate left by a wife is \$100 in money, appraisement thereof, as required by the laws of Colorado, is not essential to the validity of proceedings to sell her land for the payment of debts.

3. The purchaser of such land under execution against the husband is not a necessary party to proceedings to sell the land for the payment of the wife's debts.

4. Gen. St. Colo. 1883, § 8577, provides that "whenever, after inventory and appraisement, \* \* \* it shall appear that the personal estate of any decedent is insufficient to discharge his debts, \* \* \* resort may be had to the real estate." *Held*, that inventory and appraisement are not conditions precedent to the resort to the real estate.

Commissioners' decision. Appeal from district court, Weld county.

An action in ejectment to recover the undivided one-half of certain property in the town of Greeley. In January, 1879, Henry W. Lee, appellee, recovered a judgment against Edward T. and William A. Nichols in the county court of Weld county for the sum of \$93.50. Execution issued, and returned, with indorsement of \$18 and some cents, as having been made, and no

further property found. The transcript of the judgment was filed in the office of the county clerk, and by proper proceedings the judgment was kept alive and operative, but remained unsatisfied. On the 15th of November, 1883, Sarah A., wife of Edward T. Nichols, died intestate, owning in fee a lot with a dwelling-house upon it in the town of Greeley, which was incumbered by mortgage to the extent of \$1,000, drawing interest at 12 per cent. per annum, being a balance of a larger sum formerly obtained on the property. Sarah A. left as heirs her husband, Edward T. Nichols, Lottie Nichols, (appellant,) Edward T. Nichols, Jr., and two married daughters, Laura N. Hill and Sarah M. Gumaer. On the death of Sarah A., appellee, assuming that Edward T., under the statute, became as heir of his wife entitled to one-half of the estate, and that this judgment was a lien upon it, sued out a *pluries* writ of execution, had it levied upon the undivided one-half of the property in controversy, caused it to be advertised, and at the sale bought it for the sum of \$149, and afterwards received a sheriff's deed for the same. On the 26th of March, 1884, Edward T. was appointed administrator of the estate of his deceased wife, qualified, and entered upon the duties of the office. An inventory of the property of the deceased was made and filed by the administrator, stating that there were no personal assets of any kind whatever, except \$100 in money. Claims were filed against the estate for debts of deceased, and on the 5th of May, 1884, established by proper proofs, and allowed by the court as follows: To appellant, \$2,322.69; to Wilbur H. Hill, \$720.04; and to Laura N. Hill, \$561.37; all as claims of the fourth class, aggregating \$3,604.10. On the 14th of June following the administrator filed a petition duly verified naming the heirs, stating that he had filed an inventory of the estate, which had been approved; that there were no personal assets, except \$100; that no appraisal of the personal assets had been made or ordered; stating the aggregate amount of claims proved and allowed to be \$3,604.10, the personal assets to be of the value of \$100, the deficit \$3,504.10; asking that the premises be appraised, and he be ordered to sell at public or private sale so much of the real property as was necessary to pay the deficiency. Writs of summons were issued, returnable to the term to be held on the first Monday of July, 1884, which were returned unserved. A warrant for the appraisal of the estate was issued and an appraisal had on the 19th of June, in which the personal estate was valued at \$100, and the real estate at \$1,980 over the incumbrance. On the 19th of June an affidavit was filed with the clerk of the court, and an order prayed that publication of summons be made as to appellant and the two other non-resident sisters, and copies of summons be mailed to them at their places of abode, and that an *alias* summons be sent to the sheriff of Lake county in this state to be served upon Edward T., Jr., all of which writs were served and the acceptance of service indorsed upon each, which writs were properly returned. On the 18th of

November following, judgments by default were entered, and a decree of sale of the real estate made. At the sale appellant became the purchaser at the appraised price, and on the 5th of January, 1885, the sale was approved and confirmed by the court, and on the 21st of January a conveyance of the property was made. She entered into the possession, retaining the same, making payments upon and largely reducing the incumbrance, paying taxes, and for necessary repairs, and receiving the rental and income of the property up to the time of the institution of this suit. Upon the trial appellant verified an account, showing that during the time she had been in possession her expenditures, including payment on the principal and interest of the mortgage, exceeded the amount received by her by \$643. A cross-complaint was filed in this case by appellant, setting up the proceedings to subject the real estate to sale for the payment of the debts; the insufficiency of the property to discharge the indebtedness; and the title of appellant by the purchase at the sale, etc. The case was tried to the court without a jury, resulting in a judgment for appellee "that he have and recover the undivided one half of the property upon payment of \$321.54, being one-half of the excess of money paid by appellant over the amount received by her, and that the costs be equally divided," etc. The cross-complaint was adjudged "wanting in equity and insufficient, except as to the excess of expenditures above rents and profits." A large number of errors were assigned by appellant and cross-errors by the appellee.

*J. E. Garrigues and Wells, McNeal & Taylor, for appellants. Haynes, Duuning & Annis, for appellee.*

REED, C., (after stating the facts as above.) There is no troublesome conflict of testimony. All important facts are established by undisputed evidence, and seem to have been conceded. There are no charges of fraud or circumvention. The established facts are: *First*, that at the time of the death of Sarah A. Nichols appellee had a valid existing judgment against the husband, Edward T., and another, amounting to something over \$100; *second*, that Sarah A. died intestate, seized in fee of the property in controversy subject to the incumbrance; *third*, that the value of the real estate over the incumbrance was \$1,980, and the personal assets \$100, making the aggregate value \$2,080; *fourth*, that at the time of her death she was indebted in various sums, amounting in the aggregate to \$3,604.10, and exceeding the value of the estate \$1,524.10; consequently, that the estate was insolvent. These facts having been established or conceded without question, the issues to be determined were not issues of fact, but questions of law applicable to the facts; the theory of appellee being that there was an inheritance; that the husband, under the statute, immediately upon the death of the wife became the heir to one-half of the estate in gross, and that one-half of the estate at once vested in him regardless of the financial condition of the

estate as to solvency; and that the inheritance cast at once became available for the satisfaction of the judgment, and took precedence to the exclusion of creditors of the estate. This theory is erroneous, and cannot be maintained. In our view of the case, all supposed errors assigned may be disregarded except the general one that "the court erred in finding that the plaintiff [appellee] was the owner of the undivided half of the premises, and had been since July, 1884, and that defendant [appellant] unlawfully detained the premises, and that the matters in the cross-complaint of defendant are wanting in equity and insufficient to afford relief, except as to the excess of expenditures paid above the rents by her received." We think the entire case can be satisfactorily disposed of by the application of primary and fundamental principles of law to the admitted and established facts.

1. That during the life of the intestate the husband had no interest in the estate in controversy that he could make available for the payment of appellee's judgment, or that appellee could reach under execution. Upon her death, the judgment creditor could only take the distributive share of the estate going to the husband; in other words, the creditor could take no greater interest in the estate than the husband took by inheritance in the estate of the wife upon her death. These propositions are so self-evident and elementary that no authorities are needed in their support.

2. Both in England and in this country, lands held in fee are subject to the debts of the owner while living and after death, and this is the case whether the debt be due upon matter of record, by specialty, or by simple contract; and, if the lands descend to the heir, or go to a devisee, he holds them subject to be taken for the payment of the debts of the ancestor, according to the laws of the state in which they are situated. 1 Washb. Real Prop. (4th Ed.) 87; *Watkins v. Holman*, 16 Pet. 63; 1 Greenl. Cruize, 60, note.

3. The only title or interest in the estate that could be taken at the sale under execution was the distributive share of the husband in the estate of the wife after the payment of all debts. The regularity and legality of the appointment of the administrator, and the validity of the claims against the estate and the legality of their allowance by the court, having been unquestioned, and no objection made to the valuation of the estate and aggregate value found, and these proceedings being conceded to have been regular, the appellee to that extent is concluded by them. Under our statutes, as at common law, the lands of the intestate descend to the heir subject to the payment of debts, if the personal estate be insufficient; and when there is a deficiency of personal estate neither the heir nor one holding under him by deed or by operation of law can retain the estate as against creditors, except by the payment of the debts. "Heirs, devisees, and distributees are liable to creditors \* \* \* to the full amount of the property received by them, whether real or personal." 2 Woerner, Adm'n, 1265. In

*Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. Rep. 342, it was held that after the settlement and distribution of the estate and discharge of the administrator, a creditor of the estate could proceed in equity in the state of the domicile to which the assets had been removed, and subject such assets in the hands of an heir or devisee to the payment of the debt. The estate being insufficient to pay the debts, it follows that an action could not be maintained by appellee without paying or contributing to their payment to the value of the property claimed. Many questions, technical, and of minor importance, are raised in regard to the proceedings in subjecting the property to the payment of the debts. The first, and one of the most important, is that there was no appraisement of the personal estate. The object of appraisement is to inform the court of the value of personal property as a guide and aid in the adjustment of the affairs. It is not contended that the petition did not contain and set forth the amount and value of the personal property, nor that the inventory was not correct; it showed the only personal property to be \$100 in money. The contention is that the proceedings were irregular and illegal because three disinterested persons had not only appraised the value of \$100 in money. The value of that item being known, and it being the only one, there was no personal estate to be appraised. The law does not require unreasonable, unnecessary, nor superfluous acts to be performed. The failure to cause such appraisement under the circumstances cannot avail to vitiate the proceedings. It is urged that the service of summons was defective. We do not so regard it. The proceedings appear to have been regular; service was acknowledged by all to whom the writs were directed, and they were properly before the court. If they had not been, it was a defense that could only be interposed by the parties, or some of them; it was personal to them, and could not avail appellee.

It is also contended that the proceedings were faulty in not making appellee a party. Whatever title or supposed title appellee had was not by virtue of descent cast, but was derivative. As already shown, if he had any interest, it was that coming through the heir. The proceedings were to settle the estate. Appellee was neither heir nor creditor, and was not an indispensable party. If he had wished to intervene, he could have done so. His failure to do so should not prejudice the result. It follows that the general assignment of error should be sustained. The finding and judgment were erroneous—*First*, in finding the title in appellee, and that appellant unlawfully detained the premises; *second*, in finding that the averments in the cross-complaint were insufficient. The title of appellant was shown to be that acquired by purchase as creditor,—the only title that could prevail. The minor irregularities supposed to have existed in the proceedings could in no way affect appellee when the insolvency was established and conceded. There being no allegations of fraud, and it being obvious that under no possible manipulation could

the estate have shown a residue for distribution, it becomes apparent that the only interested parties who would have a legal right to complain of such irregularities, if they existed, were the creditors who had not been and could not be fully paid. We advise that the judgment be reversed, and the cause remanded.

RICHMOND and BISSELL, CC., concur.

#### ON REHEARING.

BISSELL, C. The judgment is clearly right, and there can be found in the statute a perfect answer to all the contentions of counsel. While this opinion is probably not indispensable to a clear expression of the general law determining the rights of the parties, it will serve to construe the various statutory provisions on this subject, and demonstrate the correctness of the judgment thereunder. The law in this country seems to be that upon the death of the ancestor the title to real property immediately vests in the heir who inherits under the statutes of the state where the property is situate; that the heir takes an absolute title, unincumbered by any claims of the administrator or of creditors, in the sense that the rights and claims of either are liens upon the property. In other words, in the absence of affirmative action by either the administrator to subject the property to the payment of debts, or similar action by the creditor to enforce his claim, the heir has a good title, which he may dispose of by contract, or which may be taken by his creditors. It is undoubtedly true that this title, whether it be that of the heir, or the derivative title of the vendee, or of his creditor, may be divested in the manner designated by statute. 2 Washb. Real Prop. 414; *Wilson v. Wilson*, 13 Barb. 252-264; *Chubb v. Johnson*, 11 Tex. 470. This general doctrine is not understood to be controverted by the appellant. According to the positions assumed upon the argument, the claim is that the heir succeeded to the estate, which thereupon became immediately subject to the judgment against him and available to process, and only liable to a defeasance if the representative or creditor should proceed in the authorized way to appropriate it. Conceding, *ex gratia*, that the heir took a legal estate, there can certainly be no question but that it was subject to execution, and might be levied upon by the judgment creditor. *Pitts v. Hendrix*, 6 Ga. 452; *Black v. Steel*, 1 Bailey, 307. It is entirely unimportant to discuss or adjudicate this proposition, since the vital question is whether what was done by the administrator was a sufficiently substantial compliance with the statute to be operative to divest the heir's title. The answer to this inquiry will dispose of the controversy. That there is ample statutory authority to subject real property to the payment of debts admits of no question. In the absence of a power conferred by will, action may be taken by the representative under the provision of section 3577, etc., of the General Statutes of 1883. This section 3577 commences: "Whenever, after

inventory and appraisement therein, as herein provided, it shall appear that the personal estate of any decedent is insufficient to discharge the just debts, \* \* \* resort may be had to the real estate." This section evidently refers to an antecedent statutory provision for the making of an inventory of the personal property, and its appraisement by individuals designated by order of the court for the purpose. All this is to be done within 30 days after the administrator's appointment, and, together with one or two similar duties, is among the earlier things to be done by him in the settlement of the estate. Since the petition in this case fails to show the making of an inventory, and does not state that there was an appraisement, and the record affirmatively shows that nothing of the sort was done, it is contended that it could not serve as a basis for proceedings to sell real estate. This can only be contended for on the hypothesis that the making of the inventory and the appraisement are conditions precedent to the exercise of the right by the administrator to resort to the real estate for satisfaction of the debts. This contention cannot be supported by the phraseology of the statute, for it does not provide that it shall appear by the inventory and appraisement that the personal estate is insufficient, but the right to resort to the realty is given whenever it appears that the personalty is insufficient for the purpose. The words "after inventory and appraisement" can properly be taken only as a designation of the time at which, or before which, the administrator may not make his application. It is simply a statutory method of fixing the order of the proceedings, and in no sense can be so held to be a condition precedent as to make a failure to observe that statutory provision necessarily fatal to the proceedings. The reasoning of the principal opinion on the lack of the necessity for an inventory and appraisement under the facts existing in this case is entirely satisfactory and conclusive.

The subsequent section relates to the form and contents of the petition which the petitioner must present to the court. It specifies the court in which it shall be filed, and directs that the petition must set forth the amount and value of the personal estate "according to the inventory and appraisement." This phraseology the appellee contends necessitates a statement in the petition that the inventory and appraisement were had. No such construction is at all necessary, but in this regard the section as a whole simply requires the petition to show the amount and value of the personal estate. The primary purpose of the limitation is that, if there be an inventory and appraisement, the petition shall be in accord with its terms. If it be adjudged that an inventory and appraisement are not necessary, then the purpose of the statute is accomplished when the amount and the value of the personal estate are shown by the petition. The section further continues to prescribe what shall be done in case any sale has been made of a portion of the estate; requires the amount of debts and

claims allowed and disallowed, and the amount of the legacies, if any, to be stated; and likewise requires it to contain a description of the whole of the real estate of which the decedent died seised, the nature of the title, the nature and value of the several parcels, and the nature and amount of the incumbrance. This is the substantial phraseology of the section under consideration. In the case at bar the petition set forth the amount and value of the estate, and the debts and claims, described the property in controversy as that of which the ancestor died seised, stated her estate to be that of a fee-simple, set out the incumbrance, and prayed the aid of the court. It did not state in so many words that this was all the real property, nor did it attempt to specify the value of the realty described. These defects, it is claimed, are jurisdictionally fatal. Many cases in California contain much that is apparent authority for the contention; but when this section is construed, as it must be, in connection with the subsequent provisions of the statute, whereby the statutory scheme for subjecting the property of a decedent to the payment of his debts is completed, they cannot be held conclusive of the present controversy. It is not universally true, even in California, that a failure to comply with some of the statutory requirements is absolutely fatal. The doctrine there only goes to the extent of establishing the rule to be that where there is a total failure to observe them it is fatal, because those requirements are of necessity jurisdictional in many particulars. But, as was said in *Stuart v. Allen*, 16 Cal. 501: "It is not necessary, in order to exercise jurisdiction, that there shall be a literal compliance with the directions of the statute; a substantial compliance is sufficient. The main fact required is the averment of the insufficiency of personal assets, and mere formal defects in the mode of statement would not affect the jurisdiction." Under that rule, the petition in this case is abundantly sufficient. The lack of assets, the existence of the debts, that the ancestor died seised of real property, the nature of her title, and the fact of the incumbrance, were all set out. These were the fundamental requirements. The failure to state that this was all the real property of which she died seised, and the neglect to set up its value, would be purely formal defects, available to the persons who are parties to the proceedings, if they sought to take advantage of them by either demurrer or motion, but entirely ineffectual to deprive the court of jurisdiction in the premises. A principal phase of this question received consideration in *Townsend v. Gordon*, 19 Cal. 208: "It may be that the omission of a portion of the real estate would not affect the proceedings or the sale of another portion described." The court then proceeded to discuss the question whether the heir could be divested of his title to any property for the sale of which there was no petition, and the necessity for the petition as a jurisdictional foundation for the proceeding; but conceded that the want of a statement in the

petition that that was all of the estate would not be destructive of the validity of the sale, provided only that thing was sold which the petition described. This is in accordance with reason and sound sense. This is the only construction consistent with the subsequent statutory provisions. It is evident that the petition is nothing more, so far as its effect and position in the proceeding are concerned, than that of a complaint in an ordinary suit; and, if enough is contained therein to call upon the heirs who are made parties to respond, it is sufficient, because the action of the court does not rest upon the petition itself. This is a very strong reason for disregarding the binding force of the authorities which hold slight defects fatal to the jurisdiction of the court. By the provisions of sections 3585 and 3588, the court is bound to proceed according to the principles of courts of chancery in like cases, and it is enacted that an issue shall be formed, heard, and determined, and that the court must hear proofs touching the matters alleged in the petition. Whether the petition be taken as confessed, or the hearing is had upon an issue framed under the statute, the court must take the testimony, and decide the matter upon the proofs. It is thus evident that under our statute, after service of process, all that is essential to confer upon the court jurisdiction to proceed in the premises is a petition which shall substantially contain what the statute points out. The petition in this case contains everything that the statute specifies, with the solitary exception of the words "the whole," and a statement of value; things not of the substance, but of the form, which must of necessity have been cured by the hearing which the statute provides for. There seems to be a strong statutory support for the position taken in the main opinion that the creditor was neither a necessary nor an indispensable party. This is found in sections 3578 and 3587, in the first of which it is provided that the widow or husband, the heirs or devisees, shall be made defendants; and in the second of which it is enacted that any creditor or person interested in the estate may appear; thus, upon the doctrine of exclusion by expression, making it plain that the creditor of the heir was in no sense a necessary party to the proper settlement of the controversy. For the reasons above assigned, as well as those expressed in the main opinion, the exceptions should be overruled, and the judgment follow as originally recommended.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion and in the principal opinion prepared by Mr. Commissioner REED the judgment is reversed.

CALDWELL v. WILLEY.

(*Supreme Court of Colorado*. March 6, 1891.)

CONTRACT FOR LEASE—EVIDENCE—SUFFICIENCY.

In an action for breach of contract to lease a mine plaintiff testified that defendant contract-

ed to lease him the mine for five years. The evidence for defendant showed that he was not the owner of the mine, but had a lease thereof for a year, and that he agreed to allow plaintiff to mine coal therein for that period. He denied having made any other agreement, his testimony being supported by other witnesses; and introduced a letter from plaintiff recognizing the agreement under which he was then working, and asked defendant to send him a "bogus contract" for a longer time to be used to induce a railroad to put in a side track for plaintiff, and then to be returned to defendant. *Held*, that the evidence would not support a verdict for plaintiff.

Commissioners' decision. Appeal from district court, Fremont county.

*Geo. C. Norris and R. H. Gilmore*, for appellant. *John G. Taylor and A. Macon*, for appellee.

REED, C. This was an action brought by appellee to recover damages for a failure to execute and deliver a lease to a certain coal mine in Fremont county. The issues were made by cross-complaint and answer. In some former litigation, which appears to have been between the Caldwell Coal & Oil Company, a corporation of which appellant was president, some other corporation, and appellee, the nature and result of which are not disclosed in this record, it appears a stipulation was filed under which an agreed judgment was entered, and that by such document it was agreed that this action should be prosecuted by the appellee against Caldwell individually. In making up abstracts of records counsel unfortunately, frequently, well knowing the premises themselves, forget that this court is not equally well informed in regard to proceedings in the trial court, and cause much labor and trouble by not stating full and sufficient facts, and we are compelled to grope about, and, by inference from the meager facts stated, to arrive at some conclusion in the premises.

The case in some respects is quite peculiar. The allegations in the cross-complaint are that on June 15, 1884, Elder, Jones, Delano, Cole, and appellant were the owners in fee and in possession of certain lands, and that they, "desiring to have the same prospected for coal, agreed with appellee that he [appellee] should explore for coal, and, in case of discovery of a vein, said Elder, Jones, Cole, Delano, and Caldwell, for certain considerations, which included payment of royalties \* \* \* should and would execute to him (Willey) their certain lease and demise in writing of the whole of said premises for a term of five years," etc. "That in and about the making of the said agreement with appellee the said Elder, Jones, Cole, and Delano were represented by the said Caldwell, who, in making the said agreement, acted and agreed for and on behalf not only of him, the said Caldwell, but of the said Elder, Jones, Cole, and Delano; and that Caldwell was \* \* \* authorized so to agree," for the others. This is the only agreement alleged,—a joint agreement of all the owners; the consideration moving them being to have "the land prospected for coal." It is also alleged that, after the agreement was made, Elder, Jones, Cole, and Delano were fully in-

formed, and ratified it, and permitted him to go to work upon the land; that, relying upon the agreement, appellee entered into possession, expended large sums of money, and on his part complied fully therewith; that Caldwell, Jones, Cole, and Delano delayed and finally refused to execute a lease, and that appellee sustained great damage; prays that all the last-named parties be made defendants, for a decree compelling a lease, for an injunction, damages, etc. The complaint was verified by appellee. There was no joint answer, and neither Elder, Cole, Jones, nor Delano answered. Appellant answered individually, denying that he, individually or in connection with others, at any time made an agreement to lease the land or the mine for five years, or any other time; denied that at any time before November 21, 1884, he was the owner of any part of or had any interest in the land; denied that he desired to have the land prospected for coal, or that he, individually or in connection with others, entered into an agreement with appellee to explore the land for coal; denied that he, for himself or in connection with others, was to execute any lease whatever; denied that he ever represented Elder, Jones, Cole, and Delano, or either of them, in any agreement with appellee as agent; admitted that on June 15, 1884, he was in possession of the premises, but alleged it to have been under a lease from the owners, that expired on the 15th of November, 1884; admitted that appellee mined and took coal from a vein on the premises, but denied that it was under any agreement with him, or with his authority, etc. The answer was verified. It is evident that there is not a full transcript of the cross-complaint in this record. It appears inferentially that certain corporations were made co-defendants. Who they were, and for what purposes joined, we are not informed. It is stated that "the corporations answered the cross-complaint, but no issue concerning them was tried." The answers of the corporations are not given. The trial was to a jury, resulting in a verdict for appellee for \$3,345, and a judgment upon the verdict.

It appears to have been conceded, or at least not disputed, that at the time of the alleged making of the agreement appellant owned no interest in the property, and that he first acquired an interest in November following. It is also conceded, or not disputed, that at the date of the alleged agreement for a lease neither appellant nor the corporation of which he was president had any interest in the property, except a lease from the owners, expiring on November 15th of the same year; and that at the expiration of such lease the owners went into possession, and retained it until January 1, 1885, when a new lease was made to appellant for one year.

Numerous errors are assigned, many of which it will not be necessary to discuss. It is urged that the damages allowed were excessive. Nearly all of the evidence in the record upon the question of damage was that of appellee. Apparently no effort at reduction was made by



appellant. If the finding upon the other issues was correct, and can be sustained, the assessment must stand. The amount was warranted by the evidence, and seems reasonably moderate under the proof. A party cannot let such questions go by default upon the trial, and urge them here, when the only question is as to the amount awarded, and the verdict does not exceed the proof.

Upon the trial there was no evidence introduced nor attempt made to establish a joint agreement by the owners to make a lease, nor of any desire to have the land explored or prospected for coal, which was alleged as the incentive or consideration for the supposed promise. It was shown and conceded that Caldwell was not an owner; that he was in possession under a lease from the owners; consequently, that the owners had no control of the property for the purposes supposed at the time, nor the possession of the property as alleged in the cross-complaint. No effort was made to in any way connect the owners with the transaction. No proof was made or attempted in support of the allegation that Caldwell acted as the agent of the owners; and, although the only agreement alleged was a joint one, where all the owners were parties, appellee (Willey) testified to an agreement with Caldwell alone, stating in his evidence that he supposed him (Caldwell) to be the sole owner of the 3,000 acres of land, and that he never knew that he was not the sole owner until November 15, 1884.

The testimony is very voluminous and contradictory. The only person testifying directly and positively to a contract for a lease for five years, is the appellee. J. C. Bansemer's testimony was taken on behalf of appellee. He says that Willey entered upon the land, and commenced opening the mine, July 8, 1884, "by permission, and with the expectation of getting a lease from Caldwell. I became interested with Willey, holding one-half interest: I furnishing what cash means were needed and credit to buy other materials. \* \* \* After the expiration of the Caldwell Coal & Oil Company's lease, November 15, 1884, Willey desired me to get a lease from Mr. Jones, who represented the largest portion of the property." In answer to an interrogatory he says: "Mr. Willey stated that he had no doubt that he could get a lease, but that it always ended in failure. Twice he represented that he had a lease from Caldwell, but was never able to produce it." In answer to the interrogatory: "Did you ever purchase from Mr. Willey his claim or interest in the Willey mine, and, if so, when?" he said: "Mr. Willey sold me his entire interest in the mine April 21, 1885, with the positive assurance that I should have a lease." This assignment was in writing, and was put in evidence as Exhibit A. In answer to the interrogatory: "Did you ever have any conversation with Mr. Caldwell on the subject of the five-years lease?" he said: "Yes; during the first week in July, 1884. Question. In that conversation, did you ascertain from Mr. Caldwell that he had agreed with Willey to give you and Willey a five-years lease upon the coal vein? An-

swer. Mr. Caldwell left me under that impression." On re-direct examination he was asked: "Did Mr. Caldwell ever tell you himself that he would give Mr. Willey a five-years lease, or did he state that fact to Mr. Willey, and did Mr. Willey report it to you?" A. He did not tell me personally, but told Willey, and Willey reported it to me." The witness further testified that in November or the first of December, 1884, he knew Caldwell's lease had expired; that at the request of Willey he went to see Jones, to secure a lease from the owners; and that several times Jones promised them a lease. This rather equivocal and uncertain testimony of Bansemer's is all the testimony supporting Willey. Caldwell positively and directly denies that he ever agreed with Willey to make a lease for five years; states that it would have been impossible for him to have done so—*First*, for the reason that he was not an owner of any share of the property at the time the alleged promise was made; *second*, that all the control he had of the property, or interest in it, was that of the Caldwell Coal & Oil Company, which was a lease to expire in four or five months. Caldwell's testimony is sustained by that of Mr. Jones, one of the largest owners of the property. He testified that in July, 1884, Willey had a conversation with him. "He said \* \* \* he had got permission to mine on section 18 until the expiration of Caldwell's lease, which expired the 15th of November, 1884;" and on cross-examination, when asked in regard to Willey's knowledge of the time that Caldwell's lease expired, said: "He did know, for I told Willey,—so had Caldwell,—how long Caldwell's lease was to run. Question. When did you tell him this? Answer. Previous to the time he commenced work on section 18 he was there working by the day at what was called the 'Canfield' mine." On November 15, 1884, the Caldwell lease expired, and possession was taken by the owners. Willey, by license or permission of the owners, continued to mine until January 1, 1885, paying royalty to Mr. Jones. At that time a new lease was made by the owners to Caldwell for one year. Mr. Jones says: "After the lease was made to Caldwell, I told Willey that he must stop mining coal there, but that he could go to Caldwell, and see if he could get Mr. Caldwell's consent to mine coal. Mr. Willey said he would go to Caldwell about it. Question. Did Willey claim at that time that he was there under a lease or promise of a lease from Caldwell? Answer. No; he said that he wanted to get a lease from Caldwell." Willey had paid Caldwell no royalty whatever for the coal taken out between the time of his entry and the expiration of the lease on the 15th of November previous. It is shown that Willey went to Caldwell to get a lease after Caldwell got the new lease from January, 1885, to January, 1886; and Mr. Jones further says: "I was in Caldwell's office about March, 1885, and Caldwell read a memorandum to Willey. Willey wanted to get a lease, but did not pay the royalty. Caldwell insisted it should be paid; not only all back royalty, but for all coal he should mine in the future. Willey said

he would see Caldwell again." He further testified that the memorandum for a lease made by Caldwell to Willey was to expire December 31, 1885, and that Willey made no objection to the time mentioned. "I never heard of a five-years lease until a short time before this suit was commenced."

C. P. Elder, one of the owners, testified, in answer to the question whether he had ever had any conversation with Willey regarding a lease: "I had several conversations with him in my room; also in George C. Norris' room; and he made certain statements in which he said Mr. Jones had given him a lease, and that Mr. Caldwell had given him a lease, etc. Afterwards Mr. Jones and Mr. Caldwell met him in my room, and together they said that they had never made such a lease. Mr. Willey was present when the statement was made, and that they had never made or promised a lease. When this statement was made Mr. Willey did not contradict it. This was during a conversation with Willey, and he heard it."

Although the former owners of the land and the Caldwell Coal & Oil Company were by stipulation dropped out of the litigation, and it was continued against appellant alone, an examination of the entire evidence shows that whatever was done or attempted by Caldwell, if not done on behalf of the corporation of which he was president, was done through and by advising with or with the co-operation of Mr. Norris, the secretary of the corporation. Mr. Norris testified that on the 8th or 9th of July, 1884, he was at the office on Coal creek, and Mr. Caldwell showed him a statement or proposition for a lease to Willey for five years in the handwriting of Mr. Bansemer, that Caldwell said Willey had left there the night before. It appears the matter was by Caldwell submitted to Norris for his action or consideration, and he testified: "Immediately after, I went over to see Mr. Willey. His house was probably twenty rods from the office. Before I arrived at the house, he, being in the yard, came to meet me. I spoke to Mr. Willey about the memorandum he had left at the office for the lease. I at once said to Mr. Willey that it was impossible to think of such a lease as that, because we only had an option on the property that would only run about four months from that time, or ending the 15th of November, 1884; and, while we expected to take the property, yet we could not execute a lease for longer than that time under any circumstances. Neither would I advise him to take a lease for any length of time, on account of the uncertainty. Mr. Willey said he was not particular about that; that that was written by Mr. Bansemer, and he had put in five years, but he was willing to take it for any length of time, but he did not like to take it for a short time, because it would be necessary for him to get some other parties to furnish him the money. I told him that was a matter he must decide himself, but it was utterly impossible for us to execute a lease longer than the 15th of November, 1884. Question. Was there anything said at that time to Mr. Willey

about a promise? Answer. He said nothing whatever about a promise being made. \* \* \* I then said to Mr. Willey that I would draw up for him a permit, if he wished something in writing, to go on and mine coal up to the time our lease expired,—the 15th of November, 1884. I immediately went over to the office, and drew up a rough sketch of a license or permit for him to mine, and handed it to Willey, [which he identifies as the one in evidence.] I told him that was the utmost that we could do. He then said he was satisfied with that, but he wished to send it to Mr. Bansemer. \* \* \* He told me he was perfectly satisfied with this, but said he would have to submit it to Mr. Bansemer; and, whether Mr. Bansemer agreed to it or not, he would execute it when it came back. I then and there distinctly told Mr. Willey I would not advise him to do anything whatever with this property; it was so short a time; and it would be foolish for him to go on and go to any expense mining coal under this agreement. He said he could get coal almost from the surface, and the expense of opening the mine would be very small, and that he was willing to take the risk."

The testimony of John S. Palmer in regard to conversations had by him with Willey also sustains the other evidence given on the part of the appellant. It is clear that the only written instrument given appellee was the unsigned draft of the license or permit drawn and delivered by Norris. It also appears from the testimony of appellee, as well as that of others, that during the occupation of the mine by Willey he was in treaty with the Denver & Rio Grande Railway Company, or with some of its officers, to secure a side track and switches at the coal-bank, to facilitate shipping; and on October 19, 1884, he wrote the following letter, which was in evidence, and marked "Exhibit C: "Coal Creek, Colo., 10-19-1884. Mr. Caldwell & Norris—Dr. Sirs: Since my return from Denver I have bin thinking what is Best to do when Mr. Danforth loms up here and wants to see my contrack Before contracking with me for my coal. Don't you think it will Bee Best for you to Draw up a Bogus Contrack and send it to me, with the understanding that I will return the same to you after the D. & R. g. Puts a Switch in at the mine; if I show the one I have got they want do Enny thing, you Bet. Please let me here from you at once what is Best to do. the miners all hot yet. yours Respectfully, H. WILLEY." In this there is no assertion of any promise to him by Caldwell to make and execute a *bona fide* contract of lease, and asking a fulfillment of a promise, no complaint that it has not been done, but a tacit admission that the unsigned draft of a license was the document under which he held, and his authority for mining. He says, if he shows the authority he has, the railroad company will do nothing; and with an exhibition of moral obliquity that should discredit him in any court he asks that a "bogus" contract of lease be sent to him, by which he can impose upon the railroad company, and afterwards return it. It is unnecessary to comment upon

Willey's testimony, or his want of moral integrity, as evinced by his own evidence and in his correspondence. It is sufficient to say that his testimony is not only not supported by that of any other witness, but is overwhelmingly contradicted and overthrown by that of several others. The letter above given, when identified and admitted in evidence, was alone sufficient to render his entire evidence insufficient if it had been uncontradicted.

Leaving out of consideration the fact that there is no evidence whatever to sustain the allegations of the cross-complaint, as before shown, and the fact of the assignment of Willey to Bansemer of all his interest by a writing of April 21, 1885, which should have precluded him, if he had had a lease, from claiming damage after that date, and basing our conclusion only on the ground of a want of evidence to sustain the verdict, we think the judgment should be reversed. On examination, it is obvious that the verdict was the result of mistake and misapprehension, or of bias and prejudice. It was certainly unwarranted, and should have been set aside. This court, like others of last resort, is loth to interfere with findings of fact by a jury, and has in several instances carried the rule of non-interference to the fullest extent allowable; but where, as in this case, the verdict is clearly the result of misapprehension or bias, there should be no hesitation in setting it aside. We find no error in the instructions of which appellant can complain. That they were not properly considered and followed by the jury is apparent. We advise that the judgment be reversed, and the cause remanded.

BISSELL and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed.

COLORADO CENT. R. CO. v. HUMPHREYS.

(Supreme Court of Colorado. March 6, 1891.)

EMINENT DOMAIN—PROCEDURE—JURY—BENEFITS.

1. A jury of 12, called from the general panel in attendance in term-time, is not a legal jury, in condemnation proceedings, under Civil Code Colo. § 243, providing that the land-owner may demand "a jury of six freeholders," to be drawn as provided in the succeeding sections.

2. As such statute requires the jurors to be freeholders, it is error to overrule a challenge to one who testified that he owned personal property, but no mining property nor any house or land.

3. In proceedings to condemn a right of way for a railroad, it is error to withdraw from the jury evidence as to benefits to the property from the proposed railroad, as Civil Code Colo. § 253, expressly provides that the value of benefits shall be deducted from the amount of the damages.

Commissioners' decision. Appeal from district court, Gilpin county.

This was a proceeding in condemnation on the part of appellant to acquire a right of way 10 feet in width across a piece of ground occupied as a mill-site, and on which there was a mill for the reduction and treatment of ores on North Clear

creek, at Black Hawk. The proceedings were instituted in the county court, and by agreement the venue was changed to the district court, where a trial was had to a jury, resulting in a verdict for \$1,500, the value of the land taken having been found to be \$500, and the damage to residue of property not taken, \$1,000. Motion for a new trial made and overruled, and a judgment on the verdict, from which the appeal was taken. The further facts necessary for a proper understanding of the case appear in the opinion.

*Teller & Orahood*, for appellant. *Chase Withrow* and *Morrison & Kohn*, for appellee.

REED, C. (after stating the facts as above.) A large number of errors are assigned. It appears that the case was tried at a regular term; the jury was a jury of 12 persons, called from the general panel in attendance. It was objected that the jury was not a proper one in this proceeding, and a challenge and objection was filed, which was overruled by the court, and exception taken. The ruling of the court is assigned for error. Condemnation proceedings under the acts relative to eminent domain are special proceedings, purely statutory, unknown to the common law. Such proceedings, to be valid, must be substantially conformable to the law conferring the right to condemn. Any serious departure violates and renders the proceeding void. The right to condemn and appropriate is derived from the constitution and the statutes. The constitutional provision is as follows: "That private property shall not be taken or damaged for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law." In section 23, art. 2, it is declared that "a jury in civil cases in all courts \* \* \* may consist of less than twelve men, as may be prescribed by law." Under these constitutional provisions, the legislature provided in section 242, Civil Code 1883, for commissioners, and in section 243 for a jury, as follows: "Any person, persons, or company, whose estate or interest is to be affected by the proceeding, may demand, at the time of any hearing of such petition, and before the appointment of the commissioners, a jury of six freeholders, residing in the county where such petition is filed, to ascertain, determine, and appraise the damages or compensation to be allowed therefor; and thereupon said court or judge shall make an order for the drawing of such jury, as herein provided." Section 244 provides for a jury and a trial in vacation. It is evident, from an examination of section 246, that the jury shall be the same in number, and selected in the same way, whether the trial occurs in term or vacation. The proceeding being statutory and special, a substantial compliance with its provisions is necessary and imperative. If by statute a new power or right is conferred, and a particular form or manner of proceedings in connection therewith is

provided, it is an exclusion of any other mode. In such cases the maxim, *expressio unius est exclusio alterius*, applies. Potter's Dwar. St. 275; Sedg. St. & Const. Law, 30, 31. "Where a statute gives a new power, and at the same time provides the means of executing it, those who claim the power can execute it in no other way." Turnpike Co. v. Gould, 6 Mass. 40; Glass Co. v. White, 14 Mass. 286; Potter's Dwar. St. 275; Smith v. Lockwood, 13 Barb. 209; Thurston v. Prentiss, 1 Mich. 193; Bassett v. Carleton, 32 Me. 553; Renwick v. Morris, 7 Hill, 575; Lang v. Scott, 1 Blackf. 405; Almy v. Harris, 5 Johns. 175; New Haven v. Whitney, 36 Conn. 373; District Tp. v. Dubuque, 7 Iowa, 262; Adkison v. Hardwick, 12 Colo. 581, 12 Pac. Rep. 907. It follows that a jury of 12 was not a legal jury, and that the jurors were not drawn in the manner, and did not possess the qualifications, required. The challenge should have been sustained.

Had the jury been of the proper number, and properly drawn, it would have been error to overrule the challenge for cause to the juror Parcell. The eminent domain statute declares that the jurors shall be freeholders. In answer to questions, he said: "I own, yes, sir, some personal property. Question. Do you own any lode property,—mining property? Answer. No; I do not. Q. Any house or property? A. No; none whatever." It will readily be seen that he did not possess the qualifications required by the statute, and was incompetent.

The court also erred in holding and declaring, during the progress of the case, that no evidence of benefits to the property could be considered. The judge said: "I am going to hold, for the purposes of this trial, \* \* \* that the benefits to this property, by virtue of the increased transportation, will not be considered in this case at all. \* \* \* The ruling is, any benefits you might tender this party are not to be considered as a set-off." It is expressly provided in section 253, Civil Code 1883, that benefits shall be considered. The language is: "In estimating damages occasioned to other portions of claimant's property, or any part thereof other than that actually taken, the value of the benefits, if any, may be deducted therefrom." And in states where there is no statute, the great weight of authority is in favor of the reception of testimony of benefits, such as the evidence here rejected tended to show, as well as injury; and it is clear, on principle, that the damage could only be the balance after deducting such benefits. Whether there were benefits, and of what value, were questions of fact for the jury. Several witnesses testified that the property was benefited by increased facilities for transportation, in connection with the mill business, by the construction and operation of the road. To withdraw such evidence we think was error. We do not find it necessary to examine and discuss each of the supposed errors herein. There are several palpable errors in the admission and rejection of testimony, and in the charge to the jury, which will probably not occur upon a retrial. We advise that the judgment be re-

versed, and the cause remanded for a new trial.

RICHMOND and BISSELL, CC., concur.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed.

(3 Idaho [Hash.] 35)

#### TERRITORY V. STAPLES.

(Supreme Court of Idaho. Feb. Term, 1891.)

##### GRAND JURY—CHALLENGES—CONTEMPT.

1. The last clause of section 7640, Rev. St. Idaho, which reads, "and no other person must be permitted to be present during the expressions of their opinion or giving their votes upon any matter before them," means no person except members of the grand jury, and does not refer to any member of the panel.

2. In case a challenge to an individual grand juror is allowed, he should not be present during the consideration of the charge as to which he is challenged.

3. If, notwithstanding the injunction, he is present, he is liable to punishment for contempt; but the indictment should not be set aside for that cause.

(Syllabus by the Court.)

Appeal from district court, Custer county.

J. W. Daniels, for appellant. Atty. Gen. Roberts, for the Territory.

MORGAN, J. The defendant was indicted by the grand jury of the third judicial district in and for the county of Custer, and charged with the crime of assault with intent to murder. He had not been examined before a committing magistrate before indictment, and was not in custody. Upon being arraigned upon the indictment on the 10th day of May, 1890, the defendant moved the court to set aside the indictment for the reasons: (1) That Parley Gould, a member of the grand jury which found the indictment, was also a witness against him before the grand jury; (2) that said Gould had expressed the opinion that said defendant was guilty of the crime charged; (3) that J. G. Fennell and Enos Watson, also members of the grand jury, had such prejudice against him (the defendant) that they could not act impartially. As evidence of these facts defendant filed his affidavit, stating that said Parley Gould had on the 6th day of May, 1890, used the following language to the defendant, to-wit: "I want you to stay away from my premises, and from around my house. You were down here, doing a lot of shooting, last night,"—and filed the affidavit of Henry Edward Miller, showing that said Gould acted with the grand jury, cross-examined witnesses in the jury-room, and manifested his interest in the case in other ways. On the 13th day of May the said motion to set aside the indictment was heard by the court, and denied, to which ruling the defendant excepted. Thereafter, on the said 13th day of May, 1890, the defendant was placed upon trial for the offense charged, and, under the instructions of the court, was convicted of the crime of "assault upon the person of another with a deadly weapon," and judg-

ment of the court entered thereon. From the said judgment the defendant takes an appeal to this court, and assigns for error, substantially as follows: (1) That the court erred in refusing to set aside the indictment because members of the said grand jury—J. G. Flnnell, Enos Watson, and Parley Gould—were in such a state of mind in reference to this case and this defendant as would satisfy the court that they could not and did not act impartially and without prejudice to the substantial rights of the defendant. (2) That the said Parley Gould expressed the unqualified opinion that the defendant was guilty of the crime charged, in the following language, used on the 6th day of May, 1890, to defendant: "I want you to stay away from my premises, and from around my house. You were down here, doing a lot of shooting, last night." It is claimed by counsel that the court should have set aside the indictment under clauses 3 and 4 of section 7730, Rev. St. Idaho. Clause 3 is: "The indictment must be set aside when a person is permitted to be present during the session of the grand jury, and when the charge embraced in the indictment is under consideration, except as provided in chapter 3, tit. 4." Clause 4 is: "When the defendant had not been held to answer before the finding of the indictment on any ground which would have been good ground for challenge either to the panel or to any individual grand juror." The reference to chapter 3, tit. 4, refers to the latter clause of section 7640, which reads: "The district attorney of the county may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, and may interrogate witnesses before them whenever they or he thinks it necessary; but no other person is permitted to be present during the sessions of the grand jury, except the members and witnesses actually under examination, and an interpreter, when necessary; and no other person must be permitted to be present during the expressions of their opinions, or giving their votes upon any matter before them." This clause means no person except members of the grand jury, and does not refer to members of the panel. *People v. Colby*, 54 Cal. 38. It does not appear whether the three grand jurors to whom objection is made were present during the expressions of their opinions by the grand jury, nor when giving their votes, and therefore we have no evidence that there was any violation of the statute to which the defendant could object. Upon examination of the words spoken by the juror Gould, it will be seen that they do not constitute an expression of an opinion that the defendant is guilty of the crime charged. He says: "I want you to stay away from my premises, and from around my house. You were down here, doing a lot of shooting, last night." This is not an opinion that defendant was guilty of the offense of "assault with intent to murder," even if the same occurrence was meant, of which there is no evidence. Section 7613 indicates what must be done in case a challenge to an in-

dividual juror is allowed on the ground that he is a witness, and has been served with process, or bound by undertaking as such, if he has formed or expressed an unqualified opinion or belief that defendant is guilty or not guilty of the offense charged, or if a state of mind exists on his part which satisfies the court that he cannot act impartially. Then the juror cannot be present, or take part in the consideration of such charge or the deliberations of the grand jury thereon, but he still remains a member of the grand jury. If, notwithstanding the injunction of the court, he does take part, he is to be punished for contempt; but the indictment is not set aside for that cause. *Id.*; *People v. Hunter*, 54 Cal. 65. Much of the argument in this case was had on the ground that the court erred in refusing a change of venue, but this point is not saved in the bill of exceptions, and is therefore not before the court. Judgment affirmed.

SULLIVAN, C. J., and HUSTON, J., concur.

(3 Idaho [Hast.] 38)

DOAN *et al.* v. BOARD OF COUNTY COMMISSIONERS OF LOGAN COUNTY.

(*Supreme Court of Idaho*. Feb. Term, 1891.)

CREATION OF COUNTIES—REMOVAL OF RECORDS—LOCATION OF COUNTY SEAT—ELECTION.

1. Citizens who are residents, electors, and tax-payers of a county may bring a suit for injunction to prohibit the removal of the county records from a place alleged to be the county-seat to a place claiming to be legally selected as the county-seat of the county, and to test the legality of such selection, when there is no speedy and adequate remedy at law.

2. Section 6 of the act creating the counties of Elmore and Logan, approved February 7, 1889, was not repealed or abrogated by section 9 of article 18 of the constitution.

3. Said section 2, art. 18, was not intended to apply to the location of a county-seat, consequent upon the organization of a new county.

4. A strained construction of the constitution is not required nor permitted, in order to work the repeal of statutes not clearly repugnant thereto. It is the duty of the court to give both the statute and the constitution such construction as will give effect to both, unless the statute is so clearly repugnant to the constitution as to admit of no other reasonable construction.

5. The election held in the state on October 1, 1890, was the general election for that year, and the county commissioners of Logan county were authorized to submit the question of the permanent location of the county-seat for said county to the voters at said election.

(*Syllabus by the Court.*)

Appeal from district court, Logan county.

Action to restrain the removal of a county-seat.

*P. L. Williams* and *V. Bierbower*, for appellants. *Arthur Brown* and *S. B. Kingsbury*, for respondents.

MORGAN, J. Appellants, who were plaintiffs below, are residents, tax-payers, and qualified electors of the county of Logan, in this state. John Halley, H. T. Smith, and J. S. Whitton, defendants, are members of the board of county commissioners of the said county of Logan. By authority of section 8, art. 21, of the constitution, the governor, on the 18th day of

July, 1890, "ordered an election to be held by the qualified electors of the state of Idaho at the usual voting places, or in such places as may be provided in each precinct, on the 1st day of October, 1890, for the purpose of electing the following officers, namely: A representative in congress, a governor, lieutenant governor, secretary of state, state treasurer, state auditor, attorney general, superintendent of public instruction, and three justices of the supreme court; a district judge and district attorney for each of the five judicial districts of the state; for each county in the state, three county commissioners, a sheriff, county treasurer, a probate judge, a county assessor, a clerk of the district court, a county surveyor, and coroner; a justice of the peace and constable for each precinct in the state; eighteen senators and thirty-six representatives for the legislature,"—directing the board of county commissioners of each county to assemble at the county-seat on the 28th day of July, 1890, and proceed to order an election to be held on the said 1st day of October, for the election of all officers, state, district, and precinct; members of the legislature; a member of congress; and directing that notices be given of such election, in the manner, and for the length of time, provided by the laws of the territory in cases of general elections for delegate to congress, county and other officers; and directing that said election be conducted in all respects in the same manner as provided by the laws of the territory for general elections, including the registration of voters as provided by law. The board of county commissioners for Logan county, at the meeting held on the 28th day of July, 1890, made an order submitting to the voters of said county, at the election to be held therein on the 1st day of October, 1890, the question of the permanent location of the county-seat of said county, alleging that said action was provided for in section 6 of an act of the Idaho legislature entitled "An act creating and organizing the counties of Elmore and Logan, and defining the boundaries of Bingham and Alturas counties," approved February 7, 1889. Said special meeting was held pursuant to a notice published in the Shoshone Journal, a newspaper published in said county of Logan, and in accordance with the proclamation of the governor. The notice calling the said meeting of the board of commissioners contained no statement that the matter of the election of a permanent location of the county-seat of said county would be acted upon. At said meeting the board of commissioners ordered that the question of the permanent location of the county-seat of Logan county be submitted to the voters of said county at the election to be held October 1, 1890. At said election a majority of all the votes cast for the permanent location of the county-seat of said county were in favor of the town of Bellevue, as appears by the canvass of votes made by said board on the 10th day of October, 1890. On the 7th day of October, 1890, the plaintiffs filed their complaint in this cause, and alleged, among other things that the defendants were

about to remove the county archives, records, and property from the county offices in said town of Shoshone to the said town of Bellevue, and threaten that they will make such removal; and further allege that, unless restrained by the injunction of the court, they will take and remove the books, archives, etc., from said town of Shoshone to the town of Bellevue, to the damage of the plaintiffs and other tax-payers, electors, and residents of said county; that said removal will be of great and permanent injury to all of the said residents, in that it will cost a large amount of the public revenue and moneys of said county to pay the expenses of the said removal, and will be of great and permanent disadvantage to the plaintiffs and other residents. Plaintiffs further allege that there was no petition whatever of a majority, or of any, of the qualified voters of said county ever made or presented at any time; allege that plaintiffs have no remedy at law; pray for temporary injunction until further hearing, and that it be made permanent on final hearing. To this complaint defendants demur, upon the ground that the complaint does not state facts sufficient to constitute a cause of action; that the complaint does not state facts sufficient to entitle plaintiffs to any injunction, nor to entitle the plaintiffs to the interference of a court of equity. Filed October 21, 1890. On the same date the defendants filed their motion to dissolve the temporary injunction, and their answer; and deny that the county-seat was ever permanently located at Shoshone; deny that the vote was taken for changing the county-seat, but allege that the said vote taken on the 1st day of October, 1890, was for the permanent location of the county-seat, in accordance with the provisions of an act of the fifteenth session of the territorial legislature, entitled "An act creating and organizing the counties of Elmore and Logan, and defining the boundaries of Bingham and Alturas counties," approved February 7, 1889; deny that the removal of the books, records, etc., would be of any damage to plaintiffs; and allege that Bellevue received a majority of all the votes cast at said election, and thereupon Bellevue was, by said board of county commissioners, declared to be the permanent county-seat of Logan county. Various other matters were alleged, not deemed necessary to rehearse. On the 23d day of October, 1890, the hearing upon the motion to dissolve the injunction was had before the judge of the district court, which resulted in the dissolution of the injunction. From the order dissolving the said injunction this appeal was taken.

The first question necessary to be considered by this court is, can these parties bring an action of this kind? They allege that they are residents and electors of Logan county, and tax-payers therein. They also allege that the board of county commissioners, defendants herein, had no right to submit this question to the voters of Logan county at the election held October 1, 1890; that the constitution of the state required an affirmative vote of two-thirds of all the votes cast

at said election to take the county-seat to Bellevue; that two-thirds of said voters did not vote in favor of said proposition; that said defendants threatened to remove the books, records, etc., of said county to Bellevue without authority of law; that said plaintiffs would be greatly damaged thereby; that they had no adequate remedy at law. Pomeroy on Remedies has the following: "Actions brought by a citizen and tax-payer or freeholder are permitted in many, and perhaps most, of the states, and are common forms of judicial proceedings to restrain the abuse of local legislative and administrative power by municipal officers." Poin. Rem. § 142. And when an act about to be committed by a municipal corporation is clearly illegal, and its necessary effect will be to impose heavy burdens upon the property of citizens and tax-payers, a court of equity is warranted in interfering by injunction for the prevention of such act. In such case a more prompt and efficacious remedy is demanded than is afforded by the tardy action of courts of law, and equity alone can administer the necessary relief by the exercise of its extraordinary power by injunction. 2 High, Inj. §§ 1236, 1247. The preventive jurisdiction of equity extends to the acts of public officers, and will be exercised in behalf of private citizens who sustain such injury at the hands of those claiming to act for the public as is not susceptible of reparation in the ordinary course of proceedings at law. Id. § 1308. To the same effect is the following: "To allow the taxable inhabitant to maintain a bill for an injunction to prevent illegal expenditures or appropriations of money, has the advantage of directness and simplicity, and notwithstanding its departure, or apparent departure, from technical principles, has the quite general, but not uniform, approval of the courts of this country; and practically this course has not had the effect to engender a multiplicity of similar suits by separate parties, but a few persons usually unite in one suit, which, when judicially determined, in effect settles the question in controversy." 2 Dill. Mun. Corp. § 921. To warrant the relief, however, in any case, it must appear that the acts complained of are of such a character that full and adequate redress cannot be had at law. 2 High, Inj. § 1243. The record in this case does not show that there was any order entered upon the records of the county commissioners of Logan county directing the removal of the records or other property to the town of Bellevue, from which an appeal could have been taken to the court to test the legality of the election, or the threatened removal, nor does it appear that there was any other means for bringing the action of the county commissioners before the court for consideration and decision. We are of the opinion, therefore, that the plaintiffs had no adequate remedy at law, and that they were entitled to relief in equity. We do not understand the appellants to now seriously contend that the law passed by the fifteenth session of the legislature is void. We assume that the decisions of the courts have finally set-

tled this question in favor of its validity. Section 6 of the act creating the county of Elmore is as follows: "The county-seat of said Elmore county is temporarily located at the town of Rocky Bar; the county-seat of Logan county is located temporarily at the city of Shoshone; and, at the regular election to be held in the year 1890, the county commissioners of said Elmore and Logan counties must submit the question of location of the county-seat, for their respective counties, to the voters of their said counties, and the places in each county receiving the highest number of votes for the county-seat is hereby declared to be the permanent county-seats for said counties." The authorities are numerous and conclusive that the legislature has the right and authority to submit to the vote of the people certain local questions, among which is fixing a county-seat. See Paine, Elect. § 268, and cases there cited.

The next question to be considered is, was section 6 of the act of the fifteenth session of the legislature, entitled "An act creating the counties of Elmore and Logan," etc., abrogated by the constitution? Section 2, art. 21, of the constitution, provides that all laws then in force in the territory of Idaho, which are not repugnant to this constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature. Section 2, art. 18, of the constitution, is relied upon by the appellants as abrogating the section in question. It is clear from the reading of this section that the framers of the constitution had no such intention. It reads: "No county-seat shall be removed unless upon petition of a majority of the qualified electors of the county, and unless two-thirds of the qualified electors of the county voting on the proposition at a general election shall vote in favor of such removal. A proposition of removal of the county-seat shall not be submitted in the same county more than once in six years, except as provided by existing law," etc. The conditions apply to the removal of a county-seat once permanently fixed. The county-seat of Logan county had never been permanently fixed. The language of the section is: "The county-seat of Logan county is located temporarily at the city of Shoshone." The legislature, in effect, says it is necessary that we should designate some place in said county where the county business shall be done, until the people can by their votes designate the place they desire for the permanent county-seat. Therefore the act states the county-seat is located temporarily at the city of Shoshone. The balance of the section puts the meaning beyond question, as follows: "And at the regular election to be held in the year 1890 the county commissioners of said Elmore and Logan counties must submit the question of location of the county-seat for their respective counties to the voters of said counties, and the place in each county receiving the highest number of votes for the county-seat is hereby declared to be the permanent county-seat for said county." The language of the act is too plain for construction or argument. It was not



the removal of the county-seat which was submitted to the voters, but the permanent location thereof. The said section of the constitution, therefore, was not intended to apply to the location of a county-seat, consequent upon the organization of a new county. A strained construction of the constitution is not required nor permitted in order to work the repeal of statutes not clearly repugnant thereto. It is the duty of the court to give both the statute and the constitution such construction as will give effect to both, unless the statute is so clearly repugnant to the constitution as to admit of no other reasonable construction. *McCool v. Smith*, 1 Black, 459; *Bowen v. Lease*, 5 Hill, 221; *Ex parte Yerger*, 8 Wall. 85, 105; *Furman v. Nichol*, Id. 44; *Red Rock v. Henry*, 106 U. S. 596, 1 Sup. Ct. Rep. 434. We must therefore conclude that the section of the constitution was not intended to and does not repeal section 6 of the act requiring the location of the county-seat of Logan county to be submitted to a vote of the people.

Had the board of commissioners lawful authority to submit the question of the permanent location of the county-seat of Logan county to a vote of the people at the election held October 1, 1890? The language of the act is: "At the regular election to be held in the year 1890 the county commissioners of said Elmore and Logan counties must submit the question of location of the county-seat to the voters of said counties." We accept the definition given to the word "regular" by the appellants, that it is, in this connection, synonymous with the word "general," and, as used, was intended to mean the general election, as provided for by section 465 of the Revised Statutes of Idaho. Rev. St. Idaho, §§ 465, 466, are as follows: "Sec. 465. There must be held throughout the territory on the first Tuesday after the first Monday of November, in the year eighteen hundred and eighty-eight, and in every second year thereafter, an election to be known as the 'general election.' Sec. 466. At such election the following officers must be elected: One delegate to congress for the entire territory; members of the legislative council and house of representatives, according to the number apportioned by law to the county, or to counties jointly; one probate judge; one treasurer, who is *ex officio* public administrator; one sheriff; one district attorney; one recorder, who is *ex officio* auditor, and *ex officio* clerk of the board of county commissioners; one assessor, who is *ex officio* tax collector; one surveyor; one school superintendent and one coroner for each county, and one county commissioner for each of the three districts of each county; two justices of the peace and one constable for each precinct of each county." It is not a general election because the day on which it was to take place was fixed as the first Tuesday after the first Monday of November, 1888, and every second year thereafter, but because all the officers of the territory, of the districts, and of the counties and precincts were then to be elected. If the legislature, or any other competent authority, should

in the mean time change the date on which the same officers should be elected, it would still be the general election for that year. *McCrary, Elect.* § 159. Congress might have at any time changed the date provided by this statute for the election of the same officers in the territory of Idaho, and it would have still been the general election. The constitution adopted by the people, and ratified by congress, did change the date for the general election for the year 1890, and fixed said time by the proclamation of the governor on October 1st of said year. At said time so fixed were elected all the officers named in section 466, above quoted, and many more. Such a general election never did occur in the history of the territory, and never will occur again in the progress of the state. The term "general election" is more clearly and completely defined by reference to the next section of the statute, which defines "special elections," as contradistinguished from "general elections," described in section 466, as follows: "Sec. 467. Special elections are such as are held to supply vacancies in any office, and are held at such times as may be designated by the proper board or officer." It was not the day on which it occurred, nor the authority which designated the day, but the character of the election, which made it the general election for that year. The statute making it the duty of the board of county commissioners to submit this question to the voters at the general election for the year 1890 rendered it unnecessary for the commissioners to give any notice, in their call for the meeting of July 28th, that such action would be taken. We are of the opinion, therefore, that the board of county commissioners had the authority, and it was their duty, to submit the permanent location of the county-seat of Logan county to the voters at said election; that they did lawfully submit said question to said voters; that said election resulted in the selection of Bellevue as the permanent county-seat; and that the board of county commissioners had lawful authority to remove the records to said town. The action of the judge of the court below, refusing the permanent, and dissolving the temporary, injunction, is approved, and the judgment affirmed. It is further ordered that the plaintiffs herein pay the costs of this action, and that execution issue therefor.

SULLIVAN, C. J., and HUSTON, J., concur.

(20 Or. 365)

STATE *ex rel.* EVERDING *v.* SIMON.

(Supreme Court of Oregon. March 23, 1891.)

CONSTRUCTION OF STATUTES—REVISION—ELECTIONS—OFFICERS—TENURE OF OFFICE—ELECTION OF SUCCESSOR.

1. In the construction of a statute the cardinal point is to ascertain the intention of the legislature, but this intention must be ascertained from the words used, in connection with surrounding circumstances.

2. Where a statute has been amended, resort may be had to the original act to explain any ambiguity which may exist in language of amended act, but not to supply omissions.

3. Statutes and parts of statutes omitted from a revision are to be considered annulled, and cannot be revived by construction.

4. An election, in order to be valid, must be held in pursuance of some law authorizing it, in force at the time.

5. The provision for the general election in the city of Portland does not authorize the election of any officer of the city, unless special provision is made by law, either directly or by implication, for the election of such officer for the particular time to which he is seeking to be elected.

6. Courts cannot, even in order to give effect to what they may suppose to be the intention of the legislature, put upon the provisions of a statute a construction not supported by the words.

7. When the legislature has omitted, by mistake or otherwise, to make the necessary provisions to carry out its intention, the court cannot by construction supply the omissions.

8. Where, while a person is rightfully in possession of a public office, the legislature abolishes the term and mode of electing his successor, the public necessities requiring that the office be in possession of some one with authority to discharge its duties, he continues to hold it until he shall be superseded by proper legislative action.

9. Under the provisions of section 1, art. 15, of the constitution a member of the board of commissioners of the city of Portland is authorized to hold the office until his successor is duly elected or appointed under some existing provision of the law.

*(Syllabus by the Court.)*

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

W. L. Boise and John H. Hall, for appellant. A. F. Sears, Jr., for respondent.

BEAN, J. This case involves a controversy between the relator, Richard Everding, and the respondent, Joseph Simon, concerning the right to exercise the office of police commissioner of the city of Portland. The facts are these: In 1885, section 72 of the charter of the city of Portland was so amended as to provide that the police force of the city shall be appointed and organized by three commissioners, and prescribing the qualifications and duties of these officers. This act provides that the first three commissioners shall be appointed by the governor, and shall hold their office for one, two, and three years, respectively, from the first Monday in July, 1886; their respective terms to be determined by lot; and, commencing with the general election to be held in the city on the third Monday in June, 1887, there shall be elected, annually, one commissioner, who shall hold his office for three years, and until his successor is elected and qualified. That all vacancies shall be filled by appointment made by the mayor, with the consent of a majority of the common council; and that the commissioners shall take the oath of office required of other city officers, and enter upon their duties within 10 days after their appointment by the governor, or on the first Monday in July succeeding their election when elected by the people. The respondent was appointed, by the governor, one of the commissioners provided by the act, and in the allotment of terms secured the three-years term. In 1889, and before his term had expired, the legislature amended the act of 1885, by providing "that section 72 be amended so as

to read as follows." This section, as amended, is substantially the same as former acts, except there is omitted therefrom all the provisions concerning the appointment by the governor, term of office, and time and place of election of these officers, and in lieu thereof the following inserted: "The police commissioners now in office shall hold their respective offices until their successors are elected and qualified." It also limits the mayor's power of appointment to vacancies caused by death or resignation. At the general election for city officers in June, 1889, the relator was a candidate for police commissioner, and as such candidate received all the votes cast for said office; there being no opposing candidate. He afterwards duly qualified, and demanded of respondent the possession of the office, which was refused; hence this proceeding. By the act of 1889 the office of police commissioner remained, with its duties clearly defined, but with no term fixed, and no provision for a election or appointment to the office except an appointment by the mayor in case of a vacancy occurring by death or resignation; but we are urged to supply these omissions by construction. It is claimed that the language of the act of 1889, "that commissioners now in office shall hold their respective offices until their successors are elected and qualified," and that "the commissioners shall take the oath of office required of other city officers, and enter upon the discharge of their duties on the first Monday in July succeeding their election," evinces an intention on the part of the legislature that the successors of the commissioners then in office should be elected by the people, and that, in order to carry out such intention, recourse should be had to the act of 1885 to supply the omission. The rule is unquestioned that in the construction of a statute the cardinal point is to ascertain the intention of the legislature; but it is just as well settled that this intention must be ascertained from the words used, in connection with the surrounding circumstances. For the purpose of explaining any ambiguity that may exist in the language of the act of 1889, resort may be had to the act of 1885, sought to be amended; but the parts of the former act omitted in the revision cannot be supplied under the guise of construction. The rule seems to be that statutes and parts of statutes omitted from a revision are to be considered annulled, and cannot be revived by construction. They cannot be read into the latter statute, so as to restrict its operation; and this, although it seems likely that the omissions were unintentional. End. Interp. St. §§ 202, 384; Woodbury v. Berry, 18 Ohio St. 456. All the provisions of the act of 1885 fixing the terms of office of police commissioner, and providing for an election for such office, are omitted from the act of 1889, and this court cannot assume that provisions of such vital and far-reaching importance were unintentionally omitted. State v. Clark, 57 Mo. 25. It seems more probable, from the manner in which the omissions occurred and the substituted language, that the legislative act was intentionally and deliberately done, with a

design to insert the proper provisions in some other part of the statute.

The term of office is not fixed by the act of 1889, nor is there anything in the language from which the length of such term can be inferred. The three-years term provided by the act of 1885 has been omitted in the amendment, and must therefore be considered repealed. If the court should undertake, by any possible construction of the language "until their successors are elected and qualified," to ascertain the length of the term intended, what term would it declare? Not three years,—the former term,—because that has been expressly abolished, and the legislature has thereby indicated an intention to make some change in the length of the term, or at least we must conclude that it so intended. It will readily be perceived, then, that this omission cannot be supplied by the court without assuming the functions of the law-making power, and this a court cannot do. It is our legitimate province to interpret legislation, but not to supply omissions.

Nor do we think there is anything in the language of the act of 1889 that can be construed to authorize an election for the office in controversy. It is provided, it is true, "that commissioners now in office shall hold their respective offices until their successors are elected and qualified," and that "the commissioners shall enter upon the discharge of their duties on the first Monday in July succeeding their election," but this does not in any way authorize an election. It may, and perhaps does, indicate an intention on the part of the legislature that such officers should be elected, but, unless some provision is made for carrying out such intention, it is of no avail. An election, in order to be valid, must be held in pursuance of the provisions of some law authorizing it, in force at the time. There is no inherent reserved power in the people to hold an election. *People v. Bull*, 46 N. Y. 67; *State v. Jenkins*, 43 Mo. 261; *People v. Johnston*, 6 Cal. 673; *Matthews v. Commissioners*, 34 Kan. 606, 9 Pac. Rep. 765; *State v. Sims*, 18 S. C. 460. This rule was recognized in the act of 1885, and the time and place of the election provided; but the act of 1889 contains no such provision, nor does it contain anything from which it can be inferred. Our attention has been called to section 11 of the charter of the city of Portland, which provides for the annual city election. This is only a provision for the general election, and certainly does not authorize the election of any officer of the city, unless special provision is made by law, either directly or by implication, for the election of such officer for the particular term to which he is seeking to be elected. *Sawyer v. Haydon*, 1 Nev. 75; *McKune v. Weller*, 11 Cal. 49. As we have already seen, there is no provision of law for the election of police commissioner. If the language of the act of 1889 should be so construed as to authorize an election, at what time must such election be held? At the time the relator claims to have been elected? If so, upon what theory? Certainly not because it was the general election for city officers. The act of 1885

provided an election for this office at the general election, and, as we have already seen, this provision was annulled or repealed by being omitted from the act of 1889. If any inference is to be drawn from this omission it must be that the legislature intended, if it intended that an election should be held at all, that it be held at some other time; else why should this provision have been omitted? And again, if an election could be had at all, it must have been immediately preceding the expiration of respondent's term of office; and when did his term expire? We look in vain to the law as it existed in June, 1889, for an answer. It is true, respondent was appointed at a time when the term was fixed at three years, but before the expiration of his term the legislature repealed that provision, so that at the time relator claims to have been elected no term for the office was fixed by law. That the legislature had the right to change the term of the office will not be denied. *Territory v. Pyle*, 1 Or. 149. These suggestions show the impossibility of so construing the law as to authorize an election, without interpolating into it express and positive provisions not inserted by the legislature. It may be admitted that the language of the act of 1889 shows that the legislature contemplated that the successor of respondent should be elected; and a comparison of the provisions of this act with the provisions of the section intended to be amended suggests the conjecture, if not convinces us of the fact, that the omission to provide for the term of office and election of these officers must have been unintentional; but, whatever may have been the intention of the legislature, it failed to carry it into effect. The inference we draw from the language of the act is not that the legislature thereby gave, even by implication, any power to the people to elect police commissioners, but rather intimated an intention to do so,—an intention which it failed to carry out. Courts "must not, even in order to give effect to what they may suppose to be the intention of the legislature, put upon the provisions of a statute a construction not supported by the words, even although the consequences should be to defeat the object of the act." *Smith*, Const. Const. § 714.

This is a case, it would seem, where the legislature has omitted, by mistake or otherwise, to make the necessary provisions to carry out its intention; but we cannot by construction supply these omissions. As was said by *DAVIES, J.*: "It is always competent for the legislature to speak clearly and without equivocation, and it is safer for the judicial department to follow the plain and obvious meaning of an act, rather than to speculate upon what might have been the views of the legislature in the emergency which may have arisen. It is wiser and safer to leave to the legislative department to supply a supposed or actual *casus omissus* than to attempt to do so by judicial construction." *People v. Woodruff*, 32 N. Y. 364. Courts cannot supply omissions in legislation, nor afford relief, because they are supposed to . . . st. To

adopt the language of Mr. Justice Woods in *Hobbs v. McLean*, 117 U. S. 579, 6 Sup. Ct. Rep. 870: "When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate, and not to construe." "We are bound," said Justice BULLER, in *Jones v. Smart*, 1 Term R. 44, "to take the act of parliament as they have made it. A *casus omissus* can in no case be supplied by a court of law, for that would be to make laws. Nor can I conceive that it is our province to consider whether such a law that has been passed be tyrannical or not." And Mr. Justice STORRY, in *Smith v. Rines*, 2 Sum. 338, 354, 355, observes: "It is not for courts of justice *proprio marte* to provide for all defects or mischiefs of imperfect legislation." See, also, *King v. Burrell*, 12 Adol. & E. 460; *Lamond v. Eiffe*, 3 Q. B. 910; *Bloxam v. Elsee*, 6 Barn. & C. 169; *Bartlett v. Morris*, 9 Port. (Ala.) 266. We have here, then, a case where the office of police commissioner of the city of Portland was created by a law fixing the term, and providing for the appointment of the first incumbents and the election of their successors, but before the expiration of respondent's term the law was so changed by the legislature, either by mistake or design, that no provision remains fixing the term of office or providing for the election of his successor, leaving him in possession of the office, with its duties devolving upon him; yet, despite this condition of things, the relator claims to have been elected at the expiration of respondent's term, as originally provided; and this brings the case squarely within *People v. Mathewson*, 47 Cal. 442. In September, 1871, Rosenfeld was by the state at large elected state harbor commissioner of the state of California for the term of four years from December 1, 1871, and served until May 23, 1873, when he resigned, and defendant, Mathewson, was duly appointed by the governor to fill the vacancy. On January 1, 1873, the Revised Code of California went into effect, from which in some manner the provision for an election of harbor commissioner was omitted. Yet the two political parties each nominated a candidate for the office, and at the general election in September, 1873, one Newman received the greater number of votes cast for said office, to whom a commission was regularly issued by the governor, and, having duly qualified, he demanded possession of the office from Mathewson, the appointee of the governor. Mathewson refusing to surrender possession of the office, the attorney general commenced proceedings to oust him. In deciding the case, WALLACE, C. J., speaking for the court, says: "It is necessary to the validity of an election to office that it be authorized by some statute in force at the time. Here there was none. By the three hundred and sixty-second section of the Political Code it is provided as follows: 'Harbor commissioners are elected and appointed and hold their office as provided in title 6 of part 3 of this Code.' But, on referring to that portion of the Code, no provision for such election is found.

The defendant, Mathewson, having been regularly appointed by the executive to fill the vacancy caused by the resignation of Rosenfeld, his term continues by law until the next election by the people, (Pol. Code, § 999;) but, as we have said already, such election by the people cannot legally occur until authorized by a statute in force at the time." Again, by an act of the legislature of California approved April 1, 1878, the judges of the fourth, twelfth, and fifteenth judicial districts of the state were empowered and required to choose the members of the board of police commissioners of the city of San Francisco. No term of office for the commissioners was fixed by the act. The act prescribed the powers and duties of the board, and further provided that after the expiration of the official term of the then chief of police his office should "cease to be elective, and shall be filled by the commissioners." On the assumption that the act was unconstitutional, because the power thus conferred upon the judges was not judicial in its nature, an application was made to the courts for a writ of *mandamus* requiring the election commissioners to make suitable and legal preparation for the election of chief of police and police commissioner, but was denied on the ground that such officers were not elective. *Staude v. Commissioners*, 61 Cal. 313. By the constitution of 1879 the judges of the district courts were superseded by the judges of the superior courts, but an application for a writ of mandate commanding the judges of the latter court to appoint police commissioner was, assuming that the terms of office had expired, denied, because the power of appointment in question was not a judicial power, and did not devolve upon the superior judges by force of the constitution of 1879. *Heinen v. Sullivan*, 64 Cal. 378, 1 Pac. Rep. 158. The governor of the state then, assuming that the office was vacant, under the constitution, on and after four years from the date of the original appointment, undertook to fill such vacancy by appointment, but the court held that there was no vacancy in the office which the governor was authorized by law to fill by appointment, and that the incumbent must discharge the duties of the office until succeeded by some person entitled by virtue of some existing law to supersede him. *People v. Hammond*, 66 Cal. 654, 6 Pac. Rep. 741.

We could safely rest the case before us here, but there is another question argued by counsel which we think proper to notice. It is contended that the act of 1889 invests respondent with an office, the tenure of which is longer than four years, and therefore in conflict with section 2, art. 15, of the constitution, which inhibits the legislature from creating any office the tenure of which shall be longer than four years. The fallacy of this argument lies in the fact that the act of 1889 does not create the office of police commissioner; nor did it invest respondent with the office; nor does it undertake to definitely fix the tenure. The office was created, by the act of 1885, with a fixed term, and defendant was regularly appointed, and while he was rightfully in possession of the office,

and discharging its duties, the legislature abolished the term and mode of electing his successor, leaving the office, with its duties clearly defined, in the legal possession of respondent, with no mode provided for the election or selection of his successor, except in case of death or resignation. He does not hold the office by virtue of the provisions of the act of 1889, but under his original appointment, and the failure of the law to provide a mode for the election of his successor. The act of 1889 left him in possession of the office, and its duties are of a public character, and the public exigencies demand that they be discharged. He is simply *locum tenens*—holding the place—until he shall be superseded by some person authorized by law to be inducted into the office. It is claimed that the provision in the act of 1889, "that commissioners now in office shall hold their respective offices until their successors are elected and qualified," without any mode being provided for the election of such successors, is in effect a continuance of the commissioners in office by legislative enactment, and that respondent's title depends on this enactment. As we have said already, respondent's right to the office does not depend on the act of 1889, but upon the fact that he was in possession of it rightfully when the act was passed; and the public necessities requiring that the office be in possession of a person with authority to perform its duties, he continues to hold it until he shall be relieved or superseded by proper legislative action. Strictly speaking, respondent is not "holding over," for "to hold over," when applied to a public officer, implies that the office has a fixed term which has expired, and the incumbent is holding into the succeeding term. Here there is no fixed term, and therefore can be no holding over. But conceding that his term has expired, and he is holding over, he has a right to do so by force of the constitution; and the language above referred to is but a legislative declaration of the constitutional provision. Section 7, art. 6, of the constitution, authorizes the election or appointment, as may be prescribed by law, of such city officers as may be necessary; while by section 1 of article 15 it is provided that "all officers, except members of the legislative assembly, shall hold their offices until their successors are elected and qualified." Whether or not, as a general principle of the common law, officers are entitled to hold over beyond their prescribed terms without some express provision, is not entirely settled upon authority; but, whatever the rule at common law may have been, it is clear that when by the constitution or law officers are elected or appointed for a term, and until their successors are elected and qualified, they are thereby authorized to hold and exercise their offices until their successors are duly elected or appointed under some existing provision of law. The right to hold over is derived from the same constitution that imposes the limitation upon the legislature in the creation of the office. The constitution permits a legislative tenure for a fixed term, not exceeding four years; and if, at the expiration of that period, from any

cause, such as the failure of the legislature to provide for the election of his successor, (People v. Hammond, 66 Cal. 654, 6 Pac. Rep. 741;) or of the regular appointing power to make an appointment, (State v. Howe, 25 Ohio St. 588;) or of the electoral body to elect, (State v. Harrison, 113 Ind. 434, 16 N. E. Rep. 384; People v. Oulton, 28 Cal. 44; People v. Stratton, Id. 382; State v. Lusk, 18 Mo. 333;) or the death of the person elected to fill the office before he has qualified, (Com. v. Hanley, 9 Pa. St. 513.)—no successor has been elected or appointed under an existing law, the incumbent holds over, by virtue of the provisions of the constitution, until he is superseded by duly-qualified successor, who shall have been elected or appointed in the manner provided by law, (People v. Woodruff, 32 N. Y. 355; People v. Batchelor, 22 N. Y. 128; Mechem, Pub. Off. § 397; State v. Davis, 45 N. J. Law, 390; People v. Tilton, 37 Cal. 614.) The reason of this rule is that public policy requires that the duties of the office be performed, and it is better that the incumbent should continue in the office and in the performance of its duties than an interregnum should occur. It conserves the public interests by preserving the methods and instrumentalities by which alone public business can be transacted; while the opposite rule, when pushed to its consequences, might result in the suspension of business in many of the departments of the public service. It was urged that the statute under consideration is harsh and oppressive in its character, and contrary to the genius of our institutions, in denying to the people of Portland the right to elect their own police commissioners. These are political considerations, fit to be weighed by and to influence legislators; but, if disregarded by them, their responsibility is to their constituents, and not to the courts. The impolicy, unwisdom, or unreasonableness of a statute, by themselves merely, are and ought to be urged to a court in vain. The functions of the judicial department are not adequate to the application of those principles, and not conferred for that purpose. If a change is desired in the law in this respect application must be made to the legislature, and not to the courts. The judgment of the court below is therefore affirmed.

*In re WIERBITSKY et al.* (No. 14,155.)  
(Supreme Court of California. March 19, 1891.)

APPEAL—TRANSCRIPT—WANT OF CERTIFICATE.

In California an appeal will be dismissed where there is no certificate to the transcript.

In *bank*. Appeal from superior court, city and county of San Francisco; T. H. REARDON, Judge.

G. H. Perry, for appellant. Pierson & Mitchell, for respondent.

McFARLAND, J. This is an appeal by J. J. Rauer from an order declaring H. Wierbitsky & Co. insolvent debtors, and appointing an assignee. A motion was made by respondent on November 28, 1890, to dismiss the appeal on the grounds, among others, that there is no certificate

to the transcript, and nothing to show that the papers in what is called the "transcript" are copies of the originals filed in the superior court. On the same day appellant suggested a diminution of the record, and moved this court for an order directing the clerk of the lower court to attach to the transcript a proper certificate, which motion was on the same day granted. Since then no such certificate has been furnished, and no further step has been taken by the appellant. There being no certificate to the transcript, the said motion of the respondent is now granted, and the appeal is dismissed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.; PATERSON, J.; HARRISON, J.

88 Cal. 360

CONGRAVE *et al.* v. SOUTHERN PAC. R. CO.  
(No. 13,395.)

(*Supreme Court of California.* March 19, 1891.)

MASTER AND SERVANT—PERSONAL INJURIES—FELLOW-SERVANTS.

Under Civil Code Cal. § 1970, providing that an employer is not bound to indemnify his employe for losses suffered in consequence of the negligence of another person employed by the same employer "in the same general business," unless he has neglected to use ordinary care in the selection of the culpable employe, a railroad company is not liable for the death of a brakeman in a collision caused by the negligence of the conductor on the same train in running his train ahead of schedule time, unless the company was negligent in selecting an incompetent conductor.

In bank. Appeal from superior court, Placer county; B. F. MYERS, Judge.

D. M. Delmas and Robert F. Devlin, for appellants. Hale & Craig, for respondent.

MCFARLAND, J. This action was brought by the widow and infant son of James W. Congrave, deceased, to recover damages for the death of the latter, who was killed by an accident on a railroad train of the defendant. A demurrer to the complaint was sustained by the court below; and, plaintiffs declining to amend, judgment went for the defendant. From this judgment plaintiffs appeal.

The plaintiffs aver that said Congrave, deceased, was a brakeman in defendant's employ upon a train which left the town of Truckee on March 19, 1888, and started westward, destined for Sacramento city. It is averred, in general terms, that the deceased, as such brakeman, was "placed by said defendant under the control and direction and subject to the orders of the conductor of said train;" but it is not averred that the accident which resulted in the death was caused, in whole or in part, by any order or direction given by said conductor to said deceased, or that any order or direction whatever was given. On the other hand, it appears affirmatively that the accident was not caused by any order or direction given by the conductor to said deceased. The complaint proceeds to state in detail the circumstances, facts, and causes which produced the accident by which the deceased was killed, and they are briefly as follows: The train, proceeding westward, had to pass a cer-

tain station called "Tamarack." "According to the rules and regulations, time-tables and schedules, made by said defendant to govern and regulate the movements of its trains upon its aforesaid roads, and the times of the arrivals and departures of said trains from said stations, and for the instruction and guidance of its conductors," said train ought to have left Tamarack at the hour of 55 minutes past 12 o'clock noon of said day, and not earlier; and it was "the duty of said conductor" not to have allowed the train to start before said time. But the conductor, "in disregard of the aforesaid rules, regulations, time-tables, and schedules of said defendant," "negligently and recklessly ordered, caused, and permitted said train to leave said Tamarack station, in its westward bound course, a long time before the expiration of the proper and schedule time as aforesaid," viz., at 46 minutes past 12 o'clock. "By reason of said negligence, recklessness, and breach of duty by said conductor, and the departure of said train from said Tamarack station before its proper and schedule time as aforesaid," the train collided with another train, and by said collision the deceased was killed. It is stated by way of recital that he was killed "while at his post obeying the orders and directions of said conductor, and performing his duties as such brakeman;" but there is no averment that any particular order was given, or that any such order contributed in the slightest degree to the accident or the death. The demurrer contained the general ground of want of facts, and also special grounds,—one being that the complaint was uncertain, etc., because "it does not appear therefrom what were the duties, or any of them, required of or to be performed by James W. Congrave, mentioned in said complaint, as brakeman on the train mentioned therein." We think that the demurrer was properly sustained, and that the judgment should be affirmed.

It is entirely clear on the face of the complaint that the deceased and the conductor were co-employees of defendant. It is also clear that the death was caused by the negligence and breach of duty of the conductor in starting the train before schedule time; no other cause of the accident is intimated in the complaint. There is no averment that the defendant was negligent in the selection of the conductor. And the general rule (whatever exceptions there may be to it) is well settled in England and the United States, and particularly in this state, that a master is not liable to his servant for damages sustained by the negligent act of a fellow-servant, unless the master was negligent in the selection of the servant at fault. It is hardly necessary to cite authorities on this point, as we do not understand counsel for appellant to contend against the general rule as above stated. The earliest cases upon the subject in this country in which the principle was applied to railroad companies and their employes are *Murray v. Railroad Co.*, (decided by the supreme court of South Carolina in 1841,) 1 McMul. 385, and *Farwell v. Railroad Corp.*, (decided

In 1842 by the supreme court of Massachusetts, Chief Justice SHAW delivering the opinion,) 4 Metc. 59. These leading cases were generally followed in the United States. Very few cases can be found which deny the general rule. They were also followed in England. *Hutchinson v. Railroad Co.*, 5 Exch. 343; *Wigmore v. Jay*, Id. 354; *Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266. We need not allude further to authorities in other jurisdictions, as this court has frequently approved the rule. In *Yeomans v. Navigation Co.*, 44 Cal. 71, the point was directly involved, and the court, among other things, say: "The defendants excepted to these instructions, and contended that the case is within the reason of the rule that an employer is not responsible to his employe for injuries resulting from the negligence, carelessness, or unskillfulness of a fellow employe engaged in the same general business. The rule itself cannot be questioned. It has been settled by a uniform series of both English and American decisions. The question comes upon the application of the principle to the present case." In that case it was held that plaintiff, who was an express agent, was a passenger, and not an employe of defendant. In *Hogan v. Railroad Co.*, 49 Cal. 128, the court say: "In *Yeomans v. Navigation Co.* we announced the rule of law on this subject, and referred to many of the authorities by which it was sustained. The cases are very numerous,—many of them being cited by defendant,—and they are to the effect that the master is not liable for injuries suffered by a servant through the negligence of a fellow-servant, unless the master was negligent in the selection of the servant in fault. The early cases in Wisconsin, Indiana, and Ohio, relied on by plaintiff as sustaining his view of the law, have since been overruled or disapproved." Other cases to the same point are *Collier v. Steinhart*, 51 Cal. 116; *McLean v. Mining Co.*, 51 Cal. 256; *McDonald v. Hazletine*, 53 Cal. 35; *Brown v. Railroad Co.*, 72 Cal. 523, 14 Pac. Rep. 138; *Fagundes v. Railroad Co.*, 79 Cal. 97, 21 Pac. Rep. 437.

It is true, however, that there has been some difference of opinion as to the meaning of the phrase "fellow-servant;" and a few of the cases have recognized a distinction growing out of different grades of employment. There has also been recognized in a few instances what may be called the doctrine of "vice-principalship;" that is, where one general employe is held to have been given the entire and unlimited control of the whole business of the principal, so that he stands in all respects in his principal's place, and all his negligent acts are deemed to be the direct acts of the principal. And upon these asserted principles we understand appellant to mainly rest his case. It is contended that as the conductor was superior in grade to the deceased brakeman, and had certain authority over him, and as the conductor, with respect to the running of the train, was the vice-principal, therefore the general rule applicable to fellow-servants does not apply. In support of this position the case of *Railroad Co. v. Ross*, 112 U. S. Rep. 377, 5 Sup. Ct. Rep. 184, is cited.

The facts of the last-named case are not exactly like those in the case at bar. It may be assumed, however, that the opinion of the majority of the court in that case is favorable to appellant's contention. That seems to be the view taken by the four dissenting justices, BRADLEY, MATTHEWS, GRAY, and BLATCHFORD; for, in expressing their dissent, they say: "We think that the conductor of the railroad train in this case was a fellow-servant of the railroad company with the other employes on the train. We think that to hold otherwise would be to break down the long-established rule with regard to exemption from responsibility of employers for injuries to their servants by the negligence of their fellow-servants." But it is to be observed that the majority of the court were not governed or restrained by any statutory provision. They were at entire liberty to consider the philosophy of the subject, and to follow the direction of their own judgment as to what should be the rule. The decision was not given in view of the statutory law of California upon the point, or of any similar law of any other state. The Civil Code of California went into effect January 1, 1873, and under the head of "Obligations of the Employer" it provides as follows: "Sec. 1970. An employer is not bound to indemnify his employe for losses suffered by the latter in consequence of the ordinary risks of business in which he is employed, nor in consequence of the negligence of another person employed by the same employer, in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe." This section of the Code not only restates the rule first established by judicial decision as to injury received through the negligence of a fellow-servant, but it clears away to a great extent the difficulties which may have existed as to the meaning of "fellow-servants." It declares them to be those employed "in the same general business." And if the employes on a train of cars, including the engineer, the conductor, the fireman, and the brakeman, are not persons employed in the same business, it would be difficult to imagine a set of men who could be considered as so employed. They are employed on the same train; their duties all appertain to the running of that train; each has his own work to do, and the joint work of all is necessary to the business; they are almost constantly in close relations and personal contact with each other; they have the fullest opportunities for knowing each others' qualifications as to carefulness and skill, and detecting any failure of duty; and to them applies peculiarly the reasoning upon which the general rule was originally founded. This clause of the Code has received judicial construction. In *McLean v. Mining Co.*, 51 Cal. 255, plaintiff was employed to work in a hydraulic mine. One Kegan was "foreman of all the work" with "authority to employ and discharge hands." Through the negligence of Kegan plaintiff was injured by a blast. Judgment in the trial court went for defendant, and on appeal plaintiff's counsel contended, as an exception to the general rule,



"that the employer is liable for injury to a subordinate servant by the negligence of a superior." The court affirmed the judgment, and in its opinion, after quoting section 1970, said: "The injury to the plaintiff was caused by the negligence of Kegan, the foreman of defendant, who was a fellow-servant with the plaintiff,—'another person employed by the same employer in the same general business,' that is, the business of working the mine of defendant,—Kegan being in the blasting, and plaintiff in the hydraulic, department of the 'general business.' \* \* \* The law of this state respecting this subject, as set forth in the Code referred to, recognizes no distinction growing out of grades of employment of the respective employees; nor does it give any effect to the circumstance that the fellow-servant through whose negligence the injury came was the superior of the plaintiff in the general service in which they were in common engaged; and the alleged distinction in this respect insisted upon by the defendant's counsel, founded, as he claims, on the general principles of law and the adjudged cases, requires no examination at our hands. *Collier v. Steinhart*, ante, p. 116, (51 Cal.)" It is clear that in deciding this case the court determined that the Code swept away the distinctions which appear in some of the "adjudged cases" on the subject of fellow-servants. *Collier v. Steinhart*, referred to in the opinion, (51 Cal. 116,) is still stronger to the point decided. Both of these cases were approved in *McDonald v. Hazletine*, 53 Cal. 35, which was also a case where an employe was injured through the carelessness of a foreman. These cases were again followed and approved in *Stephens v. Doe*, 73 Cal. 26, 14 Pac. Rep. 378, where it was held that "the foreman of a mine and a miner employed to work under his directions are fellow-servants; and the owner of the mine is not liable for injuries caused through the negligence of the foreman, unless he failed to use ordinary care in the selection of the foreman." The same doctrine was announced in *Brown v. Railroad Co.*, 72 Cal. 523, 14 Pac. Rep. 138, and *Fagundes v. Railroad Co.*, 79 Cal. 97, 21 Pac. Rep. 437.

It is contended, however, that the principal may give an employe such authority as will constitute him a "vice-principal;" that in that instance such employe stands in the shoes of the principal, and the latter is liable for the employe's negligence by which another employe is injured; and that in the case at bar the conductor was such vice-principal. The authorities mainly relied on for this contention are *Beeson v. Mining Co.*, 57 Cal. 20; *Brown v. Sennett*, 68 Cal. 225, 9 Pac. Rep. 74; *Sanborn v. Trading Co.*, 70 Cal. 261, 11 Pac. Rep. 712; and *McKune v. Railroad Co.*, 66 Cal. 302, 5 Pac. Rep. 482. In the *Beeson* Case the death of the deceased was caused by a defective pipe in a mine; and the only point decided was that a principal is liable for injury to an employe caused by defective machinery. The principle that it is the duty of an employer himself to provide safe materials and structures has never been disputed. There is some language used in the opinion which, perhaps,

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goes further, for which reason, probably, three justices dissented; but the case decides nothing more than as above stated. In *Sanborn v. Trading Co.* the plaintiff was injured by defective machinery used in a saw-mill; and the court decided, according to the well-settled rule, that "it is the duty of the owner of a saw-mill to furnish suitable and safe machinery for the use of his employes." *Brown v. Sennett* and *McKune v. Railroad Co.* seem to recognize to some extent the doctrine of vice-principalship. In the former case it was held that "the foreman of a gang of men to whom a stevedore delegates the entire management of the work of unloading a vessel, with full direction to control and supervise it, is not a fellow-servant with his subordinate employes." The court says in its opinion that the "defendants abdicated the control and management of the entire work to the foreman, and gave him full discretion to control and supervise it." He employed the men; and the court holds that "the foreman was therefore in the performance of the 'job' in place of the master." The case is decided by a mere majority of the court, it makes no allusion to the language of the Code; and it is hard to reconcile with some former decisions, particularly with *Collier v. Steinhart*, above mentioned, (51 Cal. 116,) and *McLean v. Mining Co.*, supra. But, assuming the case to be correctly decided, the facts were very different from those in the case at bar. In *McKune v. Railroad Co.*, a department decision, the defendant was engaged in constructing a railroad. The plaintiff was injured by the negligence of one Fisher, who "was material agent and train dispatcher for defendant, and had charge of the moving of trains." The negligence consisted in his carelessly sending out a special train which collided with a hand-car on which plaintiff and others were riding, and injured plaintiff. "A rule of the company declared that no extra engine, either with or without train, unless in company with a regular train, would pass over any portion of the road, except on an order from the material agent or train dispatcher." The court say: "He represented the defendant; was a vice-principal; he employed and discharged men, and directed the movements of the trains. When he directed the extra train to go up the road, the company directed it." Assuming this case not to be in conflict with the numerous decisions above noticed, it is clear that it is not authority for appellant in the case at bar. The material-man and train dispatcher seems to have had control of the entire business of constructing the railroad. He employed and discharged men, and moved all the trains at his own will, without any restraint. The defendant seems to have "abdicated" in favor of this general agent. But in the case at bar the conductor was merely an ordinary employe, who worked with other employes on a train, each having certain duties to perform. He had no power to "direct the movement of trains." He had no authority to direct the movement of the particular train on which he was employed, except in accordance with the regulations

and schedules and time-tables by which the defendant directed the work to be done. He had no power to employ and discharge men. It cannot be said that when he started the train before the schedule time "the company directed it." He was not then acting for the defendant, but against its express orders. He did not, therefore, come within the doctrine of vice-principalship,—assuming that there may be cases to which that doctrine would apply. Moreover it was said, and we think it was clearly intended to be decided, in *Brown v. Railroad Co.*, 72 Cal. 523, 14 Pac. Rep. 138, that the brakeman and conductor on a railroad train are fellow-servants. And in *Fagundes v. Railroad Co.*, supra, it was held that a laborer, a track-worker, and a conductor were all fellow-servants. Our conclusion is that, on the facts of this case as presented in the complaint, the deceased and the conductor were persons "employed by the same employer in the same general business," within the meaning of section 1970 of the Civil Code, and that, therefore, the defendant is not liable for the death of the one caused by the negligence of the other. Judgment affirmed.

We concur: DE HAVEN, J.; HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.

(88 Cal. 302)

*In re BAUQUIER'S ESTATE.* (No. 14,080.)  
(Supreme Court of California. March 18, 1891.)

EXECUTORS—ISSUE OF LETTERS—OBJECTIONS ON THE GROUND OF INCOMPETENCY.

1. The fact that an executrix claims property as her own, which the other legatees insist belongs to the estate, does not, of itself, show a want of integrity, within the meaning of Code Civil Proc. Cal. § 1850, providing that no person is competent to serve as an executor who is wanting in integrity.

2. Code Civil Proc. Cal. § 1849, provides that the court admitting a will to probate must issue letters thereon to the persons named therein as executors, who are competent, who must appear and qualify, unless objection is made under section 1851, which provides that any person interested may file objections to granting letters testamentary to the persons named as executors, and the objections must be determined by the court. *Held*, that the objections must show that the applicant for letters is incompetent upon some ground specified in section 1850, which provides that no person is competent to serve as executor who is under the age of majority, convicted of an infamous crime, or adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.

3. Where, on objections by the legatees to the issue of letters testamentary to the person named as executrix in the will, the court adjudges her incompetent, and denies her application for letters, an order denying her a new trial is appealable.

In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

J. C. Tubbs and A. L. Hart, for appellant. G. L. Johnson and James B. Devine, for respondent.

DE HAVEN, J. Mary C. Rode was named in the will of Joseph Bauquier, deceased, as executrix without bonds, and filed in

the superior court of Sacramento county her petition for the probate of said will, and for the issuance to her of letters testamentary. Objections to her appointment as executrix were filed by her brothers, who were also legatees named in the will, upon the alleged ground that she, in the life-time of said Joseph Bauquier, "for the purposes of pecuniary gain, and to obtain an unjust and larger portion of the estate of said Joseph Bauquier, deceased, than she was legally or morally entitled to, and to defraud said Peter, Frank, and Joseph Bauquier of their just portion of said estate, did, by means of intimidation, falsehood, fraud, deceit, misrepresentation, and undue influence, compel, influence, and induce her said father, the said Joseph Bauquier, deceased, to assign, set over, and deliver" to her \$12,543.88 in money and certain described real and personal property, and that the said petitioner claims adversely to the estate to be the owner of said property so fraudulently obtained. This is followed by the general allegation "that said Mary Rode is incompetent to act as executrix of the said last will and testament for want of integrity, as shown by the facts herein set forth, and that she is generally incompetent, by reason of the facts herein set forth, to act as such executrix." An answer was filed to these objections, and, after a trial upon the issues arising, the court made the following and only finding: "Mary C. Rode is incompetent to execute the duties of the trust of executrix of the said last will and testament of said Joseph Bauquier, deceased, for want of integrity; and that the said Mary C. Rode is antagonistic and hostile, and asserts claims adverse to the said estate, and that she wants integrity in that regard." The court thereupon denied her application to be appointed executrix. The petitioner moved for a new trial, which was denied, and from this latter order this appeal is taken.

1. Under section 1850 of the Code of Civil Procedure no person is competent to serve as an executrix who is wanting in integrity. The word "integrity," as here used, means soundness of moral principle and character, as shown by one person's dealing with others in the making and performance of contracts, in fidelity and honesty in the discharge of trusts. In short, it is used as a synonym for probity, honesty, and uprightness in business relations with others. The evidence in the record before us is not such as would justify a finding that the petitioner is lacking in integrity, as thus defined, and we are not certain, from the peculiar language of the finding quoted, that the learned judge of the court below intended to say anything more than that the adverse interests of the petitioner would prevent her from fairly, justly, and properly protecting the estate; and that this is a want of integrity within the meaning of the statute. We do not think, however, that the mere fact that the appellant claims property as her own, which the other legatees insist belongs to the estate, would of itself, and without some reference to the honesty of her claim, show a want of integrity.

<sup>1</sup> Rehearing denied, post, 532.

2. The remaining inquiry is whether the court was justified in denying the appellant's application upon the ground that she "is antagonistic and hostile, and asserts claims adverse to the said estate of Joseph Bauquier, deceased, and to the heirs at law, and persons interested in said estate;" or, adopting the language of counsel for respondents, "can one who claims a hostile and adverse interest in property alleged to belong to an estate be appointed administrator of such estate?" The answer to this will be found in the provisions of the Code of Civil Procedure relating to the appointment of executors, and declaring who shall be incompetent to act in that capacity. These sections are as follows: "Sec. 1349. The court admitting a will to probate, after the same is proved and allowed, must issue letters thereon to the persons named therein as executors who are competent to discharge the trust, who must appear and qualify, unless objection is made as provided in section thirteen hundred and fifty-one. Sec. 1350. No person is competent to serve as executor who, at the time the will is admitted to probate, is (1) under the age of majority; (2) convicted of an infamous crime; (3) adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity. \* \* \* Sec. 1351. Any person interested in a will may file objections in writing to granting letters testamentary to the persons named as executors, or any of them; and the objections must be heard and determined by the court." The meaning of these sections is that at the time of admitting the will to probate the court must appoint as executor the person who is therein named as such, if he has petitioned therefor, and is not incompetent, unless written objections to such appointment have been filed, in which case the objections must be heard and determined; and the objections made must be such as show that the applicant is incompetent upon some one of the grounds specified in section 1350 of the Code of Civil Procedure. Under our law a man has the right to make such disposition of his property as he chooses, subject only to such limitations as are expressly declared by law; and within the same limitations he has the absolute right to select the executor to carry out the provisions of his will. In other words, any executor named in a will has the right to act, unless there is some express provision of law which declares that he shall not; and, as a consequence, the testator may lawfully select any person for this trust who does not fall within one of the classes expressly mentioned and declared to be incompetent. And, so far as our investigation has extended, this construction has been uniformly given to statutes relating to this subject. Thus, DENIO, C. J., in his opinion rendered in *McGregor v. McGregor*, 40 N. Y. 139, says: "The selection of executors is not committed to the surrogate's court. The testator is allowed to appoint such persons as he may see fit, provided they do not fall within the class of incompetent persons mentioned in the

statute." The language of JOHNSON, J., in the same case, is equally explicit. He says: "The statute (2 Rev. St. p. 69, § 1) makes it the duty of the surrogate, when any will of personal estate shall have been admitted to probate, to issue letters testamentary thereon to the persons named therein as executors, if they are by law competent to serve as such. It then provides who shall be deemed incompetent to serve as executor. I am of the opinion that any person appointed or named as an executor in a will is to be deemed competent unless he is declared incompetent by statute, and that it is the duty of the surrogate to grant letters to every person named as executor in a will, upon his application, who is not declared incompetent to serve by statute. He has no discretion to exercise in the matter, but must obey the requirements of the statute, which is the sole source of his power." The court of appeals of Kentucky take the same view of this question. "It is sufficient for us to say that the law has declared who may and who may not be executor; and, if Berry be a man whom the law allows to be appointed as such, it follows that upon his motion to give bond and security, and to qualify under the will, it was the duty of the county court, if the security was sufficient, to permit him to give bond, and be qualified as executor, and to give him letters testamentary. \* \* \* Whatever may be opinions of men as to the propriety or impropriety of a particular appointment, the very basis and foundation of the exercise of the right which society has granted to its members to appoint its own representatives after death is the special confidence reposed by the testator in the appointee; and men, it seems to us, would care but little for the high privilege of disposing of their estates to their own liking if they are to be denied the right of selecting those who are to carry out and effectuate the benevolent purposes of their wills. It is true, some persons are incapable of being executors. The law has pointed out who they are, and society has long been satisfied with the wisdom of the rules upon this subject." *Berry v. Hamilton*, 12 B. Mon. 191. That the courts have no right to say that a person is incompetent to be appointed as an executor unless he falls within one of the classes of persons expressly declared to be incompetent by statute, is further shown by the decisions in regard to administrators where the law designates the order of priority in which different persons shall be entitled to appointment, and also declares who are incompetent to act. It is held in such cases that the order of priority named in the statute must be followed, and that no person can be declared incompetent unless he is one of a class so declared by the statute. A leading case on that point is *Coope v. Lowerre*, 1 Barb. Ch. 45. In that case the chancellor said: "The Revised Statutes provide that administration in cases of intestacy shall be granted to the relatives of the deceased who would be entitled to his personal estate, if they or any of them will accept the same, in the order specified in the statute; and I think the surrogate has no dis-

cretion to exclude a person declared by the statute to be entitled to a preference, except for the causes specified in the thirty-second section of the title of the Revised Statutes relative to granting letters testamentary and of administration." This case has been approved and followed in our state in *Estate of Pacheco*, 23 Cal. 480. In that case it was said: "On the trial it was admitted that one of the applicants, Rosa Pacheco de Sibrán, cannot read, write, or speak the English language; that she cannot read or write the Spanish; that she is sixty-nine years old, a Californian by birth, and a daughter of the intestate. It is not claimed that the other applicant, Penniman, is subject to any of the disqualifications mentioned in section 55; nor is the other applicant included therein. The fact of her great age, and that she cannot read or write, and that she cannot speak English, do not show any want of understanding within the statute. It is true, they may render it difficult for her to perform some of her duties properly, yet they do not render it impossible. In the case of *Coope v. Lowerre*, 1 Barb. Ch. 45, it was held by the court of chancery of New York, in construing a similar statute, that the surrogate had no discretion to exclude a person declared by the statute to be entitled to a preference, except for some of the causes specified in the statute; and it was held that no degree of legal or moral guilt or delinquency was sufficient to exclude a person from the administration as the next of kin in the cases of preference given by the statute, unless such person had been actually convicted of an infamous crime. In that case the administration was granted to a person proved to be dishonest, and against whom a large judgment had been recovered in a case of *crim. con.* \* \* \* We therefore hold that, under the admissions and evidence of this case, the daughter, Rosa Pacheco de Sibrán, was entitled to letters of administration." The decision in the case of *Coope v. Lowerre*, *supra*, will be better understood when it is stated that in that case objection was made to the appointment of the petitioner as administrator of the estate of his father upon the ground "that he was disqualified on account of his vices and his improvidence," and the statute of New York provided, among other cases of disqualification, conviction of an infamous crime and improvidence, and it was with reference to that particular statute that the court in that case said: "No degree of legal or moral guilt or delinquency, therefore, is sufficient to exclude a person from the administration as the next of kin, in the cases of preference given by the statute, unless such person has been actually convicted of an infamous crime." The principle underlying that decision and the cases which have followed it is that the courts have no right to add to the disqualifications prescribed by the legislature for such cases. In some of the states the courts are by law given a wide discretion in determining who are qualified to act in the capacity of executors and administrators. The decision in the case of *Stearns v. Fiske*, 18 Pick. 24, cited and relied on by respondent,

was based upon a statute which authorized the court to deny the application of a person "evidently unsuitable" to discharge the duties of the trust, and it was held that this language vested a wide discretion in the probate judge. We feel entirely satisfied that the words "want of integrity," found in section 1350 of the Code of Civil Procedure, do not apply to a case where there is a simple conflict of interest in regard to the estate between the executor named in the will and the other legatees. We are also satisfied that, if the legislature had designed to make such a conflict of interest a cause for refusing to appoint an executor so named, such intention would have been manifested by language more apt for that purpose than is to be found in that section of the Code of Civil Procedure. We may add that, while the court is authorized to refuse to appoint an executor named in a will for want of integrity, yet for manifest reasons this power should not be exercised except upon clear and convincing evidence establishing such disqualifying fact. The executor may always be removed after appointment, unless he discharges the duty of his trust faithfully, and as directed by law.

3. The order denying the appellant's motion for a new trial in this proceeding is an appealable one. Order reversed.

We concur: HARRISON, J.; McFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; GAROUTTE, J.

83 Cal. 319

HYDE v. MANGAN *et ux.* (No. 13,767.)

(Supreme Court of California. March 18, 1891.)

EJECTMENT—DEFENSES—EQUITABLE TITLE.

Defendants, who were in possession of land under a contract to purchase, assigned the contract as security for a debt. The assignee assigned to plaintiff, who, with full knowledge of defendants' right, made payment to the vendor of the full purchase money, surrendered the contract, and received a deed for the land. He then brought ejectment. There was no evidence that defendants were in default under the contract. Held, that their equitable title should prevail over plaintiff's legal title, and he cannot recover.

In bank. Appeal from superior court, Tulare county: WILLIAM W. CROSS, Judge. *Justin Jacobs*, for appellant. *Lambertson & Taylor*, for respondents.

GAROUTTE, J. This is an action of ejectment, the complaint being in the usual form. The answer makes a general denial, and then alleges certain facts in the nature of a special defense. Judgment went for the defendants in the lower court, and the case is before us for consideration upon an appeal from the judgment and from the order denying plaintiff's motion for a new trial. The following are substantially the findings of the court, and they are supported both by the allegations of defendants' special defense, and by the evidence: That upon the 20th day of October, 1879, the Southern Pacific Railroad Company was the owner of a certain tract of land situated in Tulare and Fresno counties, and at said time Mary A. Mangan, who was the wife of J. M. Man-

gan, entered into a written contract with said company, whereby said company contracted to sell to her said real property for an agreed price; and said Mary A. Mangan at that time, from her separate property, paid a portion of said purchase price, and agreed to pay the balance on or before the 20th day of October, 1884, with interest at 10 per cent. per annum; and upon the payment of said purchase price and interest said company agreed to execute and deliver to her a deed in fee of said premises. That upon the execution of said agreement the defendants entered into the possession of said property, and ever since said time have been in the open, notorious, and exclusive possession and occupancy thereof, having valuable improvements thereon, and claiming to own the same; and the plaintiff, prior to his purchase, never made any inquiry from them, or either of them, as to their rights or claims in and to the premises. That about the 18th day of September, 1883, defendant Mary A. Mangan assigned her interest in and to the foregoing contract of sale to one Brownstone, to secure a promissory note given by defendant J. M. Mangan to said Brownstone; and said assignment was made with the understanding that said contract should be reassigned to her when said note and interest were paid. That said note was subsequently surrendered to J. M. Mangan, and he gave a new note to Brownstone for a larger amount, (including the amount of the first note,) without the consent or knowledge of Mary A. Mangan, and no part of said note has been paid. That upon the 22d day of November, 1883, Brownstone assigned an undivided one-half interest in said contract to B. Schwartz, and upon February 25, 1888, Brownstone and Schwartz assigned said contract to one Erlanger, who had actual knowledge of the claims and rights of defendants in and to said land. That upon the 7th day of March, 1888, Erlanger assigned said contract to plaintiff, who, upon the 14th day of March, 1888, made full payment to said railroad company for said land, surrendered said contract, and received a deed therefor. The court further found that the assignment of the contract of sale to Brownstone was a mortgage of defendants' interest in the land, and that the possession of defendants was sufficient to put plaintiff on inquiry as to their rights; and, having failed to make such inquiry, he is in no better position than if he had done so, and had been fully informed as to the defendants' claims and equities. The assignment of the contract by Mary A. Mangan was as follows: "I, Mary A. Mangan, the within-named purchaser, for and in consideration of the sum of six hundred dollars to me in hand paid, do hereby sell, assign, and transfer all my right, title, interest, and claim in and to the within-described tract or parcel of land, and the within contract No. 759, unto D. Brownstone, his heirs and assigns forever, subject to the stipulations and conditions therein contained, which are to be performed by said D. Brownstone, the assignee. MARY A. MANGAN. September 18, 1883."

Appellant relies upon two main propositions in this case, either of which, if maintained, he claims would entitle him to recover: *First*. That he is the owner and holder of the legal title to the premises, and in an action of ejectment the legal title must control. *Second*. If the assignment of the contract were to be held to be a mortgage, the debt for which it was given being barred, defendants are entitled to no consideration without offering to redeem. The first proposition, that "in an action of ejectment the legal title must control," is not the law of this state. The case of *Willis v. Wozencraft*, 22 Cal. 615, decides: "A mere equitable title to land, if it is of such a character as entitles the holder to possession in equity, is a sufficient defense, under our system of practice, to an action for the possession, brought even by the holder of the legal title." *Railroad Co. v. Mudd*, 59 Cal. 585; *Whittier v. Stege*, 61 Cal. 238; *Hicks v. Lovell*, 64 Cal. 17. As to the second proposition contended for by appellant, there is a line of authorities which supports such contention. *Hughes v. Davis*, 40 Cal. 120; *Bruck v. Tucker*, 42 Cal. 352; *Pico v. Gallardo*, 52 Cal. 206. This proposition of law, as laid down in the cases just cited, is based upon another principle of law, established for the first time in this state in *Hughes v. Davis*, supra, and which has since been discarded by section 2925 of the Civil Code. This principle, as announced by the court, was "that an absolute deed, which is shown by parol evidence to have been intended as a mortgage, conveys the legal title to the property." And our attention has not been directed to any authority since this principle ceased to be the law of this state, which has held to the doctrine laid down in those cases; but, upon the contrary, the later decisions of this court hold that under the general issue the defendant may be allowed to show that the deed by which the plaintiff claims title is a mortgage, and therefore gives him no title. In the case of *Healy v. O'Brien*, 66 Cal. 519, 6 Pac. Rep. 386, the language of the opinion is: "But when the court found that the deed was given only as security for money loaned, it found, in effect, that it was but a mortgage, and did not pass the legal title to plaintiff. If, therefore, defendants had rested only on their denial of plaintiff's alleged ownership of the property, judgment must have passed for the defendants." In the case of *Smith v. Smith*, 80 Cal. 329, 21 Pac. Rep. 4, and 22 Pac. Rep. 186, 549, the court says: "The plaintiff contends that his motion to proceed first with the trial of the affirmative defense set up by the answer should have been granted for the reason that it was an equitable defense, and that the whole judgment should have been reversed upon this ground. The affirmative defense was, in substance, that the deed of 1876 was a mortgage, and that the debt secured thereby had been fully paid. But the allegation that the deed was a mortgage was merely another way of saying that the plaintiff had no title, which was fully covered by the denial of plaintiff's ownership. And so far as the plaintiff's right of possession

was concerned, it was immaterial whether the debt had been paid or not. And while it may be possible that if the defendant had a title he would have been entitled to some affirmative relief in the nature of the removal of a cloud, yet he did not ask for such relief in terms, and no affirmative relief of any kind was awarded to him by the judgment." See *Roberts v. Columbet*, 63 Cal. 25.

In the case at bar the defendants have not relied upon the general issue simply, but by a special defense—not seeking any affirmative relief—have attacked the title of plaintiff, and set out a history of their own title and right of possession. This special defense counsel for the plaintiff did not see fit to attack in the lower court; and, indeed, it cannot be discerned upon what grounds an attack could have been successfully made. The plaintiff came in to court in this action with full notice of all the rights and equities existing between the railroad company and the defendants, and between Brownstone and his assignees and the defendants; for the defendants were in the open, notorious, and exclusive possession of this land at all these times, and plaintiff made no inquiry to ascertain the rights or claims of defendants; and he is in no better position, and no more entitled to be regarded as a purchaser in good faith, than if he had so inquired, and ascertained the real facts of the case. *Pell v. McElroy*, 36 Cal. 268; *Bank v. Baker*, 82 Cal. 114, 22 Pac. Rep. 1037; *Scheerer v. Cuddy*, 85 Cal. 273, 24 Pac. Rep. 713. Neither could the plaintiff be recognized as a *bona fide* purchaser from his assignor, Erlanger, upon the additional ground that in the sale of equitable interests the principle of *bona fide* purchasers has no standing. *Taylor v. Weston*, 77 Cal. 534, 20 Pac. Rep. 62. The transfer of Mary A. Mangan's interest in the land (by the assignment of the contract to Brownstone) being a mortgage, Brownstone took no title; and his assignment to Erlanger, who assigned to plaintiff, gave the plaintiff no title, for, as we have already seen, he is deemed to have had notice of the character of the original assignment. The plaintiff does not even occupy the position of Brownstone, for he has an assignment of the security without the transfer of the indebtedness. The debt and security are inseparable; the mortgage alone is not a subject of transfer. Section 2936, Civil Code: *Peters v. Bridge Co.*, 5 Cal. 334; *Nagle v. Macy*, 9 Cal. 426. Conceding that under the assignment of Mary A. Mangan to Brownstone she authorized him to procure from the railroad company the legal title, yet it is a matter of very serious doubt whether under the assignment Brownstone had the right to delegate that power to another; but that is a question unnecessary to decide. If we regard the plaintiff as the assignee of the railroad company, he then purchased the legal title, subject to the equitable title of the defendants under the contract, and his legal rights in maintaining this action are identical with those of his assignor, and, under the facts as disclosed by the record in this case, the railroad company

could not prevail in this action. The record discloses that the defendants went in to possession under the contract, paid a portion of the purchase price, paid the taxes and annual installments of interest for years. The plaintiff, before suit, made no demand for possession. There is no proof in the case of any special facts tending to show either an active or constructive ouster of the plaintiff; nor is there any evidence tending to show a demand and refusal to pay the purchase price, or any installment of interest after it became due, or that the railroad company had not given the defendants additional time in which to make the final payment, or that the defendants had abandoned the purchase, or refused to complete it according to the terms of the contract. There is nothing to indicate that the defendants were in default in the performance of the contract; and, being rightfully in possession under their equitable title, they could not be disturbed, even by the holder of the legal title. Let the judgment and order be affirmed.

We concur: HARRISON, J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; DE HAVEN, J.

STATE ex rel. CONGDON v. SECOND JUDICIAL DISTRICT COURT.

(Supreme Court of Montana. March 3, 1931.)

CONTINUANCE—POWER TO IMPOSE COSTS.

Civil Code Mont. § 253, authorizes a continuance on account of absence of material testimony, when the adverse party refuses to admit that such testimony would be given; and that "upon terms" the court may, in its discretion, postpone a trial upon other grounds than the absence of evidence. Section 503 authorizes the courts to impose costs as a condition of granting a continuance. *Held*, that costs may be imposed as a condition of a continuance for absence of evidence.

*Certiorari.*

This is a writ of *certiorari* brought to review two orders of the second judicial district court, made in the case of *Charles O'Donnell v. Nelson Bennett et al.*, pending in that court. That case came on for hearing December 16, 1890. The defendants moved for a continuance, upon the ground of the absence of evidence. The motion was made upon an affidavit of E. Congdon, agent of defendants, setting forth what we may here consider material testimony expected to be obtained by the evidence of one Bocarde, an absent witness, and showing the diligence used to procure his attendance. The plaintiff admitted that the showing of diligence was sufficient, and declined to admit that the witness, if present, would testify to the matters set forth. The court continued the case until the next call of the docket, at the costs of the defendants. This appears from the bill of exceptions certified by the district court in obedience to the writ of *certiorari*. The bill of exceptions further recites as follows: "That thereupon the defendants, by their said attorneys, stated to the court that they declined to pay such costs, and would proceed to trial with such evidence as they had, but

would not withdraw their motion for a continuance; but the court ordered that the said cause be continued until the next call of the civil calendar for setting causes for trial, at the cost of defendants." It further appears by the certified record that plaintiff filed his bill of costs. No exception was made thereto by defendants, nor was a motion made to relax the costs. Thereafter, on the plaintiff's application, the court ordered execution to issue for the collection of the costs, which was done. Thereupon the defendants, by said Congdon, as agent, sued out this writ of *certiorari* to the district court. Relators claim that the district court exceeded its jurisdiction in two respects: (1) In imposing the costs upon the continuance; (2) In ordering execution for the collection of said costs. The statutes to be construed are as follows, all from Code Civil Proc.: "Sec. 253. A motion to postpone a trial on the grounds of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. The court may also require the moving party to state upon affidavit the evidence which he expects to obtain, and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given upon the trial, or offered and overruled as improper, the trial shall not be postponed; and, upon terms, which the court may, in its discretion, upon good cause shown, and in furtherance of justice, postpone a trial or proceeding upon other grounds than the absence of evidence." "Sec. 503. When an application is made to a court or referee to postpone a trial, the payment of the costs occasioned by the postponement may be imposed in the discretion of the court or referee, as a condition of granting the same." "Sec. 486. Whenever an order for the payment of a sum of money is made by a court, pursuant to the provisions of this Code, it may be enforced by execution in the same manner as if it were a judgment."

F. T. McBride, for petitioner. Chas. O'Donnell, for respondent.

DE WITT, J., (after stating the facts as above.) We have recently (State v. District Judge, this term, 25 Pac. Rep. 1053) so fully defined our views of the province of the writ of *certiorari* that we will now do no more than inquire whether the district court exceeded its jurisdiction in making the two orders complained of. The greater portion of relators' argument is made upon the alleged ground that they offered to proceed with the trial, but were not allowed to do so by the court. Indeed, the record does show that they offered to proceed with the trial. But the record also discloses that they moved for a continuance, and that the continuance had been granted at their costs. Relators argue that they rejected the terms imposed by the court, and that the trial, upon their offer to go on, should have proceeded, and the court had no authority to continue the case, and tax the costs against them. How they could reject an order of the court does not appear. Perhaps they could

have declined to accept a continuance on the terms imposed, and have done this by withdrawing their motion for a continuance. They did not ask, or offer that the order for the continuance should be vacated, which must necessarily have been done if the trial was to be had. They expressly stated that they would not withdraw their motion for a continuance. They placed themselves in the peculiar position of, at the same time, demanding a continuance and offering to try the case. As to the motives of counsel in this action nothing appears, nor does it seem to concern this court. But, however proper the motives, the fact is plain upon the record that their attitude towards the court was equivocal. How was the district court to know of what mind the counsel were when they demanded two things, absolutely inconsistent, in the same breath? It is no answer to say that counsel were endeavoring to preserve their rights. If the court had jurisdiction to impose costs, counsel must submit to the law. In that contingency they could have paid the costs and had their continuance, or they could have asked to have the order for the continuance vacated, and, if done, could have saved the payment of the costs. On the other hand, if the court had not jurisdiction to impose the costs, counsel had the remedy which they are now invoking. The district court could not have done other than it did; that is, take the word of counsel as expressed by the solemnity of their motion of record, and disregard their utterances contradicting their motion.

This matter seems very plain to my mind, so much so that noticing it may seem superfluous. But counsel have pressed it upon our consideration, and it is perhaps fair to meet the argument contended for at the bar. Suffice it to say that we know of no principle of law or rule of practice by which it may be demanded from a court, as was demanded from the district court in this case, and even here insisted upon, that it do both of two things at once, the performance of one of which is the non-performance of the other, and then complain that the court has done the one demanded by a formal motion. *Hughes v. Investment Co.*, 11 Sawy. 561, 26 Fed. Rep. 831, and cases cited; *Newell v. Meyendorff*, 9 Mont. 262, 23 Pac. Rep. 333.

I am of opinion that the granting of the continuance was proper and unavoidable, and will inquire whether the court had jurisdiction to impose the costs as it did. If section 253 stood alone, relators might have some reasons for their contention. The section first provides for a continuance on the ground of the absence of evidence, and says nothing about the imposition of terms on a continuance granted for this reason. Then the section goes on, and says that the court may postpone the trial for grounds other than the absence of evidence, and may do so upon terms. The argument is left open by this section, that, having provided terms on a continuance for causes other than the absence of evidence, this, by implication, excludes the imposition of terms



on a continuance granted by virtue of the absence of evidence. But the matter is made certain by section 503 part of the same Code, that, when a trial is postponed for any cause, the costs occasioned by the postponement may be imposed, in the discretion of the court. In section 253 we have a special provision covering one class of cases. In section 503 we find a general provision covering all classes, including that named in section 253. It is not a case of *expressio unius, exclusio alterius*; because, when we consider the two sections, it is not a fact that there is an *expressio unius*, and, consequently, there can be no *exclusio alterius*. The facts are quite the contrary. Section 503 is an expression of all, and hence an including of all, and the maxim becomes *expressio omnium, inclusio omnium*. The district court, therefore, had jurisdiction, under section 503, to impose costs as it did. No question of their amount or their retaxation is presented. The order imposing costs being made, the statute (section 486) allows an execution therefor. I advise that the writ be dismissed.

**BLAKE, C. J., (concurring.)** Sections 253, 503, *supra*, are parts of the same act, the Code of Civil Procedure, and should be construed together. When they are thus read, there is no repugnancy, and the court below had the power, in the exercise of its discretion, to impose costs upon the relators as a condition of granting the motion to postpone the trial of the action; and I concur in the judgment that the writ should be dismissed.

**HARWOOD, J., (concurring.)** The sole question to be considered in this case is whether the court exceeded its jurisdiction in assessing the costs involved by the continuance upon the party applying therefor. Counsel for relator admits that under the statute quoted, *supra*, the court has jurisdiction to impose such costs as a condition of granting continuance, except where the moving party is entitled, on his showing, to a continuance, on the ground of absence of evidence. His reasoning would apply with much force if section 253 was the only statute on the subject. But section 503 seems to apply to all cases of postponement, and especially provides that costs occasioned thereby may, in the discretion of the court, be imposed as a condition of granting the same. This section is general, and makes no distinction as to the grounds upon which continuance is granted. Relator contends that section 503 should be interpreted to relate only to the latter part of section 253, authorizing continuance to be granted on "other grounds than the absence of evidence." If that be done, section 503 becomes meaningless, and vain legislation, because section 253 provides that terms may be imposed upon granting a continuance on "grounds other than the absence of evidence." Such interpretation would give section 503 the effect of only reiterating what was already provided by section 253. We ought to interpret these statutes so that both will have an effect, if such interpretation is possible. Section 630,

Code Civil Proc. I think the statute gives the court jurisdiction, in its discretion, to impose the costs involved by the continuance upon the party applying therefor, without reference to the ground for which continuance is granted. Such discretion might be exercised so as to work hardship or injustice upon a party who had endeavored with due diligence to prepare for trial, and had been prevented from maturing his preparation by circumstances beyond his control. In such cases, if abuse of the discretion appeared, it would undoubtedly be corrected. But in the case at bar we are to pass upon the question of jurisdiction only, and not whether it has been properly exercised. The application of said provisions of the statute being the only question involved in the case, and the only one presented by relators' brief, with these observations I concur in the order dismissing the writ.

(10 Mont. 462)

## CUNNINGHAM v. QUIRK.

(Supreme Court of Montana. March 2, 1891.)

## NEW TRIAL—REDUCING VERDICT—ESTOPPEL.

1. In an action for conversion of household goods against a constable who sold them under execution, the verdict assessed plaintiff's damages at \$196. Plaintiff testified that the furniture cost \$236.90, had been in use four years, and was now worth \$196. The purchaser stated that the goods "looked to be used up pretty well." The articles were sold separately at one bid for \$72.25. *Held*, that it was not an abuse of discretion to require plaintiff to accept \$185.60, and remit the excess, under the alternative of a new trial.

2. The statement "that this cause came on regularly to be heard \* \* \* on defendant's motion for a new trial," in plaintiff's bill of exceptions, precludes him from setting up that defendant never made or filed a motion for new trial.

Appeal from district court, Lewis and Clarke county; WILLIAM H. HUNT, Judge.

*Kinsley & Knowles*, for appellant. *F. N. & S. H. McIntire*, for respondent.

**BLAKE, C. J.** The appellant alleges in her complaint that she was the owner of and in possession of the following described property, to-wit: One carpet, bedstead, bureau, washstand, table, wire-spring mattress, lamp, chair, stove, and two pillows, and four shades, of the value of \$196; that the same were taken and converted, July 15, 1889, by the respondent; and that she has suffered damages by the unlawful conversion. The answer sets forth substantially that James Kerwin recovered a judgment against the appellant in the sum of \$101.25, and that the property was sold by said respondent, as a constable, under an execution in favor of said Kerwin. There is a denial that the property was of any greater value than \$72.25, or that appellant suffered any damage. The jury returned a verdict for Mrs. Cunningham, and assessed her damages in the sum of \$196. Quirk filed his notice of intention to move for a new trial upon several grounds, including the following: Excessive damages, appearing to have been given under the influence of passion or prejudice; and insufficiency of the evidence to justify the verdict. The statement of the case on the motion for a new

trial was settled and allowed, and thereafter the court made and entered this order: "That if plaintiff shall file, on or before August 5th proximo, a stipulation consenting to a judgment in her favor in the sum of one hundred and thirty-five and 60/100 dollars, and interest from July 9, 1889, at ten per cent. (10%) per annum, together with costs, and remitting all in excess of such sums, then judgment for such sums may be allowed to stand, and motion for new trial overruled; other wise, the defendant's motion for new trial will be granted." To this order Mrs. Cunningham excepted, and refused to file the stipulation above mentioned, and the motion for a new trial was granted.

The appellant relies upon the proposition that the issue as to the value of the property was for the exclusive determination of the jury, and that the court usurped their province in making the order supra. We will not compare the authorities upon this question, but accept the law which has been declared in the recent case of *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. Rep. 696. Mr. Justice GRAY reviewed the provisions of the Code of Civil Procedure of this state, and said: "Under these statutes, as at common law, the court, upon the hearing of a motion for a new trial, may, in the exercise of its judicial discretion, either absolutely deny the motion, or grant a new trial generally, or it may order that a new trial be had, unless the plaintiff elects to remit a certain part of the verdict, and that, if he does so remit, judgment be entered for the rest." There may have been sufficient evidence to justify the verdict, and the court might refuse to grant a new trial for this cause, and at the same time set aside the verdict upon the ground that the damages were excessive, and given under the influence of passion or prejudice. But the appellant had the option of remitting the excess, and thereupon a judgment would have been entered for her for the residue. Did the court abuse its discretion in disturbing the verdict? The testimony relates to one element of damages,—the value of the property. Mrs. Cunningham testified that the furniture cost \$226.90, and that it was worth \$196; that it had been in use four years; and that she had a husband and children. The number of the latter is not given,—but there were three or more, according to the testimony. Mr. Quirk testified that every article was sold separately, and that there was only one bid, and that the value was \$72.25. Mr. Lommi testified that he kept a second-hand store, and that "a set of furniture may be used two years, and not be damaged ten dollars, and may be used two years and not be worth one-third of its original value." Mr. Kerwin testified that the furniture when sold by the constable "looked to be used up pretty well;" that he was the buyer, and paid therefor \$72.25; and that he supposed he could not dispose of the property for half of his bid. This is the substance of the evidence which appears in the record upon this point, and we cannot perceive any error in the ruling of the court thereon.

The counsel for the appellant claims

that no motion for a new trial was ever made or filed. We find in the transcript this statement in "plaintiff's bill of exceptions, filed July 31, 1890," which is binding upon the appellant: "Be it known that this cause came on regularly to be heard this 31st day of July, 1890, on defendant's motion for a new trial herein." It is therefore ordered and adjudged that the order and judgment be affirmed, with costs.

HARWOOD and DE WITT, JJ., concur.

# In re MCFARLAND'S ESTATE.

(Supreme Court of Montana. March 8, 1891.)

## APPEALS — PROBATE MATTERS — CONSTITUTIONAL LAW.

1. Prob. Prac. Act Mont. §§ 324, 325, passed by the territorial legislature, which provided for appeals directly from the probate court to the territorial supreme court, are void, as being in conflict with Rev. St. U. S. §§ 1809, 1832, which limited the appellate jurisdiction of the territorial supreme court to appeals from the district court, and which gave the district court jurisdiction of appeals from the probate court; and therefore these two sections of the probate practice act did not become laws of the state by virtue of Const. Schedule, § 1, which adopts, as laws of the state, the laws of the territory "in force" on its admission into the Union.

2. The provisions of Civil Code Mont. § 421, subd. 2, and section 444, which regulate appeals from judgments of the district court rendered on appeal from inferior courts, and which limit the time of appeal to 90 days, do not now apply to appeals from the district court in probate matters, as Const. Mont. art. 5, § 11, abolished the probate courts, and extended the original jurisdiction of the district court to matters of probate; and appeals from the district court to the supreme court, in probate matters, are now to be taken under section 421, subd. 1, which regulates appeals from final judgments in actions commenced in the court in which they are rendered, and which limits the time of taking the appeal to one year from the rendition of the judgment.

3. A decree of distribution by the district court in a probate proceeding pending before it is a "final judgment," within the meaning of Code Civil Proc. Mont. § 421, subd. 1, which provides that an appeal from a "final judgment" in an action or proceeding commenced in the court in which it is rendered may be taken within one year from the rendition of the judgment.

Appeal from district court, Deer Lodge county; D. M. DUFFEE, Judge.

*Forbis & Forbis*, for appellants. *Thompson Campbell and Robinson & Stapleton*, for respondents.

HARWOOD, J. The appeal herein is prosecuted on behalf of Hannah De Long, and for other persons claiming to be heirs at law of Elizabeth McFarland, deceased. Appeal is taken "from an order or decree" of the district court of the third judicial district, directing the distribution of the estate of deceased to Wilbur N. Aylesworth, and to the estate of David H. McFarland, deceased. It appears by the record that said order or decree of distribution was made and entered February 8, 1890, and that appeal therefrom was taken January 20, 1891. Said distributees named in said order now appear by counsel, and move the dismissal of said appeal, on the ground that the same was not taken

within the time required by law in such cases.

It is contended in support of the motion that the time for taking an appeal in the matter here involved is limited to 60 days, under the provisions of sections 324 and 325, Prob. Prac. Act. On the other hand, counsel for appellants contend, in opposition to said motion, that under the new system of judiciary, and the jurisdiction thereof, established by the constitution, an appeal in the matter at bar should be taken under the provisions of chapters 1, 2, tit. 11, Code Civil Proc.; and that the time within which the same must be taken is prescribed by subdivision 1, § 421, Code Civil Proc., and is limited to one year in case the appeal is from the judgment. It is further contended by appellants' counsel that sections 324, 325, Prob. Prac. Act, in so far as the same provides for an appeal directly from certain orders and decrees of the probate court to the supreme court, are null and void, and have no force as statutes of this state, for the reason that when enacted, in 1887, the provisions thereof were contrary to the laws of the United States organizing the territory of Montana, and applying thereto; and hence, being invalid as laws of the territory, the same did not become laws of the state of Montana by virtue of the constitutional provision that "all laws enacted by the legislative assembly of the territory of Montana, and in force at the time the state shall be admitted into the Union, and not inconsistent with this constitution, or the constitution or laws of the United States of America, shall be and remain in full force as the laws of the state, until altered or repealed, or until they expire by their own limitations." Const. Schedule, § 1. This motion raises questions of much interest and importance, and fraught with some difficulty in the solution thereof. If sections 324, 325, Prob. Prac. Act, are in force as statutes of this state, the provisions thereof sustain the propositions asserted in favor of the motion before us, and this appeal should be dismissed. If, however, for any cause of invalidity, said sections were not in force as statutes of the territory, the same cannot be statutes of the state; because the enabling act of congress (section 24) and our constitution (Schedule, § 1) both provide that the laws of the territory in force at the time the state should be admitted into the Union, and not inconsistent with the constitution and laws of the United States, or our state constitution, should remain in force, as the laws of the state, until otherwise provided. We therefore address our inquiry at once to the question of the validity of said sections 324 and 325 of the probate practice act. Said sections, providing for an appeal directly from the probate to the supreme court, were passed subject to the organic law governing the territory of Montana in 1887, and were valid or null, by virtue of that law. The organic act of the territory of Montana (section 9) provides "that the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. \* \* \* The jurisdic-

tion of the several courts herein provided for, both appellate and original, and that of probate courts, and of justices of the peace, shall be limited by law." Again, section 1866, Rev. St. U. S., provides: "The jurisdiction, both appellate and original, of the courts provided for in section 1907 and 1908 shall be limited by law." Section 1907 provides: "The judicial power in \* \* \* Montana shall be vested in a supreme court, district courts, probate courts, and justices of the peace." Section 1932, Rev. St. U. S., provides: "The probate courts of the territory of Montana, in their respective counties, in addition to their probate jurisdiction, are authorized to hear and determine civil causes wherein the damage or debt claimed does not exceed five hundred dollars, and such criminal cases arising under the laws of the territory as do not require the intervention of a grand jury; but they shall not have jurisdiction of any matter in controversy when the title or right to the peaceable possession of land may be in dispute, or of chancery or divorce causes; and in all cases an appeal may be taken from any order, judgment, or decree of the probate courts to the district courts." Section 1869, Rev. St. U. S., defines the appellate jurisdiction of the supreme court of the territory of Montana as follows: "Writs of error, bills of exception, and appeals shall be allowed, in all cases, from the final decisions of the district courts to the supreme court of all the territories respectively, under such regulations as may be prescribed by law."

We think it is palpable, without argument, that where the organic law provided that the jurisdiction of the courts of the territory, both appellate and original, shall be limited by law, and that, "in all cases," appeals to the district courts should be "from any order, judgment, or decree of the probate courts;" and, further, that the appellate jurisdiction of the supreme court should be of appeals "from final decisions of the district courts,"—a law passed by the legislative assembly, governed by such fundamental provisions, directing the course of appeals otherwise, is void and of no effect, in so far as it prescribes such other course of appeals. This conclusion would be reached by applying either of two familiar maxims,—*expressio unius est exclusio alterius*; or, *expressum facit cessare tacitum*. Co. Litt. 210a; Broom, Leg. Max. 226. These maxims are applicable to the interpretation of statutes which expressly prescribe the method to be pursued, or the conditions governing the subject; for it is the common understanding that the expression of such method or conditions manifests an intention to exclude all that might otherwise be implied, unless the contrary intention clearly appears in the instrument. It should be remembered that the provisions of section 324, Prob. Prac. Act, for an appeal from the probate to the supreme court, as found in the present volume of Compiled Statutes, is not found in the Revised Statutes of 1879, preceding the present volume. The same section, as found in the Revised Statutes of 1879, provides that such appeal should be taken from the

probate to the district court, and conformed to the provisions of the organic law above reviewed. An inspection of the original act, which became the present volume of Compiled Statutes, will show that the change crept into the statute, not by design on the part of the compiler, but by inadvertently compiling that portion of the act from a publication which did not contain a correct print of the statute as it then, and had for a long time, existed. The statutes comprised in said sections 324, 325, Prob. Prac. Act, are not the only statutes providing for appeals from the orders, judgments, and decrees of the probate courts. Chapter 3, tit. 11, p. 180, Comp. St., is entirely devoted to the subject of appeals from the probate to the district courts; and the same orders and decrees in probate matters are there made appealable to the district courts, which, by section 324 of the probate practice act, are made appealable directly from the probate to the supreme court. It is further provided in section 699, Code Civil Proc., that "the jurisdiction of the district court shall be original and appellate." Section 701, Code Civil Proc., provides that "the appellate jurisdiction of these [district] courts shall extend to hearing upon appeal an order or judgment of a probate court or justice of the peace, in the cases provided by law." Section 697, Code Civil Proc., provides: "The supreme court shall have appellate jurisdiction in all cases tried in the district courts." Under the territorial system, a party feeling aggrieved by the decision of the probate court, in a matter like that in the case at bar, could carry the question ultimately to the supreme court. But such question had to come to the supreme court by appeal from the final determination thereof in the district court. The jurisdiction and practice of the district court, in such cases, as well as the manner of appealing from the final determination by that court to the supreme court, is ably elucidated by Chief Justice WADE in *Broadwater v. Richards*, 4 Mont. 52, 80, 2 Pac. Rep. 544, 546.

The foregoing inquiry into the conditions which governed the practice under the old system concerns the question before us, not only in order to find whether or not sections 324, 325, Prob. Prac. Act, are valid statutes of the state, by virtue of having been valid statutes of the territory, but also as shedding some light upon the practice to be pursued in the appeal from judgments, orders, and decrees of the district courts, in probate matters, under the new conditions inaugurated by the adoption of our state constitution. It cannot yet be said, in respect to our system of laws: "Old things are passed away; behold, all things are become new." While we have a new judiciary, established by the constitution, wherein there is no probate court, as a distinct member of that system, we have the old body of statute laws, which was modeled to apply to the territorial system, in which there was a distinct probate court, which statutes are still in force as state laws, in so far as the same are not inconsistent with the constitution. Const. Schedule, § 1. By a provision of the constitution, the

original jurisdiction of the district courts thereby established is extended over the whole field of "matters of probate." Const. art. 8, § 11. By this provision, "all matters of probate," and necessarily the administration of all laws relating thereto, are now under the original jurisdiction of the district courts. In order to make the statutes relating to probate matters and probate courts apply to the district courts under the new system, it is provided in the constitution (Schedule, § 4) that the term "probate," where it occurs in the statute in the combination "probate judge" or "probate court," is eliminated, and the term "district" is inserted in lieu thereof. What change has these provisions of the constitution wrought in reference to appeals to the supreme court in probate matters? We have seen how, under the old system, the probate matters enumerated in section 445, Code Civil Proc., were brought under the jurisdiction of the district court. When a party, feeling aggrieved by the final determination of the matter by that court, sought to appeal, he found in the organic law a provision that "writs of error, bills of exception, and appeals shall be allowed in all cases from the final decisions of the district courts to the supreme court, \* \* \* under such regulations as may be prescribed by law." Section 1869, Rev. St. U. S. Turning to the statutes of the territory, he found in section 444, Code Civil Proc., a provision that "an appeal may be taken to the supreme court from the district courts in the following cases: *First*, from a final judgment, or any part thereof, entered in an action or special proceeding commenced in those courts, or brought into those courts from other courts." In section 421, Code Civil Proc., was found prescribed the time within which such appeal must be taken, in the following terms: "An appeal may be taken \* \* \* from a judgment rendered on an appeal from an inferior court within ninety days after the entry of such judgment." He also found in the Code of Civil Procedure statutes prescribing the grounds upon which he could move for a new trial, and section 327, Prob. Prac. Act, directing that in probate proceedings either party "may move for a new trial upon the same grounds and errors, and in like manner, as provided in the civil practice act for civil actions." It is further provided in section 323, Prob. Prac. Act, that, "except as otherwise provided in this title, the provisions of the civil practice act \* \* \* are applicable to and constitute the rules of practice in the proceedings mentioned in this title." This provision is comprehensive, and refers to proceedings in all matters of probate, in whatever court adjudicated. Now, under the new system, these provisions of the Compiled Statutes are all in force; with this modification as to "probate matters," these matters are now within the original jurisdiction of the district court. Const. art. 8, § 11. Proceedings in probate matters are commenced and determined in that court, and hence the provisions of sections 421 and 444, quoted supra, as to appeals from final judgment "rendered on an appeal

from an inferior court," do not now apply to probate matters. Appeals to the supreme court from final judgments, orders, or decrees of the district courts,—that is, orders, decrees, or judgments which in their nature amount to a "final determination of the rights of the parties in the proceeding," (section 238, Code Civil Proc.)—in the administration of the laws pertaining to probate matters, are now to be taken under the provisions relating to appeals "from a final judgment in an action or special proceeding commenced in the court in which the same is rendered," (section 421, Code Civil Proc.) subject to all other provisions relating to motions for new trials, and the review of evidence on appeal, etc., if such relief is sought, (section 327, Prob. Prac. Act.)

It is objected that the term "judgment," as used in the Code of Civil Procedure, and especially as used in sections 421 and 444 thereof, was not intended by the framers of the Code to apply to or include an order or decree of the court exercising probate jurisdiction, directing the distribution of an estate, as in the case at bar; or granting letters testamentary or of administration, or refusing the same; or an order made upon the settlement of an executor or administrator or guardian, etc. What is a "judgment," in contemplation of our Code of Civil Procedure? It is not necessary to look beyond that instrument for a definition of the term. Section 238, Code Civil Proc., defines the term as follows: "A judgment is the final determination of the rights of parties in an action or proceeding." There is a large class of matters or subjects arising in the administration of probate matters, susceptible of final determination, by the court exercising probate jurisdiction, so far as concerns the action of that court; like the subject at bar,—an order or decree directing the distribution of the estate. This certainly comes under the head of a "proceeding," and the action of the court was a final determination of the rights of all parties claiming a right of succession to said estate or a part thereof. It is plain that the action of the court, by whatever term it may be designated, has all the elements of a "judgment," under the statutory definition. If the term "judgment" was not defined by the Code, it would be found that the general definition of the term includes in its scope an order like that in the case at bar. And. Law Dict. 576. It can be demonstrated by the provisions of the Code of Civil Procedure that the term "judgment," as therein defined, was intended to include and apply to such orders or decrees in purely probate matters as that involved in the case at bar; and, further, that the general provisions of chapters 1, 2, tit. 11, Comp. St., were intended to provide for appeals to the supreme court from the "final determination of the rights of the parties" in proceedings pertaining to purely probate matters as well as formal litigation. The matters of probate susceptible of final determination by the court exercising jurisdiction over the same are grouped together in section 445, Code Civil Proc., such as: "Admitting a will to probate, or refusing the same;

setting apart property, or making an allowance to the widow or children; granting letters testamentary or of administration, or appointing a guardian, or refusing to grant such letters or make such appointment; or an order or decree by which a debt, claim, legacy, or distributive share is allowed, or payment thereof directed, or by which such allowance or direction is refused," etc. All the proceedings in purely probate matters there mentioned are made appealable from the probate to the district court. Section 445, Code Civil Proc. In referring generally to appeals from the probate court provided for in chapter 3, tit. 11, (Code Civil Proc.) section 450 of that chapter provides that "the appeal shall be taken by filing with the clerk of the court in which the judgment appealed from is entered \* \* \* a notice stating the appeal from the same." Here the term "judgment" is applied indiscriminately to the final determination of the rights of parties in matters purely probate, as well as to matters of formal litigation in the probate court. These matters of probate being appealed to the district court, all the original papers pertaining to the case, with a transcript of the docket, were by section 454, Code Civil Proc., directed to be transmitted to the district court. Section 457 of the same chapter provides "that all appeals taken by virtue of this act shall be tried in the district court upon the papers in the case, as if the same had originally been instituted in said court." The matters of probate thus appealed received the final determination of the district court. Now, section 444, Code Civil Proc., contains the provision that "an appeal may be taken to the supreme court from the district courts in the following cases: *First*, from a final judgment, or any part thereof, entered in an action or special proceeding commenced in those courts, or brought into those courts from other courts." Turning to section 421, Code Civil Proc., we find again the provision, among others, that "an appeal may be taken \* \* \* from a judgment rendered on an appeal from an inferior court." These terms are general, comprehensive, and apply to judgments rendered by the district court in those cases which were in that court on appeal from an inferior court, without distinction between probate matters and matters of formal litigation; so that it is conclusive that the term "judgment," as used in sections 421, 444, Code Civil Proc., refers to the "final determination of the rights of parties" in all the matters of probate mentioned in section 445, appealable to the district court, as well as to matters of formal litigation.

Bearing in mind that the legal definition of the term "judgment" is "the final determination of the rights of parties in an action or proceeding," it will be interesting to notice a little further what terms the framers of our Codes employ in referring to matters purely probate. The term "proceedings" is used in the Probate Code as a general designation of the action and procedure whereby the law is administered upon the various subjects within the probate jurisdiction. Section 1, Prob.

## WINDT v. BANNIZA et al.

(Supreme Court of Washington. Feb. 21, 1891.)

## ATTACHMENTS—DISSOLUTION—PRACTICE—APPEAL.

1. Under Laws Wash. 1888-89, p. 45, §§ 81, 82, providing for dismissal of an attachment on motion to the court in which the action is brought, on the ground that it was improperly or irregularly issued, and that, if the motion is made on affidavits on defendant's part, plaintiff may oppose the same by affidavits or other evidence, the questions of fact raised by the motion are to be tried by the court, and, the attachment being merely ancillary to the action, a jury cannot be demanded.<sup>1</sup>

2. A motion to discharge an attachment on the ground that the affidavit on which it was issued is insufficient on its face must explicitly point out the insufficiency.

3. An attachment may be discharged on motion and affidavits of only one of several defendants.

4. No appeal from an order of the superior court discharging an attachment lies to the supreme court under Laws Wash. 1888-90, pp. 333, 334, giving the right of such an appeal in "all actions and proceedings," etc., since an attachment is merely an ancillary proceeding.

Appeal from superior court, Pierce county.

*Applegate & Titlow*, for appellant. *Doolittle, Pritchard & Stevens*, for appellees.

ANDERS, C. J. This was an action by appellant against appellees, who were partners, upon an account for goods, wares, and merchandise sold and delivered. Before judgment, plaintiff filed his affidavit and bond, and caused a writ of attachment to be issued and levied upon certain personal property alleged to have been fraudulently disposed of by defendants. The grounds for the issuance of the writ, as stated in the affidavit of the plaintiff, were—*First*, that the defendants had disposed of their property with intent to defraud, hinder, and delay their creditors; and, *second*, that the defendants were guilty of a fraud in contracting a certain portion of the indebtedness mentioned in the complaint. One of the defendants appeared in the action, and applied to the court upon motion, supported by his affidavit, to discharge the attachment upon two grounds: *First*, "that the affidavit in the said cause is insufficient upon its face;" and, *second*, "that the grounds for said attachment alleged in said affidavit are not true." The affidavit by the defendant in support of his motion, controverting the allegations contained in plaintiff's affidavit for attachment, was attacked by plaintiff for alleged insufficiency by motion to strike it from the files. The

Prac. Act, provides: "The proceedings of the probate courts shall be construed in the same manner, and with like intents, as the proceedings of courts of general jurisdiction." Section 5, Id., provides that "the seal of the court need not be affixed to any proceedings therein, except," etc. Section 328, Id., provides that "at or before the hearing of petitions and contests for the probate of wills; for letters testamentary or of administration; for sales of real estate and confirmations thereof; settlements, partitions, and distributions of estates; setting apart homesteads; and all other proceedings where all the parties interested in the estate are required to be notified thereof,"—the court may appoint counsel to represent, "in all such proceedings," certain parties interested, who "are unrepresented." Where a contest may be raised and a final determination made by the court respecting any subject involved in the administration of an estate, the Probate Code terms the same a "proceeding," and directs the procedure therein to conform as nearly as the nature of the case will admit to the practice governing the formation and trial of issues in civil actions, and expressly declares that the provisions of the Code of Civil Procedure "are applicable to and constitute the rules of practice in the proceedings mentioned in" the Probate Code, except as otherwise provided therein. Sections 20-22, 164-166, 287, 323, 326-330, Prob. Prac. Act. The terms "cases," "cause," and "judgment" are likewise applied by the Code of Civil Procedure to proceedings of distinct inquiry and determination by the court in matters of probate as well as to matters of formal litigation. Sections 445, 450, 454, 457, Code Civil Proc. A careful study of the Code will reveal the fact that the term "case" and "proceeding" is used in a much broader and less technical sense than the term "action." Section 697, Code Civil Proc., provides: "The supreme court shall have appellate jurisdiction in all cases tried in the district courts." This statute is no less in force now than under the territorial system, for it is in entire harmony with section 15, art. 8, of the constitution, which provides: "Writs of error and appeals shall be allowed from the decisions of the district courts to the supreme court under such regulations as may be prescribed by law." The district courts now have original jurisdiction of "all matters of probate." Const. art. 8, § 11. We think the final determination by those courts of cases in the probate department of their jurisdiction, susceptible of final determination, such as are enumerated in section 445, Code Civil Proc., ought still to be regarded as final judgments of the district courts, and, where appeal to the supreme court is sought, the same must now be taken under the regulations prescribed for appeals "from final judgment in an action or special proceeding commenced in the court in which the same is rendered." Code Civil Proc. cc. 1, 2, tit. 11. It is ordered that the motion to dismiss the appeal herein be, and the same is, overruled.

BLAKE, C. J., and DE WITT, J., concur.

<sup>1</sup> Act Pa. March 17, 1869, § 6, provides that defendant in attachment may apply to the court, or to a judge thereof in vacation, to dissolve an attachment, and, on hearing, "the said court, or judge thereof in vacation, shall have power to hear evidence or determine the truth of the allegations contained in the affidavit upon which said writ issued, and to dissolve or continue the lien of the attachment." Under this act it was held that where an attachment, issued on the ground that the debt was fraudulently contracted, was sustained by the court after hearing, on motion to dissolve, and, on the subsequent trial of the case, the defendant admitted owing the money, he could not try the question of fraud to the jury. *Walls v. Campbell*, 17 Atl. Rep. 423.

reasons assigned in the latter motion were that no facts were stated in said affidavit showing or tending to show that the attachment was improperly or irregularly issued, and that the facts therein set forth stated an issue triable by a jury, and which the plaintiff demanded to have so tried. The court overruled the motion to strike, and proceeded to hear the motion to discharge upon affidavits and counter-affidavits. This action of the court is relied on by appellant as sufficient ground for the reversal of the order discharging the attachment; but we think the court committed no error in this proceeding. It is true that the issues raised by the pleadings in an ordinary action at law must be tried by a jury unless a jury is waived; but an attachment proceeding is not an action, but only a proceeding ancillary to an action, and does not in any manner affect the main issues in the case. A motion to discharge an attachment is addressed to the consideration of the court or judge, and our statute does not contemplate the interposition of a jury to determine it, or to aid in its determination. The statute provides two methods by which an attachment may be discharged. One is by the defendant filing a bond, with sufficient sureties, to be approved by the officer having the attachment, or, after the return thereof, by the clerk, to the effect that he will perform the judgment of the court; and the other is by an application on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued. Laws 1885-86, p. 45, §§ 29, 31. And it is further provided that "if the motion be made upon affidavits upon the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to those on which the attachment was issued." Id. § 32. The latter provision of the statute was followed in this instance by the court below; and this practice was approved by this court in the case of *Hanson v. Doherty*, decided at its last session, and reported in 25 Pac. Rep. 297. We are satisfied with that decision, except the closing portion thereof, wherein it is stated that "we see no reason why the defendant may not set forth specifically in his notice and motion the fact showing wherein the attachment was improperly issued, and prove the same by the testimony of witnesses before the court." This is an inaccurate statement, and liable to mislead. When the motion to discharge is made upon affidavits, the plaintiff may oppose the same by affidavits or oral testimony; but the defendant has no right, in the first instance, to introduce any testimony other than affidavits in support of his motion. The practice of hearing motions to dissolve attachments by the court without a jury upon affidavits and counter-affidavits or other evidence obtains in many of the states. See *Holland v. White*, 120 Pa. St. 228, 13 Atl. Rep. 782, 783; *Grimes v. Farrington*, 19 Neb. 44, 26 N. W. Rep. 618;

*Genesee Co. Sav. Bank v. Michigan Barge Co.*, 52 Mich. 164, 17 N. W. Rep. 790, and 18 N. W. Rep. 206; *Hardesty v. Campbell*, 29 Md. 533; *Baer v. Otto*, 34 Ohio St. 11; *Drake*, *Attachm.* (6th Ed.) §§ 401-403.

It is insisted by appellant that that part of defendant's motion based on the ground "that the said affidavit in the said cause is insufficient upon its face" states no fact, and that it is but a conclusion; and we think the view of counsel in that particular is correct, and, if that had been the only ground of the motion, it would have been manifestly insufficient. The insufficiency of plaintiff's affidavit should have been distinctly and explicitly pointed out, so as to have enabled him to avail himself of the right of curing by amendment any defects appearing in his affidavit or bond. Appellant further contends that, even if it be conceded that the court below did not err in hearing the motion to discharge the attachment upon affidavits, still the proof shows that the attachment ought to have been sustained. But, conceding that the transcript contains all the testimony, we nevertheless cannot say that the ruling of the court was not warranted by the evidence. Appellant also contends that in no event should the attachment have been dissolved upon the motion and affidavit of but one of the defendants. The practice, however, is sanctioned by authority, and we see no reason for holding to the contrary. See *Drake*, *Attachm.* (6th Ed.) § 53; *Holland v. White*, *supra*.

But there is a jurisdictional question involved in this controversy, which, though not raised by counsel in this proceeding, ought to be considered. It is whether the order appealed from can be reviewed by this court, and a negative answer will be decisive of this appeal. Our statute for the removal of causes from the superior to the supreme court, as amended March 22, 1890, provides that an appeal may be taken to the supreme court from the superior courts "in all actions and proceedings," with certain exceptions and limitations, not pertinent to the question now before us. See Laws 1889-90, pp. 333, 336. And we are of the opinion that the word "proceedings," in contradistinction to "actions," must be taken to include not the orders of the court in matters arising in the progress of the action, or merely incident or ancillary thereto, but only those matters outside of ordinary actions, and commonly known as "special proceedings." We cannot think that the constitution of the state, which is in substantially the same language as to appeals as the statute, contemplates the review by this court (at least without express legislation) before final judgment of orders discharging or sustaining attachments, or of any other orders not affecting the merits of the action. The supreme court of California, having before it an appeal from an order refusing to dissolve an attachment, says: "The attachment is merely a proceeding ancillary to the action, by which a party is enabled to acquire a lien for the security of his demand by a levy made before, instead of after, the entry of judg-



ment. This ancillary proceeding may be taken at the time of the commencement of the action or at any time afterwards. Neither the action nor the judgment, under our law, in any manner depends upon the attachment, although the attachment depends upon the judgment. The judgment in the case is precisely the same whether the attachment is dissolved or not. In those states where the attachment is used as a process for acquiring jurisdiction, the consequences of dissolving or refusing to dissolve an attachment might be different." *Allender v. Fritts*, 24 Cal. 447. The appeal in that case was dismissed on the ground that it was not warranted by the statute, and we think the language used by the court is peculiarly applicable to the case now before us. We are aware that appeals from orders discharging or sustaining attachments are provided for by statute in some of the states; and it may be said that our statute is broad enough to cover such cases. Our reply is: It is broad enough, but too indefinite. Taken in a literal sense, it would permit an appeal from any and every interlocutory order and decision made in the progress of an action. Ordinarily speaking, every step taken in an action is a proceeding; and, if every proceeding were appealable, then this court might be compelled to sit in judgment upon the ruling of the lower court in changing the place of trial of an action, or in overruling a demurrer. We do not believe the legislature intended that the word should be understood in any such sense. But we do believe that the court should not depart from the well-known and established principles of the common law, and permit a cause to be brought before it by piecemeal for review, unless clearly authorized so to do by legislative enactment. It is true, we entertained a similar appeal in the case of *Hanson v. Doherty*, above mentioned; but in that case the question of jurisdiction, not having been raised or considered, was not passed upon by the court. The order of the court below not being reviewable by this court, the appeal must be dismissed at the cost of appellant.

STILES, DUNBAR, and HOYT, JJ., concur.

SCOTT, J. I concur in the result.

(2 Wash. St. 155)

CLINE v. HARMON *et al.*<sup>1</sup>

(Supreme Court of Washington. Feb. 24, 1891.)

APPEAL—ORDER OF ARREST IN CIVIL ACTIONS.

An order of arrest before final judgment in civil actions is not appealable, under Laws Wash. 1889-90, p. 336, § 1, providing that "an appeal may be taken from the superior courts in all actions and proceedings," except in certain cases, since such order is merely incident to the action. SCOTT, J., dissenting.

Appeal from superior court, Pierce county.

John C. Stallcup, for appellant. Marshall K. Snell, for appellees.

ANDERS, C. J. This was an action by appellees against appellant in the court below for the recovery of \$168, upon an account for

goods sold and delivered. The defendant in his answer denied owing the plaintiffs the amount claimed, but admitted an indebtedness of \$115. At about the time the defendant's answer was filed the plaintiffs filed a bond and affidavits, and caused an order and warrant of arrest to issue, upon which the defendant was arrested, and held to bail in the sum of \$300. The defendant moved the court to vacate the order of arrest, for the reasons, as alleged, that there was no law authorizing arrest and imprisonment in civil actions before judgment; that the proof upon which the order was issued was insufficient, and showed no pertinent facts; that the bond for arrest was defective; and that the allegations upon which the order was issued were untrue. The motion was denied by the court, and the defendant, before final judgment in the action, appealed to this court, and assigns the ruling of the court in granting the order of arrest, and in refusing to vacate the same, as error. Counsel for appellees move to dismiss the appeal upon two grounds: *First*, that the order from which the appeal is sought to be taken is not appealable, and the court is without jurisdiction; and, *second*, that the action in which said order was made is a civil action at law for the recovery of money, where the original amount in controversy does not exceed the sum of \$200, and the action does not involve the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. Whether this court has jurisdiction to hear and determine the question now before it must depend upon the construction to be given to the statute in reference to appeals. The act of the legislature concerning the removal of causes from the superior courts to the supreme court, (as amended March 27, 1890,) <sup>1</sup> following substantially the language of the state constitution, provides that "an appeal may be taken to the supreme court from the superior courts in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or property, when the original amount in controversy or the value of the property does not exceed the sum of two hundred (200) dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute." In the case of *Windt v. Banniza*, ante, 189, but recently decided by this court, and which was an appeal, before final judgment, from an order discharging an attachment, we had occasion to interpret the meaning of the word "proceedings," as used in the statutes; and we then held it did not embrace those proceedings merely incident to an action, and not affecting its merits, but only those known as special proceedings, as distinguished from ordinary actions at law. The appeal in that case was dismissed for want of jurisdiction in the court to review the alleged errors. And as it is evident that arrest and bail is a provisional remedy only, and not a special proceeding, and, like an attachment, merely ancillary to the action in which it is invoked, it fol-

<sup>1</sup>For dissenting opinion, see post, 209.

<sup>1</sup>Laws Wash. 1889-90, p. 336, § 1.

lows that this appeal should likewise be dismissed. While it seems more harsh and oppressive to arrest an individual than to seize his property, still that is no sufficient reason, in the absence of more specific legislation upon the subject, for drawing a distinction as to the right of review by this court between orders denying or sustaining motions to dissolve attachments and those refusing to vacate orders of arrest. Our conclusion is in accordance with the view of the supreme court of Kansas, as announced in the case of *Burch v. Adams*, 20 Pac. Rep. 476, in which the precise question was before the court. See *Allen v. Tyler*, 32 N. J. Law, 499; *Clasen v. Shotwell*, 12 Johns. 31. If, as appellant alleges, there is no law authorizing arrests in civil actions in this state, and he has been illegally deprived of his liberty, he is not without the means of redress, but we can afford him no relief at this time. For the foregoing reasons the appeal must be dismissed, at the cost of appellant.

HOYT, DUNBAR, and STILES, JJ., concur.

(2 Wash. St. 165)

CLINE v. BURRICHTER et al.

(Supreme Court of Washington. Feb. 24, 1891.)

Appeal from superior court, Pierce county.

John C. Stalleup, for appellant. Thad. Huston and Marshall K. Snell, for appellees.

ANDERS, C. J. This cause presents for our consideration the identical questions which were involved in *Cline v. Harmon*, ante, 191, (just decided by this court,) and, for the reasons given in the opinion filed in that case, the appeal must be dismissed, at the cost of the appellant.

HOYT, DUNBAR, and STILES, JJ., concur.

(2 Wash. St. 164)

CLINE v. TACOMA STOVE CO.

(Supreme Court of Washington. Feb. 24, 1891.)

Appeal from superior court, Pierce county.

John C. Stalleup, for appellant. Thad. Huston and Marshall K. Snell, for appellees.

ANDERS, C. J. This case presents for our consideration the identical questions which were involved in that of *Cline v. Harmon*, ante, 191, (just decided by this court,) and for the reasons given in the opinion filed in that case the appeal must be dismissed, at the cost of appellant.

HOYT, DUNBAR, and STILES, JJ., concur.

(2 Wash. St. 81)

PIERCE v. FRACE.<sup>1</sup>

(Supreme Court of Washington. Feb. 11, 1891.)

PUBLIC LANDS—PRE-EMPTION—FRAUD—CANCELLATION OF ENTRY AND CERTIFICATE.

1. The commissioner of the general land-office, in complaint of a stranger that one who has entered land under the pre-emption laws of the United States, and received a cash entry certificate and final receipt from the register and receiver of the district land-office, has not made his residence on the land, or improved it, as required by law, may suspend the entry, order the register and receiver to hear the charges, and, on their being established, may cancel the entry, under Act Cong. July 4, 1886, providing that the issuing of patents and the sale of public lands

shall be under the supervision of such commissioner.

2. The holder of such cash entry receipt, while it is uncanceled, may maintain ejectment.

DUNBAR, J., dissenting.

Error to superior court, Pierce county. *Doolittle, Pritchard & Stevens*, for plaintiff in error. *Judson, Sharpstein & Sullivan*, for defendant in error.

HOYT, J. Plaintiff in error filed his complaint in ejectment, and sought to recover possession of certain land therein described. Defendant in error answered, denying the allegations of the complaint, and alleging as an equitable defense facts substantially as follows: "On December 20, 1880, the plaintiff in error filed his declaratory statement for the premises in controversy under the pre-emption laws of the United States. On February 13, 1883, he made final proof to the satisfaction of the register and receiver of the United States land-office at Olympia, and on March 12, 1883, his cash entry was allowed by the register and receiver, and a final receipt issued to him; that on August 7, 1883, and while the final proof of plaintiff in error was in the hands of the commissioner of the general land-office, the defendant in error filed with said commissioner his corroborated affidavit, in which he alleged that plaintiff in error had 'at no time established his residence on said land, and that he had failed to improve and cultivate the same as required by law, and that the said cash entry had been procured by fraud.' The commissioner on the 16th day of May, 1885, suspended the entry, and ordered a hearing to be had before the register and receiver, touching the charges made by defendant in error in said affidavits. On July 13, 1885, said hearing was had, at which plaintiff in error appeared with his witnesses, as did also the defendant in error. The evidence was taken, and after argument the register and receiver found that plaintiff in error 'at no time established his residence on the land embraced in his said cash entry; that he failed to cultivate and improve said land as required by law;' and they, therefore, advised that said cash entry be canceled. Plaintiff in error thereupon took an appeal from the decision of the register and receiver to the commissioner of the general land-office, and on June 8, 1886, the commissioner affirmed said decision, and ordered plaintiff in error's cash entry to be canceled. Again plaintiff in error took an appeal, this time to the secretary of the interior, and on March 31, 1888, the secretary affirmed the decision of the commissioner of the general land-office, and thereafter canceled said plaintiff's cash entry. Subsequently the defendant in error filed upon said premises embraced in said cash entry under the homestead laws of the United States, and thereafter made his final proof, and received from the register and receiver of the land-office his patent certificate for said premises." To this answer plaintiff in error filed a reply, in which he asserted that the proceedings of the land-office after the 12th day of March, 1883, the date on which his certificate was

<sup>1</sup>For dissenting opinion, see post, 807.

issued, "were wholly void, for the reason that said officers had no jurisdiction whatever over the said land or the plaintiff in error," and denied that the defendant in error, in the affidavit filed by him with the commissioner of the general land-office, alleged that the plaintiff in error failed to improve and cultivate said land as required by law, or that said entry of plaintiff in error had been procured by fraud. He further denied that the decision of the commissioner of the general land-office was affirmed by the secretary of the interior, except as to the findings of the register and receiver and commissioner that plaintiff in error had not made his residence upon said land. Defendant in error demurred to this reply, and the ruling of the court sustaining said demurrer is relied upon as cause for the reversal of the judgment rendered thereon.

Upon this record two questions have been argued: *First*. Had the court jurisdiction of the subject-matter of the action? *Second*. Had the officers of the land department jurisdiction to cancel the entry of plaintiff in error?

The first proposition is so largely dependent on the latter that it is necessary only to say that, if the final receipt was in force and uncanceled, it would, under the laws of this state, authorize the holder to maintain an action for the protection of his possession thereunder. The authorities cited are to the effect that the courts will not take jurisdiction to determine the title of adverse claimants to land until the land department is through with it, and the legal title has passed from the government, and are not applicable to a case like the one at bar, where the right of possession under the laws of the state is alone in question. It is true that the language of the court in the case of *Hays v. Parker*, 2 Wash. T. 198, 3 Pac. Rep. 901, seems to warrant the contention of defendant in error; but the language used must be interpreted in the light of the facts of the case, and, thus interpreted, is not inconsistent with the above-stated conclusions; for though that was an action of ejectment, and the plaintiff relied upon a final receipt as in this case, yet it appeared that at the time the action was commenced the plaintiff was in the land-office of the United States waging a contest with the defendant as to the validity of the right upon which his action was founded, and under these circumstances the court very properly refused to aid either party in so changing the situation as to affect, or have a tendency to affect, the contest then being waged in the land-office. Under the second question above stated, the contention of the plaintiff in error is that a patent certificate issued in due form, in favor of a pre-emptioner, for lands subject to entry under the pre-emption law, where no appeal is taken from the decision of the register and receiver in granting the same, cannot be set aside by the land department upon proceedings subsequently initiated by a stranger, and upon the ground of failure to comply with the law in relation to settlement and improvement; while the defendant in error contends that until the issuance of

the patent the commissioner of the general land-office may suspend an entry, and place the pre-emption claimant in the same position that he was prior to the offering of proof; and that on said second hearing the government can itself, through its officers and agents or by the efforts of an informer, re-examine the question as to the pre-emption claimant's compliance with the law; and if on said hearing it is shown that the claimant has not done so, that the commissioner of the general land-office may cancel the entry, and allow another to file upon the land.

These contentions have been elaborately argued by counsel for the respective parties, who by their zeal and ability have brought together and summarized nearly all the authorities upon this subject; and the labors of the court in coming to a conclusion as to these important questions have been thereby greatly facilitated. Plaintiff in error, to maintain his contention above stated, relies upon the provisions of section 2263 of the Revised Statutes of the United States, which, he claims, constitute the register and receiver a tribunal to hear and determine all questions relating to the settlement and improvement of pre-emption claims, and that, in the absence of a contest, there is no appeal to the higher officers of the land department; the only exception being that they shall hear and determine these questions agreeably to such rules as may be prescribed by the secretary of the interior. The language of this section is as follows: "Prior to any entries being made under and by virtue of the provisions of section twenty-two hundred and fifty-nine, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands lie, agreeably to such rules as may be prescribed by the secretary of the interior; and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void," and would seem to warrant such construction, though it might be contended that, under the power given to the secretary of the interior, he might provide by rules that the decision of these facts should, in the first instance, be only tentative, and that before such decision should become final the register and receiver should, when directed by the commissioner of the general land-office, again pass upon the question, and so continue to do until their superior officers were satisfied with the correctness of their determination. This latter contention would, however, be an unnatural and forced one, and if said section stood alone, unqualified by other provisions of the land law, we should have little trouble in coming to the conclusion that the contention of the plaintiff in error was correct.

This language, however, must be interpreted in the light of all the provisions of law relating to the disposition of public lands. Upon an investigation of these provisions, we find that the entire duty of supervising the disposal of such lands is vested in the secretary of the interior and the commissioner of the general land-office; that such commissioner is the head

of a bureau having in charge all matters relating to such lands; that the register and receiver are inferior officers in such bureau, who must make full report of all their proceedings to such commissioner, who is charged with the duty of seeing that a patent issues to persons entitled thereto. These provisions were in existence at the time of the enactment of the pre-emption law of 1841, in which was found the section above quoted from the Revised Statutes. Under such provisions it had been the constant practice of registers and receivers not only to send up to the commissioner their finding of facts, but to send therewith all the proofs taken by and before them upon which such findings were based. This practice could only be justified upon the theory that such register and receiver were inferior officers to the commissioner, and their findings were subject to review by him. Viewing the language of the section in question in the light of the law and the practice thereunder existing at the time such section was enacted, we think it is not sufficient to show the intention of congress to overturn such law and practice, and by indirection take from the commissioner his powers of supervision, and transform the theretofore inferior officers of register and receiver into courts of final determination, by whose decisions, however erroneous, the government would be absolutely concluded. The responsibility of finally determining as to the conditions precedent to the issuing of a patent for lands of the United States could not thus indirectly be taken from one of the higher officers of the government, acting under the immediate supervision of the president, and cast upon inferior and comparatively unknown ones, exercising their powers in places remote from the seat of government.

It is true that to hold that these findings of the register and receiver may be reviewed by the commissioner, and a rehearing ordered, may work great hardships to individuals who may thus be called upon to prove facts that they had long supposed settled by the finding of such register and receiver; but these considerations can have but little weight in construing the statutes, as courts are bound to assume that the higher officers of the land department will not act arbitrarily, and causelessly put the burden of a second hearing upon an applicant. On the other hand, to hold otherwise would place the entire interests of the government, as to these important questions, in the hands of these inferior and remote officers, who, by their careless or corrupt administration of the trust reposed in them, might to a great extent nullify the policy of the government as to the disposal of its lands to actual settlers and improvers only. That a policy that congress had, and since has, taken such pains to establish and carry out, should be left at the mercy of such inferior and remote officers, does not seem reasonable. The opportunities for evasions of such policy are very great, even under the most careful supervision of the highest officers of the government; and without such supervision there would be little practical utility in all the laws enacted by

congress upon that subject. The language of the section in question is susceptible of the interpretation claimed for it by plaintiff in error, but when viewed in the light of other statute law and public policy, we cannot believe that such was the intention of congress.

The adjudicated cases upon this subject are quite numerous, and, though there may be found in some of them expressions which seem to give force to the claim of plaintiff in error, yet we think that, when examined in the light of the facts of each particular case, they will be found to better harmonize with the contention of defendant in error. In fact, after a somewhat exhaustive research, we have been unable to find any case that fully supported the plaintiff in error's contention, or that could not be harmonized with the positions of the defendant in error, except two cases in the circuit court of the United States for the district of Oregon: *Smith v. Ewing*, 11 Sawy. 56, 23 Fed. Rep. 741; *Wilson v. Fine*, 40 Fed. Rep. 52. The long experience and great reputation for learning and ability of the judge who tried those cases is well known, and they on that account are entitled to great consideration and weight. The court which rendered these opinions was, however, an inferior one, whose decisions were subject to reversal on appeal, and its judgments are not entitled to the same weight as courts of last resort. The opinions in said cases, however, show that the most painstaking research was brought to the aid of the court in the decision thereof, and the argument therein is very strong; and did we not think that they stand alone, while on the other hand are a large number of cases tending more or less strongly in an opposite direction, we should perhaps be content to accept the argument of the learned judge who decided them, and sustain the contention of the plaintiff in error; but in the light of such other cases we are led to the belief that said decisions were founded too much upon the language of the particular sections in controversy, and that due weight was not given to other portions of the statutes relating to the disposition of public lands. We shall not attempt a review of the cases cited from the state reports, as their number is too great to make a careful review of them all practicable. Besides, this is a purely federal question, and, so far as the supreme court of the United States has spoken, their decision must be taken as final. Cases more or less conclusive upon the subject-matter under discussion have been from time to time decided by the supreme court of the United States, and to these we must mainly look for guidance. And, first, we may say generally that a large number of cases cited by plaintiff in error passed upon the effect of a final receipt in cases where the land was subject to private entry, and where proof of any fact was not required as a prerequisite to the purchase. In this class of cases it has often been held that by the payment of the money to the government the substantial title at once vested in the purchaser, and that there was nothing further for the government to do except to complete the

sale by the conveyance of the bare legal title. These cases, however, are only remotely applicable to the case at bar. In this case, while it is true that the government has received the money for the land, yet it has done so upon the assurance and proof of the purchaser that he had qualified himself under the land laws to become such purchaser; and if such assurance and proof were false, then the government has acted under a mistake as to the facts, and the reasons for concluding it would not be nearly so strong as in the former case. The settlement and improvement may be said to be a substantial part of the purchase price, for which the government consents to part with its title. At the time the final receipt is issued it is supposed that that part, as well as the cash part, has been paid; but before the government has parted with its title it is found that such part of the purchase price has not been paid, and therefore the government asserts only the right which a private party would have under like circumstances in refusing to convey the contracted premises.

We shall now briefly examine a few of the cases decided by the supreme court of the United States bearing upon this question. The case of *Wilcox v. Jackson*, 13 Pet. 498, is much relied upon by plaintiff in error. In its opinion in that case the court says: "Even assuming that the decision of the register and receiver, in the absence of fraud, would be conclusive as to the facts of the applicant then being in possession, and his cultivation during the preceding year, because these questions are directly submitted to them, yet if they undertake to grant pre-emptions in land in which the law declares they shall not be granted, then they are acting upon a subject-matter clearly not within their jurisdiction;" which language is far from conclusive, as, instead of indicating that the court had actually determined the law as thus stated, it clearly shows that it was only an admission by way of argument. It is but fair to say, however, that the above-quoted language, when taken in connection with the context and of the reference therein made to the case of *Elliott v. Peirsol*, 1 Pet. 340, very strongly supports the contention of plaintiff in error, and, if the statute law upon the subject was the same now as when that decision was rendered, might well be cited as nearly conclusive of the question. Such, however, is not the case, for not only has the law been materially changed, but the law as thus changed has received an interpretation by the same court which, as we shall see hereafter, has destroyed the force of the case under consideration. The case of *Lyle v. State*, 9 How. 314, is a still stronger one, and, were it not qualified by the statement just made, might well conclude our inquiry; for Justice McLEAN, in the course of his opinion, says that the findings of the register and receiver are final. These cases are entitled to but little weight in determining the proper practice under the law as it now stands. At the time the proceedings passed upon therein were had, the law provided that the fact of settlement and cultivation should be

proved to the satisfaction of the register and receiver, from whom no appeal was given, and over whose acts, in that regard, no control was given by the higher officers of the land department. At the time the proceedings were had, which are under review in the case at bar, the law, as we have seen, was very different. At this time the entire responsibility as to the control and disposition of the public lands had been cast upon the commissioner of the general land-office; and the effect of all these provisions would seem to be sufficient to change the ruling of the court, as above set forth; and as we read the cases, such has been their effect. In deciding the case of *Barnard's Heirs v. Ashley's Heirs*, 18 How. 43, Mr. Justice CATRON uses the following language: "In cases arising under the pre-emption laws of the 29th of May, 1830, and of the 19th of June, 1834, the power of ascertaining and deciding on the facts which entitle a party to the right of pre-emption was vested in the register and receiver of the land district in which the land was situated, from whose decision there was no direct appeal to higher authority. But, even under these laws, the proof on which the claim was to rest was to be made agreeably to the rules to be prescribed by the commissioner of the general land-office; and, if not so made, the entry would be suspended, when the proceeding was brought before the commissioner by an opposing claimant. In cases, however, like the one before us, where an entry had been allowed on *ex parte* affidavits, which were impeached, and the land claimed by another, founded upon an opposing entry, the course pursued at the general land-office was to return the proofs and allegations, in opposition to the entry, to the district office, with instructions to call all the parties before the register and receiver, with a view of instituting an inquiry into the matters charged; allowing each party, on due notice, an opportunity of cross-examining the witnesses of the other, each being allowed to introduce proofs; and, on the close of the investigation, the register and receiver were instructed to report the proceeding to the general land-office, with their opinion as to the effect of the proof, and the case made by the additional testimony; and on this return the commissioner does in fact exercise a supervision over the acts of the register and receiver. This power of revision is exercised by virtue of the act of July 4, 1836, § 1, which provides 'that, from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed, by law, appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of land and the issuing of patents for all grants of land under the authority of the government of the United States, shall be subject to the supervision and control of the commissioner of the general land-office, under the direction of the president of the United States.' The necessity of 'supervision and control,' vested in the commissioner, acting under the direction of the president, is too mani-

lest to require comment, further than to say that the facts found in this record show that nothing is more easily done than apparently to establish, by *ex parte* affidavits, cultivation, possession of particular quarter sections of land, when the fact is untrue. That the act of 1836 modifies the powers of registers and receivers to the extent of the commissioner's action in the instances before us, we hold to be true. But if the construction of the act of 1836 to this effect were doubtful, the practice under it for nearly twenty years could not be disturbed without manifest impropriety; which language, we think, directly approves of the course pursued by the land department in the case at bar; for though it is true that in that case the contestant claimed an interest in the land at the time of the institution of the contest, yet that fact could not affect the question, as, without any appeal having been taken to the commissioner, he reversed the findings of the register and receiver, and ordered another hearing before them. Had the court said only as above quoted, it would be reasonably clear that the cases of *Wilcox v. Jackson* and *Lytle v. State*, supra, were not applicable after the passage of the act of 1836; but we are not left in doubt upon this question, as the court in the case under review proceeded further to say: "The case relied on of *Wilcox v. Jackson*, 13 Pet. 511, was an ejectment suit, commenced in February, 1836; and as to the acts of the register and receiver, in allowing the entry in that case, the commissioner had no power or supervision, such as was given to him by the act of July 4, 1836, after the cause was in court. In the next case (9 How. 333) all the controverted facts on which both sides relied had transpired, and were concluded before the act of July 4, 1836, was passed; and therefore its construction, as regards the commissioner's powers, under the act of 1836, was not involved; whereas, in the case under consideration, the additional proceedings were had before the register and receiver in 1837, and were subject to the new powers conferred on the commissioner." The case of *Harkness v. Underhill*, 1 Black, 316, fully sustains the right of the commissioner to review the action of the register and receiver, and makes use of language which would seem to indicate that the question was fully settled. The court say: "The question is again raised whether this entry, having been allowed by the register and receiver, could be set aside by the commissioner. All the officers administering public lands were bound by the regulations published May 6, 1836, (2 L. L. & O. 92.) These regulations prescribed the mode of proceeding to vacate a fraudulent occupant entry, and were pursued in the case before the court. The question has several times been raised and decided in this court, upholding the commissioner's powers." The above citations are sufficient to show that the supreme court of the United States has more than once had substantially the same question before it, and that since the

act of 1836 the jurisdiction of the commissioner has been sustained and approved. The case of *Cornelius v. Kessel*, 128 U. S. 457, 9 Sup. Ct Rep. 122, does not militate against the doctrine of the cases before decided in that court. On the contrary, when carefully considered, it tends to confirm them; for while it is true that Mr. Justice FIELD, in deciding that case, in setting out the findings that may be reviewed by the commissioner, omits that of settlement and improvement, yet he does not say that this question cannot, in a proper case, be reviewed. On the contrary, he by inference recognizes that right, but says that it cannot be exercised arbitrarily, or so as to deprive an applicant of land lawfully paid for. The language of the opinion, taken as a whole, does not sustain the position of plaintiff in error; and, even if it did, it would lose much force from the fact that this was a case of private entry, where no act was required but the payment of the purchase money. This case, as we understand it, only asserts the recognized doctrine that the courts will inquire into the decisions of the land-office as to questions of law, and, if erroneous, correct them. It may also be gathered from this case, as well as many others decided by the same court, that if the land-officers have been imposed upon, and by mistake and fraud been induced to decide a question of fact wrongly, the court will interfere to protect the rights of the parties. This last question may at some future time arise upon the facts of the case at bar. But that question has not, and probably could not have, been raised in this case, and it is not necessary that we should say anything in regard thereto. On the whole case, we agree with the contention of the defendant in error, and the case must be affirmed.

ANDERS, C. J., and SCOTT, J., concur.  
STILES, J., did not sit at the hearing.

DUNBAR, J., (*dissenting*.) After as thorough an investigation of this cause as time and opportunity would permit, I find myself unable to concur in the majority opinion, and will at some future time express my grounds of dissent.

#### ORCHARD V. ALEXANDER.

(*Supreme Court of Washington*. Feb. 11, 1891.)

Error to superior court, Pierce county.

*Doolittle, Pritchard & Stevens*, for plaintiff in error. *Judson, Sharpstein & Sullivan*, for defendant in error.

HOTT, J. Substantially the same questions have been argued in this case as in that of *Pierce v. France*, ante, 192, (just decided,) and for the reasons therein stated the judgment of the lower court must be affirmed, and it will be so ordered.

ANDERS, C. J., and SCOTT, J., concur.

DUNBAR, J., (*dissenting*.) After as thorough an investigation of the cause as time and opportunity would permit, I find myself unable to concur in the majority opinion, and will at some future time express my grounds of dissent.

STATE ex rel. WADE v. KENNEY, State Auditor.

(Supreme Court of Montana. March 13, 1891.)

MANDAMUS—TO STATE AUDITOR—APPROPRIATION OF MONEY.

Act Mont. March 14, 1889, which fixes the compensation of the Code commissioners at \$4,000 each, and which provides that on filing any one of the completed Codes with the secretary of the territory the auditor shall draw his warrant for the *pro rata* salaries of the commissioners, constitutes an appropriation of the money required for the compensation of the commissioners, and *mandamus* will issue to the state auditor to compel him to draw his warrant in favor of the commissioners who have performed their duties as prescribed by the act.

Application for peremptory writ of mandate.

B. P. Carpenter and F. W. Cole, for petitioner. Henri J. Haskell, Atty. Gen., for respondent.

BLAKE, C. J. The affidavit of the relator contains the following allegations: "That he was duly appointed, in the year 1889, one of the Code commissioners under an act of the legislative assembly of the territory (now state) of Montana, entitled 'An act to provide for the appointment of a commission to codify the criminal and civil law and procedure, and to revise, compile, and arrange the statute laws of Montana,' approved March 14, 1889. That ever since such appointment he has acted as such commissioner in the preparation of the four Codes provided for in said act. That said Codes have been prepared and filed, as required by said act and the act of the legislative assembly of the state of Montana amendatory of said act, approved March 9, 1891. That the Civil and Penal Codes and the Code of Civil Procedure were prepared and filed, and a warrant drawn by the auditor in favor of this affiant and each of the Code commissioners, and paid out of the state treasury. That the Political Code was filed, as required by law, on the 10th day of March, 1891. That affiant, on the 10th day of March, 1891, after filing the said Political Code with the secretary of state, demanded of said E. A. Kenney, the state auditor of the state of Montana, a warrant on the state treasurer of the state of Montana, for the sum of one thousand dollars, which said sum was due this affiant for his salary and compensation in the preparation of said Political Code. That the said E. A. Kenney, state auditor as aforesaid, refused, and still refuses, to give affiant a warrant on the state treasurer for said amount, or any other amount." There are other allegations, which do not become material to this controversy, and the prayer is for a peremptory writ of mandate to issue out of this court, directed to said state auditor, and commanding him to give to the affiant a warrant for said sum. The return of the respondent is to the effect that the foregoing act of the legislative assembly in 1889 did not make any specific appropriation of money out of any fund to pay the relator; that the relator was not entitled to receive any compensation by the terms of this act until he had performed certain services; and

that, when said Political Code was filed with the secretary of state, there was no money in the state treasury which was applicable to the payment of said claim by reason of the appropriations of large amounts by the second legislative assembly of the state, which had been made in 1891. It is necessary to construe these clauses and sentences of the act which was approved March 14, 1889: "The said commissioners shall each receive a compensation for his services of \$4,000." Section 4. "Upon the completion of any one of the said Codes, and upon filing the same, accompanied with a general index, and the report of the commission in relation thereto, \* \* \* in the office of the secretary of the territory or state, as the case may be, it shall be the duty of the chief justice and the secretary of the territory or state to examine the same, and, as soon as practicable, to determine whether the work has been done as provided in this act; and, if they so determine, they shall file their decisions with the state auditor, whereupon it shall be lawful for, and the duty of, such auditor to draw his warrant for the *pro rata* salaries of the commission under the provision of this act, and to be paid by him out of any funds not otherwise appropriated." Section 5. In *State v. Hickman*, 9 Mont. 370, 23 Pac. Rep. 740, we held that a section of the constitution which provides that the secretary of state shall receive for his services \$3,000 per annum, payable quarterly, was an appropriation by law. The relator has been nominated by the governor and confirmed by the territorial council, and is an officer whose duties and compensation are fixed by the statute *supra*. It is also specified that the payment *pro rata* for his services shall be made at a time which is made certain by the completion of the respective Codes. The constitution has declared that "all obligations of the territory of Montana existing, in force, and unpaid at the time of the admission of the state into the Union are hereby assumed by the state, which shall and will well and truly pay the same." Article 20, § 12, Schedule.

We have commented heretofore upon the provisions of the constitution concerning an appropriation, and do not think our views require a repetition of the reasons which control this decision. Under the authorities, the legislation providing for the appointment of the Code commission is held to appropriate the definite sum which is designated as the compensation of the commissioners. *State v. Bordelon*, 6 La. Ann. 68; *Ristine v. State*, 20 Ind. 328; *McCauley v. Brooks*, 16 Cal. 11; *Proll v. Dunn*, 80 Cal. 220, 22 Pac. Rep. 143; *Humbert v. Dunn*, 84 Cal. 57, 24 Pac. Rep. 111. The last-named case is a recent utterance of the supreme court of that state, and is directly in point. Our construction of the act, *supra*, that it is an appropriation of the money required for the compensation of the relator, renders needless a consideration of the other grounds of defense of the respondent. The laws making appropriations for various purposes, which are cited, were enacted subsequently to the act under view, and cannot affect the



rights of the relator. It is therefore ordered and adjudged that the peremptory writ of mandate be issued in accordance with the prayer of the relator.

HARWOOD and DE WITT, JJ., concur.

SWENSON v. KLEINSCHMIDT *et al.*

(Supreme Court of Montana. March 8, 1891.)

TROVER—WHO MAY MAINTAIN—PLEADING—EVIDENCE.

1. A written order by the owner of personal property, authorizing plaintiff to dispose of it, and collect the proceeds, does not transfer the title to plaintiff, and does not enable him to maintain trover against a third person, who converted the same to his own use. *De Witt, J.*, dissenting.

2. Neither does such order constitute plaintiff a "trustee of an express trust" within the meaning of Code Civil Proc. Mont. § 6, which authorizes a "trustee of an express trust" to sue without joining the persons for whose benefit the action is prosecuted. *De Witt, J.*, dissenting.

3. In trover for wood, plaintiff alleged title in himself, and a conversion by defendants. Defendants set up a counter-claim, in which they alleged that the title originally had been in a third person, for whom plaintiff had done the cutting; that such third person had sold the wood to defendants; and that they had furnished supplies to plaintiff while engaged in the cutting. Plaintiff's replication consisted of a general denial. *Held*, that on the trial plaintiff could not admit the truth of the facts averred in the counter-claim, and introduce evidence in avoidance, as the issue raised by his general denial was the existence of the facts averred in the counter-claim.

4. A conversation in which plaintiff demanded of one of defendants \$74 for the wood, adding that if such sum was not paid he would sue, is admissible in evidence, where there is nothing to show that the conversation took place while negotiating for a peaceful settlement, or with a view to compromise.

Appeal from district court, Deer Lodge county; D. M. DURFEE, Judge.

*W. H. Trippett and Robinson & Stapleton*, for appellants. *Cole & Whitehill*, for respondent.

HARWOOD, J. Action for damages for taking and conversion of personal property. The plaintiff, for cause of action, avers that on June 1, 1887, he possessed and owned 250 cords of wood, of the value of \$287.50; that between said date and October 26, 1887, defendants unlawfully took and conveyed away said wood, and converted the same to their use, to plaintiff's damage in said sum, for which judgment is demanded, with interest at 10 per cent. per annum from the time of such alleged taking. Defendants made answer, denying the allegations of the complaint; and further alleged, as new matter of defense or counter-claim, a transaction connected with the cutting of said wood, in effect as follows: That defendants, Albert Kleinschmidt and Addison Smith, were copartners doing business in the firm name of A. Kleinschmidt & Co.; and that during the winter of 1885 to 1886 the Butte Manufacturing Company, a corporation existing under the laws of Montana, employed plaintiff and L. Mangarud and C. J. Lindquist, as partners, to cut wood for said company at an agreed price of \$1.15

per cord for cutting and packing the wood; that said partners, under said agreement, cut the wood in question, but the same was only 205½ cords in quantity, instead of 250 cords, as alleged by plaintiff; that while plaintiff and his said partners were cutting said wood, defendants, for said Butte Manufacturing Company, furnished plaintiff and his said partners, at their instance and request, goods, wares, and merchandise at and for the price of \$153, and that plaintiff and his said partners became indebted to the Butte Manufacturing Company therefor in said sum; that during the year 1886 said debt owing by plaintiff and his said partners for said goods was assigned by the Butte Manufacturing Company to defendants. Defendants' answer further alleges that plaintiff and his said copartners became indebted to one Phil. E. Evans in the sum of \$9.07, which is alleged to have been assigned to defendants, A. Kleinschmidt & Co., and that plaintiff and his said partners assumed and agreed to pay the same. Defendants also allege that defendants, A. Kleinschmidt & Co., paid \$10.74 at the instance and request of plaintiff and his said partners for hauling said goods to them, which plaintiff and his said partners agreed to pay. Defendants further allege that long before the commencement of this action all of said indebtedness of plaintiff and his partners was assigned to and became the property of defendants, A. Kleinschmidt & Co., and that all of said wood was sold to and became the property of the same defendants prior to the commencement of the action; that said wood was not packed or piled; and that, in order to ascertain the amount of said wood, defendants were compelled to pay, and did pay, 15 cents per cord for packing the same, amounting to the sum of \$30.80. In conclusion defendants offered to pay plaintiff the sum of \$32.33, which they admitted was a balance due plaintiff and his said partners for cutting said wood. Plaintiff, by replication, denied said matters set up by the answer, alleging, however, that said wood was cut by plaintiff and said Mangarud and Lindquist, not as partners, but each cutting for himself. Upon the issues thus formed the case was tried, and during the course of the trial, as appears by defendants' bill of exceptions, plaintiff was sworn, and, while testifying on his own behalf, said the wood in controversy was cut by himself, Mangarud, and Lindquist for the Butte Manufacturing Company; that said parties were chopping together, and they chopped about 250 cords; that plaintiff chopped 120 cords, and one of the others chopped about 75 to 80 cords, and the other from 85 to 90 cords; that these choppers had no contract with defendants, but their "contract was with the Butte Manufacturing Company, at the agreed price of \$1.15 per cord, and that the company was to furnish grub, and would receive the wood about June 1, 1886;" that they "chopped till about February 16, 1886, and quit because the company busted up." He said: "Nobody offered to pay us. I never received anything but goods—about \$150 worth, I think—for myself and the two men that

were with me. Each man chopped for himself. I am suing for what they chopped, too. The goods we received were in part payment for the wood. The amount was to be deducted." Plaintiff then offered in evidence what he claimed was a transfer from said Mangarud and Lindquist to him of the wood which each of them cut. The papers offered are in terms as follows: "Deer Lodge, Apr. 24th, 1886. This is to certify that I, the undersigned, have given S. Swenson, of Deer Lodge, full authority to dispose of all the wood belonging to me in Mt. Powell gulch, in Deer Lodge county, and collect money for the same if sold. The wood is marked thus: 'C-I-L.' [Signed] C. LINDQUIST." "Deer Lodge, April 24th, 1886. This is to certify that I, the undersigned, have turned my wood over to S. Swenson, of Deer Lodge, and given him full authority to dispose of it in any way he may deem satisfactory. Also collect money for me for the same if sold, all wood belonging to me in Mt. Powell wood camp, and are marked thus: 'L-M.' [Signed] L. J. MANGARUD." Those papers were offered in evidence, as the bill of exceptions recites, "to show title in plaintiff to the wood cut by said parties," and to the introduction of which the defendants objected for the reason that the same were incompetent and insufficient to show title in plaintiff to the same. The court overruled the objection, and admitted said papers to be read in evidence to the jury; to which ruling defendants excepted, and assign the same as error.

Plaintiff's action is for damages for the conversion of 250 cords of wood,—his property. He must prove the essential allegations of his complaint to make a cause for recovery. As said by Bishop: "To maintain this particular action [trover] he must have a right both to the property and to the possession of it." Non-Cont. Law, § 397. Plaintiff had just shown by his testimony that when this wood was cut certain separate described portions of it were not his property, but were the property of others. To make out his case as to that wood, plaintiff must show conveyance of title to him. This he undertook to prove by introducing said papers; but said papers do not show a transfer of title. They constitute mere revocable grants of authority or agency to plaintiff to do stated acts in relation to the wood belonging to said Lindquist and Mangarud. The terms used indicate no intention to transfer the property. The contrary is shown. In the first the maker gives the plaintiff authority to dispose of all the wood belonging to him, "and collect money for the same if sold." In the second the plaintiff is authorized by the maker to dispose of the wood, "and collect the money for me for the same if sold." If said papers were sufficient to show, or intended to show, a transfer of title in this action, the same papers ought certainly to be good evidence for the same purpose in case said Lindquist or Mangarud had brought an action against plaintiff for recovery of possession of their wood, respectively, or for damages for the conversion thereof by plaintiff. Said pa-

pers can in no way be construed to have such an effect. So far as said papers show, the makers of them still own the respective portions of the wood, as plaintiff testified. Plaintiff's counsel contend that said papers made plaintiff "trustee of an express trust" for the other owners of respective portions of said wood, (Code Civil Proc. § 6;)<sup>1</sup> but such position cannot be sustained. (Pom. Rem. § 171 et seq.; Bliss, Code Pl. §§ 54-57, and 262, and cases cited.) It was error to admit said writings as evidence tending to establish plaintiff's title to the respective portions of the wood in controversy, which he had testified was the property of Lindquist and Mangarud.

After plaintiff had testified that he and Lindquist and Mangarud had cut said wood for the Butte Manufacturing Company under a contract with said company for the price of \$1.15 per cord, "and that the company was to furnish grub, and would receive the wood about June 1, 1886," and that about \$150 worth of goods were received by plaintiff and Lindquist and Mangarud, and that "the goods were received in part payment for the wood," plaintiff's counsel then asked him to explain for what reason he was not indebted to the Butte Manufacturing Company. Defendants objected to the witness responding to that question for the reason that such inquiry was incompetent, and not warranted by the pleadings. The objection was overruled, and defendants excepted to such ruling. In response to said question plaintiff testified "that the contract was that said company was to furnish grub and receive the wood; that by their failure to fulfill the contract they had nothing left but the wood; and, as it was, they were thrown out of everything, and that they were idle for a while." Defendants then moved the court to strike out said testimony. This motion the court overruled, to which ruling defendants excepted, and assign the same as error. Was that proof warranted by the pleadings? By reverting to the pleadings it is seen that plaintiff alleged as his cause of action these simple facts: That he owned and possessed a certain quantity of wood of a certain value, and that defendants carried away and converted the same to their own use, to plaintiff's damage in a certain sum, for which he demanded judgment. Defendants answered plaintiff's alleged cause of action, denying his allegations, and setting forth as new matter or counter-claim a state of facts which, if true, and of binding force, would at least modify the amount which plaintiff ought to recover. By defendants' answer an issue of fact was raised as to the truth of the allegations of the complaint, and also a new state of facts affecting the rights of the parties to the controversy was introduced. The new matter or counter-claim set up in the answer must be controverted, or it will be deemed true. Code Civil Proc. § 109. How shall the new matter be controverted? To "controvert" means more than to deny. Webst. Dict.;

<sup>1</sup> This section provides that a trustee of an express trust may sue without joining the persons for whose benefit the action is brought.

Century Dict. If the allegations constituting new matter or counter-claim are deemed untrue by plaintiff, he will, of course, controvert the same by direct denial. Then the issue on that point is as to the verity of such matter; that is, as to the existence of the facts stated as new matter or counter-claim. But the new matter stated by way of defense or counter-claim may be true, and yet have no binding force by reason of the existence of another fact, or state of facts, which occurred in relation to the same. How, in such a case, shall the plaintiff controvert the new matter of defense or counter-claim? Shall he make a direct and unqualified denial of such matters in his replication, and then, on the witness stand, admit the truth of what he denied by replication, and then introduce proof of a new state of facts, foreign to the pleadings, which occurred in relation to the new matter of defense or counter-claim, and which, as he contends, destroyed the binding force thereof? Aside from the duplicity involved in such a position, is not a denial of a transaction, by necessary and inevitable implication, a denial also that any facts exist relating to or growing out of such a transaction? How can there be a state of facts growing out of, or relating to, or affecting that which never existed? How can there be a breach or satisfaction of a contract or transaction which was never engaged in? The pleader not only stands in such an attitude as a logical sequence arising from direct, unqualified denial of a transaction or contract alleged as new matter of defense or counter-claim, but he raises an issue of no consequence in the trial, for he will upon the trial admit what he denied, as he must admit it in whole or in part, to show that other facts arose in relation to such new matter or counter-claim, which satisfied or destroyed the obligation arising therefrom. Again, the issues are materially different under the one or other method of controverting new matter of defense or counter-claim. If direct denial is made, the issue raised is as to whether such facts exist or not. If, however, the replication controverts the counter-claim, or new matter of defense, by alleging a state of facts which would, when proved, destroy the force of such new matter or counter-claim, the issue is then shifted to the question of the existence of the latter facts, by which the new matter or counter-claim would be avoided. This latter issue is raised by an assumed denial of new matter stated in the replication. "The statement in the replication of matter in avoidance shall on the trial be deemed controverted by the adverse party." Section 109, Code Civil Proc. Again, "an issue of fact arises . . . upon new matter in the replication." Section 248, *id.* We think that to allow a party who, by replication, makes an unconditional denial of facts constituting new matter of defense or counter-claim to admit those facts on the trial, and then, under color of such former denial, to enter upon the proof of facts material to the rights of the parties, and foreign to the pleadings, by way of avoidance, would be

paradoxical, and contrary to the provisions and spirit of our Code of Civil Procedure. *Mauldin v. Ball*, 5 Mont. 96, 1 Pac. Rep. 409. We think the court erred in admitting the said evidence objected to as not warranted by the pleadings.

There is one other assignment of error which we will notice. During the course of the trial, P. Bader, testifying in behalf of defendants, stated that on a certain occasion he heard a conversation in defendants' store between plaintiff, Swenson, and defendant Strenhal, in which "Swenson asked Strenhal if he would take his wood, and Strenhal told him he would, but it was not piled; and Swenson said he thought it ought to be worth \$1.15 outside of piling. Strenhal said he could get it banked for that price. He told him he would find out." "In the second conversation Swenson asked Strenhal if he would pay him, and he told him the wood was not measured yet. Swenson said he wanted \$74. or he would sue." Defendants' bill of exceptions recites that plaintiff objected to said evidence, "and the court ruled that all evidence with reference to the offer to take \$74 be stricken out, and the same was withdrawn from the consideration of the jury." The objection to said evidence assigns no ground for the exclusion of the same. Nor does it appear on what ground said evidence was stricken out and withdrawn from the consideration of the jury. It is asserted by respondents' counsel in their brief that said evidence was withdrawn from the jury because the court previously ruled that the conversation was concerning a compromise. The bill of exceptions is quite elaborate in setting out the evidence of two conversations to explain the point of defendants' exception; but nowhere in said evidence is there an expression showing that the demand of plaintiff for \$74 from defendant Strenhal, in payment for the wood cut by plaintiff, was made as a compromise offer; nor that said statements were made while negotiating for a peaceful settlement, nor in view of any compromise. The evidence is a plain recital of a demand by plaintiff upon one of the defendants for the payment of a certain sum in settlement, adding that if the same was not paid he would sue. There are no expressions which indicate that plaintiff was offering to take anything less than his due, nor that in making such demand he was offering to sacrifice anything whatever. We must presume that in settling the bill of exceptions the court made the same conform to the truth. According to the recitals therein, said evidence was clearly admissible, and the order withdrawing the same from the consideration of the jury was error. 1 Greenl. Ev. § 192; *Rest*, Ev. § 510. It is ordered that the judgment appealed from be, and the same is hereby, reversed, with costs, and the cause is remanded for trial *de novo*.

BLAKE, C. J., concurs.

DE WITT, J. While I concur that the cause must be reversed, some views have been expressed from which I must record a dissent. The appeal is on the judgment

roll. The only questions presented are in a bill of exceptions. The only evidence before us is that contained in the bill to explain the points of the exceptions. The first point is the objection that the writings offered and received in evidence "were incompetent and insufficient, and did not show any title in plaintiff." Whether these writings were alone sufficient to show title, whether they were conclusive, whether they wholly proved plaintiff's right to sue, is not before us for determination. The whole evidence is not before us. We do not know what plaintiff proved as to the essential allegations of his complaint, outside of the writings. The question for determination under the exception is, were the writings competent as tending to prove what plaintiff claimed for them? that is, as establishing a title in plaintiff, against trespassers, for the purposes of the action. Whether they were sufficient is another matter to be taken in connection with the whole evidence, which is not before us. Did the writings tend to show that plaintiff had a right of action for the conversion of the wood? That the writings may have been revokable is not material in the absence of any claim that they had been revoked, and in an action between plaintiff and trespassers, and where no question is raised between plaintiff and Mangarud and Lindquist. The writings confer upon Swenson, plaintiff, the right to dispose of the wood. He alleges in his complaint that he was in the lawful possession of the wood. We do not know what evidence he offered in other parts of the trial of the fact of possession. We speak now, for the moment, only of his right of possession. Having the right to dispose of, what does "dispose of" mean? Webster's Dictionary defines the term "to determine the fate of; to exercise the power of control over; to fix the condition, application, employment, etc., of; to direct or assign for a use." With this idea of the term "dispose of," it can be said without much hesitation that Swenson had the right of possession of the wood. But did these writings tend to show title in plaintiff? "Title" must mean title for the purposes of the action against the alleged trespassers. "Title" here means, I take it, much the same as "property," when that word is used to designate the interest which one has in a thing, in distinction to the use of the word as signifying the thing itself. Mr. Bishop says, speaking of trover: "Yet to maintain this particular action he must have a right both to the property and to the possession of it." Non-Cont. Law, § 397. What is property, as to things personal or title? Bouv. Law Dict. says: "Property in personal goods may be absolute or qualified, \* \* \* because more persons than one have an interest in it, or because the right of property is separated from the possession." The same authority says of "title:" "In general, possession constitutes the criterion of title of personal property, because no other means exist by which a knowledge of the fact to whom it belongs can be attained." Now, those writings offered in evidence tended to show the lawful possession which was

alleged. A lawful possession was one of the elements of a special or qualified title or property against alleged trespassers, which it is claimed the plaintiff must have; and therefore evidence of such lawful possession was competent in the chain of testimony. I am of opinion that the writings were at least one step in the proof of a title as trustee of an express trust, and if Swenson, plaintiff, were trustee of an express trust, that is one of the facts establishing his cause of action. Whether the writings alone were sufficient to establish the existence of an express trust is not before us. I am satisfied that they tended in that direction, and for that reason were competent. The writings were informal, but substance, and not form, is material. 1 Amer. & Eng. Enc. Law, 835; Voorhies' Code Proc., N. Y. § 111, p. 93. There is no substantial difference between our statutes and those of the states from which I cite the following cases: *Considerant v. Brisbane*, 23 N. Y. 389; *Weaver v. Trustees*, 28 Ind. 112; *Tyler v. Houghton*, 25 Cal. 29; *Smith v. Logan*, 18 Nev. 152, 1 Pac. Rep. 678; *Wetmore v. Hegeman*, 88 N. Y. 69, and cases cited; *Reed v. Harris*, 7 Rob. (N. Y.) 151; *McKee v. Judd*, 12 N. Y. 622; *Richtmeyer v. Remsen*, 38 N. Y. 206, citing *Haight v. Hayt*, 19 N. Y. 464; *Hoyt v. Thompson*, 5 N. Y. 347; *Greene v. Insurance Co.*, 6 Hun, 131; *Hoogland v. Trask*, 6 Rob. (N. Y.) 540; *Allen v. Brown*, 44 N. Y. 231; *Robbins v. Deverill*, 20 Wis. 158; *Deer. Code Civil Proc. Cal.* §§ 367-369, notes; *Voorhies' Code Proc. N. Y.* §§ 111-113, notes; *Pom. Rem.* §§ 132, 133, 172, and cases cited. In accordance with the views above expressed and the authorities cited, and in consideration of the fact that plaintiff was undertaking to prove a case against alleged trespassers, and not against Mangarud and Lingquist, I am of opinion that there was no error in admitting in evidence the writings in controversy.

As to the second point discussed by my associate, Mr. Justice HARWOOD, I concur in the conclusion he reaches. And also as to the third point,—the error in excluding the evidence of Bader. As to that I will add a word. If Swenson offered to take \$74, and it was clearly a compromise proposition, the evidence of such offer was not admissible. If it were a remark that he claimed only \$74, and would take that amount, and such remark was an independent fact, disconnected with the proposition to compromise, it was competent. *Williams v. Thorp*, 8 Cow. 202, note and cases reviewed; *Harrington v. Inhabitants of Lincoln*, 4 Gray, 566; *Reynolds v. Manning*, 15 Md. 526; *Paulin v. Howser*, 63 Ill. 312. It does not appear by the bill of exceptions that it was a compromise proposition. It was not objected to as such. The record shows simply that the evidence was objected to, without purporting to give any reasons whatever for the objection. That is not a good objection. In *re Thompson*, 9 Mont. 887, 28 Pac. Rep. 933, citing *City of Helena v. Albertose*, 8 Mont. 499, 20 Pac. Rep. 817. I agree to a reversal of the judgment on these latter points, and state my dissent from the first point for the reason that

the proposition therein involved becomes material on a retrial of the case in the district court.

**MCCORMICK v. RIDDLE et al.**

(*Supreme Court of Montana.* March 8, 1891.)

**INJUNCTION—SHERIFF'S SALE—PLEADING.**

1. A sheriff's sale of land to enforce a judgment subjecting it to a mechanic's lien will not be enjoined at the suit of the owner, who did not contract for the erection of the building, and who was not made a party to the mechanic's lien proceeding, as the purchaser at the sale will acquire no title as against him.

2. An allegation in the complaint that the sale will result in great and irreparable injury and damage to the owner is not admitted by demurrer, as such allegation is a conclusion of law, and not the statement of a fact.

Appeal from district court, Missoula county; CHARLES S. MARSHALL, Judge.

Action by Kate H. McCormick, administratrix, etc., of W. J. McCormick, deceased, against Joseph N. Riddle and others, to enjoin a sheriff's sale of land belonging to her estate. From a decree in complainant's favor defendants appeal.

*Walter M. Bickford*, for appellants. *Geo. W. Reeves*, for respondent.

BLAKE, C. J. The complaint of the respondent, as the administratrix of the estate of W. J. McCormick, deceased, contains the following allegations of facts, which are not denied by the appellants, and therefore admitted: Riddle & Watts, two of the appellants, filed February 13, 1890, their complaint, and set forth that they were employed by T. D. Rees to do certain work upon a house constructed upon a lot numbered 1, in block numbered 56, in McCormick's addition to the town of Missoula; that Rees, prior to the time of this employment by said Riddle & Watts, entered into a contract with Kate H. McCormick to erect a house upon said lot; that said Kate H. McCormick owned said lot; that said Rees was the agent of said Kate H. McCormick for the purpose of contracting for said work; that between March 1, 1889, and May 15, 1889, Riddle & Watts completed said house according to the contract they had made with Rees; that at the time of commencing their suit there was due them the sum of \$554; and that in May, 1889, Riddle & Watts filed their lien under the statutes on said lot; and that they prayed for judgment against Rees and said Kate H. McCormick for said sum, and that their lien be enforced against said property. The complaint of the respondent further alleges that the court entered May 5, 1890, a decree in said action, by which it is adjudged "that the said Kate H. McCormick and T. D. Rees were indebted to the said Riddle & Watts in the sum of six hundred and nine dollars and 40 cents, and to secure said sum aforesaid the said Riddle & Watts have and hold a lien on the lot of land aforesaid, and the building thereon situated; \* \* \* that, for the purpose of paying the sum aforesaid as found to be due Riddle & Watts, said lot \* \* \* be sold by the sheriff of Missoula county, state of Montana, upon the payment of the purchase price of said lot and premises,

that said sheriff convey said lot by deed to the purchaser; and that, in obedience to the directions of said decree aforesaid, the said sheriff has advertised said lot and premises for sale at the court-house in Missoula, Mont., on the 3d day of June, 1890; \* \* \* that said lot \* \* \* was never the property of the said T. D. Rees and Kate H. McCormick, or either of them, and that at the time when the contracts for the building of the house on said lot was said to have been made with the said Riddle & Watts and with T. D. Rees said lot aforesaid was, and has continued to be and is now, the property of the estate of W. J. McCormick, deceased; that, during the time of the construction of the said house aforesaid, as shown by the complaint and decree in the case of Riddle & Watts v. T. D. Rees and Kate H. McCormick, this plaintiff was and continued to be, and now is, the regularly appointed and acting administratrix of the estate of W. J. McCormick, deceased, and as such holds the title to said lot for the benefit of the estate aforesaid; that under the decree aforesaid the said sheriff, W. H. Houston, who is made defendant hereto, will, on the 3d day of June, 1890, sell said lot, and will convey the same by deed, unless enjoined and restrained from so doing by this court; that if said property is permitted to be sold, and the sheriff is not enjoined and restrained from making said sale, great and irreparable injury and damage will result to the plaintiff as the representative of the estate aforesaid, and to the estate also." The judge of said court, by an order dated June 3, 1890, enjoined the sheriff from making a sale and conveyance of said property. We will not review the motions which appear in the transcript, and depend upon one question. If the complaint states facts sufficient to justify the issuance of the injunction, there is no error in the proceedings.

The respondent contends that the allegation in her complaint that "great and irreparable injury and damage will result to the plaintiff" must be considered as true, because it is not denied. But this is a conclusion of law, which does not fall within this rule, and is not admitted by the appellants. *Boley v. Griswold*, 2 Mont. 447. Another familiar principle has been stated repeatedly in the books. In *Carlisle v. Stevenson*, 3 Md. Ch. 499, the chancellor said: "The mere allegation that irreparable injury will result to the complainant, unless protection is extended to him, is not sufficient; the facts must be stated, that the court may see that the apprehensions of irreparable mischief are well founded." See, also, *Waldron v. Marsh*, 5 Cal. 119; *Mechanic's Foundry v. Ryall*, 75 Cal. 601, 17 Pac. Rep. 703; *Thorn v. Sweeney*, 12 Nev. 251; *Crisman v. Heiderer*, 5 Colo. 589. A perusal of the complaint fails to disclose any facts of this nature. A valid judgment, of which no criticism is made, was entered in favor of Riddle & Watts, and against Kate H. McCormick and T. D. Rees. There are no allegations of an equitable character, such as fraud, injustice, or insolvency. The position of the respondent is fairly presented in the following sentences of the brief: "The contention of

plaintiff and respondent is, as alleged in the complaint, that the property upon which the structure was built was the property of W. J. McCormick, deceased, and that Kate H. McCormick, one of the defendants in the former action, never had any interest in the property whatever. Upon this statement of the case respondent's counsel will present their argument." This court has passed upon one of the questions which arises in the case. *Chummasero v. Vial*, 3 Mont. 376; *Story v. Black*, 5 Mont. 26, 1 Pac. Rep. 1; *Princeton Min. Co. v. First Nat. Bank*, 7 Mont. 530, 19 Pac. Rep. 210. In the case last cited, Mr. Justice BACS said: "And it is also a rule of law that where a judgment creditor attaches real estate of his judgment debtor, and that property is held by the said judgment debtor in trust, the judgment creditor (at least when purchasing with actual notice) obtains no right, as against the *cestui que trust* of that property, even though the trust is no part of the records." The statutes concerning the liens of mechanics are decisive of some of the propositions which have been discussed by courts: "In all suits under this chapter the parties to the contract shall, and all other persons interested in the matter in controversy, and in the property charged with the lien, may, be made parties; but such as are not made parties shall not be bound by any such proceedings." Comp. St. div. 5, § 1879. It is shown by the record that neither the estate of W. J. McCormick, deceased, nor the administratrix thereof as the representative of said estate, who is the respondent, was a party to the action wherein said Riddle & Watts recovered their judgment. The foregoing language of the statute fixes in direct terms the legal consequences of such an omission. The section which authorizes the sale to enforce the lien of a mechanic is as follows: "That the lien given by section 820 of this chapter shall extend to the lot or land upon which any such building, improvements, or structure is situated to the extent of one acre, if outside of any town or city, or, if within any town or city, then to the extent of the whole lot or lots upon which the same is situated, if the land belonged to the person who caused said building to be constructed, altered, or repaired; but if such person owned less than a fee-simple estate in such land, then only his interest therein is subject to such lien." 15th Ex. Sess. 71. The injunction under review is not subject to any conditions or limitations. We think that the case at bar is governed by *Archbishop v. Shipman*, 69 Cal. 586, 11 Pac. Rep. 346. It appeared that Dorland recovered a judgment against J. S. Alemany et al. for the foreclosure of a lien upon a certain parcel of land; that a corporation sole, known as "The Roman Catholic Archbishop of San Francisco," was the owner of the premises, and was not a party to the judgment; that J. S. Alemany was the said archbishop; and that upon the application of the said corporation an injunction was issued to restrain the sale of the land by the sheriff. Mr. Justice McKEE in the opinion said: "The judgment creditor has been forever enjoined from enforcing

her judgment, because the plaintiff herein was not a party to it. \* \* \* The interest to which the lien attached may not have constituted a valid title; it may not in fact have been of any value; but, whatever it was, the party in whose favor the right to it was adjudged was entitled, as matter of right, to have her judgment against it enforced by legal process. \* \* \* One who is not a party or privy to a judgment is not affected by it. As to him, the judgment, and all proceedings under it, are void. Neither the judgment, nor an execution sale of land affected by it, can change his rights in the land, or create a cloud upon his title. \* \* \* The complaint fails to state a case cognizable in equity." We are satisfied from the foregoing authorities that the court erred in issuing the injunction. Some questions respecting the service of papers or process have been discussed by counsel, but the transcript does not contain the facts which are essential to their decision, and we will presume that there was no irregularity. It is therefore ordered and adjudged that the judgment and order be reversed, and that the cause be remanded, with instructions to dissolve said injunction.

HARWOOD and DE WITT, JJ., concur.

SPECT v. SPECT. (No. 14,075.)

(Supreme Court of California. March 25, 1891.)

EJECTMENT AGAINST MORTGAGEE IN POSSESSION.

One claiming through a mortgagor who has placed his mortgagee in possession cannot maintain ejectment against the mortgagee while the mortgage debt remains unsatisfied, even though an action thereon by the mortgagee is barred by the statute of limitations.

In bank. Appeal from superior court, Colusa county; E. A. BRIDGEFORD, Judge.

B. F. Howard and S. G. Tomkins, for appellant. H. M. Albery and W. G. Dyas, for respondent.

HARRISON, J. The defendant in her answer to a complaint in ejectment, which was in the ordinary form, denied all its allegations, and, "for a separate and equitable defense to plaintiff's action, and for the purpose of obtaining equitable relief herein," alleged that in October, 1875, Jonas Spect, who was then the owner and in possession of the demanded premises, conveyed the same to one Montgomery; that in October, 1876, said Jonas Spect borrowed from the defendant the sum of \$2,200, and executed to her his promissory note therefor; that on the 2d day of January, 1877, he procured said Montgomery to convey the demanded premises to her, and that at the same time, and as a part of the same transaction, an agreement was entered into between herself and said Jonas Spect declaring that said conveyance was made as security for the payment of said promissory note; "that by virtue of said conveyance from Montgomery, and said agreement, and by the consent of said Jonas Spect, defendant took possession of the demanded premises, and has ever since remained and is now in actual possession of the same, claiming them

as her own; that no part of said \$2,200 has ever been paid, principal or interest, but the whole thereof is now due and unpaid, amounting to \$5,632;" and prayed judgment that plaintiff's complaint be dismissed. The action was tried by the court, and judgment rendered for the plaintiff. The court made findings of the facts alleged in the complaint, and incorporated therein the following statement with reference to the equitable defense set up in the answer: "The court declines to find on the fact whether or not defendant has a mortgage lien on the premises in controversy, for the reason that the court is of the opinion that it is not necessary for the disposition of the issues involved in this case to find upon that matter, this being an action of ejectment, and the only question involved being the right to the possession of the premises described in plaintiff's complaint." The defendant has appealed directly from the judgment, and presents as a ground for its reversal that the court failed to find upon the issues presented by her equitable defense.

Inasmuch as the court gives as its reason for not making findings upon these issues that such findings were immaterial, we must assume that evidence was introduced at the trial sufficient to support the allegations, and therefore the rule announced in *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. Rep. 1098, had no application. If the facts alleged by the defendant constitute a defense to the cause of action set forth in the complaint, they presented material issues upon which the court should have made findings, and a failure to do so was error which will require a reversal of the judgment.

The court does not find by what means the plaintiff became the owner of the demanded premises, but, as it is alleged in the equitable defense above named that Jonas Spect was the owner at the time he made the conveyance to Montgomery, we must assume that the plaintiff's title is derived under him, and is therefore subject to whatever incumbrance was created by the foregoing facts in favor of the defendant, and that the plaintiff can assert no greater rights to the premises than could Jonas Spect himself, were he the plaintiff herein. It may also be assumed, although it does not appear in the record that such point was presented to the court below, that the defendant's right of action upon the debt for which this mortgage was given to her was barred by the statute of limitations. The question to be determined is, "Can a mortgagor, who has placed his mortgagee in possession of the mortgaged premises, maintain ejectment against him while the debt for which the mortgage was given remains unsatisfied, even though an action by the mortgagee for the recovery of the debt is barred by the statute of limitations?" Section 2927 of the Civil Code declares that "a mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage, but after the execution of the mortgage the mortgagor may agree to such change of possession without a new consideration." The right of the mortgagee

to take possession of the mortgaged premises does not depend upon the statute. The mortgagor could at all times, even by a parol agreement, give to his mortgagee this additional security. *Fogarty v. Sawyer*, 17 Cal. 589; *Edwards v. Wray*, 11 Biss. 251.<sup>1</sup> In taking such possession the mortgagee does not thereby acquire any estate in the land, or obtain for his mortgage any higher character or any different or greater protection than it would otherwise have possessed. In any action to enforce the mortgage, or to collect the debt for which it was given as security, the mortgagee has no additional rights by reason of the fact that he is in possession of the mortgaged premises with the consent of the mortgagor. Such possession does, however, give him rights in addition to those conferred by the mortgage. It is an additional security for the debt, which he is entitled to retain in accordance with the terms under which it was received. This right to retain the possession of the land is not coincident with a right to foreclose his mortgage, or dependent upon such right, but depends solely upon the existence of the debt. The possession of the land is a special security for the debt, distinct and separate from the mortgage, which has been conferred by an act of the debtor, and the right to retain the same is independent of and distinct from any right springing from the mortgage. A mortgage is defined by section 2920 of the Civil Code to be "a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession." The use of the term "hypothecate" signifies that possession is not an incident of the mortgage, and that the fact of possession is entirely distinct from the contract of hypothecation. When, therefore, in addition to the contract of hypothecation, the debtor gives to his creditor the possession of the mortgaged premises, he thereby, in addition to the mortgage which he has executed, pledges to him the land also as security for the debt, and confers upon him such rights as are incident to a pledge.

The common law recognized this species of landed security. It was there called *vadium vivum*, as distinguished from the *vadium mortuum*. This is defined by Chancellor Kent to be: "When the creditor takes the estate to hold and enjoy it without any limited time for redemption, and until he repays himself out of the rents and profits. In that case the land survives the debt, and when the debt is discharged the land by right of reverter returns to the original owner." 4 Kent, Comm. 137; 2 Bl. Comm. 157; Co. Litt. 205a. The holding of the land in pledge is like the holding of any other pledge. Until the debt is repaid the owner of the pledge cannot recover it from the creditor. The holder of personal property given as security for a debt is entitled to retain the same from the owner until the debt is satisfied, even though the statute of limitations has barred all right of action to recover the debt. *Jones v. Bank*, 4 Rob. (N. Y.) 221.

<sup>1</sup>12 Fed. Rep. 42.



Under the same principle the mortgagee in possession is entitled to retain such possession until the debt is paid. "The mortgagee's right, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to retain the possession of the pledge for the purpose of paying the debt. Such a right is but the incident of the debt, and has no relation to a title or estate in the lands." *Kortright v. Cady*, 21 N. Y. 364. "On the same principle that the party who holds goods in pledge for a debt may retain these goods, even after an action at law upon such debt has been barred, the party who has got rightful possession of land mortgaged may retain possession thereof until his debt is paid, although he can bring no action to enforce the debt." *Henry v. Mining Co.*, 1 Nev. 622. In *Dutton v. Warschauer*, 21 Cal. 625, it is said: "When possession is taken by the mortgagee after condition broken by consent of the mortgagor, it will be presumed, in the absence of clear proof to the contrary, to be with the understanding that the mortgagee is to receive the rents and profits, and apply them to the payment of the debt secured. There is, indeed, no other good reason why the mortgagee should be let into possession in preference to any other party, and, unless a limitation to the period of possession is fixed at the time, it will be considered as extending until the satisfaction of the debt. Having thus entered, the mortgagee can hold against the mortgagor and all others until such satisfaction is obtained."

The rights which grow out of the relations existing between mortgagor and mortgagee, as well as the remedies for the enforcement and protection of those rights, are of equitable origin, and are to be determined by the principles of equity, whether the right be asserted or the remedy sought in an action at law or in equity. These principles, when once established, become the guidance of courts of law as well as of equity, even in those countries where the tribunals of law and equity are distinct. It was said by Lord REDESDALE: "The distinction between strict law and equity is never in any country a permanent distinction. Law and equity are in continual progression, and the former is constantly gaining ground upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next." Section 307, Code Civil Proc., declares: "There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs." While all distinctions in the form of actions are abolished, yet the principles upon which the rights of parties are to be determined remain to guide the judgment of the court. Courts look to the substantial rights of the parties for the purpose of determining the remedy to which they are entitled, irrespective of the form of the complaint under which the remedy is sought. Whenever a mortgagor seeks a remedy against his mortgagee which appears to the court to be inequal-

table, whether it be to cancel the mortgage as a cloud upon his title, (*Booth v. Hoskins*, 75 Cal. 271, 17 Pac. Rep. 225,) or to enjoin a sale under the power given by him in the security, (*Grant v. Burr*, 54 Cal. 298,) or to recover from the mortgagee the possession of the mortgaged premises, the court will deny him the relief he seeks, except upon the condition that he shall do that which is consonant with equity. In accordance with these principles, it is a settled rule that a mortgagor cannot maintain ejectment against his mortgagee until the debt is paid. *Phyle v. Riley*, 15 Wend. 248; *Hubbell v. Moulson*, 53 N. Y. 225; *Fee v. Swingly*, 6 Mont. 596, 13 Pac. Rep. 375; *Roberts v. Sutherland*, 4 Or. 220; *Cooke v. Cooper*, 18 Or. 142, 22 Pac. Rep. 945; *Frink v. Le Roy*, 49 Cal. 314; *Tallman v. Ely*, 6 Wis. 244; *Brinkman v. Jones*, 44 Wis. 512; *Sahler v. Signer*, 44 Barb. 614; *Madison Ave. Church v. Oliver St. Church*, 73 N. Y. 82; *Den v. Wright*, 7 N. J. Law, 175; *Wells v. Van Dyke*, 109 Pa. St. 335; *Duke v. Reed*, 64 Tex. 705; 1 *Jones, Mortg.* § 715.

The debt is not satisfied or paid by mere lapse of time. The statute of limitations is a bar to the remedy only, and does not extinguish, or even impair, the obligation of the debtor. It is available in judicial proceedings only as a defense, and can never be asserted as a cause of action in his behalf, or for conferring upon him a right of action. It is to be used as a shield, and not as a sword. "It has never been held that the expiration of the statutory time for bringing an action to recover a debt, or to enforce any personal obligation, operated either as an extinguishment or payment. Such a result cannot be derived from the language of our statute, the reason or policy of the law, or the decisions of courts in this state or elsewhere." *Grant v. Burr*, 54 Cal. 301. The mortgagee, after the mortgage debt has been barred by the statute of limitations, cannot, by any affirmative proceedings on his part, invoke the aid of the court for the collection of the debt; but, if the mortgagor has placed him in the possession of the land mortgaged, he does not lose the right thus conferred upon him, and can resist any action by the mortgagor to deprive him of this security. In *Frink v. Le Roy*, 49 Cal. 314, a decree of foreclosure and sale of the mortgaged premises was entered in 1859. Thereupon *Le Roy*, one of the mortgagees, took possession of the premises under an agreement between the parties that he might do so, and apply the rents to the satisfaction of the judgment. In 1870, *Frink*, who had succeeded to the interest of the mortgagor in the premises, brought an action in ejectment against *Le Roy* for their recovery. *Le Roy* in his answer, by way of equitable defense, set up the mortgage, the judgment foreclosing the same, and the agreement under which he had taken possession. To this defense the plaintiff pleaded the statute of limitations. Upon an appeal from the judgment in favor of the plaintiff, the supreme court held that the statute of limitations had no application, and that *Le Roy's* right to remain in possession under the agreement was not affected by it,

saying that "the equity of Le Roy to be maintained in possession until satisfaction of the debt is not lost from the fact that for upwards of ten years he has been in the actual possession of that of which he is now sought to be deprived." In *Hubbell v. Moulson*, 53 N. Y. 225, it was held that the mortgagor could not maintain an action in ejectment against the mortgagee for the mortgaged premises, even though he could prove at the trial that the mortgagee had received from the lands sufficient rents and profits to satisfy the debt; that such receipt did not *ipso facto* satisfy the mortgage and discharge its lien, but was in the nature of an equitable set-off to the amount due upon the mortgage debt; and that until after a judicial determination had been had upon an accounting in equity, and the application of these receipts decreed by the court in satisfaction of the debt, the mortgage was not satisfied. Section 846, Code Civil Proc., provides that "an action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage." If the mortgagor could maintain ejectment against his mortgagee, after the debt for which the mortgage was given had become barred by the statute of limitations, he would have no need to bring an action to redeem the mortgage; and, if the mortgagee had maintained an adverse possession of the mortgaged premises for five years after the breach of some condition of the mortgage, such adverse possession would be a complete defense to the action of ejectment. Mere lapse of time does not constitute adverse possession, but, if the mortgagor could maintain ejectment as soon as the right of action upon the debt was barred by the statute of limitations, the provisions of this section would be meaningless. It follows, from a consideration of the principles which we have herein stated, that the equitable defense alleged by the defendant was, if sustained by proofs, sufficient to defeat the plaintiff's right of recovery; and that the failure of the court to make findings upon the issues so presented was error, for which the judgment must be reversed; and it is so ordered.

We concur: BEATTY, C. J.; McFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; DE HAVEN, J.; GAROUTTE, J.

88 Cal. 374

SMITH *et al.* v. WESTERFIELD *et al.* (No. 13,935.)

(Supreme Court of California. March 19, 1891.)

DESCENT—DETERMINATION OF HEIRSHIP—JURISDICTION—DEPOSITIONS—APPEAL.

1. Under Code Civil Proc. Cal. §§ 22, 23, providing that an action is an ordinary proceeding for the enforcement or protection of a right, or the redress or prevention of a wrong, and every other remedy is a special proceeding, the determination of the heirship of claimants to an es-

tate by the superior court is a special proceeding, and under Code Civil Proc. Cal. § 1664, conferring jurisdiction, and providing that any person claiming to be an heir to deceased, or entitled to distribution, may, "after the expiration of one year" from the issuing of letters of administration, petition the court to determine the rights of persons to the estate, and to whom distribution shall be made, the court acquires no jurisdiction where the petition is filed within a year from the issuing of letters of administration.

2. The supreme court will not dismiss an appeal from a judgment of the superior court on the ground that the court had no jurisdiction to entertain the proceeding, if it assumed jurisdiction, and rendered an affirmative judgment.

3. The deposition of "James M. T.," taken under a commission to take the deposition of "Jno. T.," is not competent evidence.

4. The admission of such deposition, where it is as to a material fact, is ground for reversal, though there is other competent evidence of the same fact.

In bank. Appeal from superior court, Nevada county; J. W. WALLING, Judge.

John Caldwell for appellants. P. F. Simonds and James A. Stidger, for respondents.

HARRISON, J. William Westerfield died intestate in Nevada county, October 16, 1888, and on the 29th of that month letters of administration upon his estate were issued out of the superior court of that county to the public administrator. February 27, 1889, the plaintiffs herein filed in said superior court their petition in the matter of said estate for a determination by the court of the interests of all parties in the estate, and to whom distribution thereof should be made, and that upon final hearing thereof they be declared to be the sole heirs of said estate, and that the estate be distributed to them. Thereupon, upon the same day, the court made an order that notice be given requiring all persons claiming to be interested in said estate to appear before said court on the 20th day of May, 1889, and exhibit their respective claims of heirship or other interest in said estate, and directing that said notice be personally served "on all persons herein named, and all other persons known as claiming any interest in said estate, at least thirty days before the time fixed for said appearance;" and further directing that "service of said notice be made on all said persons claiming interest in said estate by publication thereof in the Daily Transcript, a newspaper published in said Nevada county, and that said publication be made at least once a week for seventy consecutive days before the time herein named for such appearance." At the time of filing said petition and making said order no person had appeared claiming any interest in the said estate other than the petitioners, nor were any other persons "named" in said petition or order. Notice, as required by said order, was on the same day issued by the clerk of the court, and on the 27th day of May, 1889, the court made its order and decree, stating that "due and legal notice to all persons claiming an interest in said estate as heirs at law of said deceased or otherwise has been given, and that the same is established of record, and that this decree be entered in the minutes of

this court." At various dates prior to July 22, 1889, the plaintiffs and the defendants herein filed their appearance and respective claims of heirship, and on that day the court made an order adjudging "that the default of all such persons that have not appeared herein as aforesaid be, and the same is hereby, entered according to law." On the 30th day of July, 1889, the plaintiffs herein filed their complaint in the matter of said estate, setting forth their claims of heirship thereto, and making as defendants the persons who had previously appeared undersaid notice, and filed their claims of heirship to said estate. The defendants thereafter filed answers to said complaint, setting forth therein the facts constituting their claims of heirship, and praying that they be declared to be the heirs at law of the deceased, and entitled to the distribution of his estate. The matter was thereafter tried by the court without a jury, and judgment rendered that the plaintiffs "are not and were not relatives of said William Westerfield, deceased, and are not entitled to be decreed his heirs at law;" and also that the respondents herein "are the lawful heirs at law of said William Westerfield, deceased, and, as such, entitled to inherit his estate." This judgment was entered January 3, 1890, and the plaintiffs, having made a motion for a new trial upon a statement of the case, and the same having been denied, have appealed from both the judgment and the order denying the new trial.

Section 1664, Code Civil Proc., provides that "any person claiming to be heir to the deceased, or entitled to distribution in whole or in any part of such estate, may at any time after the expiration of one year from the issuing of letters testamentary or of administration upon such estate file a petition in the matter of such estate, praying the court to ascertain and declare the rights of all persons to said estate, and all interests therein, and to whom distribution thereof should be made." The section further provides that "upon the filing of said petition the court shall make an order directing service of notice to all persons interested in said estate to appear and show cause on a day to be therein named;" and, after prescribing the character of the notice to be given, declares: "Which notice shall be served in the same manner as a summons in a civil action; upon proof of which service, by affidavit or otherwise, to the satisfaction of the court, the court shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership, and interest of all parties in and to the property of said deceased." Proceedings for the administration of the estates of deceased persons and for their distribution to those who may be entitled thereto, including the determination of the heirs of the decedent, are purely statutory. The superior court, while sitting as a court of probate, has only such powers as are given it by statute, and such incidental powers as pertain to all courts for the purpose of enabling them to exercise the jurisdiction which is conferred upon them. Although it is a court of general jurisdiction, yet in the exercise of these powers its jurisdiction is

limited and special; and whenever its acts are shown to have been in excess of the power conferred upon it, or without the limits of this special jurisdiction, such acts are nugatory, and have no binding effect, even upon those who have invoked its authority, or submitted to its decision. The authority conferred upon the superior court by the above section to determine the heirship of claimants to an estate is a "special proceeding," within the meaning of that term as defined in the Code of Civil Procedure. Section 22, Id., declares that "an action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or punishment of a public offense;" and section 23 of the same Code declares that "every other remedy is a special proceeding." Jurisdiction of special proceedings is conferred by the constitution upon the superior court; but, inasmuch as special proceedings are only such as are created and authorized by statute, the court, in the exercise of this jurisdiction, is limited by the terms and conditions under which the proceedings were authorized. It is stated in the briefs of both appellants and respondents that this may be regarded as a contest to determine heirship under the general provisions of the probate law, preparatory to the final distribution of said estate. We have not been referred, however, to any section of the Code which authorizes such proceeding other than section 1664; and, as we have above shown, unless authorized by statute, the superior court has no power by virtue of its general jurisdiction in cases at law and in equity to entertain a proceeding of this character. Section 1664, Id., provides that distribution of an estate may be made on the settlement of the final account, provided a petition therefor has been filed with said account, and section 1665, Id., provides that at any time subsequent to the final settlement of the account distribution may be made. Whenever distribution is sought under either of these sections the court has power to inquire into and determine who are the heirs of the deceased and entitled to receive the estate; but the terms of each of these sections show that this power can be exercised only after the final accounts of the administrator have been settled.

In view of the principles above stated, and of the statute under which the proceedings herein were had, it results that the superior court had no jurisdiction to entertain the petition of the plaintiffs, or to determine who were the legal heirs of the deceased. The petition of the plaintiffs, under which the court proceeded to act and to render judgment, was filed in the superior court within less than four months after the issuance of letters of administration upon the estate of the deceased; and the complaint and answers upon which the issues were tried were all filed before the expiration of the year. The court, however, had no jurisdiction to entertain any petition for this purpose, or to make any order that would be binding upon the heirs of the deceased, or upon those who may claim to be such heirs, until

"after the expiration of one year from the issuing of letters of administration upon said estate." It does not appear from the record that the respondents made any objection in the court below to its want of jurisdiction, but they now ask that the appeal be dismissed upon the ground that the proceeding was instituted before the expiration of a year after the issuance of the letters of administration upon the estate of the deceased. This court will not, however, dismiss an appeal from a judgment of the superior court upon the ground that that court had no jurisdiction to entertain the proceeding when it has assumed such jurisdiction, and rendered an affirmative judgment therein. Our appellate jurisdiction over the judgments of the superior court includes those in which that court improperly assumed jurisdiction, as well as those in which it was properly entertained. It is revisory of the action of that court, and is to be exercised by affirming, correcting, modifying, or setting aside its judgments; whereas, if the appeal therefrom is dismissed, the judgment would remain as originally pronounced. Section 1664, *supra*, provides, however, that "all appeals herein must be taken within sixty days from the date of the entry of the judgment or the order complained of." The judgment herein was entered January 3, 1890, and the appeal therefrom was not taken until June 2, 1890. It follows, therefore, that by reason of the failure to take the appeal from the judgment until more than 60 days after its entry we have no jurisdiction of that appeal, and it must be dismissed.

The appeal from the order denying the plaintiff's motion for a new trial was, however, taken within 60 days after its entry, and can, therefore, be reviewed by us. A commission was issued out of the superior court to Orris C. Cobb to take the depositions of several witnesses named therein, one of whom was "Jno. Thompson," of Cincinnati, state of Ohio. At the trial of the cause the respondents offered to read in evidence the deposition of James M. Thompson, taken under said commission, to which the appellants objected on the ground that the commission to Cobb did not authorize him to take the deposition of James M. Thompson, but to take that of one John Thompson. Upon this objection being made, J. C. McBurney testified on behalf of the respondents that he presented them in the matter of taking said deposition, and was personally acquainted with said James M. Thompson at the time of the issuance of the commission to take his deposition, and that "the name intended to be inserted in said commission was James M. Thompson, and the person designated as John Thompson in said commission was identical." It was not shown, however, that this fact was known by or ever communicated to the appellants, and the difference in the names would presumptively indicate different persons. The court overruled their objections, and allowed the deposition to be read. This ruling was erroneous. The commissioner had no authority to take the testimony of any person other than those named in the commission, and the

testimony of any person not so named was not properly taken by him, and should not have been received in evidence. The real name of the person whom the defendants intended to examine under the commission should have been given to the plaintiffs and inserted in the commission, in order that the plaintiffs might intelligently prepare their cross-interrogatories. This not having been done, the taking of the testimony of James M. Thompson was, so far as they were concerned, purely *ex parte*, and should have no effect against them in determining the issues in the case. *Brown v. Southworth*, 9 Paige, 351; *Scholes v. Ackerland*, 13 Ill. 650; *Strayer v. Wilson*, 54 Iowa, 565, 7 N. W. Rep. 7; *Denny v. Horton*, 11 Daly, 361; *Patterson v. Railway Co.*, 54 Mich. 91, 19 N. W. Rep. 766. In *Brown v. Southworth*, *supra*, a commission had been issued to take the testimony of James Hurd, whereas the true name of the witness who was intended to be examined, and who in fact was examined, was Imus Hurd. The court, upon the objection of the defendant, excluded the deposition upon the ground that, "owing to the mistake in his Christian name, he was not one of the witnesses that the commissioners were authorized to examine, and would not, therefore, by the laws of any country, be guilty of perjury if his deposition was false." In *Scholes v. Ackerland*, *supra*, a commission had been issued to take the testimony of Seymour Rank of Cincinnati. The deposition of Seigmund Rank, and signed "Seigmund Rank," was taken, and returned with the commission. The supreme court held that it was error in the trial court to admit the deposition in evidence, saying: "The *dedimus* directed the commissioner to take the testimony of one person, and under it the deposition of another person was taken. The special authority was not pursued. The names were essentially variant, and clearly indicated different individuals." We cannot agree with the respondents that, inasmuch as other witnesses testified to the same fact, this was an immaterial error. One of the issues presented for trial in the case, and which was sharply contested on both sides, was whether the name of the plaintiff's father was "Westfield" or "West-erfield." The respondents alleged in their answer that the true name of the plaintiff's father was Charles Westfield, and the court found that the plaintiffs are "the issue of Charles Westfield and Mary Westfield, his wife." It was for the purpose of establishing this fact that the defendants issued the commission to take the testimony of the witnesses at Cincinnati. This is not a case where an incidental and collateral fact which may not be seriously contested had been shown by incompetent evidence, but the testimony of the witness bore directly upon the main point in issue. In such a case all the evidence upon that point becomes material, and the introduction of any incompetent testimony is presumed to cause an injury to the opposite party. We cannot determine the weight which the court below gave to the testimony of this witness in reaching its conclusion upon this controverted point. If

the respondents believe that this testimony of the witness was unnecessary for the purpose of establishing their case, they should have declined to introduce it after the objection had been made thereto. They cannot now, after insisting upon a ruling in their favor, and introducing the testimony, say that the error was harmless.

Other errors appear from the statement of the case to have been assigned by the appellants, but, inasmuch as the error in receiving in evidence the above deposition necessitates the reversal of the order denying a new trial, and in view of what we have said upon the jurisdiction of the superior court to entertain the proceeding, it is unnecessary to pass upon the correctness of the other rulings of the court which were excepted to by the plaintiffs. The appeal from the judgment is dismissed, the order of the court below denying a new trial is reversed, and that court directed to enter an order dismissing the petition of the plaintiffs, and all proceedings subsequently taken thereunder.

We concur: DE HAVEN, J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; GAROUTTE, J.

88 Cal. 516

*Ex parte ESTRADO.* (No. 20,819.)

(*Supreme Court of California.* March 21, 1891.)

ABDUCTION—COMMITMENT.

1. An order of commitment for taking a female away for the purpose of prostitution "from her father, mother, guardian, or other person having the legal charge of her person," in violation of Pen. Code Cal. § 267, need not recite that the father, mother, or guardian had legal charge of the female's person, since the law gives them such charge.

2. A defect in the commitment in describing the offense is immaterial if it is sufficiently described in the order indorsed on the deposition.

3. Evidence that a woman took a girl 17 years old to a house of prostitution, to act as a domestic, warrants her commitment for taking the girl for the purpose of prostitution.

In bank. Appeal from superior court, city and county of San Francisco  
B. B. Haskell, for petitioner.

BEATTY, C. J. The petitioner is held in the custody of the chief of police of the city and county of San Francisco under a commitment which recites an order of the police judge holding her to answer "on a charge of felony, to-wit, enticing a minor away for the purpose of prostitution, committed as follows: said Cora Estrado did, in the city and county of San Francisco, on the 25th day of February, 1891, willfully, unlawfully, and feloniously take away a certain female under the age of eighteen years,"—naming her,—“of the age of seventeen years, from her father, for the purpose of prostitution. It is claimed that the imprisonment of the petitioner is unlawful for two reasons: *First* because the order recited in the commitment does not show that the father of the girl, from whom she was taken, had the legal care of her person; and, *second*, because the evidence adduced at the examination does not show any reasonable or probable

cause for holding that the petitioner is guilty of the offense charged.

The first ground is not alleged in the petition upon which the writ was issued, but is taken by way of objection to the return, and rests upon counsel's construction of section 267 of the Penal Code, which reads as follows: "Sec. 267. Every person who takes away any female under the age of eighteen years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, is liable to imprisonment in the state-prison not exceeding five years, and a fine not exceeding one thousand dollars." According to the construction of this section contended for, it is not sufficient to allege and prove that a girl has been taken away from her father, mother, or guardian; it must also be alleged that the father, mother, or guardian had the legal charge of her person. But a father, mother, or guardian necessarily has the legal charge of the person of a minor child or ward, and the true construction of the statute only requires averment and proof of legal custody when the child is taken from some other person. Moreover, a defect in the commitment in describing the offense is immaterial if it is sufficiently described in the order indorsed on the deposition, (*Ex parte Kell*, 85 Cal. 309, 24 Pac. Rep. 742, and cases cited;) and it is not alleged in this case, either in the petition or by way of traverse to the return, that a sufficient order was not so indorsed.

The second ground relied on is, if possible, more barren of merit than the first. We note in passing, that the petition, so far as this ground is concerned, was wholly insufficient to call for the issuance of the writ under the decision in *Ex parte Walpole*, 84 Cal. 584, 24 Pac. Rep. 308. But the writ was issued, and on the return enough of the deposition was read to show that the petitioner induced a girl of 17 years to go to a house of prostitution for the ostensible purpose of domestic service. She did not disclose to the girl or her father what the character of the place was. It is contended that this does not show that the purpose of taking the girl to the house was to make her a prostitute; but clearly such evidence would sustain a verdict against the petitioner. It is not to be supposed that a procuress will furnish direct and positive proof of her guilt by openly proposing a life of shame to a girl that she is seeking to lead astray. On the contrary, every motive of policy will conspire to induce her to pursue a course of discretion in carrying out her design, and she is judged not by what she says so much as by what she does. *People v. Marshall*, 59 Cal. 386. If a person is to be presumed to intend the natural consequences of his acts, it is certainly fair to presume that when a woman takes a young girl, without the knowledge or consent of her parents, and puts her to work as a domestic servant in a house of prostitution, she intends to lead her to take up that sort of life; for it is very certain that amidst such surroundings she cannot long preserve either reputation or modesty.

And a court should look with extreme suspicion upon such an excuse as the petitioner offers for her conduct. To treat it with any favor would make the nefarious traffic of which she is accused easy and safe, when it ought to be made difficult and dangerous. An example which would enforce the lesson that domestic servants for such places are to be sought outside of the ranks of immature girls, would be extremely salutary. The prisoner is remanded.

We concur: DE HAVEN, J.; GAROUTTE, J.; MCFARLAND, J.; SHARPSTEIN, J.; HARRISON, J.

88 Cal. 447

**BARNHART V. KRON.** (No. 13,233.)  
(*Supreme Court of California.* March 26, 1891.)  
COSTS—ALLOWANCE.

The allowance of costs is in the discretion of the trial court, and its action will not be disturbed on the ground that items of expense allowed against appellant were incurred by his co-defendant only, unless the record shows that the items were not incurred partly by appellant, or for his benefit.

Department 1. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

*E. Spalsbury* and *W. E. Turner*, for appellant. *T. H. Laine* and *Wm. T. Jeter*, for respondent.

HARRISON, J. The plaintiff moved the court below to retax the bill of costs filed by the respondent, by striking out each and every item thereof, upon the ground that none of said items were incurred by the respondent in maintaining or establishing any part of his defense to the action, but that each of said items was so incurred by his co-defendant. The court denied the motion, and the plaintiff has appealed.

The allowance or disallowance of items for the expenses and disbursements incurred upon the trial of an action must be left, in nearly every instance, to the discretion of the judge before whom the cause was tried. He has an opportunity to know the issues that are tried, the character of the prosecution and of the defense, the principal points upon which the witnesses are called, and whether there existed any necessity for calling them. We must assume that he would not allow costs to a party for witnesses that were unnecessarily called, or, in a case like the present, for witnesses who were not called for the respondent. There is nothing in the record in the present case which shows that the court did not properly exercise its discretion in refusing to strike out the items objected to. The plaintiff does not in his affidavit show that the witnesses named in the bill of costs were not necessary for the defense of the respondent, or that they did not testify in his behalf. His statement that certain of the witnesses were called as witnesses for the co-defendant of the respondent, and did not testify on behalf of the respondent, "except in a general manner in connection with H. F. Kron, \* \* \* and that they did not testify on behalf of Os-

car Kron, as contradistinguished from H. F. Kron," is an admission that they did in some respects, or upon some matters, testify in behalf of the respondent. So, too, his statement that other witnesses "did not testify as to any separate issue, as made by the answer of Oscar Kron," does not sufficiently show that the items for their defense as witnesses should be stricken from the cost-bill. The character of their testimony at the trial is not a test of the necessity for incurring the expense of subpoenaing them as witnesses. The memorandum of costs filed by the respondent is supported by the affidavit of his attorney that "the foregoing items of costs and disbursements in this action are correct, and that the said disbursements have been necessarily incurred in said action," and, unless controverted, should control the decision of the court. The fact that the items for the fees of the sheriff, the clerk, and the reporter were for services performed for both defendants, and not "for services performed for Oscar Kron alone," would not authorize the court to strike these items from the cost-bill. The respondent may have himself paid all of these items, and, if so, they were expenses necessarily incurred by him in his defense. The order appealed from is affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

88 Cal. 446

**MOULTON V. KNAPP.** (No. 12,212.)  
(*Supreme Court of California.* March 26, 1891.)  
INJUNCTION—RELIEF AGAINST EXECUTION—LACHES.

Where defendants consent to waive all defenses, and confess judgment on the strength of a verbal agreement that plaintiffs will stay execution for a year, they cannot enjoin a sale under the execution which plaintiffs levied before the end of the year, being guilty of laches in standing by and permitting the execution to be levied without moving the court to recall it. Affirming *Moulton v. Knapp*, 85 Cal. 385, 24 Pac. Rep. 803.

In bank. Appeal from superior court, Stanislaus county; WILLIAM O. MINOR, Judge.

*E. G. Knapp*, *T. Z. Blakeman*, and *Wright & Hazen*, for appellant. *Turner & Maddux* and *J. H. Budd*, for respondent.

PATERSON, J. In *Moulton v. Knapp*, 85 Cal. 385, 24 Pac. Rep. 803, (this cause,) an injunction had been granted on verified complaint alone. It was held that plaintiffs' remedy, if any they had, was by motion to set aside the execution, and to stay all process until the expiration of the year; that plaintiffs were not entitled to an injunction. That decision is the law of the case, and is conclusive of the question involved in this appeal. The judgment appealed from is based upon the complaint on which the preliminary injunction referred to was granted, and decrees to plaintiff the relief therein prayed for. Judgment reversed.

We concur: MCFARLAND, J.; DE HAVEN, J.; GAROUTTE, J.; HARRISON, J.; SHARPSTEIN, J.

NEVADA SCHOOL-DIST. v. SHOECRAFT *et al.*  
(No. 14,092.)ESREY v. SOUTHERN PAC. R. CO. (No. 13,-  
914.)

(Supreme Court of California. March 19, 1891.)

(Supreme Court of California. March 20, 1891.)

## SPECIAL ACTS—SCHOOL-DISTRICTS—OFFICERS.

1. There being nothing in the old constitution of California which prevented special legislation, Pol. Code Cal. § 1593, providing that "the number of school trustees for any school-district, except where city boards are otherwise authorized by law, shall be three," did not prevent the passage of Act Cal. March 25, 1874, creating the Nevada school-district, and providing for the election of its directors, and the latter not controls.

2. Const. Cal. art. 4, § 25, prohibiting the legislature from passing local or special laws in certain cases, does not affect past legislation.

SHARPSTEIN, J., dissenting.

In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

J. J. Caldwell, for appellant. Niles Sears and P. F. Simonds, for respondents.

PER CURIAM. This action is brought in the name of the Nevada school-district; and its purpose is to have the court decree that the defendants deliver all the lots, buildings, and school-houses in the city of Nevada, used for the purpose of conducting the public schools, into the possession of George E. Shaw, J. I. Caldwell, and N. Douglas, who claim to have been recently elected school trustees of said district. The defendants, all but two, are the persons who are the regularly elected and acting school directors of said district, under an act of the legislature, approved March 25, 1874, entitled "An act to establish and define the powers and duties of the board of education of Nevada school-district," and the other two are the janitor and watchman under said other defendants. The point relied on by appellant is that said act of March 25, 1874, under which the board of education of Nevada City has been acting for more than 16 years, is unconstitutional, and totally void. We do not think that the position taken by appellant is tenable. There is nothing in the old constitution which prevented special legislation, (Meade v. Watson, 67 Cal. 591, 8 Pac. Rep. 311;) and therefore the fact that when the said act was passed section 1593 of the Political Code provided that "the number of school-trustees for any school-district, except where city boards are otherwise authorized by law, shall be three," did not prevent the legislature from subsequently creating the Nevada district. The latest expression of the legislative will on the special subject in hand controls. The provision of the present constitution,<sup>1</sup> that the legislature shall not pass local or special laws in certain cases, applies to future, and not to past, legislation. Ex parte Burke, 59 Cal. 6. Neither do we think that the act is void because inconsistent with any of the provisions of the present constitution. The judgment is affirmed.

SHARPSTEIN, J., dissenting.

<sup>1</sup> Const. Cal. art. 4, § 25.

RAILROAD COMPANIES — INJURIES TO PERSON ON  
TRACK—CONTRIBUTORY NEGLIGENCE.

1. Where a person, seeing a train advancing on a track located within three feet from a high station platform, hurriedly crosses, and stands between the track and platform for the train to pass, she is guilty of contributory negligence, and cannot recover for injuries by being struck by the train.

2. In an action for injuries in such case there cannot be a recovery, notwithstanding plaintiff's negligence, on the ground that defendant's employees saw her dangerous position, and failed to stop the train and allow her to move, if the complaint merely alleges negligence on defendant's part, and not willful and wanton negligence.

BRATTY, C. J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

E. L. Craig and Horace Hawes, for appellant. Justin Jacobs and W. A. Gray, for respondent.

VANCLIEF, C. This was an action for damages for personal injuries. The plaintiff had a verdict and judgment for \$5,000, and the defendant appeals from the judgment and an order denying its motion for a new trial. The following are the material facts: The accident occurred at Leemore, a small town between Tulare and Huron, in the afternoon of February 13, 1889. The plaintiff had gone to the depot with a friend, one Miss Furnish, to bid good-bye to an acquaintance, one Mrs. Shively, who took the freight train which passed Leemore about that time. The general features of the locality are as follows: The main track ran east and west. Almost parallel with it, and a few feet to the south, was a side switch, which ran along a platform about four feet high, and came into the main track a little further to the east. The platform was about 100 feet long, and about 3 feet from the first rail of the side switch. The train was headed towards the east. Its forward part, consisting of the engine and some flat-cars, uncoupled from the caboose, (which was left standing on the main track opposite the platform,) for the purpose of taking on some box-cars which were on the western end of the side switch. Mrs. Shively got into the caboose, and the plaintiff and Miss Furnish, having taken leave of her, started to go around by the western end of the platform to the street which crosses the track there. They changed their minds, however, and went towards the western end. By this time the engine and the platform cars were backing down the side switch, and plaintiff was aware of the fact. She says: "I knew the train was switching before I crossed, but I thought I had time to escape any danger." "And I thought that the space between the cars—I had never paid any particular attention to that—and I thought the space between the cars and the platform would be wide enough that I could walk right along without being injured in the least." She "crossed



the switch just at the end of the box-cars." Miss Furnish did not cross the switch. In this regard plaintiff says: "At this time Miss Furnish was with me. She did not cross the track with me. I told her I thought we had ample time to get across. I don't know what her answer was exactly. I know she didn't come. I could not say whether she said anything to me about going, or that there was not time to cross the track before the cars came. There was no time for talking. She might have spoke, but I did not hear." Miss Furnish says that she did not cross because she was afraid. There were two brakemen employed on the train. One of them (Ferguson) was on the ground near the box-car for the purpose of signaling the engineer. The other (Williams) was on the end of the flat-car, but got down to make the coupling when the end of the train neared the box-car. He says: "A young lady ran in between the box-car and the flat-car, and I told her to 'get out of there, or you will get hurt'; and she said, 'I am not afraid.'" The fact that he did not say this is corroborated by Miss Furnish, by one Benton, "an engineer and pumper" about the station, and by Mrs. Shively. The plaintiff says that if the brakeman spoke to her she did not hear him, and it is assumed that her statement in this regard is true. After she had crossed the switch she found that she had not time to get around the platform before the end of the train reached her, so she stood with her back against the platform. While standing in this position the flat-cars passed her, but did not touch her; and she does not seem to have been alarmed. In this regard her testimony was as follows: "Question. The brakeman at this time was about six feet from you. Could you not have spoken to the brakeman, and asked him to hold until you could get around the corner? Answer. Yes, sir; I could. Q. Did you attempt to? A. No, sir. Q. Did you do anything but press back against the platform? A. I did not, because I thought I was perfectly safe." The same sense of security appears from her conversation with Mrs. Shively. The latter says: "I looked out the caboose window, and saw the plaintiff standing between the flat-car and the platform. I told her I thought it was a dangerous place where she was. She said she was all right;" and the plaintiff admits that this conversation occurred. The defendant's employees evidently shared plaintiff's opinion that there was no danger, for they paid no further attention to her. The brakeman Williams says: "I went about my work, made the coupling, and Mr. Ferguson, the other brakeman, gave the signal to go ahead. When he gave the signal to go ahead the girl was out of my sight. I did not see her. She must have gone behind the box-car, or I would have seen her." The engineer says he did not see her when he got the signal. And the fireman, who had seen her cross the switch, says: "She disappeared from my sight. I cannot tell which way she went;" and he went on ringing his bell without troubling himself

further about the matter. The plaintiff's account does not differ materially from this. Her testimony is as follows: "Question. You did not ask either brakeman to stop the train? Answer. No, sir. Q. But simply pressed back against the platform? A. I did. Q. State whether or not you are positive that both these brakemen saw you. A. I am positive. Q. I ask you now with reference to that. Do you mean to say at this time that both of those brakemen were looking at you at the time the car was coupled, and you were standing here, pressed up against the platform? A. I mean to say that both could have seen me. Q. You mean to say that both could have seen you? A. Yes, sir. Q. You don't mean to swear positively that they were both looking at you at that time? A. I didn't say they were looking at me at the time; but I know positively they both saw me. They saw me standing there. Q. At some time? A. At some time. Q. You don't mean, then, however, to be understood by the jury that at the time the coupling was made, and the signal given to start, that both these brakemen were looking at you in this position? A. I could not say they were looking at me just at that time, but I am positive they both saw me. Q. As I understand you, you are positive that while you were standing there, and the train was coming in, that they saw you over on that side of the car? A. Yes, sir." These extracts show clearly enough that the employees on the train saw the plaintiff go in between the flat-cars and the box-cars, and saw her standing up against the platform as the flat-cars passed her, but paid no further attention to her, apparently sharing her belief that she was safe. But neither she nor they seem to have thought of the fact that the box-cars were wider than the flat-cars. She says: "When the cars began to move I noticed that the box-cars were considerably wider than the flat. Then I fully realized my danger. Not until that time." The first car struck and crushed her shoulder, whereupon she threw herself upon the ground, and the train passed without injuring her further.

All of the foregoing facts appear without substantial contradiction. The only conflict is as to whether she heard the brakeman tell her not to go in there; and for the purposes of the opinion it is assumed that she did not hear him. Upon these facts it seems clear that her own negligence contributed directly and approximately to the injury. She had voluntarily placed herself in a dangerous position,—a position in which, as it turned out, she would be almost certain to be injured by the running of the cars in the ordinary way, and from which her more prudent companion shrank back in fear. Now, if the defendant's employees had not seen her position of danger, the defendant would have owed her no duty to take any particular precaution, and consequently would not have been guilty of negligence. *Toomey v. Railroad Co.*, (Cal.) 24 Pac. Rep. 1074. But the defendant's employees saw her in time to have avoided the accident, and hence were bound to use care. The brake-

men ought to have stopped the train, and, if necessary, compelled her to get out of harm's way. They did not do this, and hence are guilty of negligence. But the complaint does not charge that there was anything willful or wanton against the defendant. It simply alleges that the defendant "carelessly and negligently" ran one of its cars against the plaintiff, and this is all that the evidence shows. For this negligence on the part of the defendant plaintiff would have had a cause of action if there had been no contributory negligence on her part; but the rule is that, wherever the negligence of the plaintiff contributed directly and approximately to the injury, there can be no recovery. Such negligence must have contributed to the injury, not remotely, but directly and proximately. *Needham v. Railroad Co.*, 87 Cal. 409; *Kline v. Railroad Co.*, Id. 406; *Fernandez v. Railroad Co.*, 52 Cal. 53. But I think that such was the case here. The plaintiff's negligence was certainly not remote in point of time. She voluntarily went into a dangerous place, where she had no right to be; and the brakeman very foolishly allowed her to do so. The fatal mistake after this was in not thinking of the fact that the box-cars were wider than the flat-cars; and this was evidently shared by all the parties. The plaintiff probably was correct in the opinion which she expressed to Mrs. Shively shortly after the accident. "She said it was some of her foolishness, — it was her own fault. I asked her what in the world did she go in there for. She said, 'Some of her own foolishness.'" I think the judgment and order appealed from should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

BEATTY, C. J., dissenting.

(88 Cal. 396)

MASON v. VESTAL. (No. 14,001.)

(Supreme Court of California. March 20, 1891.)

EXECUTION—CLAIMS BY THIRD PERSON—  
FRAUDULENT CONVEYANCE.

1. In an action against an officer for the value of property wrongfully levied on, in which plaintiff claims title by purchase from the execution debtor, defendant may show that the alleged sale was fraudulent, without having alleged fraud in his answer.

2. In such action evidence that the execution debtor, who was a witness for plaintiff, before the trial made statements consistent with his testimony, is not admissible either in rebuttal of proof of inconsistent statements, or of evidence of his bad reputation for veracity.

Commissioners' decision. In bank. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

John F. Ellison and J. T. Matlock, for appellant. A. M. McCoy, Clay W. Taylor, and Jackson Hatch, for respondent.

TEMPLE, C. This appeal is from the judgment and from an order denying de-

fendant's motion for a new trial. The suit was brought against the sheriff to recover for property seized at the suit of L. Newcomer against James Gleason, who is a brother of the plaintiff. The answer denies the title and possession of plaintiff, justifies under the writ, and avers title in Gleason. Plaintiff derives her title from Gleason, and at the trial the controversy was as to the validity of the transfer against her. The questions raised relate almost entirely to alleged erroneous rulings in the admission of evidence tending to establish the *bona fides* of the sale to plaintiff. On the trial the plaintiff objected to the testimony of defendant on this subject, claiming that the answer did not raise the issue of fraud, and now insists that, if the rulings complained of are erroneous, they are still not injurious for the same reason. It is claimed that the insufficiency of this answer is established by the cases of *Albertoll v. Branham*, 80 Cal. 633, 22 Pac. Rep. 404, and *Sukelforth v. Lord*, (Cal.) 25 Pac. Rep. 497. In those cases, however, the defendants did not content themselves with simply denying the right of plaintiff, justifying under a writ, and averring title in the debtor of the attaching creditor, but proceeded to charge the plaintiff with an attempt to assist the debtor in defrauding his creditors. It is not necessary to set up such a defense; it has been held that the defendant is not required to anticipate the source from which plaintiff claims to derive his title, but, if he does proceed to set up the acts of fraud which he charges render plaintiff's title invalid, he must state facts which are sufficient in law to that end. But such plea is entirely unnecessary. A sale made to hinder, delay, and defraud creditors is, as to such creditors, absolutely void, and not voidable merely. Section 3439, Civil Code; *Freem. Ex'ns*, §136; *Butler v. Collins*, 12 Cal. 457. When the defendant denies the plaintiff's title, and shows himself to be a creditor, such evidence is admissible in rebuttal of plaintiff's proof of title. It shows such title invalid; that as to defendant the transfer is void. This question was expressly decided in this court in *Grum v. Barney*, 55 Cal. 254, and in *Humphreys v. Harkey*, Id. 284, and decisions elsewhere accord with these decisions. See *Tupper v. Thompson*, 26 Minn. 385, 4 N. W. Rep. 621.

James Gleason was a witness for the plaintiff, and gave evidence in support of nearly all the facts constituting plaintiff's case. In rebuttal he was impeached by evidence of statements made by him inconsistent with his testimony, and by showing that his reputation for truth was bad. The plaintiff was then allowed, against the objection of defendant, to prove by other witnesses that he had also made statements consistent with his testimony. When this testimony was objected to, counsel explained the offer, "We propose to prove [statements made?] at a time so far remote that there was no possibility he would foresee it, and which precludes the idea that the story was a fabrication of recent date." Respondent does not claim the right to prove such statements in rebuttal of the statements proved by de-

fendant, but claims that the fact that his witness was impeached by evidence of bad reputation justifies such evidence. The first thing that strikes one upon such a proposition is that this character of evidence does not meet the emergencies of the case. Where a witness is discredited by showing that he is not disinterested, but is testifying under an inducement to misstate the facts, there is some plausibility in the claim that statements to the same effect as his testimony, made before he became interested, tend in some degree to show that his testimony was not affected by this interest. Here the question was whether Gleason was a truthful man, and the evidence had no bearing upon that issue. The doctrine upon this subject is discussed in *People v. Doyell*, 48 Cal. 90; *Barkly v. Copeland*, 74 Cal. 1, 15 Pac. Rep. 307; and 1 Greenl. Ev. § 469. These authorities do not support the respondent in this matter, and he has not referred us to any which do. On the hypothesis of the plaintiff, Gleason had no interest in the case, nor could he have had any except upon the theory of the defense that the transaction was an attempt to hide his property from his creditors; and upon that supposition, who can tell how long he had been seeking a cover for his fraud? It is denied that the evidence was material, and it must have been injurious. The trial was before a jury, who found for plaintiff. We think the ruling erroneous. The other alleged errors need not be noticed, as they may not be repeated on a new trial, except the point made that the evidence does not show an immediate delivery. Upon that point we think there was evidence enough to warrant the court in submitting the matter to the jury. We advise that the judgment and order be reversed, and a new trial ordered.

WE CONCUR: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered.

#### IN RE CONSTITUTIONALITY OF A COURT OF APPEALS.

(Supreme Court of Colorado. Feb. 16, 1891.)

##### COURT OF APPEALS—CONSTITUTIONAL LAW.

1. An intermediate court, having appellate and final jurisdiction, can be constitutionally created in Colorado, but it cannot be given appellate jurisdiction in cases within the appellate jurisdiction of the supreme court, unless its judgment in such cases is made subject to review by the supreme court.

2. Senate Bill Colo. No. 98, creating "the court of appeals," is constitutional.

Senate bill No. 98 provides:

"Be it enacted by the general assembly of the state of Colorado: Section 1. No writ of error from, or appeal to, the supreme court shall lie to review the final judgment of any inferior court, unless the judgment, or, in replevin, the value found, exceeds two thousand dollars, exclusive of costs: provided, this limitation shall not apply where the matter in controversy relates to a franchise or freehold, nor

where the construction of a provision of the constitution of the state or of the United States is necessary to the determination of a case: provided, further, that the foregoing limitation shall not apply to writs of error to county courts. Sec. 2. There is hereby established a court which shall have appellate jurisdiction only, and which shall be called 'The Court of Appeals.' Said court shall consist of three judges, who shall possess the qualifications required of judges of the supreme court. Sec. 3. Immediately upon the taking effect of this act, the governor shall nominate, and, by and with the consent of the senate, appoint, one judge for the term of two years; one for the term of four years; and one for the term of six years; and biennially thereafter he shall in like manner appoint one judge for the term of six years. The term of office shall begin on the first Wednesday in April next after each regular meeting of the legislature. The judge having the shortest term to serve, not having been appointed to fill a vacancy, shall be the president of the court. Vacancies shall be filled in the same manner as original appointments are required to be made: provided, that, where such vacancies occur during the recess of the senate, the governor shall fill the same by appointment until the next meeting of the senate, when he shall nominate some person to fill such office. Sec. 4. The said court shall have jurisdiction—*First*. To review the final judgments of inferior courts of record in all civil cases, and in all criminal cases not capital. *Second*. It shall have final jurisdiction, subject to the limitations stated in subdivision 3 of this section, where the judgment, or, in replevin, the value found, is two thousand dollars or less, exclusive of costs. *Third*. It shall have jurisdiction, not final, in cases where the controversy involves a franchise or freehold, or where the construction of a provision of the constitution of the state, or of the United States, is necessary to the decision of the case; also in criminal cases, or upon writs of error to the judgments of county courts. Writs of error from, or appeals to, the court of appeals shall lie to review final judgments, within the same time and in the same manner as is now or may hereafter be provided by law for such reviews by the supreme court. Sec. 5. Any cause now pending in the supreme court, within the jurisdiction of the court of appeals, may, by order of the supreme court, upon notice to the parties or their attorneys of record, be transferred to the court of appeals for determination, unless objection to such transfer be interposed within thirty days after service of the notice aforesaid. Sec. 6. The court of appeals shall have power to adopt rules regulating the procedure therein in the same manner and with like effect as the supreme court; provided, that such procedure shall be so far similar to that of the supreme court as in the judgment of the judges of said court of appeals may be practicable. Sec. 7. The court of appeals may issue all necessary and proper writs and other processes in causes within its jurisdiction, in the same manner and with the same effect as

the supreme court. It shall be a court of record, and have a seal. Sec. 8. Opinions shall be delivered as may be required of the supreme court, and may be published in like manner and in separate volumes. The reporter of the supreme court shall be the reporter of the court of appeals. Sec. 9. The clerk of the supreme court shall be the clerk of the court of appeals, but shall receive no extra compensation therefor. He may employ such deputies and other clerical assistance as may be required to transact the business of the court: provided, the compensation paid such deputies and assistants shall not exceed the sum of \$1,500 a year in the aggregate: and provided, that the amount thus paid shall not exceed the amount of fees in cases in said court. The deputies and assistants shall be paid in the same manner as the deputies and assistants in the business of the supreme court. Sec. 10. Fees shall be fixed in said court in the same manner as in the supreme court. Sec. 11. The judges of the court of appeals shall each receive an annual salary of five thousand dollars, to be paid in the same manner as the salaries of judges of the supreme court are paid. Sec. 12. It shall be the duty of the secretary of state to provide the court and the judges thereof with suitable rooms, stationery, fuel, and other things, in like manner as the supreme court and the judges thereof are provided. Sec. 13. The judges of said court may employ such stenographic and other clerical assistance as may be required for the proper transaction of their duties, at a compensation not greater than that allowed for like services in the supreme court: provided, such compensation shall be paid only out of the fees collected in said court. Sec. 14. Terms of court shall be held at the capitol, at such times as may be fixed for the terms of the supreme court. Sec. 15. Writs of error from, or appeals to, the supreme court shall lie to review every final judgment of the court of appeals in cases which, under this act, might have been taken for review to the supreme court in the first instance. Such writs of error shall be sued out or appeals taken within sixty days after the rendition of the final judgment, and not thereafter. Any case in the court of appeals, not within the final jurisdiction thereof, shall be transferred to the supreme court, upon motion of a plaintiff in error or appellee, made within such time as such party may be by law or rule of court required to file a brief in the case, and such case shall be for hearing in the supreme court the same as if originally taken there, and all bonds or other obligations shall remain in full force and effect. When any such case is taken to the supreme court, all pleadings, papers, abstracts, briefs, and other things pertaining to the case shall be transferred to the supreme court, and new briefs and abstracts shall not be required, except by special rule in particular cases. Appeals shall be perfected, and a writ of error made a *supersedeas*, in the same manner and under the same conditions as in cases brought from other courts. Sec. 16. All acts and parts of acts inconsistent with this act are hereby repealed. Sec. 17. Whereas, an emergency

exists, this act shall take effect and be in force from and after its passage."

The following questions were by the senate submitted to the supreme court for determination: "*First*. Under the state constitution, can an intermediate court be legally created, having appellate and final jurisdiction? "*Second*. If such a court can be legally created, having co-ordinate jurisdiction with the supreme court in certain classes of cases, what jurisdiction could be conferred, and to what extent as co-ordinate jurisdiction? "*Third*. In what cases could not final jurisdiction be conferred upon such a court by legislative enactment? "*Fourth*. Would a court of appeals with jurisdiction as provided in senate bill No. 98, hereto attached, be obnoxious to any provisions of our constitution?"

**PER CURIAM.** In response to the interrogatories presented by the state senate touching the creation of a court of appeals, the following conclusions are respectfully submitted:

An intermediate court, having appellate and final jurisdiction, can be legally created. Such a court may, by legislative enactment, be clothed with appellate jurisdiction in cases remaining within the appellate jurisdiction of the supreme court, provided its judgments in such cases are made subject to review by the latter court. But no other court can, under the constitution, be given final appellate jurisdiction in cases left by law within the appellate jurisdiction of the supreme court. In re Court of Appeals, 9 Colo. 623, 21 Pac. Rep. 471. Under the constitution as amended in the fall of 1886, a court of appeals, as provided in senate bill No. 98, submitted for examination, is not obnoxious, so far as we are advised, to any constitutional objection.

(3 Idaho [Hasb.] 51)

JONES v. MEYERS.

(*Supreme Court of Idaho. March 18, 1891.*)

**PUBLIC LANDS—CANCELLATION OF FINAL RECEIPTS.**

1. The commissioner of the general land-office of the United States has the authority to cancel the final receipt or certificate issued to a pre-emption entryman at any time before patent issues to such entryman upon a proper showing, made in accordance with the rules and regulations of the land department, that said entryman obtained such certificate illegally or fraudulently.

2. The fact that such entryman had sold and conveyed the land so entered to an innocent purchaser would not deprive the commissioner of the authority to cancel an entry illegally or fraudulently made.

(*Syllabus by the Court.*)

Appeal from district court, Bear Lake county.

Ejectment to recover the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 33, township 12 S., range 44 E., Boise meridian.

*Smith & Smith*, for appellant. *R. S. Spence* and *Hawley & Reeves*, for respondent.

**SULLIVAN, C. J.** This is an action in ejectment, brought by the plaintiff against the defendant, to recover possession of

certain real estate situated in the county of Bear Lake, in this state. The complaint is the ordinary one in an action of ejectment. The answer is a general denial of the allegations of the complaint, and sets up that defendant is in possession of said land under a homestead entry. The pleadings are not verified. The case was heard in the court below upon the following stipulation of facts: "In the above cause it is stipulated and agreed that the facts are as follows: That about the month of August, 1884, Lauritz Neilson made pre-emption declaratory statement No. 1,362, embracing the land in controversy in this cause, and on the 1st day of October, 1885, made his pre-emption entry and final proof for the land embraced in his declaratory statement, being the lands in controversy in this case and in the case of *S. P. Sorrenson v. Emil Meyers*, [post, 218.] That he, on that day, purchased said land, and paid \$200 therefor, and took patent certificate for the same. That on the 28th day of October, 1886, said Lauritz S. Neilson, together with his wife, Catharine Neilson, by deed of conveyance duly executed and recorded, conveyed the lands described in the complaint to the plaintiff, Thomas W. Jones. That said Thomas W. Jones has never conveyed any of said land to any other person. That said conveyance to Thomas W. Jones was made in consideration of the sum of \$200, which had been paid in the month of June or July, 1886. That said purchase was made in good faith by said purchaser on June 7, 1886. That the defendant filed an affidavit in the United States land-office at Oxford, Idaho, charging that Lauritz S. Neilson had failed to comply with the requirements of the pre-emption law in the matter of residence and improvement of said land, previous to his final proof and payment therefor. That Neilson was notified by the officers of the United States land-office that a day had been set for hearing, to determine the question as to whether his final entry should be canceled on account of the fraud charged. That Neilson ignored this notice, and did not endeavor to resist such cancellation, if it could be made. That the defendant appeared at the time appointed, August 10, 1886, and offered his evidence; and that afterwards, on the 24th day of January, 1887, an order was made by the officers of the land department of the United States canceling the final entry of Lauritz S. Neilson; and thereafter, on the 25th day of January, 1887, the defendant, Emil Meyers, made homestead entry upon said land, which was accepted by the land department of the United States, and the proper certificate issued. That the defendant, Emil Meyers, took possession of the land mentioned in the complaint on the 20th day of January, 1887, and has ever since had possession of the same. That a reasonable rent for the premises described in the complaint during the time that the defendant has been in possession is \$150. That the damage to the plaintiff, being ejected from the land, is \$1.00; and it is agreed, in case the plaintiff recover in this case, that he shall recover \$1.00 damages for the taking of the place

by the defendant, and \$150 damages for rent during the time he has been excluded therefrom by the defendant. It is further agreed that said Neilson had not resided upon the said land six months prior to his making said final proof, and did not reside upon the land at the time he made said proof."

It is admitted that Lauritz S. Neilson, the grantor of plaintiff, entered the land in question under and by virtue of the pre-emption laws of the United States, and that at the time he made his final proof and received his final receipt or certificate from the receiver he had not resided upon said land six months, and did not reside thereon at the time of making said final proof. It is conceded by appellant that the final certificate was procured illegally and fraudulently, but appellant contends that the land department of the United States has no authority to cancel an entry where final certificate has been issued, and the land described therein sold to such a purchaser as the stipulation of facts shows appellant to be. It is admitted that respondent entered a contest to set aside Neilson's entry in June, 1886. It is also admitted that appellant purchased the land in question from Neilson in June, 1886, and paid him therefor in June or July, 1886, but that said Neilson did not execute a deed of conveyance conveying said land to the appellant until October 28, 1886. Neilson was duly notified that said contest was set for hearing August 10, 1886, but failed to appear and defend. The respondent in this cause introduced his testimony at said hearing, and thereafter said entry was canceled by the proper officer of the land department. The question, then, is, had the land department, under the facts of this case, the authority to cancel said entry? The secretary of the interior is given by law the entire supervision of the survey and the sale of the public lands. The commissioner of the general land-office is by law required to perform, under the directions of the secretary of the interior, all executive duties appertaining to the survey and sale of the public lands of the United States. The registers and receivers are but local officers of the several land-districts, charged with the performance of certain duties, and subject to the direction and supervision of the commissioner of the general land-office and secretary of the interior. From the organization of the land department of the United States down to the present time it has been held by that department (and by the supreme courts of numerous states and territories) that it had the right and authority to cancel all entries of public lands upon a proper showing, made prior to the issuance of a patent, if the entrymen had failed to comply with the law, and had procured final receipt or certificate upon false proof. In *re Cogswell*, 3 Dec. Dep. Int. 23, and authorities there cited; *Hosmer v. Wallace*, 47 Cal. 461; *Figg v. Hensley*, 52 Cal. 299; *Hestres v. Brennan*, 50 Cal. 211; *Vance v. Kohlberg*, 50 Cal. 346; *Randall v. Edert*, 7 Minn. 450, (Gil. 359); *Gray v. Stockton*, 8 Minn. 529, (Gil. 472); *Judd v. Randall*, (Minn.) 29 N. W. Rep. 589; *Bellows v.*

Todd, 34 Iowa, 31; McLane v. Bovee, 35 Wis. 27; Franklin v. Kelley, 2 Neb. 79; Hayes v. Parker, 3 Pac. Rep. 901. We have examined the cases cited by counsel for appellant and many other cases not cited, and, with the exception of Smith v. Ewing, 23 Fed. Rep. 741, have been unable to find any case that sustains the view taken by appellant. The decided weight of authority is clearly against the position contended for by appellant. The appellant cites *Cornelius v. Kessel*, 58 Wis. 237, 16 N. W. Rep. 550, as holding that the commissioner had no power to cancel a final certificate. The court says: "The land was then subject to entry. It was purchased by him, and paid for. There was no fraud or mistake in the transaction." In the case at bar it is admitted that the entryman had not complied with the law; that he had not resided upon the land six months, and was not residing there at the time he made his final proof. The case at bar differs from the one last above cited in this: in that case, there was no mistake or fraud; in this, there appears to have been perjury committed in making the final proof, and by such perjury a fraud was committed upon the land department. The appellant also cites *U. S. v. Minor*, 114 U. S. 223,<sup>1</sup> as an authority in this case. It was held in that case that, where the land department had issued a patent upon false and perjured affidavits, the United States is not precluded from instituting a suit in equity to cancel such patent. It does not conflict with former decisions of said court, in which it has been held that the decisions of the land department upon questions of fact and mixed law and fact are conclusive.

Appellant contends that the supreme court of the United States in *Myers v. Croft*, 13 Wall. 291, holds that a sale by a pre-emptor, after entry and final proof and the issue of a final certificate to a *bona fide* purchaser for a valuable consideration, conveys to the purchaser a valid, legal title. The court in that case in no respect intimates that the grantee of a pre-emptor would get any better title than his grantor had, or that any title would pass if the grantor had not in good faith, and in full compliance with the requirements of the pre-emption law, entered the land conveyed. The concluding portion of said opinion indicates very strongly the contrary opinion. The court says: "If it had been the purpose of congress to attain the object contended for, it would have declared the lands themselves unalienable until the patent was granted. Instead of this, the legislation was directed against the assignment or transfer of the right secured by the act, which was the right of pre-emption, leaving the pre-emptor free to sell his land after entry, if at that time he was in good faith the owner of the land, and had done nothing inconsistent with the provisions of the law on the subject." 13 Wall. 297. It will not be contended for a moment that Neilson, appellant's grantor, was in good faith the owner of the land in question

when he sold the same to the appellant. The case of *Carroll v. Safford*, 3 How. 441, cited by appellant, proceeds upon the theory that the government has no right to refuse a patent to a *bona fide* purchaser of land offered for sale. The court says: "But where there has been fraud or mistake the patent may be withheld, and every other purchaser at tax-sale incurs the risk as to the validity of the title he purchases." The case of *Brill v. Stiles*, 35 Ill. 809, is cited by the appellant as holding that the commissioner has no power to cancel the final certificate, and that his doing so is void. The court says: "If the entry was authorized by law, the title passed to him, subject to be defeated by the proof of a right of pre-emption; and, if unauthorized, he acquired no title. But until it was shown to have been illegally made, or to have been defeated by proof of a pre-emption, the certificate of purchase was evidence of an equitable title." There may be some apparent conflict in the Illinois decisions, but in the case of *Robbins v. Bunn*, 54 Ill. 48, the court has clearly shown that there is no conflict in the decisions of that state upon this question. The court says, after citing *Brill v. Stiles*, supra, and other decisions: "These two classes of cases may seem at first inconsistent with each other, and there are probably some expressions in the various opinions not strictly harmonious, but on further consideration it will be seen there is no real antagonism in the decisions. The cases in the first class relate to pre-emption claims upon which the land-officers have decided. The pre-emption law of 1830 required proof of the facts upon which the right of pre-emption depended to be made to the satisfaction of the register and receiver, agreeably to rules to be prescribed by the commissioner of the general land-office. This, by implication, gave them the right to decide all cases of contested pre-emption, so far as they depended upon the facts of prior settlement; and this construction has been uniformly given to the law, as will be seen by the cases before cited and in other authorities quoted in the opinions pronounced in these cases. The finding of the land-officers upon the facts in matters of pre-emption has been held conclusive by the courts, upon the familiar ground that such officers, in these proceedings, were acting in a quasi-judicial capacity, and within the scope of their authority. But, on the other hand, when these officers have undertaken to cancel a patent or a certificate of entry for which a purchaser has paid his money, either at their discretion, or under some patented regulation of the department which the law did not authorize, or under some clearly erroneous construction of the law of congress, the courts have held themselves not bound by such acts of the officers of the land department, because they were not exercising a judicial function within the limits prescribed by law. The cases cited by counsel for defendant will be found to relate to proceedings of this character. Between those two classes of authorities there is a clear and sound distinction. In the one, the proceedings of the land-officers are held

<sup>1</sup> 5 Sup. Ct. Rep. 836.

conclusive, because judicial in their character, and within their conceded jurisdiction; in the other, such proceedings are held not conclusive, because they are either ministerial in their character, or, if judicial, beyond the authority given by the acts of congress." In *Stark v. Starrs*, 6 Wall. 402, it is claimed that the supreme court of the United States holds that "a right to a patent once vested is treated by the government when dealing with the public lands as equivalent to a patent issue." This case arose under what is known as the "Oregon Donation Act," and under that act the right of the claimant to a patent became perfected when the certificate of the surveyor general and accompanying proof were received by the commissioner of the general land-office, and he found no valid objection thereto. In that case the law had been fully complied with by the claimant, but the commissioner objected to issuing the patent to Stark upon the ground that the land was brought under the operation of the "town-site act," and was not subject to disposition under said "donation act." If the "donation act" of 1850 was applicable to the lands, Stark's right to a patent became perfect when the certificate of the surveyor general and accompanying proof showed, in the judgment of the commissioner, a compliance with its requirements. In that case the commissioner's objection to the issuance of a patent arose, not from any defect in the certificate or proof, but from an opinion that the lands were subject to the provisions of the "town-site act" of 1844. How very different from the case at bar! The appellant's grantor had not complied with the requirements of the pre-emption law. Through false proof he had obtained a final certificate. A hearing was ordered long before the appellant received a deed of conveyance from his grantor, and, had the appellant examined the records of the land-office at Oxford, Idaho, he would have found a contest pending to set aside his grantor's entry at least four months before said deed of conveyance was executed. If an entryman can through false proof pre-empt land, and, as soon as he obtains his final certificate, sell the same, and convey a valid title, it seems to us that it would "open wide the door to frauds innumerable and to an extent almost incalculable." Until the patent issues, we think that the rule *caveat emptor* applies with peculiar force to purchasers of lands from pre-emption entrymen.

Chief Justice TRIPP, of Dakota, in the case of *United States v. Edward H. Dudley*, 1887,<sup>1</sup> rendered an exhaustive opinion as to the authority of the land department to cancel a final certificate issued to a pre-emptor, in which he reviews and comments upon numerous decisions of the supreme court of the United States and decisions of the highest courts of many of the

states and territories, and arrives at the following conclusions, to-wit: "I am clearly of the opinion that the supervisory and appellate powers vested in the secretary of the interior, and the commissioner of the general land-office, under his direction, gives them the right to examine all acts of the register and receiver. In matters of fact left to the determination of the local officers, the jurisdiction of the secretary and commissioner may be exercised by appeal and a re-examination of the facts themselves, or by examination of their action, and requiring them again to examine the questions of fact involved, and in all cases to supervise the purely administrative or executive acts of the local officers. The power of supervision given the secretary and commissioner is a general one over all the acts of the register and receiver. There is no exception made in the matter of the issuing of final certificates; and, if the position here contended for be the correct one, to-wit, that the commissioner must issue a patent at once upon the presentation of the certificate, and that issue of the certificate would conclude all inquiry into matters settled by its issue, then it would conclude all supervision by the superior officers; and on that reasoning the patent might as well issue by the local as by the supervisory officers. I am led to adopt the contrary of this reasoning. Besides, any other view would lead to hopeless conflict between the department and the courts. Our calendars would be crowded with land contests, and the action of the department would be indefinitely postponed. The only true doctrine, in my opinion, is that announced by the supreme court,—that the jurisdiction of the court commences when that of the department ceases; and that, until the patent issues, and while the matter is still pending before the department, the question is not one of private right upon which the courts have power to act." We are of the opinion that if a pre-emptor has not complied with the law, and procures a final certificate through fraud or perjury, a purchaser from him gets no better title than such pre-emptor obtained, and, if such fraud or failure to comply with the law is established to the satisfaction of the land department, under its rules and regulations, before patent has been issued, the land department has the authority to cancel such certificate. In *re Cogswell*, 3 Dec. Dep. Int. 23, and authorities there cited. Those decisions which hold that a final certificate is equivalent to a patent issued proceed upon the theory that the pre-emptor has complied with the law as to residence and improvement and all other requirements, and that such certificate was not procured through fraud or perjury. The judgment of the court below is affirmed, with costs.

HUSTON and MORGAN, JJ., concur.

(3 Idaho [Hasb.] 61)

SORRENSEN v. MEYERS.

(Supreme Court of Idaho. March 18, 1891.)

Appeal from district court, Bear Lake county. *Smith & Smith*, for appellant. *R. S. Spence and Hawley & Reeves*, for respondent.

<sup>1</sup>A *visi prius* decision, (rendered by Chief Justice TRIPP, sitting as judge of the district court,) and not reported in any regular series. But see, also, *Vantongeren v. Heffernan*, 38 N. W. Rep. 52, in which substantially the same language is used in a Dakota supreme court decision.



SULLIVAN, C. J. It is stipulated that the question raised by the appeal in this cause is the same as that raised in the cause of Jones v. Meyers, ante, 215, (decided at the present term of this court,) and that the decision in this cause abide the decision in said cause of Jones v. Meyers. For the reasons stated in the opinion of this court in the said cause of Jones v. Meyers the judgment of the court below is affirmed, with costs of this appeal.

MORGAN and HUSTON, JJ., concur.

#### STATE v. LYNCH.

(Supreme Court of Oregon. March 23, 1891.)

#### ASSAULT WITH INTENT TO KILL—INDICTMENT—INTENT.

In an indictment for an assault with intent to kill, after properly charging the assault, the intent may be alleged by averring that the assault was made "with the intent him, the said J. B., then and there to kill and murder."

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

The charging part of the indictment is as follows: "The said Tony Lynch, on the 20th day of October, A. D. 1890, in the county of Multnomah and state of Oregon, was armed with a dangerous weapon, namely, a pistol loaded with gunpowder and leaden balls, and, being so armed with such dangerous weapon aforesaid, did then and there unlawfully and feloniously assault one James Brown with such dangerous weapon by then and there shooting at him, the said James Brown, with said loaded pistol, with intent him, the said James Brown, to then and there kill and murder." A general demurrer to this indictment was interposed and overruled. Upon a trial the jury found the defendant guilty as charged in the indictment, and he was sentenced to the penitentiary, from which judgment he has appealed to this court.

H. E. McGinn, A. F. Sears, Jr., and N. D. Simon, for appellant. F. A. Stevens, Dist. Atty., and W. T. Hume, for the State.

STRAHAN, C. J., (after stating the facts as above.) There was but one question presented upon the argument that we deem necessary to notice, and that is the sufficiency of the indictment. The appellant's contention is that the indictment is fatally defective for the reason that it fails to charge that the assault was made maliciously, or of deliberate and premeditated malice, and this is the only question necessary to be decided. The indictment is founded on section 1740, Hill's Code, which is as follows: "If any person shall assault another with intent to kill, to rob, or to commit a rape upon such other," etc. The indictment charges that the assault was made upon the prosecutor "with the intent him, the said James Brown, to then and there kill and murder." It may be safely conceded that the authorities are not uniform on this subject, and probably the weight of authority is with the appellant; but in State v. Doty, 5 Or. 491, a conviction was upheld upon an indictment for this crime which certainly was not drawn with as much technical accuracy as the one now before the court. After disposing of

some other questions presented in that case the court said: "But we do not think it can be maintained that this indictment does not charge a crime within the meaning of subdivision 4, § 123, of the Criminal Code. The charge is in the language of the statute, and the legal significance of the term 'assault with intent to kill' implies the unlawful and felonious attempt to take the life of another." This is a construction of this provision of the Code by this court which has never been questioned, and which we do not feel at liberty to disregard. Mr. Bishop, in his work on Directions and Forms, is in accord with this construction. In section 553 this distinguished author says: "In general, the verb 'to kill,' in such a connection, requires only the intent to do what would constitute, if done, either murder or manslaughter." And he adds, in section 555: "The common and prudent method of alleging this intent, not inquiring whether any other is permissible, is after its legal effect in distinction from its outward form; as, 'with intent to kill the said X.,' or 'with intent to murder the said X.,' or 'with intent to kill and murder the said X.,' or 'with intent feloniously and of his malice aforethought to kill and murder the said X.,' or 'with intent feloniously and of his malice aforethought to commit murder in the first degree.'" And in effect the same doctrine is announced in People v. Congleton, 44 Cal. 92; People v. Swenson, 49 Cal. 388. The intent necessary to constitute a crime under this section of the Code is stated with as much particularity as could be reasonably desired. The assault was made with intent to kill and murder, and the circumstances of the assault are stated with particularity. In addition to this, the court instructed the jury in effect that they must find that the assault was made of deliberate and premeditated malice or maliciously before they could find the defendant guilty. Practically the defendant had the benefit of every principle of law for which he has contended on this appeal. Finding no error in the judgment appealed from, the same must be affirmed.

BEAN, J., (concurring.) I concur in the opinion of the chief justice in this case solely upon the ground of *stare decisis*. It seems to come within the doctrine of State v. Doty, 5 Or. 491; and, while I think that case is not supported by the better authority, I do not feel at liberty to disturb it at this time. I am authorized to say that Justice LORD concurs in this view.

#### CADWELL v. BRACKETT.

(Supreme Court of Washington. March 13, 1891.)

#### MECHANICS' LIENS—CONTRACT—EVIDENCE.

In an action to foreclose a mechanic's lien on defendant's property for services by plaintiff as superintendent of buildings thereon, plaintiff testified that defendant employed him, but he made no definite statement of the manner of his employment, and admitted that he came to take charge of the work under contract with defendant's architects to superintend their buildings, including defendant's. Defendant denied having employed him, and was corroborated by the ar-

ohitects, who testified that the employment was by them, that they were to pay him, and defendant only to make up to them a certain amount of his wages. *Held*, that a judgment for plaintiff was unwarranted.

Appeal from superior court, Kittitas county.

Action by W. H. Brackett to foreclose mechanics' liens on property owned by E. P. Cadwell. Judgment for plaintiff, and defendant appeals.

*Frederick Bausman*, for appellant. *Welsh & Warner and Reavis & Mires*, for appellee.

DUNBAR, J. From a careful investigation of the evidence in this case, we are unable to arrive at the conclusion reached by the lower court. It is true that Brackett testified that he was employed by Cadwell to superintend his building, but makes no definite statement as to the manner of his employment, while he admits he came to Ellensburg under contract with Proctor & Dennis at a stipulated price of six dollars per day. Cadwell, on the other hand, who, for all the record shows, is entitled to as much credit as Brackett, and whose interest is the same, testifies positively that he never employed him at all; that all the contract or understanding he ever had concerning his work was with Proctor, and that the agreement with him was that he (Cadwell) would make up to Proctor & Dennis any deficiency that might exist to bring Brackett's wages to six dollars per day after they had appropriated a certain per cent. that they were to receive on other buildings; and that, in consideration of such deficiency being made up to them, Brackett was to superintend the construction of his (Cadwell's) buildings, in common with the other buildings which Proctor & Dennis were under contract to superintend in Ellensburg. This statement of Cadwell's is explicitly corroborated by Proctor, who, in his direct testimony, says: "The defendant was to pay the deficiency that might accrue from the proceeds of our work on the other part of it. You [meaning defendant] were to make that up, so that we would not lose anything by bringing Brackett up here at \$6 per day." He also testifies that when he put Brackett to work on their buildings, under their contract with him, the defendant's buildings were included in the lot; nor can we see anything in the cross-examination of the witness that substantially affects his direct testimony. The testimony of the witness Loyd might seem to support the theory of the plaintiff. His testimony, admitted by the court as rebutting testimony, was as follows: "There was one interview between Cadwell, Proctor, and myself, in which Mr. Proctor desired to make some arrangement for a superintendent. He stated he could not furnish a superintendent, as his contract did not contemplate a superintendent; and in discussing the matter something was said with reference to compensation, and Mr. Proctor said that, generally, the services of such a man was worth \$10 or \$12 a day, but he thought in this case the better way was to prorate the expenses among the different buildings, and he intimated

that he thought about two per cent. would be about the compensation on that sort of a building." Conceding that this testimony is literally true, it does not appear that Cadwell responded in any way, or that the "intimation" resulted in a contract, and in no way disputes the testimony that Cadwell and Proctor afterwards agreed on the terms which they both swear to. Tending to weaken plaintiff's claim is the testimony of his successor in the work, Mr. Paul, who swears that when Brackett quit work he told witness that Cadwell owed him \$40 or \$50, and said that he would not pay him, and that he was going to sue him if he did not pay it. Counsel for appellee in his brief says that the testimony of Mr. Paul is indefinite, but it seems to us about as definite as any testimony in the case. We do not see any force in the argument of appellee that the exhibits and testimony show that Cadwell treated and recognized Brackett as superintendent; for Cadwell does not deny that Brackett superintended his work, but claims that he did not employ him, and that he was to pay Proctor & Dennis for his services, not at the rate of 2 per cent. on the value of the buildings, but according to the contract testified to by him. The superintendent's duties would be the same under either theory of employment, and Cadwell would have a right to give him the same recognition and authority under one theory as he would under the other. It appears from the testimony that another arrangement was afterwards made between Brackett and Proctor & Dennis in regard to Brackett's compensation, but it does not satisfactorily appear that this new arrangement was ever brought to the knowledge of Cadwell, but, on the contrary, it does appear that when it came to his knowledge that Brackett was intending to hold him responsible for his services, he immediately discharged him. From the whole testimony, it seems to us that Brackett has already received more than he was entitled to under his contract, and that he ought not to recover anything against the defendant in this action. With this view of the testimony, it is not necessary to investigate the law questions involved. The judgment of the lower court is reversed, and the case remanded, with instructions to the court to enter judgment for the defendant for costs.

ANDERS, C. J., and HOYT, STILES, and SCOTT, JJ., concur.

(2 Wash. St. 194)

DELFEY V. HAUSON *et al.*

(*Supreme Court of Washington*. March 5, 1891.)

INTOXICATING LIQUORS—CIVIL DAMAGE SUIT—PARTIES.

Code Wash. § 2059, provides that "every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person or property or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person; and a right of action

is also given against the owners of the building in which the liquor was sold or given, where they knew of or permitted it. *Held*, that the words "severally or jointly" refer to defendants, and, where a widow and her minor children sue jointly for the death of the husband, there is a misjoinder of parties plaintiff.

Appeal from superior court, King county.

*Richard Osborn, Thompson, Edsen & Humphries, and Lewis & Gilman*, for appellants. *N. Soderberg and T. C. McDivitt*, for appellees.

HOYT, J. The widow and three minor children joined in an action under section 2059 of the Code to recover for the death of the husband and father, brought about by his intoxication caused in part by liquor sold him by the defendant. The record presents many important questions, but the argument here has been almost exclusively confined to two of them, and, as the others are doubtful and unimportant, we shall only decide those argued. The first claim of appellant is that there was a misjoinder of parties plaintiff. That the four plaintiffs who, under our statute, each have a separate cause of action, could not join in an action, unless by statute authorized so to do, is elementary. It is contended, however, that the section under which the action was brought specially authorized them to sue jointly or severally. The section is as follows: "Every husband, wife, child, parent, guardian, employe, or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person; and any person or persons owning, renting, leasing, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who, having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors, shall, if any such liquors sold or given therein have caused, in whole or in part, the intoxication of any person, be liable, severally or jointly, with the persons selling or giving the intoxicating liquors as aforesaid, for all damages sustained, and the same may be recovered in a civil action, in any court of competent jurisdiction. A married woman may bring such action in her own name, and all damages recovered by her shall inure to her separate use; and all damages recovered by a minor under this chapter shall be paid either to such minor, or to such person in trust for him, and on such terms, as the court may direct. In case of the death of either party, the action and right of action to or against his executor or administrator shall survive."

It is contended, on the one hand, that the words "jointly and severally" refer to the plaintiffs; and on the other, that they refer to the defendants. We think

the latter construction the true one. The other construction would lead to such absurd results that it could not be presumed to have been intended by the legislature. Under the section thus construed, it would be competent for any number of persons, however differently injured, to join in one action; and we might have a case where one person was seeking to recover for the killing of a horse, and another for the loss of an arm. That causes of action thus distinct and several could not properly be joined in an action is too manifest for argument; and even if the statute had provided, in express terms, for such joinder, there could be no real unity of interests between the plaintiffs, for the reason that, though the remote cause of the loss to each would be the same, the immediate cause might be entirely and widely separated acts of the intoxicated person. Besides, the elements that entered into the question of damages would have nothing in common. We think the legislature has not used language that compels us to adopt such an absurd construction. On the contrary, the language can be given its full force, and the words "jointly or severally" held to apply to the defendants, which not only avoids any absurdity, but tends greatly to increase the benefits of said section, by allowing the injured party in one suit to sue any or all who have contributed to the intoxication of the person through whom the injury was received.

The appellant also contended that the evidence showed that the death of the husband and father was not caused by his intoxication, and that for that reason the verdict is wrong. But as this question is one of fact for the jury, under proper instructions, and as the facts may be different upon a retrial of the cause, it would be profitless to discuss it now. The effect of the instructions have not been largely commented upon, and we shall not review them more than to say that there was nothing in the case to authorize any recovery other than for loss of support, and the instructions should have confined the jury to that element of damages. The judgment must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

ANDERS, C. J., and DUNBAR and STILES, JJ., concur. SCOTT, J., did not sit at the hearing.

REYNOLDS *et al.* v. HORTON *et al.*  
(Supreme Court of Washington. March 5, 1891.)

REPLEVIN—TITLE TO SUPPORT AGAINST WRONG-DOER.

1. A company leased state land, and afterwards discovered building stone thereon, which they quarried and sold, together with the lease, to plaintiff. Defendant, without right, but in collusion with plaintiff's agent, removed the stone. *Held* that, although the quarrying of the stone was waste, plaintiff could replevy it where his possession was under *bona fide* claim of ownership.

2. Under Code Wash. § 247, a finding by the court stands as a special verdict, and will not be disturbed unless so clearly unfounded that it would be set aside if made by a jury.

Appeal from superior court, King county.

*Geo. D. Blake and W. Lais Hill*, for appellants. *Cole, Blaine & Devries*, for appellees.

**STILES, J.** The court below found as a fact that appellees were in possession of the stone in controversy at the time when appellants entered upon the lands where it lay and removed it. Considering the character of the property,—newly-quarried stone,—we cannot say that the court was not warranted in its finding. Unless the finding was so clearly unfounded as that it should have been set aside had it been made by a jury, we should not disturb it. It stands as a special verdict, and must be so treated. Code, § 247. Being in possession, then, it further appeared that appellees claimed to hold the stone under the following circumstances: A corporation known as the "Builders' Material Company" in 1889 obtained from the board of commissioners of Whatcom county a lease of certain lands in section 36, and thereafter, having discovered a ledge of building stone thereon, opened a quarry, and took therefrom the stone in question; and while the stone was still lying at the quarry the Builders' Material Company assigned its lease, and made a bill of sale of the stone, to the appellees. The appellants, without any right in them, entered upon the leased land, and took away the stone by collusion with the appellees' agent, who resided upon the land, near the quarry, and had charge of the property. The complaint alleged appellees to be the owners and entitled to the possession of the property, and that appellants had wrongfully taken it from their possession. The answer was a general denial. Judgment was for the appellees. Appellants contend that, inasmuch as the stone was quarried from lands belonging to the state, and that the act of quarrying was waste by the tenant, the possession of the lessee and of its grantee under the bill of sale was wrongful, and not sufficient to base thereon an action for the taking and detention. But, inasmuch as the appellees were in possession of the stone, under a claim of ownership, made in good faith, although perhaps erroneous, we hold that the orderly administration of affairs in the community requires that the defendants should not be allowed to get and retain the property in the manner shown by the record. The appellees' possession was rightful as against every one, with the exception, possibly, of the state, and was good as against any mere wrong-doer. *Wells, Rep. § 110; Cobbe, Rep. § 136; Sprague v. Clark, 41 Vt. 6.* The judgment of the court below is therefore affirmed, with costs.

**ANDERS, C. J., and DUNBAR, J., concur.** **HOYT, J., disqualified.** **SCOTT, J.,** did not sit at the hearing.

(2 Wash. St. 209)

#### MURPHY v. ROSS.

(*Supreme Court of Washington.* March 13, 1891.)

#### APPEAL—TIME TO PERFECT.

An appeal will be dismissed where it is not perfected within the time prescribed by the

laws of Washington and the rules of the supreme court, and no reasonable excuse is given for failure to perfect it.

Appeal from superior court, Pierce county.

*Fred T. Peet*, for appellant. *Joseph Sessions*, for appellee.

**DUNBAR, J.** This is a motion to dismiss an appeal for the reason that appellant has not perfected his appeal within the time prescribed by law and the rules of this court, and affidavits and counter-affidavits are filed in support of and opposed to the motion. We do not think that the affidavit of appellant's attorney shows any legal or reasonable excuse for the failure. It follows that the motion will be sustained, and the appeal dismissed, and it is so ordered.

**ANDERS, C. J., and SCOTT, HOYT, and STILES, JJ., concur.**

(2 Wash. St. 327)

#### SQUIRE v. GREER.

(*Supreme Court of Washington.* March 13, 1891.)

#### BOUNDARIES—GOVERNMENT SURVEYS—STATEMENT ON APPEAL.

1. In construing a deed describing land by the government survey the court must ascertain the corners of the survey as actually established, and not as they ought to have been established; but the presumption that the deed was intended to convey according to the established corners may be rebutted by evidence that the parties were mistaken as to the location of the government line, and intended to convey a definite tract.

2. A statement of facts will not be stricken from the files of the supreme court on the ground that it is misleading if the record shows that it was substituted by order of the court for an original statement which had been lost, and which had been signed by the attorneys for both parties, and certified by the judge.

Appeal from superior court, Pierce county; **FRANK ALLYN, Judge.**

Action by George H. Greer against William Squire, involving the location of a section corner by government survey. There was judgment for plaintiff, and defendant appeals.

*Town & Likens*, for appellant. *C. P. Culver*, for appellee.

**DUNBAR, J.** We do not think that the point raised in appellee's brief, that the statement of fact was misleading, or not understood by the court, is well taken. The record shows that the statement of fact was agreed upon, and regularly signed, by the attorneys of both parties to the action, and certified to by the judge; and that the statement of facts presented here was by the order of the court substituted for the original statement of facts, which had been lost. Nor do we think that the decisions cited by appellee, to-wit, *Mulkey v. McGrew, 2 Wash. T. 262, 5 Pac. Rep. 842; Bremer v. Burgess, 2 Wash. T. 290, 5 Pac. Rep. 733, 840; Swift v. Stine, 3 Wash. T. 520, 19 Pac. Rep. 63,*—are adverse to appellant's right to this appeal. Those cases only go to the extent of refusing to decide questions of fact further than the records disclose the facts. While the record here does not disclose the testimony sufficient for this court to determine definitely the

rights of the parties, it does disclose enough to show error in the court, in that the conclusions of law were not justified by the statement of facts; and we conclude that the judgment of the court was rendered on the theory that the court could correct the government surveys, and establish government corners at points other than the points located by the government. This seems to have been the theory on which the case was tried. The presumption is that the grantor intended to convey the lands embraced within the boundaries described according to the government survey; and the investigation of the court must be directed towards ascertaining the fact where the government corners are actually established, and not where they ought to have been established. But this presumption is by no means conclusive; and, while parol evidence will not be admitted to dispute the written contract, it may be admitted to explain it, and to show their understanding. This was a conveyance between private parties; and, if the intention was to convey a certain definite piece of land, and especially if the land was actually located, that could be shown, or any circumstance tending to show the intention of the parties. In conveyances by private parties descriptions by legal subdivisions are used for convenience, and it would be a hard and unjust rule to hold parties to a conveyance of property not intended to be conveyed, through mistaken understanding of where a government line was located, especially when it can be shown that the government survey was misleading, and the lines of survey deviated from their proper and intended course; but, as we have before said, the presumption is that the deed conveys all the land within the subdivisions described according to the actual survey. The judgment is reversed, and the case is remanded to the lower court, with instructions to retry the same in accordance with this opinion.

ANDERS, C. J., and HOYT and SCOTT, JJ.,  
concur.

(2 Wash. St. 204)

CASTER v. PETERSON *et al.*

(Supreme Court of Washington. March 11, 1891.)

NEGOTIABLE INSTRUMENTS—INDORSEMENT BY WIFE  
—COMMUNITY PROPERTY.

Where a note, payable to a married woman or order, is indorsed for value before maturity to one who supposes her to be married, but has no notice that the note is community property, a valid title passes, and the indorsee can recover against the maker, although the husband intervenes to disaffirm the indorsement.

Appeal from superior court, Kittitas county.

*Davidson & McFalls* and *Reavis & Mires*, for appellant. *Pruyn & Ready*, for appellees.

HOYT, J. Defendant W. H. Peterson made his negotiable promissory note to Mrs. Eliza E. Pool or order for the sum of \$1,070. This note the payee sold to the plaintiff for a valuable consideration, and indorsed the same, and delivered it to said plaintiff before its maturity. Plaintiff

sought in this action to recover upon said note against the maker. L. Pool, the husband, intervened in the suit, and alleged that the money loaned for which the note was given was community property, and claimed that the transfer to plaintiff was void, and that he had no title upon which he could recover of the maker. The court below sustained this contention of the husband, and gave judgment for defendants. There was no evidence tending to show bad faith on the part of plaintiff, and the only circumstance relied upon to charge him with notice that the note was claimed by the community was the fact that it was payable to a woman whom he supposed to be married. Under these circumstances, we think plaintiff took such a title to the note that he should have been allowed to maintain his action against the defendants. The maker promised to pay Mrs. Eliza E. Pool, or order, and in making the note so payable he guaranteed, to every person taking such note in good faith, her ability to order the same paid to another,—that is, to indorse it,—and as to every such person buying in good faith and for value such guaranty was conclusive. That the maker of negotiable paper thus guarantees the capacity of the payee to indorse and transfer the same seems to arise from the necessity of the case, and the rule is therefore founded upon reason. It is likewise abundantly supported by authority. See Daniel, Neg. Inst. § 93, and cases there cited. This rule has been frequently applied to notes made to and transferred by infants. See section 227 of authority above cited. Likewise to married women under the disabilities of the common law. See same authority, section 242. In the case of a married woman under the disabilities of the common law such a note was the property of her husband, and besides she had absolutely no power to make a contract of any kind, and if, as we have seen, the maker of a note to such person could not dispute the title of her indorsee, it is evident that he could not do so in the case at bar. Under our law the wife is fully competent to make a personal contract, and an indorsee of such married woman stands in a much stronger position than under the common law. Any other rule as to the passing of title to negotiable paper would be contrary to the universal practice of the commercial world in its dealing therewith. An indorsee knows that he is responsible for the genuineness of the indorsement under which he holds, and he understands that in further transferring it he guarantees that the first indorser is the payee, and that the indorsement of each special indorsee is the genuine signature of the person so named; but we think that it would work a great revolution in business circles, and cause an unheard-of panic therein, if the doctrine was once established that, in addition to the responsibilities above named, he also assumed that of a guarantor of the title and capacity to sell of all prior indorsers. We do not lose sight of the fact that all property, personal as well as real, acquired after marriage, is *prima facie* that of the community; but we hold that, from

the very nature of negotiable paper, one who makes it payable to the order of any person cannot be allowed to say to a *bona fide* holder that the authority which he in terms gave to such person to order the same paid to another is void. We think, moreover, that, from the nature of such property, money and negotiable paper bear a different relation to the community than other property. Not that they do not belong to the community, as between the spouses and all others having full knowledge of all the facts, but that, as between the one who is in possession thereof and one dealing in good faith and for value, they should be treated as the separate property of such possessor. We cannot see that public policy would be subserved by holding the presumption as to ownership of such possessor to be less than that of another person who is in the possession thereof without any semblance of title except such possession. Yet the books are full of cases where the title to purchasers in good faith of such property has been sustained although it appeared that the one from whom title was received had none except possession. The possession of these classes of property raises a much greater presumption of title than the possession of other classes, and we think that the rules of the law-merchant in relation thereto have not been changed by our statute. The claim of intervenor is so unconscionable that courts would not give it effect unless the statute very clearly warranted his contention. He says that the community had \$1,070; that it loaned it, and obtained the note in question; that it delivered said note to plaintiff, and received therefor \$1,070, and is thus placed in exactly the same position as before the note was taken; but that it is still entitled to recover of the maker of the note another \$1,070, thereby, without any consideration having passed therefor, doubling its money, and this at the expense of the plaintiff, who, though having contributed his \$1,070 to the community, is turned out of court without a cent. The judgment must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

ANDERS, C. J., and DUNBAR, SCOTT, and STILES, J.J., concur.

(2 Wash. St. 329)

JONES *et al.* v. SANDER.

(Supreme Court of Washington. March 13, 1891.)

#### APPEAL—NOTICE.

1. In a suit against several defendants to restrain them from diverting a natural water-course, where the court decrees the rights of defendants, as against each other, in the water-course, as well as the rights of plaintiff, an appeal by one defendant, without notice to his co-defendants, is not properly taken, under Act Wash. March 22, 1890, requiring a party on appealing to serve notice on "the prevailing party."

2. Appellant cannot sustain his appeal in such case on the ground that the court had no right under the pleadings to determine the rights of defendants as between each other, since, the court having had jurisdiction of the parties and the subject-matter, the decree is voidable, and not void.

Appeal from superior court, Kittitas county.

*Pruyn & Ready*, for appellants. *Daniel Gaby*, for appellee.

HOYT, J. Appellee brought an action against a large number of defendants to restrain them from diverting the waters from Wilson creek so as to prevent a certain flow therein through his land situated on said creek. Some of the defendants, by way of answer, set up a claim to certain water of said creek, and asked that it be decreed to them. Upon the trial of the cause the question of the rights of the respective parties as to the waters of such creek were gone into, and the decree of the court established the same, not only as between each of such defendants and the plaintiff, but also as between such several defendants themselves. From this decree a part of the defendants have attempted to appeal. But they did not join their co-defendants, nor were notices served upon them; and it is contended that, for want of such joinder or notice, the attempted appeal is insufficient to give this court jurisdiction. It has been decided by this court that, where a part of several co-parties appeal, they must serve notice thereof upon all the other co-parties, as required by section 454 of the Code, and that a failure so to do would deprive this court of jurisdiction. See *Cline v. Mitchell*, (Wash.) 23 Pac. Rep. 1013; *Nelson v. Territory, Id.* These cases are decisive of the one at bar, if said section 454 and the other sections of the Code to be construed in connection therewith are still in force. But appellee insists that these sections have been repealed by the act of March 22, 1890. We are inclined to think that this act does not repeal the sections of the Code in question. But it is not necessary that we should here decide that question, as this attempted appeal is insufficient under the said act of March 22, 1890. By that act the party desiring to appeal must serve notice on the prevailing party; and the decree in this case was such that several of the defendants, who did not join in the appeal, were prevailing parties, as against those who did, and should have been served with notice.

Appellants practically concede this to be true by the terms of the decree, but they contend that the said decree is void, so far as it attempts to determine the rights of the defendants among each other; their contention in that regard being that the pleadings upon the part of such defendants did not state facts sufficient to entitle them to the relief granted. We agree with appellants that such pleadings were insufficient, and that it was error on the part of the trial court to decree affirmatively in their favor, as it did. But we cannot agree that such parts of its decree were void. It had jurisdiction of the persons; and the pleadings, though insufficient, gave it jurisdiction of the subject-matter; from which it must follow that any decree rendered therein, however erroneous, was voidable only, and not void. Until reversed, such parts of said decree were binding on all the parties to the action, and, being to a certain extent ad-

verse to the appellants, those in whose favor they established rights were prevailing parties, within the meaning of said act, and should have been joined in the appeal, or served with notice thereof. The motion to dismiss must be granted.

ANDERS, C. J., and DUNBAR and STILES, JJ., concur.

(21 Nev. 172)

STATE v. CENTRAL PAC. R. CO. (No. 1,335.)<sup>1</sup>

(Supreme Court of Nevada. April 6, 1891.)

CROSS-APPEALS — AFFIRMANCE — DISMISSAL — ASSESSMENT — BOARD OF EQUALIZATION.

1. Where the state and defendant, in an action against a railroad company for taxes, both appeal, the former on the ground that the judgment should have been greater, and the latter on the ground that it should have been less, and the judgment is affirmed on defendant's appeal, and it thereupon pays the amount of the judgment below, it does not estop the state from prosecuting its appeal to recover a larger amount.

2. Gen. St. Nev. § 1091, provides that the board of equalization shall have the power to determine all complaints in regard to the assessed value of any property, but makes no provision for a new trial or rehearing. Held that, after the board has heard a complaint and fixed the value of property, it cannot reconsider the matter, and reduce the assessment.

Appeal from district court, Lander county; A. L. FITZGERALD, Judge.

The Attorney General, W. D. Jones, and Henry Mayenbaum, for the State. Baker & Wines, for respondent.

BIGELOW, J. This action was brought to recover from the defendant the taxes due Lander county for the year 1889. Included in the property assessed are 29.15 miles of road-bed and main track of the railroad, at a valuation of \$14,000 per mile. Upon the trial, under proper allegations, the records of the board of equalization of Lander county were offered in evidence by the defendant. They show that on September 24, 1889, the defendant filed a complaint with the board asking that its assessment be reduced to \$9,000 per mile. At the same time one Dickson also filed a complaint asking that it be raised to \$20,000 per mile. The two complaints were heard together, and on the same day the board made an order that the assessment remain, as fixed by the assessor, at \$14,000 per mile. On October 7, 1889, the board met again, and a motion to reconsider their former action was adopted. Thereupon another motion was made, and also adopted, to reduce the assessment to \$12,000 per mile. To the offer of these records the plaintiff objected, upon the ground that the action of the board on September 24th was final and conclusive, and could not be reconsidered on October 7th; that in making the last-named order the board acted without authority or jurisdiction. The objection was overruled, and the records admitted. The defendant also claimed that 78-100 miles of the road assessed was in dispute between Lander and Eureka counties, and that under the statute authorizing such payment it had paid the taxes thereon to Eureka county. Judgment was rendered for the state for 28.39 miles of road at a valuation of \$12,000 per mile. Both parties

have appealed; the defendant upon the ground that the valuation of \$12,000 per mile was excessive, and that a certain school tax was improperly included in the judgment. Upon this appeal the judgment was affirmed, (25 Pac. Rep. 296,) and upon the return of the *remittitur* to the court below it was paid in full to the district attorney. The plaintiff's appeal is founded upon the claim that the judgment should have been for the full number of miles of road assessed, valued at \$14,000 per mile.

1. The defendant now moves to dismiss this appeal upon the grounds that the acceptance by the district attorney of the money due upon the judgment as affirmed is a waiver by the state of the errors assigned, that the state cannot both enforce the judgment and appeal from it. A party may appeal from the whole or any part of a judgment, (Gen. St. § 3353; Hayne, New Trials & App. § 185;) and upon the hearing of an appeal the supreme court may reverse, affirm, or modify a judgment, or affirm it as to some issues and reverse as to others, (Gen. St. § 3361; Hayne, New Trials & App. § 295.) Under these circumstances, it would seem reasonable, where several independent issues are tried in a case, and the appeal is only taken from the judgment upon some of them, that, if error is found, the reversal should only be as to the issues appealed from, leaving it to stand upon the others. Even where the appeal is from the whole judgment, in which several independent issues have been determined, it would seem proper that it should only be reversed as to those in which error is found. In this case the judgment was for the plaintiff upon some issues, and for the defendant upon others. Each party has appealed from that which was against itself. The appeals are separate and distinct, upon different questions, and the judgment upon one need not in any manner affect the other. After the affirmance of the judgment upon the defendant's appeal there could be no further question that the plaintiff was entitled to the money thereby awarded to it. That is settled; and the only question now is, whether it is not entitled to more. Why, then, should the acceptance of this money, which was unquestionably due it, and which the reversal of the judgment upon this appeal will not require it to pay back, or in any manner affect, work a waiver of the right to appeal upon other issues decided against the plaintiff? Where a reversal upon the plaintiff's appeal would require him to refund to the defendant money or property which he has obtained under the judgment, there is reason for holding that the acceptance of the benefits of the judgment is a waiver of the right to appeal. Having elected to receive the fruits of the judgment, he is estopped from attempting to destroy the very foundation of his right to receive them. But where a reversal would not work this result, where his right to what he has received would still remain intact, it is difficult to conceive why he should not be allowed to take what is now, and always will be, his, and still prosecute his claim for more. This dis-

<sup>1</sup>Rehearing denied, post, 1193.



inction is quite clearly drawn in *Embry v. Palmer*, 107 U. S. 3, 2 Sup. Ct. Rep. 25; *Bennett v. VanSyckel*, 18 N. Y. 481; *Reynes v. Dumont*, 130 U. S. 394, 9 Sup. Ct. Rep. 486,—and other cases, which support the conclusion to which we have come. There are decisions which seem to hold the contrary, but, if so, we decline to follow them, believing that they are not founded upon principle, and are contrary to the weight of authority. The motion to dismiss must be overruled.

2. The court found that the 76-100 of a mile of the road upon which no taxes were allowed in the judgment was claimed by both Lander and Eureka counties; that it was duly assessed in Eureka county, and the taxes thereon paid to that county by the defendant prior to the commencement of the action. This finding is abundantly supported by the evidence and the plaintiff's admissions, and constitutes a complete defense to that portion of the action. Gen. St. § 1205.

3. Did the court err in admitting in evidence the records of the board of equalization of October 7, 1889, and in finding that the value of the road had been thereby duly equalized and fixed at \$12,000 per mile, instead of \$14,000? A board of equalization is of special and limited jurisdiction, and, like all inferior tribunals, has only such powers as are specially conferred upon it. It is essential to the validity of its actions that they should be authorized by some provision of the statute, otherwise they are null and void. *State v. Commissioners*, 5 Nev. 317; *State v. Commissioners*, 6 Nev. 95; *State v. Railroad Co.*, 9 Nev. 79. Gen. St. § 1091, provides that the board shall have power to determine all complaints made in regard to the assessed value of any property. Without a complaint is made, it has no jurisdiction to act in the premises, (*People v. Goldtree*, 44 Cal. 323; *State v. Northern Belle Co.*, 12 Nev. 89;) and, after a complaint is once heard and determined, there is no provision for a new trial, a rehearing, or any further consideration of the matter. It follows from the principles already stated that the power to reconsider, not being expressly given, does not exist. This statement of the law is fully borne out by the adjudicated cases. *People v. Supervisors*, 35 Barb. 408; *Hadley v. Mayor*, 33 N. Y. 603; *People v. Ames*, 19 How. Pr. 551; *Mechem*, Pub. Off. § 509. In *People v. Supervisors*, 35 Barb. 408, the board of supervisors of Schenectady county had met and legally apportioned and equalized the assessment of property among the several towns and wards of the county. The next day they reconsidered their action, and again apportioned and equalized the assessment, but upon a different basis. It was held, upon a very full review of the authorities, that in common with all other inferior jurisdictions they had by their first action exhausted their discretion over that subject; that such act was in fact a judgment, and they had no power to reconsider, to review, reverse, or annul their own judicial action. In *Hadley v. Mayor*, 33 N. Y. 603, it was held that the common council of the city of Albany, having once legally canvassed the votes returned for

the election of mayor of said city, have exhausted their power over the subject, and cannot afterwards reverse their decision by making a different determination. The same rule applies to justices of the peace, (*People v. Lynde*, 8 Cow. 134;) the courts established by statute, (*People v. Marine Court*, 12 Wend. 220;) and to the district courts of this state, except in the manner authorized by law, (*State v. District Court*, 16 Nev. 372.) There is, indeed, but one case that we have found—*Hough v. Bridgeport*, 57 Conn. 294, 18 Atl. Rep. 102—that even seems to hold the contrary; and it is probable that the ruling there was based rather upon the view that the common council had not by their first action finally disposed of the matter than with any intention of holding that they could reconsider and reverse themselves at their discretion. We conclude that the court erred in this ruling admitting in evidence the records of the board of October 7, 1889, and in deciding that the plaintiff was only entitled to recover upon a valuation of the road at \$12,000 per mile. All other defenses having been heretofore decided against the defendant, it is therefore ordered that this case be reversed, and remanded to the district court, with instructions to modify the judgment already entered herein by adding thereto the taxes and penalties due upon 23.39 miles of the road-bed and main track of the railroad at a valuation of \$2,000 per mile.

(21 Nev. 158)

**BOWLER v. CURLER et al.** (No. 1,836.)

(*Supreme Court of Nevada*. April 6, 1891.)

CONSTRUCTIVE TRUSTS — STATUTE OF FRAUDS.

Where one without consideration conveys land to one standing in a confidential relation with him, with the understanding that he shall hold it for the benefit of the grantor, equity will raise a constructive trust, which may be established by parol; and Gen. St. Nev. § 2624, providing that no trust concerning lands shall be created except by act or operation of law, or by deed or conveyance in writing, etc., will not apply.

Appeal from district court, Esmeralda county; RICHARD RISING, Judge.

*R. M. Clark*, for appellant. *A. W. Crocker*, *T. Coffin*, and *P. M. Bowler, Jr.*, in pro. per., for respondent.

**BELKNAP, C. J.** The plaintiff conveyed certain real property described in the complaint to his father-in-law, the appellant. The deed of conveyance states that it was made in consideration of the sum of \$1,200. Plaintiff claimed, and the court and jury found, in substance, that the title to the property was conveyed to the appellant, without consideration, upon his promise to hold it in trust for the benefit of the plaintiff, and, in case of the plaintiff's death, for the benefit of his infant daughter; and that the conveyance was made because of the confidential and influential relation which existed between the parties. A decree was entered in favor of the plaintiff, requiring the defendant's son, who was also a defendant in the case, and who received the title to the property without consideration, to make a deed of conveyance thereof to the plaintiff. Ap-

pellant claims that parol evidence was inadmissible to prove the trust. The claim is based upon the statute of frauds. The statute provides: "No estate or interest in lands, \* \* \* nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same. \* \* \*" Section 2624, Gen. St. If the statute is applicable to the case, the trust is void, because it is an express trust, established by parol evidence only. Nor is the trust one arising by act or operation of law, within the meaning of the statute, for the law never implies a trust when there is an express one declared by word or writing. 2 Washb. Real Prop. 470; Dennison v. Goehring, 7 Pa. St. 175. But the statute of frauds has no application. The plaintiff conveyed the property to the defendant because of the confidence reposed in him, without consideration other than he should hold it subject to the trust mentioned. If defendant were permitted to retain it, plaintiff could be defrauded, and the statute, which was intended to prevent frauds, would be the means for the accomplishment of a fraud. To prevent such a result, equity raises a constructive trust in the grantee, and in favor of the grantor. In the case of Cox v. Arnsmann, 76 Ind. 212, a husband and wife conveyed land to a person without other consideration than that he should immediately reconvey it to the wife. It was held that the land was taken in trust for the wife. The court said: "The trust in the present case, being an express trust in relation to land, cannot be proved by parol without violating the statute, unless there is some equitable rule of construction which takes such a case out of the statute. There are in equity certain trusts called 'constructive trusts,' which do not arise by implication of law. They are not resulting trusts, but are said to be in the nature of resulting trusts. Perry, Trusts, §§ 240, 241. Thus equity will raise a constructive trust to prevent a fraud. 2 Washb. Real Prop. 476. And whenever property is acquired by fraud, or when, though originally acquired without fraud, it is against equity that it should be retained by the party, then equity raises a constructive trust, which is held to be not within the statute, (Id. 482.) and which may be proved by parol. Thus in the case of Hayden v. Denslow, 27 Conn. 335, there was an agreement between father and son, by which the son was to convey land to the father, and the latter was to hold it in trust for the son's wife. It was held that, when a deed is given and received for such a purpose, a constructive trust arises, which will be enforced in equity, and that the facts out of which such trust arises may be proved by parol. So, in the case of Hoge v. Hoge, 1 Watts, 163, it was held that, if a testator be induced to make a devise, by the promise of the devisee that it should be applied for the benefit of another, equity, upon these facts, would create a constructive trust, which might

be established by parol." Another case similar in principle is that of Wood v. Rabe, 96 N. Y. 422. In that case, as in this, the trust was oral. The court said: "But, being oral, the trust was void, within the sixth section of the statute, unless the transaction constituted a trust by implication or operation of law, and was therefore within the exception in the seventh section. It is not easy to ascertain from the adjudged cases the exact scope of the exception in the statute, Car. 11., of trusts arising by 'implication or construction of law,' or of the equivalent exception in our statute of trusts arising by 'implication or operation of law.' It is not difficult to name trusts which unequivocally are trusts arising by implication or operation of law. Trusts arising from the presumed intention of the parties, indicated by their acts, although not expressly declared, and those arising from the application of some settled principle of equity to the situation, furnish many instances of implied or constructive trusts. Resulting trusts at common law, arising from the payment of purchase money, or when the trust is not declared, or is declared only in part, or for any reason fails, are illustrations of the former class, and those arising by equitable construction, independently of intention, from dealings by trustees or quasi trustees with trust property, furnish many examples of the latter. But there is a large class of so-called 'constructive trusts,' or trusts *ex maleficio*, where courts of equity treat the holder of the legal title to land as a trustee, and, through the medium of an assumed trust, makes that title subservient to the circumvention of fraud and the attainments of justice. Trusts of this character are not, I assume, within the exception in the statute. \* \* \* But see Davies v. Otty, 35 Beav. 208; Selchist's Appeal, 66 Pa. St. 237. So, where a trust is sought to be established from the violation of an oral agreement purporting to create a trust, and a court of equity upholds the trust, and enforces specific performance, the trust is not an implied or constructive trust, within the statute. See Bellasis v. Compton, 2 Vern. 294. The court in granting relief in case of an oral agreement proceeds upon the ground of fraud, actual or constructive, and enforces the agreement, notwithstanding the statute, by reason of the special circumstances." The two principles upon which equity proceeds in this character of case are thus stated: "One is that it will not permit the statute of frauds to be used as an instrument of fraud; and the other that when a person, through the influence of a confidential relation, acquires title to property, or obtain an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief." Page 425. Some of the decided cases hold that trusts arising out of facts similar to those of the present case arise by implication or construction of law, and are therefore within the exception in the statute of frauds; others, that such cases do not fall within the exception; but all agree that either by the exception, or notwithstanding the statute of frauds, relief may be granted in a proper

case. Appellant also claims that if any trust was established it was for the benefit of plaintiff's daughter, and not for himself. The complaint alleges a trust in favor of the daughter, and also a trust for the benefit of plaintiff, and, in the event of his death, then for the benefit of his daughter. The pleading is ambiguous in this respect, but the objection was not taken, and the evidence was sufficient to support the finding of fact upon this point. The judgment and order are affirmed.

PEERS v. DELUCHI *et al.* (No. 1,333.)

(Supreme Court of Nevada. April 6, 1891.)

PUBLIC LANDS — RAILROAD GRANTS — PRIOR PRE-EMPTION — EVIDENCE.

1. The affidavits and declaratory statements of persons who have entered on public lands under the pre-emption laws of the United States, filed in the proper land-office, are conclusive evidence of the existence of all facts necessary to give the right of pre-emption, and under Gen. St. Nev. § 3613, such papers may be proved by copies certified by the register of the land-office.

2. Act Cong. July 1, 1862, as amended by act of July 2, 1864, granted to the C. F. R. Co. alternate sections of land, to aid in the construction of its road, but reserved any land to which a pre-emption or homestead claim might attach before the line should be definitely fixed. Ten months before the line of the road was definitely fixed land covered by the grant was settled upon and improved, and ten days before the line was fixed the settlers filed their affidavits and declaratory statements in the proper land-office. *Held*, that the land did not pass under the grant.

Appeal from district court, Washoe county; R. R. BIGELOW, Judge.

Clark & Jones, for appellant. R. H. Lindsay and Baker & Wines, for respondents.

MURPHY, J. It appears from the records of this court that the plaintiff P. Martinoni has died since the rendition of the judgment and denial of the motion for a new trial in the district court, and by order of this court J. V. Peers, public administrator of Washoe county, has been substituted as plaintiff and appellant in place of deceased. This action was brought by P. Martinoni, now deceased, to recover possession of a tract of land situate in Washoe county. James Murphy and ——— Murphy were sued, but, they having disclaimed any interest in or right of possession to the land, it was stipulated that judgment might be rendered against them for the land, but not for damages. The cause was tried before the court without a jury, and judgment was given in favor of Joseph Deluchi and Angelo Deluchi. The plaintiff moved for a new trial, and, the motion being denied, appeals from the judgment and order. The land in controversy is situate within the limits of the grant to the Central Pacific Railroad Company of California, by an act of congress passed July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, to secure to the government the use of the same for postal, military, and other purposes." 12 U. S. St. at Large, p. 489. Section 3 of said act reads as follows: "And be it further enacted that there be, and is hereby, granted to the

said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed. \* \* \* This act was amended by section 4 of the act of July 2, 1864, (13 U. S. St. at Large, 353,) by inserting the word "ten" instead of "five," and "twenty" instead of "ten," and then reads: "And any lands granted by this act or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler. \* \* \* It is conceded that the land in controversy is a part of an odd section; that the line of the road was definitely fixed on the 14th day of October, 1867; and that the plaintiff had obtained a deed from the railroad company to the land prior to the commencement of this action; and that the title of the railroad company was perfect, when it made the deed to Martinoni under the grant found in the above-mentioned act, unless it comes within some of the exceptions mentioned in said grant. The attorney for appellant contends that the evidence introduced on the part of the defendants was "incompetent, irrelevant, immaterial, and did not tend to prove the existence of a pre-emption claim to the land." The defendants in their answer denied the plaintiff's ownership and right of possession to the land. They also introduced in evidence the following exhibits: "Martin Groten, being duly sworn, deposes and says: I reside in Storey county, Nev. I settled upon and commenced improving the south-east quarter of the south-west quarter of section sixteen, (16,) and south half of south-west quarter and north-west quarter of south-west quarter of section fifteen, (15,) township nineteen (19) north, of range 21 east, about the 15th of February, 1864. Said land was then unsurveyed. I have not seen any notice of publication of the reception of the township plat at the land-office at Carson City, Nev., and did not know that the plat was at the land-office until a few days since, or I should have filed on the land long ago, or within the time prescribed. I now ask to be allowed to file my declaratory statement upon the above described land. MARTIN GROTEN. Subscribed and sworn to before me, this 4th day of October, 1867. WARREN T. LOCKHARDT, Register." "Declaratory Statement: I, Martin Groten, of Storey county, Nev., being a married man, and a native-born citizen of the United States, did, on or about the 15th day of February, A. D. 1864, settle and improve the S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 16, and S.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  and N. W.  $\frac{1}{4}$  of S.

W.  $\frac{1}{4}$  of section 15, in Tp. 19 N., of R. 21 E., in the district of lands subject to sale, at the land-office at Carson City, Nev., and containing one hundred and sixty acres, which land has not yet been offered at public sale, and thus rendered subject to private entry; and I do hereby declare my intention to claim the said tract of land as a pre-emption right, under the provisions of the act of congress approved the 4th of September, A. D. 1841. Given under my hand and seal this 4th day of October, A. D. 1867. [Seal] MARTIN GROTEN. In the presence of WARREN T. LOCKHARDT, Register.

There were two similar papers made out and sworn to by John P. Myers on the same day, and before the same officers, the only difference being Myers was a resident of Washoe county, a single man over the age of 21 years, and had settled and commenced improving the N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , and S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , and the W.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$ , of section 15, in township 19 N., of range 21 E., on the 1st day of January A. D. 1864, and had resided on the land and made it his home from the date of his settlement until the time of filing his declaratory statement. All the papers are duly certified to by O. H. Gallup, as register of the United States land-office at Carson City, Nev., as being full, true, and correct copies of the originals thereof filed in his office, and that he was the custodian of the same. Plaintiff objected to the introduction of said declaratory statements, and to said affidavits, and to each of them, on the grounds following, to-wit: "That they were incompetent, and not the best evidence; that the matters set out in said exhibits, and each of them, could not be proved by such exhibits; that the evidence offered was *ex parte*; that the facts recited therein could not be so established in this case; that it was not competent to prove by said exhibits that the persons named therein were pre-emptors, or were entitled to the rights of such, or that they had settled upon the land, or otherwise complied with the law." The affidavits and declaratory statements are in the form as prescribed by the commissioner of the general land-office for the guidance of the local land-officers. Whenever a party makes application to pre-empt land, the register of the land-office must satisfy himself that the land is within his district; that it is subject to entry that it has not been reserved by any act of congress, or of the proper department; and that it has not been sold. He must also be satisfied that the party making the application to pre-empt possesses the necessary qualifications to entitle him to do so, and has made the settlement on the land as required by the pre-emption laws. These are all questions of fact for the register to decide, and in deciding them he requires the exercise of judgment and discretion, and when he has decided his action is final until reversed or set aside by the commissioner of the general land-office. When the proof establishes the facts to the satisfaction of the register, that the party is entitled to enter the land, the declaratory statement, and all papers connected therewith, are filed and become a part of the records of the

land department. They are kept in the office, so as to show what lands are taken under the pre-emption, homestead, or other laws of the general government. The records are in the custody and under the control of the register, and are kept under the official sanction of the government; their contents have always been considered and always have been received in courts of justice as evidence of the facts stated. In the case of *Courchaine v. Mining Co.*, 4 Nev., 375, Lewis, J., said: "The paramount proprietor of the soil, having an unrestricted right of disposition, has established certain regulations by which persons producing the requisite proof are entitled to purchase. \* \* \* The decision of the proper officers is therefore evidence, not only of the fact that he in whose favor it is rendered is entitled to the patent, but also that he has settled upon and improved the premises claimed by him, and is certainly a direct acknowledgment that such settlement and possession is lawful, and in accordance with the will of the general government. The register and receiver of the local land office are the officers appointed by the government to take the proof; decide upon the merits of the application. The law requires the proof in all cases to be made to their satisfaction. Where the proof is so made, and their decision rendered, how can it be said that such decision is not evidence of right of possession in him in whose favor it is given? It is a decision made by officers appointed by the government to determine such rights. Their decision is the decision of the government itself, and should therefore be accepted as evidence of superior rights. The conclusion arrived at by the land-officers, although not strictly a judicial decision, bears nevertheless a strong analogy to it, and it seems to us should be received as evidence of the right to the possession, and, indeed, of all the facts which it is necessary for the pre-emptor to prove before the land-officers." And in the case of *McFarland v. Culbert*, 2 Nev. 285, the same judge said: "In any event, if the defendants wished to derive any advantages from the filing of a declaratory statement, they should have introduced the statement itself, or a certified copy of it, so that the court below might judge of its effect." In the case of *Baldwin v. Stark*, 107 U. S. 465, 2 Sup. Ct. Rep. 473, Mr. Justice MILLER, speaking for the court, said: "It has been so repeatedly decided in this court, in cases of this character, that the land department is a tribunal appointed by congress to decide questions like this, and when finally decided by the officers of that department the decision is conclusive everywhere else as regards all questions of fact, that it is useless to consider the point further;" and the decision of the supreme court of Nebraska was reversed because they had re-examined the evidence upon which the officers of the land department had acted, and held the same to be insufficient.

Section 3618, Gen. St. Nev., reads: "A copy of any record, document, or paper in the custody of a public officer of this state, or of the United States, within this state, certified under the official seal, or verified

by the oath, of such officer to be a true, full, and correct copy of the original in his custody, may be read in evidence in any action or proceeding in the courts of this state, in like manner and with the like effect as the original could be if produced." The papers were admissible in evidence as tending to show that, at the time of the location of the route of the Central Pacific Railroad, there was a pre-emption claim to the land. It appears from the record submitted to us that on the 15th day of June, 1886, the railroad company made application to the land department of the government for a patent to the lands in question, which application was denied. If, now, we apply these doctrines which have been established by repeated decisions of the supreme court of the United States, this case before us will be readily disposed of. The plaintiff relies upon the title of the railroad company to the lands under the grant mentioned in the act of congress. Defendants deny the title of the railroad company to the lands under the grant, and have introduced testimony to show that at the date of the definite location of the route, and the filing of the map with the secretary of the interior, there was a pre-emption claim attached to said lands, and by reason thereof that the lands in dispute were exempt from the operation of said grant. In this we think they are correct. From the testimony it appears that, 10 months prior to the line of said road being definitely fixed, Groten, for himself and Myers, on his own behalf, settled upon and improved the lands in controversy, and, 10 days before the location of said line of road opposite said lands, the said Groten and Myers presented themselves at the United States land-office at Carson City, and made the proofs, to the satisfaction of the register and receiver, and made a pre-emption claim to said lands, and, from the time of receiving and filing the declaratory statements in the United States land-office, the said lands no longer remained a part of the public lands of the United States, and would never become a part of the public domain, until such time as the officers of the land department should take action, and cancel the applications of Groten and Myers; and to allow the conclusions of the officers of the land department, on questions of fact, to be subject to review by the courts in cases of this kind, would open the door to endless litigation. As said by Mr. Justice LAMAR, in the case of *Railroad Co. v. Whitney*, 10 Sup. Ct. Rep. 115: "When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made,—the land is entered. If either one of these integral parts of an entry is defective,—that is, if the affidavit be insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash,—the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is allowed by the land-officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterwards canceled on account of these defects

by the commissioner, or on appeal by the secretary of the interior; or, as is often the practice, the entry may be suspended, a hearing ordered, and the party notified to show by supplemental proof a full compliance with the requirements of the department, and, on failure to do so, the entry may then be canceled. But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants. In the case before us, at the time of the location of the company's road an examination of the tract-books and the plat filed in the office of the register and receiver, or in the land-office, would have disclosed an entry of record, accepted by the proper officers, in the proper office. Such an entry attached to the land a right which the road cannot dispute for any supposed failure of the entry-man to comply with all the provisions of the law under which he made his claim." *Railway Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. Rep. 566; *Newhall v. Sanger*, 92 U. S. 761; *Railroad Co. v. Whitney*, 10 Sup. Ct. Rep. 112; *Whitney v. Taylor*, 45 Fed. Rep. 616, (U. S. Cir. Ct. Cal.,) opinion by HAWLEY, J. The judgment and order appealed from are affirmed.

BIGELOW, J., did not participate in the foregoing decision, having presided at the trial of the cause below.

#### OAKES v. NORTHERN PAC. R. CO.

(*Supreme Court of Oregon. March 23, 1891.*)

##### CARRIERS—LOSS OF BAGGAGE—LIABILITIES.

1. Carriers of passengers are responsible for the carriage and safe delivery of such baggage as, by custom and usage, is ordinarily carried by travelers; and the payment of the usual fare includes, in legal contemplation, a compensation for the conveyance of such baggage.

2. They are insurers of such baggage in the same manner and to the same extent as for goods or freight.

3. Baggage, within the rule of such liability, is confined to such articles as are usually carried as baggage, for the personal use of the passenger, or for his convenience, instruction, or amusement on the journey, and does not include that which is carried for the purposes of business, such as merchandise or the like.

4. While the obligation of a carrier of passengers is limited to ordinary baggage, yet if the carrier knowingly permit a passenger, either on payment or without payment of an extra charge, to take articles as personal baggage which are not properly such, it will be liable for their loss or destruction, though without fault.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

This is an action brought by the plaintiff to recover from the defendant the sum of \$1,401.25 on account of the alleged failure of the defendant to deliver to the plaintiff certain personal property, specifically enumerated in the complaint, and constituting the contents of seven trunks.

The complaint alleges that at the time therein mentioned the plaintiff, together with his wife and several other persons, naming them, constituted the Oakes Comedy Company, an organization giving theatrical entertainments in the villages and cities situated on the line of the company's road, and that on said day, or the night thereof, the plaintiff, as proprietor of said theatrical organization, had engaged and advertised his company to give an entertainment at Thompson's Fall, Mont., and had started with said company of people and baggage, by the defendant's line of road, to said place from Hope, in Idaho; that prior to starting he applied to defendant's ticket agent at said Hope for transportation for himself and other persons aforesaid, and their trunks and contents, and other movable property necessary and proper to be used by them in the business in which they were engaged, and necessary and proper as their wearing apparel; that he informed said ticket agent that he desired transportation for said persons and property, and said agent informed him that it would be necessary for plaintiff to buy five first-class tickets for the sum therein specified to secure such transportation; and that thereupon plaintiff purchased said tickets, and secured said transportation and carriage, etc., and delivered said property to its agents and servants, which was accepted and taken in their charge and care, and for which he received checks in addition to his said tickets; that it refused and failed to deliver, etc.; and through its own negligence said train was wrecked, and a large part of the property was destroyed by fire, etc. The answer of the defendant put in issue all the allegations of the complaint, or that it had any knowledge or information as to the contents of such trunks, or the value thereof, etc. Upon the trial, the jury, at the request of the defendant, were required to find special answers to the following questions: "*First*. What do you find to be the value of the baggage belonging to the plaintiff and his company which was lost in the wreck of the defendant's cars March 25th last, aside from the stage properties, costumes, musical instruments, and theatrical property of the comedy company? Answer. \$381.25. *Second*. What do you find to be the value of the stage properties, musical instruments, advertising matter, tickets, stage costumes, and stage paraphernalia destroyed in the wreck on the 25th of March last? Answer. \$754.75." At the same time the jury found a general verdict in favor of the plaintiff for \$1,136, being for the full value of all the property belonging to the plaintiff and his company which was lost in the wreck. The counsel for the defendant moved to set aside the general verdict because the same was inconsistent with the special findings found by the jury, and moved the court to render a judgment upon such special findings in favor of the plaintiff and against the defendant for the sum of \$381.25, which the court refused to do, and rendered judgment for the plaintiff for the sum of \$1,136.

*Dolph, Bellinger, Mallory & Simon*, for

appellant. *Jones & Stuart*, for respondent.

LORD, J., (after stating the facts as above.) The defendant does not deny liability for the loss or destruction of the personal baggage of the plaintiff and the members of his troupe, but it denies liability for property other than actual personal baggage. In determining the question presented by this record it is necessary to understand the nature and extent of the obligation which a carrier of passengers by rail assumes as respects the personal baggage of the passenger. That obligation requires it not only to carry the passenger, but also to carry a reasonable amount of his personal baggage. "The carriage of the baggage of the passenger," said ANDREWS, J., "under reasonable limitations as to amount, is the ordinary incident to the carriage of the passenger; and the duty arises on the part of the company to carry the baggage of the passenger as incident to the principal contract, without any specific agreement or separate compensation." *Isaacson v. Railroad Co.*, 94 N. Y. 278. As respects such baggage, a carrier of passengers is held to the same liability as a common carrier of goods. For its loss or destruction, save by the act of God or the public enemy, it must respond, though without fault on its part. To this extent it is an insurer, and is responsible for the carriage and safe delivery of such baggage, the same as goods intrusted to it as freight. But it is only to such articles as may be legally termed "baggage" that such liability attaches, no matter what may be the contents of the bag or trunk. As to what constitutes "baggage" in the legal sense, or "ordinary baggage," or "personal baggage," as commonly used in England, it has been found by the courts difficult, if not impossible, to define with accuracy within the meaning of the rule of the carrier's liability. "It is agreed on all hands," said ERLE, C. J., "that it is impossible to draw any very well defined line as to what is and what is not necessary or ordinary baggage for a traveler. That which one traveler would consider indispensable would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind must be taken to be in the mind of the carrier when he receives a passenger for conveyance." *Phelps v. Railroad Co.*, 19 C. B. (N. S.) 321. In a general sense it may be said to include such articles as it is usual for persons traveling to take with them for their pleasure, convenience, and comfort, according to the habits and wants of the class to which they belong. In *Weeks v. Railroad Co.*, 9 Hun, 669, it is said that a passenger may carry with him "such articles of necessity and convenience as are usually carried by passengers for their personal use and comfort, instruction, and convenience, or protection." In *Jordan v. Railroad Co.*, 5 Cush. 69, the rule is stated to be "that baggage includes such articles as are of necessity or convenience for personal use, and such as is usual for persons traveling to take with them." In *Johnson v. Stone*, 11

Humph. 419, the court said: "It is not practical to state with precise accuracy what shall be included by the term 'baggage.' It certainly includes articles of necessity and personal convenience usually carried by passengers for their personal use; and what these may be will very much depend upon the habits, tastes, and resources of the passenger." In *Railroad Co. v. Swift*, 12 Wall. 262, Mr. Justice FIELD said that the contract "to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." In *Macrow v. Railway Co.*, L. R. 6 Q. B. 612, COCKBURN, C. J., said: "Whatever the passenger takes with him for his personal use and convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage. This would include," he continues, "not only articles of apparel, whether for use or ornament, \* \* \* but also the gun-case or fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying. On the other hand, the term 'ordinary luggage' being thus confined to that which is personal to the passenger, and carried for his use and convenience, it follows that what is carried for the purpose of business, such as merchandise and the like, or for larger and ulterior purposes, such as articles of furniture or household goods, would not come within the description of 'ordinary luggage' unless accepted as such by the carrier." See, also, 1 Amer. & Eng. Enc. Law, "Baggage," 1042; 2 Ror. R. R. 988; Hutch. Carr. §§ 677, 683, 686. So that it would seem that baggage, in the sense of the law, may consist of such articles of apparel as, through necessity, convenience, comfort, or recreation, the passenger may take for his personal use, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey. The question what articles of property, as to quantity and value, contained in a trunk, may be deemed baggage within the rule, is to be determined by the jury according to the circumstances of the case, subject to the power of the court to correct any abuse. *Railroad Co. v. Fraloff*, 100 U. S. 24; *Bomar v. Maxwell*, 9 Humph. 622; *Brock v. Gale*, 14 Fla. 523; *Mauritz v. Railroad Co.*, 23 Fed. Rep. 765. As the contract of the carrier of passengers is to carry a reasonable amount of baggage for the accommodation of the passenger, it follows from the nature and object of the contract, as observed by APPLETON, C. J., "that the right of the passenger is limited to the baggage required for his pleasure, convenience, and necessity during the jour-

ney." *Wilson v. Railroad Co.*, 56 Me. 62. Articles of whatever kind that do not properly come within the description of ordinary baggage are not included within the terms of such contract, nor is the carrier liable for their loss or destruction, in the absence of negligence. Stage properties, costumes, paraphernalia, advertising matter, etc., are not articles required for the pleasure or convenience or necessity of the passenger during his journey, but are plainly intended for the larger or ulterior purposes of carrying on the theatrical business. They do not fall, therefore, under the denomination of "baggage," and, in the absence of negligence, no liability can arise against the carrier for their loss or destruction, unless accepted as baggage by the carrier. And so the special verdict of the jury found. They segregated the articles which might properly be termed "baggage" from those carried for the purposes of business, and found separately the value of each, but by their general verdict found the company liable for the full value of the property upon the assumption that the trunks and their contents were received by the company as baggage. The bill of exceptions discloses that the court charged the jury, among other things, as follows: "There is another phase of this question. If you find from all the evidence in the case that these trunks were brought to the agent of the company, and their appearance indicated that they might not only contain the personal baggage, in the strict sense of the word, of the party, but that other things than baggage were received without objection, and no fraud or concealment was practiced by the plaintiff, if the trunks on their face advertised fully what their contents were, and their agents received them under these circumstances, and gave checks for them, and the company, through these agents and employees, took them into its charge without making any objection, then the defendant is to be deemed to have taken these articles as baggage," etc. In substance, the complaint alleges that the defendant was fully informed of the contents of the trunks prior to their delivery, and that the defendant received and checked them as baggage, which is put in issue by the denials of the answer. Although the bill of exceptions contains no evidence, nor is any certified to us by this record, the issue permitted, and the instruction was designed to meet, the evidence upon this phase of the case. Under such circumstances, we are bound to assume that there was evidence tending to show that the defendant had notice of the nature of the property, and received it as baggage for transportation. In this view, the general verdict is not inconsistent with the special findings, for if the defendant knowingly permitted the plaintiff to take as baggage articles that would not come under that description, it is liable for their loss, though not arising from its negligence. While it is true that passenger carriers are not liable for merchandise and the like when packed up with a traveler's baggage, if the baggage be lost, yet if the merchandise be so packed as to be obviously merchan-



dise to the eye, and the carrier takes it without objection, he is liable for the loss. Story, Bailm. § 490. Thus, in the case of *Railway Co. v. Shepherd*, 8 Exch. 30, PARKE, B., said: "If the plaintiff had carried these articles exposed, or had packed them in the shape of merchandise, so that the company might have known what they were, and they had chosen to treat them as personal luggage, and carry them without demanding any extra remuneration, they would have been responsible for the loss. So, also, upon any limit in point of weight, if the company chose to allow a passenger to carry more, they would be liable." And in *Macrow v. Railway Co.*, supra, COMBURN, C. J., said: "If the carrier permits the passenger, either on payment or without payment of an extra charge, to take more than the regulated quantity of luggage, or knowingly permits him to take as personal luggage articles that would not come under that denomination, he will be liable for their loss, though not arising from his negligence." In *Sloman v. Railway Co.*, 6 Hun. 546, GILBERT, J., after stating and citing authorities to sustain the proposition that railroad companies are not liable for the loss of merchandise delivered to them under the guise of baggage for transportation along with a passenger, said: "They are liable, if they knowingly undertake to transport merchandise in trunks or boxes, which have been received by them for transportation, in passenger trains, unless the agent who receives the packages for that purpose violates a regulation of the company by so doing, and the passenger or owner of the goods has notice of such regulation;" citing *Butler v. Railroad Co.*, 3 E. D. Smith, 571, and other cases. See, also, 2 Wait, Act. & Def. 82. "Doubtless," said MITCHELL, J., "if the carrier had actual notice of the nature of the property, and still received it as baggage, he would be liable." *Haines v. Railway Co.*, 29 Minn. 161, 12 N. W. Rep. 447. So, in *Railway Co. v. Capps*, 16 Amer. & Eng. R. Cas. 118, it was held that where a railroad company, through its baggage or ticket agent, receives articles for transportation as baggage, knowing at the time that such articles are not properly baggage, the company will be responsible therefor as a common carrier, and will be estopped from denying that the same was baggage. *Railroad Co. v. Conklin*, (Kan.) 3 Pac. Rep. 762; *Minter v. Railroad Co.*, 41 Mo. 508. Again, in *Hoeger v. Railway Co.*, 63 Wis. 100, 23 N. W. Rep. 435, a traveling agent applied to a railroad company to transport his sample trunks as baggage, and the company, knowing their contents, received and checked them as baggage, and carried them as such on the passenger train on which he rode; and the court held that both parties were estopped to claim that such trunks were not baggage, and to be treated as such, and not as ordinary freight. So that, while the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either on payment or without payment of an extra charge, to take articles as personal baggage which

are not properly such, it will be liable for their loss or destruction, though without fault. Now, the issue invites and the instruction indicates that there was evidence tending to prove that the contents of the trunks were fully advertised, and that the agent of the defendant knew that they contained, besides personal apparel, stage costumes and properties, and that they were received and checked as baggage; and in such case the defendant is liable for their loss, though without fault, as the jury have found by their verdict, and the court affirmed by its judgment. In this view there is no inconsistency in the general verdict with the special findings, and the judgment must be affirmed.

PEARCY v. BYBEE *et al.*

(*Supreme Court of Oregon.* March 23, 1891.)

QUIETING TITLE—RIPARIAN OWNERS—ACCRETION  
—CONFLICTING EVIDENCE.

In a suit to quiet title to certain alluvion claimed by the plaintiff and defendants, who were all riparian owners, when the question was left in doubt by the evidence, owing to its apparent conflict, as to the questions of fact, and it was manifest that some or all of the parties were entitled to the land in controversy as an accretion, *held*, that the court would divide the land in controversy between the respective claimants on equitable principles, and quiet the title of each riparian owner to the parcel allotted to him.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county; L. B. STEARNS, judge.

This is a suit to quiet the title to a parcel of land situate in Multnomah county. The referee found against both claimants,—that is, that neither of them was entitled to the land in controversy,—which finding was confirmed by the court, and a final decree entered dismissing the suit, from which both parties have appealed. The facts sufficiently appear in the opinion.

*R. Williams*, for plaintiff. *F. A. E. Starr*, for defendants.

STRAHAN, C. J., (*after stating the facts as above.*) The land in controversy is situated in the Columbia river, three or four hundred yards from its south bank, and near its confluence with the Willamette. An island called "Percy's Island" lies in the Columbia river, just below the land in dispute. This island was surveyed by the United States, and the plaintiff duly acquired the title of the United States thereto under the donation law. The land in controversy is situated at the upper end of Percy's island, and consists of a sandbar, which has been slowly increasing in size for a great many years, until a considerable part of it is now covered with a growth of willow and cottonwood, and it yields grass. Percy's settlement was in 1851, and before the land was surveyed. Not far from the same time William Bybee and James Bybee each made a settlement on separate parcels of land lying on the south bank of the Columbia river, and bounded thereon. These settlements were also under the donation law, and in due time their titles were perfected by final proof and the issuance of patents to the respective claimants. These claims are

opposite to the land in controversy. The defendant Adams has succeeded to all the rights of James Bybee in the lands patented to him as a donation claim. William Bybee claims so much of this sand-bar as lies in front of his claim, as an accretion thereto, and Adams sets up the same claim to all lying in front of the James Bybee claim; while the plaintiff Percy claims the entire bar as an accretion to his island claim. So far these conflicting claims all turn upon questions of fact which must be determined by the evidence. The plaintiff rests his claim on the fact that this alluvion formed at the head of his island, and connected itself therewith, and thereby became a part of said island. There is what is called a "depression" at the head of the island, several feet below the surface of the accretion, on the bottom of which grass and some willows grow; and for a long time, unless the water was very low, there was water in this "depression," and, in the earlier years of the settlement of the country, this depression formed a channel through which water-craft often passed. It is being constantly filled up, however, by natural causes, so that it now produces some vegetation. The claim of the defendants, William Bybee and Park Adams, is about as follows: That at the time of the settlement of William Bybee and James Bybee upon their donation land claims the sand-bar in dispute was formed in front of their respective land claims, and was connected with the shore at the upper and lower ends thereof; that it continued to form and rise above the water constantly thereafter until the water, which then was between this bar and the shore, had so far receded that at low water a person could pass dry shod from the shore to the sand-bar. All the parties claim to have been in possession ever since the time of their respective settlements, using the same mainly for pasturage. Under these facts the defendants claim the sand-bar as alluvion attached to the shore, and as an accretion to their lands, respectively. On all of these questions the evidence is very conflicting, though this conflict may be more apparent than real. Time and tides have wrought many changes in the formation and location of the bars and channels about this island in the last 25 or 30 years. No doubt the witnesses narrated events as they now remember them, and the changes occurring by natural causes would account for many of the apparent discrepancies. However this may be, it seems hardly practicable to decide the disputed questions of fact so as to fully sustain the contention of any of the parties. If full credit be given to all of the plaintiff's witnesses, and assuming the facts are as his evidence tends to prove them to be, then his contention is made out, and his right to the sand-bar in question is established. On the other hand, assuming that the defendants' witnesses are to receive full credit, and that the facts are as narrated by them, then the plaintiff's case is met and overthrown, and the defendants would be entitled to the premises in dispute, or a considerable portion thereof. We have no means of determining these disputed

questions of fact otherwise than by attentively weighing and considering the testimony of the witnesses, and we have seen that amidst this conflict it is impossible to determine just where the truth lies. The plaintiff's assertion of title to this land commenced earlier than the defendants', and he has exercised greater control over it, and, amidst the conflict and doubt surrounding the case, a somewhat stronger equity seems to be with him in the evidence. We have therefore concluded to quiet his title to one-half of the land in controversy lying immediately above what is known as "Percy's Island," and abutting thereon, and the other half thereof to the defendants. A decree will therefore be entered here to that effect, and the cause will be remanded to the court below, with directions to cause the lines to be marked and ascertained; and, if the defendants desire it, the half decreed to them may also be partitioned and set apart by the court below, at the same time to be held by the defendants, respectively, in severalty. These conclusions lead to a reversal of the decree of the court below. Neither party will recover costs against the other, either in this court or the trial court.

#### MURPHY v. CITY OF ALBINA.

(Supreme Court of Oregon. March 23, 1891.)

#### MUNICIPAL CORPORATION—STREET IMPROVEMENTS—RATIFICATION OF CONTRACT.

1. Under section 18 of the charter of the city of Albina (Sess. Acts 1887, p. 176) the city of Albina may, through and by its officers and agents, render itself liable or work in improving its streets, without an ordinance first passed authorizing the same. The mayor and common council are the governing body of the corporation, and it may act through these officers, or any of them, authorized for the purpose, or it may appoint agents to carry into effect the power of improving its streets.

2. If work was done in improving the streets without regular authority by direction of the mayor and members of the council, and afterwards the council accepted the same on behalf of the city, this would be a ratification, and equivalent to an original authority.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

This action is prosecuted by the plaintiff against the defendant to recover the sum of \$422.60 for grading, cutting, and filling Margaretta avenue, one of the defendant's streets, which work is alleged to have been done at the special instance and request of the defendant. The answer denies the material allegations of the complaint, and then alleges, in substance, that on the 23d day of June, 1888, the plaintiff and defendant entered into a contract by the terms of which plaintiff agreed, among other things, to do all the work necessary and required to be done in and about the improvement of Margaretta avenue, and for a certain distance along said avenue, in consideration of certain payments in said contract mentioned, which have been fully made; and all of the grading in the complaint alleged was done under and in accordance with this agreement. It is then alleged that the plaintiff agreed to

look for payment to a fund to be raised by an assessment upon the property liable to pay for such improvement, and that defendant assessed, collected, and paid into its treasury the whole sum which plaintiff was entitled to receive for said work. The reply denied the new matter in the answer, and then sets out the contract referred to therein, and then adds: "That, subsequent to the making of said contract, and after the plaintiff had graded, excavated, and filled Margaretta avenue to the full extent required by the specifications and estimates prepared by the defendant, and under which said contract was entered into, and had fully complied with the terms of said contract on his part to be done and performed, defendant changed the grade of said street, and added to the work to be done 700 yards of cut and 942 yards of fill, which is the work sued for in this action." Upon a trial before a jury a verdict was rendered for the defendant, upon which a judgment was entered, from which this appeal is taken. The bill of exceptions shows that upon the trial the plaintiff gave evidence tending to prove that plaintiff performed the work and labor named in the complaint; that he had not been paid therefor; that the work was done by order of the city surveyor of the city of Albina, and was not included in the contract set up in defendant's answer; that the grade of said street, as provided for in said contract, was changed by order of the city surveyor of Albina, and that such change in the grade necessitated the doing of the work named in the complaint; that when said change was ordered plaintiff complained of the same to two members of the council and to the mayor of the city of Albina, and that he was told by them to go on and do the work as directed, and follow the instructions of the city surveyor; that when said work was completed as ordered by the city surveyor the same was accepted by the city of Albina, and that the reasonable value of the same was the sum of \$466.20, and that said work was for the benefit of said city of Albina. At the conclusion of the evidence the plaintiff asked the court to instruct the jury that, if they should find that the work sued for was performed by plaintiff by order of the city surveyor and street supervisor of said city of Albina, acting for and on behalf of said city, and that said city, acting through its proper officers, accepted said work, and that said work was outside of and not included in plaintiff's contract with said city, and that said city received the benefit of the same; that the plaintiff notified the mayor of said city and the only councilman to be found at the time such work was so ordered of the said order of the city surveyor and street supervisor, and that said mayor and said councilman directed the plaintiff to proceed and obey the instructions of said city surveyor and street supervisor; and that, while said work was in progress, said city knew of the same,—then the city would be responsible for such work done and not paid for. This instruction was refused, and an exception was taken. The court then, among other things, instruct-

ed the jury as follows: "If the work that he has done, however, is outside of what is required by this contract,—that is to say, its grading, excavating, and filling, which brings the grade of the street above the established grade,—then he is not entitled to recover for that unless some particularly constituted authority of the city of Albina has authorized the survey of the city to be made higher than the established grade. The only authority which could thus change the grade of the street is the city council and the mayor, proceeding in the manner prescribed by charter—by ordinance—to change the grade. Unless it appears there was some such proceeding had, then any work that was done to bring the surface of this Margaretta avenue above the established grade is not authorized, and cannot be paid—cannot be lawfully paid—by the city. It may be there has been a mistake in the estimate; that the contract was framed so low by the city, and was taken by the plaintiff here upon a false basis originating in the mistake of the surveyor, whereby more work was actually done by the plaintiff than was estimated by the surveyor and street commissioner. If that was the case, I think the remedy of the parties should have been to have asked the city to revise the work of the surveyor, and, before settling with them for a price, to have had a correction then and there."

John M. Gearin, for appellant. P.L. Willis, for respondent.

STRAHAN, C. J. (*after stating the facts as above.*) Whether the rulings of the trial court can be sustained must depend on the charter of the defendant and upon the facts disclosed by the record. The defendant corporation was incorporated by an act approved February 4, 1887. (Sess. Acts 1887, p. 176.) By section 18 of the charter the council is given authority to make by-laws and ordinances not in conflict with the laws of this state or of the United States, and all necessary provisions for carrying them into effect. Subdivision 6 of the same section confers upon the council power to "grade, gravel, plank, or otherwise improve and keep in repair highways, streets, and alleys: provided, that no property shall be assessed for the construction of such improvements for more than one-half of its last county assessed valuation: \* \* \* and provided, further, that in case of proposed street improvement, when the improvement proposed is to be made at the expense of the property adjacent thereto, thirty days' notice of such intention shall be given by posting three notices thereof in public places of said city." This section confers upon the council very full power over the subject-matter named in it. It may make the improvements therein named, and pay the expenses thereof out of the general fund of the city, or, by giving thirty days' notice of such intention, it may tax the adjacent property for such proposed improvement, provided that the assessment shall not be more than one-half of the last assessed county valuation of such property. Under this provision of the charter we think the city of Albina might, through its offi-

cers and agents, render itself liable for work on its streets, without an ordinance first passed authorizing the same. The mayor and common council are the governing body of this corporation. The corporation may act through these officers, or any one of them, authorized for the purpose, or it may appoint agents to carry into effect the power of improving streets. It might confer that authority upon the street supervisor, or it might appoint a city surveyor, and vest him with authority in the premises; or, if work was done improving the streets, without regular authority by the direction of the mayor and members of the council, and afterwards the council accepted the same on behalf of the city, this would be a ratification, and would be equivalent to an original authority, and of equally binding force. Whether the work was done, and under and by what authority, and whether the same was accepted by the council, were all questions which ought to have been submitted to the jury. It appeared upon the trial that the mayor and two members of the council in effect directed the extra work to be done, and told the plaintiff to obey the orders of the city surveyor. Assuming that the two councilmen who were not consulted, so far as appears, did not consent to this, still the two that did act with the mayor would constitute a majority of the council. Upon the hearing here it was urged by respondent's counsel that it must appear that the council met and acted before any liability could arise. Two of the members of the council, and the mayor, who authorized the work, had knowledge of their own acts in directing the work to be done, and, when they met and accepted it, it is difficult to see why the city was not thereby rendered liable. The officers of the city directed the plaintiff to render valuable services for it in improving one of its streets, which he was then doing under an express contract with it; but the new or increased services were additional, and beyond those required by the original contract, which services, when performed, were accepted and used by the city with the other work performed under the express contract. In such case fair dealing requires that such labor should be paid for, when it appears that all concerned acted in good faith. The ruling of the court in giving and refusing instructions not being in harmony with what is said in this opinion, its judgment must be reversed, and the cause remanded for a new trial.

(88 Cal. 429)

**WHITE v. WHITE.** (No. 14,293.)

(Supreme Court of California. March 24, 1891.)

**RECORD ON APPEAL—BILL OF EXCEPTIONS.**

Where, on appeal from an order made after final judgment, directing payment to respondent of a sum of money for the purpose of defraying expense of counsel, the transcript showed that certain affidavits and testimony of witnesses were used at the hearing of the motion, and there is no bill of exceptions, the appeal will be dismissed, under rule 32, supreme court of California, providing in such cases that the papers and evidence used on hearing the motion must be preserved by bill of exceptions.

**Department 2. Appeal from superior court, city and county of San Francisco; E. R. GARNER, Judge.**

*E. D. Wheeler and Barclay Henley, for appellant. Henry E. Highton and McPike & Cooper, for respondent.*

**DE HAVEN, J.** This is an appeal from an order made after final judgment, directing the appellant to pay to the respondent the sum of \$7,500, for the purpose of paying certain of her attorneys for professional services rendered in the action. The respondent moves to dismiss this appeal upon the ground, among others stated: "The order appealed from was made after final judgment, and no bill of exceptions to the making of said order was ever served, settled, allowed, or filed." The transcript on appeal herein purports to show that certain affidavits and testimony of witnesses were used upon the hearing of the motion, which resulted in the order appealed from, but there is no bill of exceptions in the record. In the case of *Somers v. Somers*, 81 Cal. 608, 22 Pac. Rep. 967, the members of this court were divided as to the proper practice to be pursued in authenticating the record on appeal from this class of orders; but since then the court has adopted rule 32, which we think should be deemed as settling the practice, so far as relates to appeals taken since it went into effect; and, this appeal having been taken since that date, the rule is decisive of the question arising on this motion. The rule is as follows: "In all cases of appeal to this court from orders of inferior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in the bill of exceptions, except where another mode of authentication is provided by law." Appellant suggests a diminution of the record so as to have the transcript herein properly certified by the clerk of the court below; but it is manifest that such certificate could not supply the place of a bill of exceptions, which is required by the rule just quoted. Appeal dismissed; *remittitur* stayed for 30 days.

**We concur: MCFARLAND, J.; SHARPSTEIN, J.**

(88 Cal. xxi)

**PEOPLE v. WOHLFROM.** (No. 20,762.)

(Supreme Court of California. Feb. 17, 1891.)

**CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.**

It is error to charge that a reasonable doubt is "such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself." Following *People v. Bemmerly*, 26 Pac. Rep. 266.

**Department 2. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.**

**Indictment for murder.** On request of the people, the court instructed the jury that a reasonable doubt was "such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself." Defendant was convicted of murder in the second degree, and appeals.

*Clark & Aram, Craig & Hawkins, and J. R. Strong, for appellant. W. H. H. Hart, Atty. Gen., and C. W. Thomas, for respondent.*

PER CURIAM. On the authority of *People v. Bemmerly*, (Cal.) 25 Pac. Rep. 266, the judgment and order appealed from in this case are reversed, and the cause is remanded for a new trial.

(33 Cal. 234)

BOARD OF DIRECTORS OF MODESTO IRRIGATION DISTRICT v. TREGGA. (No. 13, 968.)

(Supreme Court of California. March 19, 1891.)

IRRIGATION BONDS — NOTICE OF PETITION — JURISDICTION.

1. St. Cal. 1889, p. 212, provides, in proceedings for the issue of bonds of irrigation districts, that the court shall direct publication of a notice of the filing of the petition in the same manner and length of time that a notice of special elections is provided for, stating the time and place for the hearing the prayer of the petition, and that any person interested in the organization may on or before the day of hearing demur to or answer said petition. *Held*, that the notice prescribed by the statute was sufficient to confer jurisdiction upon the superior court.

2. Under St. Cal. 1889, p. 212, in proceedings for the confirmation of the issue of bonds of an irrigation district, the prayer of the petition is sufficient if it prays for the examination, approval, and confirmation of the proceedings "aforesaid" for the issue and sale of bonds of the district.

3. The notice is sufficient if it states the substance of the prayer in the petition.

4. Under St. Cal. 1889, p. 212, supplemental to an act providing for the organization of irrigation districts, approved March 7, 1887, authorizing the directors to institute proceedings for the confirmation of the issue and sale of bonds, the directors of the M. district issued bonds to the amount of \$300,000, and, failing to dispose of them, issued another series upon vote of the stockholders to the amount of \$400,000. They filed a petition setting forth the last issue, published a notice praying for confirmation of the issue and sale, and designated the time when any interested person might demur or answer. Thereafter the directors filed an amended petition, alleging the issue of the first series of bonds, and stated that the \$400,000 were part of the original series, but no notice of the changes introduced in the amended petition was published or served save on defendant. The court below confirmed the order relating to the sale of both series of bonds. *Held* that, where the petition was amended by setting out new orders of the board, the court acquired no jurisdiction to confirm same without publication of a new notice, and the decree is void as to the \$300,000 issue.

5. St. Cal. 1887, p. 30, § 2, provides: "Nor shall any lands which will not, in the judgment of said board, be benefited by irrigation by said system, be included within said district." *Held*, that a city or town, or a portion thereof, may, in a proper case, in the discretion of the board of supervisors be included in an irrigation district.

6. Upon the question of fact as to what lands will or will not be benefited by irrigation the decision of the board of supervisors is conclusive.

7. St. Cal. 1889, p. 29, § 6, provides that, if there be any outstanding bonds, no order of exclusion of part of the district can be made without consent of the bondholders. There was an understanding between the bidders and directors that the former were not to be held to their offer unless they could effect a sale of the bonds. The bonds were never issued or paid for, and prior to the order of exclusion the bidders had been released from their offer. *Held*, that the decree

of validity of the order of exclusion rendered by the lower court was proper.

8. Under a petition in proceedings to confirm the sale of \$400,000 of bonds issued by an irrigating district evidence applicable thereto was taken. *Held*, that on the filing an amended petition it was not error of the court below to refuse to try the case *de novo*.

9. St. Cal. 1887, p. 85, § 15, which provides the manner of giving notices for special elections for voting bonds for irrigating districts excludes the notice provided by section 5 of the act, which provides for general elections.

10. Under St. Cal. March 16, 1889, the directors of irrigation districts may commence confirmation proceedings as soon as any resolution for the issue and sale of bonds has been adopted by them.

In bank. Appeal from superior court, Stanislaus county; D. O. MINOR, Judge.

*Geo. D. Schell, C. W. Eastin, and T. B. Bond, for appellant. C. C. Wright and C. A. Stonessifer, (A. L. Rhodes, of counsel,) for respondent.*

BEATTY, C. J. This is a special proceeding instituted in pursuance of the act of March 16, 1889, (St. 1889, p. 212,) for the purpose of obtaining judicial confirmation of the validity of certain bonds of the respondent, which it has ordered to be issued and sold. The act referred to is supplemental to the act entitled "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887, and commonly known as the "Wright Law." St. 1887, p. 29. The original act, as its title imports, provides for the organization of irrigation districts, and for the adoption and carrying out of plans for the irrigation of the lands embraced therein. Among other things so provided for is the issuance and sale of the bonds of the several districts. Before any such bonds can be issued or sold the directors of the district are required to submit the proposition to a vote of the electors at a special election, and to order and give notice of such election in a manner particularly prescribed. As the validity of the bonds, when issued, depends upon the regularity of the proceedings of the board, and upon the ratification of the proposition by a majority of the electors, it is matter of common knowledge that investors have been unwilling to take them at their par value while all the facts affecting their validity remain the subject of question and dispute. To meet this inconvenience—for the security of investors, and to enable the irrigation districts to dispose of their bonds on advantageous terms—the supplemental act, under which this proceeding was instituted, was passed. It provides that the board of directors of any irrigation district may "commence a special proceeding in and by which the proceedings of said board and of said district providing for and authorizing the issue and sale of the bonds of said district, whether said bonds or any of them have or have not been sold, may be judicially examined, approved, and confirmed." The proceeding is commenced by the filing of a petition in the superior court of the coun-

ty in which the lands of the district, or some portion thereof, are situate, praying the confirmation of the proceedings of the directors; whereupon the court is required to make and publish an order stating the prayer of the petition, and fixing a time and place for the hearing. Any person interested may demur to or answer the allegations of the petition, and the issues of law and fact are tried and determined by the court as in other cases, under the ordinary rules of practice. The court has power, upon the hearing, to examine and determine the legality and validity of the organization of the district, and all matters affecting the legality and validity of the bonds and the order for their sale, and has the power to confirm the proceedings in whole or in part, according to the facts. In this case the proceeding in the superior court resulted in a judgment affirming the regularity of the organization of the respondent as an irrigation district, and the legality and validity of its orders for the issuance of its bonds to the amount of \$800,000, and for the sale of \$400,000 thereof. The defendant, a resident and property owner of the district, who contested the validity of the respondent's proceedings, appeals from the judgment of the superior court, and from an order denying his motion for a new trial.

Numerous errors are assigned and argued, but they are all involved in, and may be disposed of by, a consideration of a few general propositions:

First it is contended that there was no sufficient notice of this proceeding to give the superior court jurisdiction to render a judgment binding upon the lands of the district and their owners. There seems to be a claim under this head, though it is not particularly insisted upon, that the notice prescribed by the statute is not sufficient. The object of the proceeding is, of course, to compel every person interested in the district, and whose property is to be bound for the payment of its debts, to come into court, and within the time limited present and submit to judicial investigation any and all objections he may have to the regularity of the organization of the district, and all other matters affecting the validity of the bonds, so that it may be finally and conclusively determined, by a judgment which neither he nor his successors in interest can thereafter question, whether such bonds are legal and valid or not. Notice must therefore be given to all persons so interested. But it need not be a personal notice. It not only may be, but, to secure the ends of the statute, it must be, a general notice by publication in some form. It is unnecessary to take up time in the discussion of this question, which has long since ceased to be an open one in this state. Without referring to many earlier and later decisions bearing more or less directly upon the point, it is sufficient to say that the statute and proceedings under review in *Lent v. Tillson*, 72 Cal. 404, 14 Pac. Rep. 71, were in all essential respects similar as to their objects and the substance of their provisions to the statutes and proceedings in question here, and the notice of this proceeding prescribed by the statute

of 1889 is for every purpose as ample and beneficial as the notice to property owners, which was, in that case, held sufficient to give validity to the proceedings by which the lands of the local assessment district were subjected to a lien for the payment of the Dupont-Street bonds. The provisions of the supplemental act in regard to this matter are found in section 3, St. 1889, p. 212, which reads as follows: "The court shall fix the time for the hearing of said petition, and shall order the clerk of the court to give and publish a notice of the filing of said petition. The notice shall be given and published in the same manner and for the same length of time that a notice of special election, provided for by said act to determine whether the bonds of said district shall be issued, is required to be given and published. The notice shall state the time and place fixed for the hearing of the petition, and the prayer of the petition, and that any person interested in the organization of said district, or in the proceedings for the issue or sale of said bonds, may, on or before the day fixed for the hearing of said petition, demur to or answer said petition. The petition may be referred to and described in said notice as the petition of the board of directors of ——— irrigation district, (giving its name,) praying that the proceedings for the issue and sale of the bonds of said district may be examined, approved, and confirmed by said court."

But it is further contended that, even conceding the sufficiency of the notice prescribed by the statute, the notice actually given of this proceeding did not comply with the statute. In order to a proper understanding of the several objections falling under this head it is necessary to state generally the facts concerning the organization of the respondent as an irrigation district, and its subsequent proceedings. The petition to the supervisors of Stanislaus county in which all its lands are situate, for the formation of the district, was filed May 11, 1887; and the order of the board declaring the due organization of the district was made July 18, 1887. Thereupon the directors of the district organized, caused surveys and estimates of the cost of acquisition and distribution of water to be made, and on November 19, 1887, fixed the sum necessary to be raised by the issuance of the bonds of the district at \$800,000. The proposition to issue this amount of bonds was at a special election submitted to a vote of the electors of the district, who, by a considerable majority, voted in favor of the proposition. Upon ascertaining the result of this election, the directors, on the 3d day of January, 1888, "resolved and order that the bonds of said district in the sum of \$800,000 be issued in the manner and form prescribed by said act." After resolving upon the issuance of said bonds, several unsuccessful efforts seem to have been made to dispose of a portion of the amount authorized, and finally, on July 1, 1889, the following resolutions were adopted by the board of directors: "It is hereby ordered that the bonds of this district be issued in the amount of \$400,000 of the following de-

nominations: 760 bonds of the denomination of \$500 each, and 200 bonds of the denomination of \$100 each; and that the said bonds shall in form and substance conform to the provisions of the act of the legislature of the state of California entitled 'An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes,' approved March 7, 1887, and that they be signed, sealed, and numbered as in said act provided. It is further ordered that the bonds of the district, conforming to the provisions of said act and to this order, be prepared, executed, and issued in such manner and form in all respects that they shall become and be ready for sale by this board, and on behalf of this district. Resolved, that this board hereby declares its intention to sell the bonds of this district to the amount of \$400,000, to-wit: 760 bonds of the denomination of \$500 each, and 200 bonds of the denomination of \$100 each; and it is therefore ordered that a notice that sealed proposals will be received by this board at its office in the city of Modesto, up to the hour of 1:30 o'clock P. M. of the 3d day of September, 1889, for the purchase of said bonds be published for twenty days before the said date in the following newspapers: The Daily Alta, published in the city of San Francisco; the Record Union, published in the city of Sacramento; and the Daily Times, published in the city of Los Angeles. On motion duly made, seconded, and carried, it was ordered that the board of directors of this district commence special proceedings in and by which the proceedings of said board and of said district for and authorizing the sale of the bonds of said district may be judicially examined, approved, and confirmed." In pursuance of this resolution the original petition in this case was filed in the superior court of Stanislaus county on the following day, August 1, 1889. In this petition the due organization of the district under the act of March 7, 1887, is alleged to have been effected on the 18th day of July, 1887. It is alleged that certain persons—naming them—were then duly elected, and have ever since been the directors of the district; that all its lands are in Stanislaus county; that as soon as practicable after its organization, to-wit, on November 19, 1887, the directors duly estimated the cost of acquiring water-rights and constructing irrigation works for the district at \$800,000, and that it was necessary to issue the bonds of the district to that amount, and that the same should be sold, provided the electors of the district should vote in favor of their issuance. It is alleged that a special election was immediately called, at which the proposition should be submitted and voted upon, of which the notices required by the statute were duly published and posted; that at the time appointed the election was in fact held; that the returns of said election were duly made and canvassed, and the result duly declared and recorded, and that the vote was 439 in favor of and only 76 against the proposition. The original petition fails at this

point to state the next steps actually taken by the board of directors, viz., its resolution of January 3, 1888, to issue the \$800,000 authorized by said vote, and its unsuccessful efforts to sell portions of such issues. Omitting all reference to these proceedings, it alleges the orders and resolutions of July 31, 1889, above quoted, directing the issuance and sale of bonds to the amount of \$400,000, and closes with the following prayer: "Wherefore your petitioner prays that the proceedings aforesaid for the issue and sale of said bonds of said irrigation district may be judicially examined, approved, and affirmed by said court." Upon the filing of this petition the judge of the superior court made an order fixing the 24th day of August, 1889, for the hearing of the petition, and ordered the clerk to cause notice of the filing of the petition to be given and published as prescribed by law. In pursuance of said order the following notice was issued and published for the prescribed period: "In the superior court of the county of Stanislaus, state of California. In the Matter of the Modesto Irrigation District, No. 1,003. Notice is hereby given that the petition of the board of directors of the Modesto irrigation district, praying that the proceedings for the issue and sale of the bonds of said district may be examined, approved, and confirmed, was on the 1st day of August, 1889, filed in said court; that said court fixed as the time for the hearing of the said petition the 24th day of August, 1889, at the court-house, in the city of Modesto; and notice is further given that any person interested in the organization of said district, or in the proceedings for the issue or sale of said bonds, may, on or before the day last above mentioned, demur to or answer said petition. By order of the court. Attest: E. D. McCABE, Clerk. By A. J. LEWIS, Deputy-Clerk. [Indorsed.] Filed October 21, 1889. E. D. McCABE." The defendant, on the 24th day of August, 1889, appeared in the proceedings by his attorney, and filed a demurrer to the petition, which was overruled by the court, and on September 3d he filed an answer, and the issues were set for trial on October 21, 1889, upon which day the trial commenced, and continued until both parties closed their evidence on October 26th, whereupon the court adjourned until October 28th. When the hearing was resumed on the 28th, and after the argument had commenced, the petitioner asked and obtained leave to file and serve an amended petition, and defendant was granted leave to demur to or answer such amended petition within 10 days after service of an engrossed copy. On the 30th day of October the amended petition was filed, which, in addition to the allegations of the original petition, alleged the order of the board of directors of January 3, 1888, for the issuance of the \$800,000 of bonds voted by the electors, and also that the \$400,000 of bonds ordered issued and sold by the resolution of July 31, 1889, were a part of the amount of \$800,000 ordered issued by the resolution of January 3, 1888. The prayer of the amended petition was a repetition of the original prayer. The defendant, upon being served with the



amended petition, again demurred, and, his demurrer being overruled, he again answered, specifically denying everything alleged in the petition, and setting up several matters of defense. He then demanded that the whole case should be tried *de novo*, disregarding all the evidence that had been taken; but the court refused this demand, holding that the evidence already taken might properly be considered, but allowing the parties to introduce evidence as to the new matters embraced in the amended pleadings. In pursuance of this order the trial was resumed on November 21st between the petitioner and defendant, and thereupon the case was argued, submitted, and decided. No notice of the changes introduced into the petition by the amendments above mentioned was ever published or served in any manner except upon the defendant, but the court in its findings and decree confirmed and declared valid not only the order of July 31, 1889, relating to the issue and sale of the \$400,000 of bonds, but also the order of January 3, 1888, relating to the issue of \$800,000, which, as we have said, was mentioned for the first time in the amended petition.

Such being the case, the appellant objects to the published notice of the filing of the petition—*First*, that it was insufficient as a notice of the original petition; and, *second*, that it could not possibly confer upon the superior court any jurisdiction to confirm the proceedings alleged for the first time in the amended petition. The statute (section 3) requires that the notice shall state, among other things, the prayer of the petition; and it is contended that this notice did not state the prayer of the petition; but we think the notice contained everything necessary to a substantial compliance with the law. The prayer of the petition must be read in connection with the petition itself in order to understand its meaning, but, so read, it is clear and intelligible, and is in effect a prayer for the judicial examination, approval, and confirmation of all the proceedings set out in the petition, including those for the organization of the district, for they, like the rest, were essential to the legality and validity of the bonds; and, accordingly, the statute (section 5) expressly confers power and jurisdiction upon the court in all proceedings for the confirmation of bonds to examine and determine, approve and confirm, the proceedings for the organization of the district, as well as all other proceedings that may affect the legality and validity of the bonds and the order for their sale. The prayer, therefore, was sufficient, when read in connection with the petition; but to have repeated it in its literal terms in the notice would have been meaningless, and the only way to "state" it was to give its substance, as was done. Of course, to a person entirely ignorant of the law authorizing and regulating the proceedings, the notice may have been unintelligible; but it would have been equally so to such a person if the prayer of the petition had been as full and specific as the allegations upon which it was founded, and had been copied ver-

*batim* in the notice. A knowledge of the law is, however, imputed to every one interested in the proceeding; and it is decided in *Lent v. Tillson*, *supra*, that the notices required in cases of this character are to be construed and aided by reference to the statute. So read and construed, we think that the notice in this case was in substantial compliance with the statute, and imparted sufficient notice to all the world that the directors of Modesto Irrigation district, No. 1,008, would, on the 24th day of August, 1889, submit the question of its corporate existence and the regularity of all its proceedings for the issuance and sale of its bonds, so far as the same were set out in its petition on file, to the superior court of Stanislaus county, and would ask the court to decree the regularity of all such proceedings; and we think that all persons interested in the district, being so notified of the time of the filing of the petition and of the office in which it remained as a public record, were bound to take notice of its specific allegations, and, if they had any objection to the confirmation of the orders and proceedings referred to in the prayer of the petition, that they were required to present their objections to the court at the time and place mentioned in the notice, or be forever precluded—they and their successors—from questioning the validity of the bonds issued in pursuance of such proceedings.

But could the court, without the publication of a new notice for the statutory period, acquire jurisdiction to examine and make a valid confirmation of the proceedings not set out in the petition on file when the original notice was published, and to which alone it referred? Or, to state the question more precisely, could the court, by giving notice of a petition to confirm an order for the issue and sale of bonds to the amount of \$400,000, acquire jurisdiction to confirm an order for the issuance of bonds to the amount of \$800,000? We do not think it could. The only answer which respondent makes upon this point to the contention of appellant is that he had notice of the amended complaint; that he demurred and answered to its allegations, and therefore cannot be heard to object that other persons had no notice. Of course, in ordinary proceedings intended to fasten a liability upon particular defendants, and in which each may be made independently liable, this would be a sufficient answer. But here the proceeding is *in rem*, and its object is to establish the validity of the bonds as against the Irrigation district and all persons interested in the district. To be effective for the protection of investors or the advantage of the district, the judgment would bind all the world. A judgment binding upon the appellant alone must be, in effect, a nullity, leaving the district in precisely the same position it was in before the proceeding was commenced. Such being the case, this appellant, as a land-owner of the district, directly interested in the price to be realized upon a sale of its bonds, has a right to insist that the steps necessary to give the court jurisdiction to pronounce a binding

decree shall be regularly taken. And we can see no escape from the conclusion that this decree, so far as it attempts to confirm the order of January 3, 1888, for the issuance of \$800,000 of the bonds of the district, is erroneous, and void for want of jurisdiction; but we think there is no doubt that the superior court had jurisdiction, acquired by full compliance of the law, to examine into and confirm the order of July 31, 1889, for the issuance and sale of \$400,000 of the bonds of the district, and that, as to that order, the decree may be affirmed, if it, and the proceedings upon which it was founded, were regular and legal. To sum up in this branch of the case, we are told, with reference to the points presented by appellant, as follows: The object of the act of March 16, 1889, is to provide a security for investors, and promote the advantage of the irrigation districts by enabling the courts of the state to render a judgment binding on all the world as to the validity of bonds to be offered for sale by such districts. To obtain such judgment the petition should set forth the particular orders for the issuance and sale of bonds, confirmation of which is desired. How fully the preliminary proceedings must be alleged is a question which does not arise here, but with respect to the organization of the district it is only necessary that its due organization and the election of its first board of directors should be alleged in general terms. The prayer of the petition is sufficient if it prays for the examination, approval, and confirmation of the proceedings "aforesaid" for the issuance and sale of bonds of the district; and the notice is sufficient if it states the substance of such prayer, and in other respects conforms to the statute. But the decree of the court cannot go beyond the orders for the issuance and sale of bonds which are alleged in the petition; and, in case the original petition is amended by setting out other orders for the issuance or sale of bonds, the court will not acquire jurisdiction to confirm such orders without the publication of a new notice of the amended petition. A decree, however, confirming all the orders alleged in the original and amended petitions, is not void for want of jurisdiction as to the orders set out in the original petition merely because no new notice has been given of the filing of the amended petition. If there was due publication of sufficient notice of the original petition, the decree of the court confirming the orders for the issuance and sale of bonds therein specifically alleged, and of all the preliminary proceedings affecting their validity, including those for the organization of the district and the election of its first board of directors, is within the jurisdiction of the court, and can be assailed only by those who have contested the proceeding, and by them only upon the ground of prejudicial errors affecting their substantial rights, which have been duly excepted to. In this case, accordingly, we hold that so much of the decree as confirms the order for the issuance of \$800,000 of bonds of the district dated January 3, 1888, is void, but that it should be affirmed, so far

as it confirms the order of July 31, 1889, for the issuance and sale of \$400,000 of the bonds of the district, unless in conducting the proceeding the superior court committed error to the prejudice of this appellant.

The first point urged by the appellant upon this branch of the case is that the superior court erred in confirming the proceedings of the board of supervisors in organizing the district because said board, by including therein the city of Modesto, had violated the following provision of the Wright law: "Nor shall any lands which will not, in the judgment of said board, be benefited by irrigation by said system, be included within such district." St. 1887, p. 30, § 2. It appears from the record that the district as originally organized contained about 108,000 acres of land, including the city of Modesto, a town covering about 2,000 acres and having about 3,000 inhabitants and about 600 dwelling-houses, besides shops, stores, etc.

One proposition of the appellant seems to be that the mere fact of the corporate existence of a town or city, though situate in the midst of a district susceptible of irrigation by one system, necessarily deprives the board of supervisors of the county of the power to include any of the lands within the corporate limits of such city or town in an irrigation district. We say this seems to be a proposition of the appellant, because, although it is not expressly stated in terms, it appears to be necessary to sustain his contention; for, if it lies within the discretion of the board to include in an irrigation district any part of the lands of a town or city upon the ground that in their judgment such part will be benefited by irrigation under the system proposed and if the judgment of the board upon the question of benefits is conclusive of the fact,—as we shall show that it is,—there is no ground upon which a court can say that an order including all the lands of a city or town in such district is void. The idea of a city or town is, of course, associated with the existence of streets, to a greater or less extent lined with shops and stores, as well as of dwelling-houses; but it is also a notorious fact that in many of the towns and cities of California there are gardens and orchards inside the corporate boundaries requiring irrigation. It is equally notorious that in many districts lying outside of the corporate limits of any city or town there are not only roads and highways, but dwelling houses, outhouses, warehouses, and shops. With respect to these things, which determine the usefulness of irrigation, there is only a difference of degree between town and county. The advantages of irrigation to a town like Riverside, in San Bernardino county, for instance, no one could deny; and the difference between such a town and these places where irrigation would be as manifestly out of place are not marked by any hard and fast line which would enable a court to lay down a rule of discrimination. The question whether in any particular case a town will, as a whole, be benefited directly by the application of water for irrigation, is in its nature, and under existing

conditions must remain, a question of fact to be decided by that tribunal to whose discretion it had been committed by the legislature. It is very certain that the legislature intended that cities and towns should, in proper cases, be included in irrigation districts, for the act expressly provides for the assessment and taxation according to their value not only of city and town lots, but also of the improvements thereon. St. 1887, p. 37, § 18 et seq. And this feature of the law was made an argument against its constitutionality in the case of *Irrigation Dist. v. Williams*, 76 Cal. 360, 18 Pac. Rep. 379, in which its constitutionality was affirmed. Such having been the intention of the legislature, as is clearly apparent, and it being equally clear and notorious as matter of fact that there are cities and towns which not only may be benefited by irrigation, but actually have in profitable use extensive systems for irrigating land within their corporate limits, it cannot be denied that the supervisors of Stanislaus county had the power to determine that the lands comprising the city of Modesto would be benefited by irrigation, and might be included in an irrigation district. There was, it appears, a large majority of the electors of Modesto in favor of such inclusion; but the appellant, and others owning buildings, objected to being included in the district, on the ground that their lots, covered with stores, shops, and warehouses, would not be benefited. If this objection was good ground for excluding the city from the district, it is probable that no district could ever be successfully organized; for, in the nature of things, an irrigation district must cover an extensive tract of land, and, no matter how purely rural and agricultural the community may be, there must exist here and there within its limits a shop or warehouse covering a limited extent of ground that can derive no direct benefit from the use of water for irrigation. Here, again, the difference between town and county is one of degree only, and a decision in the interest of shop-owners in towns that their lots cannot be included in an irrigation district would necessarily cover the case of the owner of similar property outside of a town. It is nowhere contended by the appellant that in organizing irrigation districts it is the duty of the supervisors to exclude by demarkation every minute tract or parcel of land that happens to be covered by a building or other structure which unfits it for cultivation, and certainly the law could not be so construed without disregarding many of its express provisions, and at the same time rendering it practically inoperative. We construe the law to mean that the board may include in the boundaries of the district all lands which in their natural state would be benefited by irrigation, and are susceptible of irrigation by one system, regardless of the fact that buildings or other structures may have been erected here and there upon small lots, which are thereby rendered unfit for cultivation at the same time that their value for other purposes may have been greatly enhanced. So construed, we can see no objection to the

law upon constitutional grounds or grounds of expediency. As to owners of such property, it seems reasonable to assume that they must participate, indirectly at least, in any benefits the district may derive from the successful inauguration of a system of irrigation; but, aside from this, the law contains an express provision designed to secure to them a benefit exactly corresponding to any burden to which they may be subjected, and in that respect is far more equitable than many of the assessment laws which have been upheld here and elsewhere. The provision referred to is this: Every taxpayer of the district receives a portion of all the water distributed exactly equivalent to his proportion of the total tax levied, and this water is his to use or to sell, as he may elect; so that, if his lot is not fit for cultivation, he nevertheless gets a full equivalent for the tax assessed to him. St. 1887, p. 34, § 11. Upon these grounds we hold that a city or town, or a portion thereof, may, in a proper case, be included in an irrigation district. As to what is or what is not a proper case for such inclusion, the decision of that question has been committed to the several boards of supervisors, whose discretion is not subject to the control of any court. Upon matters affecting their jurisdiction the orders of the board of supervisors may be open to review, but upon the question of fact as to what lands will or will not be benefited by irrigation their decision is final and conclusive. See section 2 of the act, St. 1887, p. 30.

The formation of irrigation districts is accomplished by proceedings so closely analogous to those prescribed for the formation of swamp-land reclamation districts that the decisions with respect to the latter are authority as to the former, and we cite, as conclusive of this point, *People v. Hagar*, 52 Cal. 181; 66 Cal. 60, 4 Pac. Rep. 951. Many other decisions to the same effect are cited in the briefs of counsel, but we deem it unnecessary to refer to them here. The superior court did not err, therefore, in refusing to allow the appellant to introduce evidence for the purpose of proving that his and other lots in the city of Modesto would not be benefited by the proposed system or any system of irrigation. Nor did the court err in refusing the offer of appellant to prove that the board of supervisors wrongfully included the city of Modesto in the irrigation district, for the purpose of carrying out the scheme of organization against the wishes of the farmers outside the city. To entitle the appellant to prove that the board and its members, well knowing that the lands of the city would not be benefited by irrigation, had nevertheless included them for the corrupt purpose suggested, and not in the exercise of their honest judgment and discretion, the facts constituting the fraud should have been fully pleaded in the answer; but no such facts as he offered to prove were pleaded. It is, indeed, alleged that the order including the city was not made in the exercise of the judgment and discretion of the board, but contrary thereto. This allegation is part of a separate defense, in which it is coupled with other

allegations, going to show that the lands of the city would not be benefited by irrigation; but it is nowhere alleged that the board, or any of its members, actually believed at the time they offered such lands to be included in the district that they would not be benefited. The court therefore properly sustained the objection that the offered evidence was immaterial. As to all such matters as were alleged in the answer, the evidence shows that the board of supervisors acted with the utmost deliberation upon the petition for the organization of the district; that they heard and considered numerous objections and the testimony offered in support of them, and did not make their final decision until the time allowed for deciding had nearly elapsed.

The next point urged for appellant arises out of the fact that, after the original organization of the district including 108,000 acres, and after the proposition to issue \$800,000 of bonds had been ratified by a vote of the electors of the district, and after the resolution of the directors to issue the bonds to that amount, the board of supervisors had ordered a portion of the district embracing 28,000 acres to be cut off and excluded therefrom. It is contended that this order, which was one of the proceedings confirmed by the superior court, was void for want of jurisdiction in the board to make it. The proceedings for the exclusion of lands from an irrigation district, of which they form a part, are authorized and prescribed by another act amendatory and supplemental to the Wright act, approved February 16, 1889. St. 1889, p. 21. This act provides for the filing of a petition for exclusion by owners of lands within the district; notice of the filing of such petition, and time and place of hearing; the presentation of objections by parties interested; and, in certain cases, for a submission of the question of exclusion to a vote of the electors of the district. Among other things it is provided that, if there be any outstanding bonds of the district, no order of exclusion can be made without the consent in writing of the holders of such bonds, acknowledged as deeds of conveyance are required to be acknowledged. It is contended by the appellant that at the time the petition for the exclusion of the 28,000 acres was filed, and during the greater portion of the time the notice of the hearing was being published, there were outstanding bonds of the district, and that no written consent of the holders of said bonds was ever given to the making of the order. But the fact is, there never were any outstanding bonds of the district. Its bonds, as above stated, had more than once been offered for sale, and at one time a bid for \$50,000 of the bonds had been made by Tucker and Perley, and formally accepted by the directors. But the evidence shows that at the time of the making and accepting of this bid there was an understanding between the bidders and the directors that the former were not to be held to their offer unless they could succeed in negotiating a sale of the bonds to some outside party, and, as they failed to do so, the bonds had never been issued or

paid for; and prior to the making of the order of exclusion, Tucker and Perley had, upon their written request, been released from their offer by formal resolution of the board of directors. Such being the case, it is clear that there had not only never been any outstanding bonds of the district, but that at the date of the order of exclusion there was not even a subsisting contract for the issuance of the bonds. We cannot perceive, therefore, that the court committed any error in decreeing the validity of the order of exclusion. But, even if the decree had been in that respect erroneous, it is by no means clear that it would have been material; for the order of exclusion is not one of the orders set out in the petition of the respondent, confirmation of which is prayed. It is alleged for the first time in the answer of appellant, and its invalidity charged as matter of defense, and as a ground for refusing confirmation of the order for the issuance and sale of bonds. It is therefore material only so far as its validity or invalidity affects such order for the issuance and sale of bonds, and we do not understand how that order would be any more or less valid whether the order of exclusion was legal or not.

The superior court did not err in holding that the \$400,000 of bonds ordered to be issued and sold by the order of July 31, 1889, was part of the issue of \$800,000 proposed and voted and ordered issued January 3, 1888. The evidence fully sustains the finding, and there is nothing really opposed to it, except the mere fact that the resolution of the board of directors does not in express terms couple the issue and sale of the \$400,000 of bonds with the previous proceedings authorizing the issuance of \$800,000 of bonds. The fact that when the proposition for the issuance of \$800,000 was ratified by a vote of the electors, the plan in contemplation was to bring water from the Stanislaus river sufficient to irrigate 108,000 acres, and that the order for the issuance and sale of \$400,000 was made after a change in the district and a change of plan contemplating the bringing the water from the Tuolumne river sufficient only for the irrigation of 80,000 acres, does not destroy the relation between the last order for the sale of bonds and the original authority to issue them. The authority to issue bonds is wholly independent of the source of supply of water or any plans for obtaining it. There is nothing in the law to prevent the directors from changing their plans in this respect whenever they find it to the advantage of the district to do so; and any order they may make for the issuance and sale of bonds must be referred to the proceedings by which alone such order is authorized whether they are expressly referred to or not.

The superior court did not err in refusing to try the case *de novo* after the filing of the amended petition. All the evidence that had been taken was applicable to the issues formed by the amended pleadings; and, indeed, the principal object and only effect of the amendments to the petition were to make it conform to the evidence already in. It would therefore have been

a mere waste of time, as well as a most unusual practice, to have introduced anew the evidence already before the court.

It is contended that the board of directors never had any authority to issue any bonds of the district, because no legal notice was given of the special election at which the proposition to issue bonds was submitted to a vote of the electors. The point of this objection is that the general notice prescribed by section 5 of the Wright act (St. 1887, p. 31) was not posted in the office of the board; but this was a special election held under section 15 of the act, page 35, and the notices prescribed by that section were duly given. As we construe the law, that section applies to such special elections, to the exclusion of section 5.

It is contended that this judgment cannot be sustained because the proceeding was commenced before any bonds had been issued. According to appellant's construction of the supplemental act, no proceeding can be commenced under it until bonds have been actually issued. There may be something in the literal terms of the title and one or two clauses of the act to countenance this construction, but, read as a whole, and with reference to its manifest purpose, and the evil it was intended to correct, it must be construed as allowing the proceeding to be commenced as soon as any resolution has been adopted for the issue and sale of bonds.

Finally, it is contended by appellant that the authority originally granted to the directors to issue bonds to the amount of \$800,000, at the time when the district embraced 108,000 acres, ended with the order excluding 28,000 acres; for, he says, even if the legislature intended to bind the new or reconstituted district by a vote of the old district, the law, to that extent, would be unconstitutional; citing sections 11, 12, and 13 of article 11 of the constitution of California, and section 10, art. 1, of the constitution of the United States. If, after this district had actually incurred a debt by the issuance of bonds, a portion of the lands of the district had been excluded without the consent of the owners of the lands remaining, the argument of appellant on this point would have had much force, and would at least have been deserving of serious consideration. But the facts being that, at the time of the exclusion of 28,000 acres from this district, it had no debt, and that, after notice of the proceeding, no objection was made to such exclusion by any person, there is no basis for any claim of injustice or violation of constitutional rights. The identity of the district was not destroyed by the exclusion of a part of its lands. Those who remain in the district will receive all the benefits of the expenditures of the proceeds of its bonds. They will not be compelled to pay for anything for the benefit of others. Nor is there anything in the law to compel the directors of the district, as constituted, to expend the whole amount of bonds authorized, if such amount shall not be needed. The provision of section 15 for the issuance of the bonds voted is merely directory, leaving it in the discretion of the board to issue and sell such

amount of bonds, within the amount voted, and at such times, as they may find expedient. Upon a review of the whole case, we conclude that all the proceedings examined, approved, and confirmed by the superior court were regular and valid, but that the court did not acquire jurisdiction to confirm the order or resolution of January 3, 1888, for the issuance of \$800,000 of the bonds of the district in this proceeding. That order, however, is not essential to the validity of the order for the issuance and sale of \$400,000 of bonds, which depends upon and is sustained by the other proceedings for the organization of the district and the issuance of bonds. It is therefore ordered that the judgment and decree of the superior court be, and the same is hereby, modified by striking out so much thereof as confirms said order of January 3, 1888, for the issuance of \$800,000 of bonds of respondent, and, as so modified, the judgment and decree, as well as the order overruling appellant's motion for a new trial, are affirmed.

We concur: MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.

(85 Cal. 545)

OHM v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. (No. 13,679.)

(*Supreme Court of California*. Sept. 10, 1890.)

EXECUTORS AND ADMINISTRATORS — FRAUDULENT CONVEYANCES BY DECEDENT — ACTION TO SET ASIDE.

1. Under Code Civil Proc. Cal. §§ 1589, 1590, which direct the administrator, on the application of creditors of the decedent, to sue for the purpose of setting aside fraudulent conveyances made by the decedent in his life-time, only such creditors whose claims have been allowed by the administrator, or who have established them by judgment, can compel the administrator to bring the action.

2. A creditor of an estate may bring an action in his own name to set aside a conveyance made by the decedent in his life-time in fraud of creditors, or the administrator may be compelled to bring the action in a proper case; and an order of the superior court, directing a creditor to commence and prosecute the action in the name of the administrator, will be annulled on a writ of review brought for that purpose.

In bank. On writ of review.  
W. C. Belcher, for petitioner.

PATERSON, J. The petitioner is administratrix of the estate of E. F. Ohm, deceased. On March 23, 1889, Mrs. Judge filed a petition in the superior court, asking for an order directing the administratrix to allow her name to be used in an action to be brought against the surviving wife of the deceased (Augusta L. Ohm) to set aside a conveyance of certain land made by E. F. Ohm in his life-time to his said wife, with intent to defraud his creditors. It was alleged that at the time of the conveyance E. F. was indebted to sundry persons in the sum of about \$90,000, including a debt to petitioner of about \$5,000; that the conveyance was made without consideration, and to defraud creditors; that deceased left no estate, except what was conveyed to his wife as aforesaid, with which to pay the claims of creditors; that

the administratrix, though requested to do so, refused to bring suit to set aside the conveyance. A hearing was had upon the allegations of the petition, and the court ordered that Mrs. Judge be allowed to sue in the name of Anna A. Ohm, the administratrix, on condition that Mrs. Judge defray all expenses of the action, and save the administratrix harmless therefrom. Thereupon the administratrix filed a petition herein for a writ of review, the writ was issued, a return has been made setting forth the facts substantially as narrated above, and showing the additional facts in a bill of exceptions, which is made a part of the return; that in due time Mrs. Judge presented her claim against the estate for over \$5,000; that the claim was rejected; and that she commenced an action against the administratrix on said rejected claim, which action is still pending.

The question is presented, therefore, whether a person whose claim has been disallowed by the administratrix, and for the establishment of which as a claim an action is pending and undetermined, is a creditor, within the meaning of section 1590 of the Code of Civil Procedure. That section reads as follows: "No executor or administrator is bound to sue for such estate, as mentioned in the preceding section, for the benefit of the creditors, unless on application of creditors, who must pay such part of the costs and expenses of the suit, or give such security to the executor or administrator therefor, as the court, or judge thereof, shall direct." Under the provisions of this section, and the provisions of sections 1589 and 1591 of the Code of Civil Procedure, it is clear that the administratrix would have no right to commence an action to set aside a deed of her intestate as void against creditors, unless "there is a deficiency of assets," (section 1589,) and there are creditors for whose benefit "all real estate so recovered must be sold," (section 1591.) Any creditor is entitled to maintain an action to set aside such a fraudulent conveyance, (*Hills v. Sherwood*, 48 Cal. 892,) but he must be a creditor whose claim has been allowed by the administrator, or is evidenced by a judgment. *Mesmer v. Jenkins*, 61 Cal. 153; *McMinn v. Whelan*, 27 Cal. 300. And the statute of limitations does not bar an action by the creditor until three years after the judgment establishing the creditor's claim. *Forde v. Fire Co.*, 50 Cal. 302. In *New York* it is held that the debt must be ascertained by judgment, and that the reason of the rule "does not fail by the death of the debtor before judgment recovered for the debt." *Estes v. Wilcox*, 67 N. Y. 264. And in Michigan, under statutes similar to our own, it has been decided that, until the estate has been charged with claims by allowance or judgment, "there is no basis for a bill against a decedent's fraudulent conveyance in order to recover means to pay them." *O'Connor v. Boylan*, 49 Mich. 209, 13 N. W. Rep. 519. To the same effect is the decision of the court in *Fletcher v. Holmes*, 40 Me. 364.

It is claimed that the order cannot be annulled in this proceeding; that the court

below had jurisdiction of the subject-matter and of the parties, and, if it decided wrongfully on the evidence adduced at the hearing, it is a case of mere error, and review will not lie. If the order of the court directed the administratrix to commence an action, it would be conclusively presumed that the evidence taken by the court was sufficient to support the order. The order, however, is not that the administratrix herself commence and prosecute the action, but that Mrs. Judge do so in the name of the administratrix. This gives to Mrs. Judge, one of the alleged creditors, control of an action in the name of the representative of all who are interested in the estate,—heirs as well as creditors. We are unable to find any warrant in the statute for such authority, and no case has been cited which upholds it. There certainly is no necessity for such action. The creditor may bring an action in his own name. The statute does not exclude him,—he has his remedy independently of the administrator. *Hills v. Sherwood*, 48 Cal. 892. Furthermore, the court can compel the administratrix to bring suit in a proper case. The statute declares that the "executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same." Section 1589. Obedience to this mandate and the order of the court may be compelled by proceedings for contempt, or the letters may be revoked, and an administrator appointed who will prosecute a proper action. The order of the court under review herein is annulled.

FOX, J., MCFARLAND, J., and SHARPSTEIN, J., concurred.

WORKS, J. I concur in the judgment.

85 Cal. 509

PEOPLE *ex rel.* FINIGAN v. PERKINS. (No. 13,535.)

(Supreme Court of California. Sept. 5, 1930.)

STATE OFFICER — QUALIFICATION — DIRECTOR OF STATE BOARD OF AGRICULTURE.

1. Pol. Code Cal. § 907, requires an officer to qualify (1) within 10 days after notice of his appointment or election; or, (2) when no such notice has been given, within 15 days from the commencement of his term of office. *Held*, that one appointed, without any knowledge on his part, as director of the state board of agriculture, may qualify within 10 days after the receipt of his commission from the governor; and the fact that it was not received by him until after the expiration of 15 days from the commencement of his term will not render his qualification invalid, as the second clause of section 907 applies only when the officer has knowledge of his election or appointment.

2. Since the appointee had no knowledge of his appointment until after the receipt of his commission, his failure to qualify within the 15 days from the commencement of his term was not a "refusal or neglect" to qualify, within the meaning of Pol. Code Cal. § 996, which provides that an office becomes vacant on the "refusal or neglect" of the appointee to file his official bond within the time prescribed by law.

3. St. Cal. April 15, 1880, declares the "state agricultural society" a state institution, to be managed by the "state board of agriculture," consisting of 19 directors, to be appointed by the governor. *Held*, that the qualification of one appointed a director of the "state board of agri-

culture" is not vitiated by the fact that his official oath designated the office as that of director of "the state agricultural society;" the variance being unimportant.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco.

*Edward P. Cole and M. M. Estee, for appellant. Atty. Gen. Johnson, W. W. Foote, and Thomas J. Clunie, for respondent.*

GIBSON, C. On the 19th day of January, 1887, Gov. Bartlett issued a commission to the relator, appointing him a director of the state board of agriculture for the term of four years, which began on February 1st of the same year, as prescribed by section 4 of the act of 1880. St. Cal. 1880, p. 49. The commission was forwarded from the capitol, at Sacramento, to San Francisco, by Wells, Fargo & Co.'s express, addressed to the relator at the latter place, but was not received by him until the 17th day of February, 1887, prior to which time he had no notice of his appointment or the issuance of the commission. The day after he received the commission he qualified by taking and subscribing the oath of office, which was filed the next day—February 19, 1887—in the office of the secretary of the state. Upon the filing of his official oath he immediately entered into and commenced to exercise the functions of the office, and continued to hold and discharge the duties of such office, until he was ousted therefrom by the defendant, Dana Perkins, on the 27th day of January, 1888, who claimed the office by virtue of a commission issued to him by Gov. Waterman on the 3d day of January, 1888, and under which he had duly qualified. To determine the defendant's right to the office, the relator caused this action to be prosecuted, which resulted in a judgment removing the defendant from and letting the relator into the office. Thereupon the defendant appealed.

The main question to be determined is whether the relator, in not qualifying under the commission until nearly 30 days after it was issued to him, forfeited his right to the office, under sections 907 and 996 of the Political Code. The first of the sections referred to provides that, when a different time is not prescribed, the oath of office must be taken, subscribed, and filed within 10 days after the officer has notice of his election or appointment, or, when no such notice has been given, then within 15 days from the commencement of his term of office; and the other section provides that an office becomes vacant upon the happening of certain events, one of which is the refusal or neglect of one who is elected or appointed to an office to file his official oath or bond within the time prescribed. These provisions of the law are mandatory. The official oath or bond must be filed within the prescribed time, or the right to the office becomes forfeited. *People v. Taylor*, 57 Cal. 620; *Payne v. San Francisco*, 3 Cal. 122; *People v. Brite*, 55 Cal. 79; *Hull v. Superior Court*, 63 Cal. 174; *People v. Hartwell*, 67 Cal. 11, 6 Pac. Rep. 873. See, also, *Bail*

*v. Kenfield*, 55 Cal. 320, and *People v. Perry*, 79 Cal. 105, 21 Pac. Rep. 423.

Now, can it be said that the relator refused or neglected to file his official oath within the proper time? We think not. To "refuse" is to decline the acceptance of something offered, or to fail to comply with some requirement. Neglect imports the omission or disregard of some duty. How could the relator refuse the appointment, or disregard the duty to qualify connected with it, until he received information of his appointment? The power to refuse a thing or neglect a duty must necessarily be based upon a knowledge of the existence of the thing or the duty. The relator did not receive his commission until February 17, 1887, nor have any knowledge of his appointment until that time; hence he could not have acted upon it before that date. It is conceded that he filed his official oath two days after he received his commission. Treating his commission, then, as notice of his appointment, he qualified in time. In cases of elections, it seems that the commissions of state officers elect, except governor and lieutenant governor, are the only notices of their election that are provided for. The issuance of commissions to such officers devolves upon the governor under section 1291 of the Political Code, wherein it is prescribed that the governor shall, upon receiving from the secretary of state, in accordance with section 1290 of the same Code, a copy of the statement of the vote cast at the election, issue commissions to the persons who from such statement appear to have received the highest number of votes for office. It is the same with regard to the certificates of election to county officers. In their case the county clerk must, as soon as the result of the election is declared by the board of supervisors, make out, under the seal of the superior court, certificates of election, and deliver one to each person declared elected by the board of supervisors. Pol. Code, §§ 1283, 1284. These are the only notices provided for; and unless the legislature intended that the receipt of the commission in the one case, or of the certificate of election in the other, should operate as a notice, then that portion of section 907 of the Political Code, requiring officers to qualify within 10 days after the officer has notice of his election or appointment, can have no effect. But, as the construction of statutes which leads to such a result is not favored, we must where possible, as in the case before us, adopt one that will give effect to every part; hence we think that it must have been the intention of the legislature that the receipt of either a commission or a certificate of election should be deemed a notice of an election. This view is sustained by *People v. Taylor*, 57 Cal. 620. There, it seems, a certificate of election as sheriff issued to the relator, and he failed to qualify within 10 days thereafter, and it was accordingly held that the certificate of election was notice of his election, and, having failed to qualify within 10 days thereafter, the office became vacant. We are also of the same opinion regarding the receipt of the commissions by appointees of the governor.



To them the governor must also issue commissions, (Pol. Code, § 891,) and there is no provision for any other notice to them of their appointment. The other portion of section 907, which requires an officer elected or appointed to office to qualify within 15 days from the commencement of his term of office, evidently applies where an officer is elected at a general or special election, the result of which, when legally declared, is presumed to be known to him, and he fails to receive his commission or a certificate of his election, in which event he must qualify within 15 days after his term of office begins. Or where he is an appointee of the governor, and, as in the case of the relator here, the commencement of his term of office is fixed at a time different from that of other offices, and he knew of his appointment when it was made, which became effective upon the issuance of the commission to him, (Ball v. Kenfield, 55 Cal. 320; People v. Whitman, 10 Cal. 38; Conger v. Gilmer, 32 Cal. 80; Marbury v. Madison, 1 Cranch, 137,) and he fails to receive his commission, he is then required to act upon such knowledge, and qualify within 15 days from the commencement of his official term. The relator in the present case had not, as appears from the evidence, applied personally, nor through any one else, for the office, and had no knowledge whatever of his appointment until he received his commission. He therefore had 10 days thereafter to qualify, and, having qualified within that time, he is entitled to the office.

The remaining question is, did the relator qualify as a member of the state board of agriculture? The appellant contends that he did not, as the act of April 15, 1880, provides for two separate and distinct institutions, viz., state board of agriculture and state agricultural society, and the relator qualified as a director of the state agricultural society. The act referred to is entitled "An act to provide for the management and control of the state agricultural society of the state." By the act the state agricultural society was declared to be a state institution; and a "state board of agriculture," to consist of 12 directors, to be appointed by the governor, was also provided for the exclusive control and management of the said "state agricultural society, as a state institution. The relator was commissioned as a director of the "state board of agriculture," and he qualified as a "director of the state agricultural society." The commission followed the designation of the office in the act by which it was created, and we think it therefore sufficiently definite and certain. The slight difference between that and the designation of the office in the relator's official oath we deem of no importance whatever. He qualified as a director of the state agricultural society. This is the equivalent of qualifying as a member of the board of directors, and also as a member of the society; for it is clear he could not be a director without being a member, nor be a director without being a member of the only board of directors designated and provided for in the act. The questions being thus disposed of ad-

versely to the appellant. It results that the judgment should be affirmed.

FOOTE and VANCLIEF, CC., concurred.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(45 Kan. 541)

DUNN v. TRAVIS.

(Supreme Court of Kansas. March 7, 1891.)

APPEAL — SETTLEMENT OF CASE — EXTENSION OF TIME.

An order, made by a judge of one of the judicial districts of this state, extending the time within which a case for the supreme court could be served, settled, and signed, the judge being in the state of Illinois at the time the order was made and signed, is a nullity; and, the case not having been served and settled within the time prescribed in the original order, the petition in error must be dismissed.

(Syllabus by Simpson, C.)

Commissioners' decision. Error to district court, Pratt county; S. W. LESLIE, Judge.

Huron & Davis, for plaintiff in error. Noffsinger & Carskadon and E. A. Austin, for defendant in error.

SIMPSON, C. In the month of September, 1887, the plaintiff in error, S. W. Dunn, as constable, served an order of attachment upon goods claimed to have belonged to, and to have been in the possession of, John J. Davis. This order of attachment was issued by a justice of the peace of Pratt county in an action pending before him, wherein Cones, Son & Co. were plaintiffs and Davis was the defendant. After the levy of the order of attachment the defendant in error, D. W. Travis, commenced this action in replevin in the district court of Pratt county, claiming that he was the owner of a certain part of the goods seized upon by the attachment. Travis claimed 23 suits of clothes and 5 pairs of pants, of the value of \$304.80, that were included in the attachment levy; and that Dunn wrongfully detained them; and that he had demanded the delivery of them to him of Dunn; and claimed \$500 as damages for their detention. A trial was had in the district court on the 28th day of April, 1888, to a jury, and a verdict was returned for Travis "that he is entitled to the possession of said goods, and that the value thereof is \$304.80, with 7 per cent. interest, and that plaintiff has sustained damages in the sum of \$257.95." A motion for a new trial was overruled, and the case is here for review.

The defendant in error claims in his brief that the record affirmatively shows that all the evidence is not contained therein, and that all the instructions are not contained therein; and he also claimed at the argument that the record did not show that the defendant in error or his attorneys had notice of the time of settling and signing the case made, and hence we cannot consider the errors assigned in the petition in error. As to the last objection, it appears from the certificate of the trial judge to the case made that it was settled and signed on the 23d day of De-

ember, 1888, and was attested by the clerk on the 24th day of December, 1888. The trial was had at the April term, 1888. That the defendant was granted 60 days to make a case for the supreme court, and plaintiff was allowed 30 days to suggest amendments, and 5 days were allowed thereafter to settle and sign such case made. That on the 19th day of June, 1888, and before the time first granted to make a case for the supreme court, to-wit, the 27th day of June, 1888, the defendant applied for further time to make such case for the supreme court; and that on the 25th day of June, 1888, the judge of the district court of Pratt county extended said time 30 days from the 27th day of June, 1888, granting plaintiff 20 days thereafter to suggest amendments, and allowing the case made to be settled on 5 days' notice. A motion to dismiss the case was filed and considered by the court at the May sitting in 1889. That motion was then overruled (no opinion) on the ground that the recitations in the record could not be controverted, but that ruling is now reconsidered and modified to the extent that questions of jurisdiction may be examined, and, if it is shown that the court or the judge at chambers has made an order that neither the court nor judge at chambers had the power to make, the want of jurisdiction may be shown to impeach the record. It is established beyond question now that at the time the judge made the order extending the time for the service of the case made and its settlement and signing the same was made in the state of Illinois, while the judge was away from this state on a visit to that state. The order extending the time is therefore a nullity, as it will not be seriously contended that he could make judicial orders while absent from his district. The case not having been served and settlement made within the time originally granted by the court for that purpose, we cannot review it. It is recommended that the petition in error be dismissed.

**PER CURIAM.** It is so ordered; all the justices concurring.

**BANNER et al. v. MAY et al.**

(*Supreme Court of Washington*. March 12, 1891.)

**FRAUDULENT CONVEYANCES—EVIDENCE.**

In an action by creditors to set aside fraudulent conveyances it appeared that when M.'s creditors were pressing her, her husband brought one S., to whom M. transferred all her property, reciting a consideration of \$33,000, but the consideration claimed to have been paid by S. was his debt, \$30,000, and other debts of M. to third persons, and \$10,000 cash, actually paid, amounting together to \$39,000. The property was worth \$20,000 more. Shortly before the transfer S. had represented to some of M.'s creditors that she was perfectly solvent. After the transfer M.'s husband remained in possession, ostensibly as S.'s agent, and continued to dispose of the stock on hand, allowing some of M.'s creditors to purchase on their debts against her; and it was not shown that he accounted to S. Afterwards M. took possession. Only one of the new books alleged to have been opened after the transfer was produced, and it seemed to have been gotten up as an after-thought. The other books were claimed to have been lost. S. was a business

man of large interests, and required his other agents to keep books. *Held*, that the transfer was fraudulent and void.

**Appeal from superior court, Yakima county.**

*D. J. Crowley and Whitson & Parker*, for appellants. *Reavis & Mires and W. Lair Hill*, for appellees.

**STILES, J.** The plaintiffs below, who are appellants here, were judgment creditors of the appellee Laura J. May, who for a number of years carried on business as a merchant, with her separate property, at Yakima city. Mrs. May, in addition to her stock of merchandise, owned a number of town lots, and several hundred acres of farming land, and a flour mill. The mill was at Yakima city, and was operated by her. D. B. May was the husband of Mrs. May, but had no interest in the property or business involved in the cause. Prior to March 14, 1881, Mrs. May had carried on her mercantile business, and on that day she bought from the defendant Snipes a stock of goods then at Yakima city, and in payment thereof gave him her note for \$16,213, payable 10 months after date, with interest at 1 per cent. per month. On the day of its date \$530 was credited on the note, leaving its actual principal \$15,683. No further credits appear upon the note. On December 11, 1883, Mrs. May executed to the defendant Snipes a bill of sale of her stock of goods, and the appliances and appurtenances connected therewith, and her safe, all book-accounts, wheat and flour at the mill, a lot of hogs, hay, horse, wagon, and harness, and two lots of bacon, stored in Yakima; and at the same time she executed to the same party a deed of all her real estate in and about Yakima, excepting 80 acres of land called the "family homestead." These two conveyances embraced all of Mrs. May's property excepting the homestead and household goods. The consideration expressed in the bill of sale was \$16,150; that in the deed was \$17,225.25. The consideration claimed to have been paid was \$10,505 in money, the principal of the note above alluded to, (\$15,683,) and interest thereon to date, \$5,159.75, the sum of \$5,548.75, due to one Murray, and the sum of \$2,400, due to the First National Bank of Yakima; making a total of \$39,811.14, or \$5,935.48 more than was expressed in the conveyances. The amounts due Murray and the First National Bank were secured by attachments upon more or less of the property, and were assumed by Snipes; and we find that these amounts and the \$10,505 cash were actually paid by him; in all \$18,453.75. Of the amount involved in the note we shall speak later. The conveyances above alluded to were made under the following circumstances: Mrs. May, in addition to Murray, the bank, and Snipes, owed numerous other creditors in Portland, Or., San Francisco, Cal., and the territory of Washington, various sums, aggregating, according to her statement, some twenty or thirty thousand dollars. Her creditors in Portland were pressing her for money, and the attachments of Murray and the bank had just been levied.

Mrs. May was sick, and confined to her room. It does not appear what occurred between her and Mr. May; but on the evening of December 9th he left Yakima, and drove by team to The Dalles, Or., about 95 miles distant, found Snipes, and returned with him to Yakima; arriving back about 2 o'clock on the morning of the 11th. Between that time and the evening of the 11th the bill of sale and the deed were agreed upon, prepared, executed, and delivered; Snipes giving his check, payable to Mrs. May, for \$10,505. The auditor's office was then closed, but Snipes found the auditor, and left the conveyances with him for record. They were recorded the following morning at 9 o'clock. Snipes left again for The Dalles on the night of the 11th, and May, with his wife's indorsement on the check, proceeded with such expedition that the check was paid December 13th by French & Co., bankers at The Dalles. The money, the proceeds of the check, was kept by May at The Dalles thereafter. Certain of the Portland creditors of Mrs. May, finding her without property or apparent means of paying their claims, agreed with her to a settlement of 50 cents on the dollar; 30 cents of which was to be paid in cash, to be produced by Mr. May at the proper time, and the balance in deferred notes. This settlement involved the payment of about \$5,000, and was carried out about the month of May, 1884, by one Williams, as agent of the creditors, at Yakima. The contract of compromise was prepared at Portland, and taken by Williams to Yakima. There, however, was difficulty in concluding it, as May did not have the money there. The business of the settlement was carried on by Williams, May, Snipes, and the counsel of the latter; Williams insisting that Snipes should pay the money, as otherwise the creditors would attach him on the ground that the sale by Mrs. May to him was fraudulent. May claimed that he could have the money in a few days, and it was finally agreed that Snipes should give his check for the amount necessary, but that it should not be presented for a certain number of days,—time enough for May to produce the money. The check was given and paid and the settlement made; and in due time May brought the money, in coin, to Snipes' place of business at The Dalles. Other creditors, who were not included in the settlement above mentioned, got judgment on their claims, and in December, 1884, brought this action to have the conveyances of Mrs. May declared to have been a fraudulent assignment, and for other appropriate relief. The testimony was taken before a referee, and, upon submission to the court, judgment was rendered for the defendants.

Appellants maintain that the decision should have been otherwise, upon several grounds, viz.: (1) Representations made by defendant Snipes to Mrs. May's creditors as to her solvency; (2) the circumstances of the transfer; (3) the conduct of the parties after the transfer, the property having been left entirely in the hands of the Mays; (4) the inadequacy of the consideration alleged to have been paid; (5)

alleged credits which should have been made on the note; (6) the books of account, their condition, and the absence of some of them. Defendant Snipes was in Portland about November 30, 1883, only 10 days before the transfer, and called upon several of the creditors of Mrs. May, told them she had asked him to see them about certain accounts against her which had been sent to Yakima for collection; assured them that she was perfectly solvent, if not pressed; that she owed him a small amount; that if he had any money to loan he would lend it to her as soon as to any one; and that, if he got money he expected shortly, he would advance enough to her to pay them. These statements were made for the purpose of quieting all the May creditors, and, had Murray been content like all the rest, the transfers might never have been made to Snipes; but they showed knowledge on the part of Snipes that Mrs. May had pressing creditors, whether he knew her actual financial condition or not. He denied such knowledge, and gave a somewhat different version of the Portland interviews; but we are constrained to conclude as above under the testimony. With the property under attachment in the Murray and national bank suits, May, with little or no consultation with his wife, made the trip to The Dalles and return, traveling 36 hours without rest at the rate of 5 miles an hour. His object was to borrow enough money from Snipes to pay off Murray and the bank, and thus relieve the pressure from other creditors. Snipes refused to make the loan, but, acting on the information conveyed to him by May, started back to Yakima with him at once to secure himself. He was prepared to attach, so as to be secured ahead of the Portland and other creditors except Murray and the bank, when the proposition was made by May to sell him the whole property. What terms the first proposal was based upon was not shown, but an agreement was very soon reached by which Snipes, in addition to his existing claim of upwards of \$20,000, should forthwith pay out nearly \$18,500 in cash. He might have attached, and, after paying out the Murray and bank claims would have saved his \$10,505 check, and whatever surplus there was after reimbursing him would have gone to other creditors. The plan adopted gave him everything, and placed the \$10,505 out of the state, and beyond the reach of creditors, except by such chance as might favor them. In this proceeding we conclude that Snipes willingly assisted the Mays, both to prefer himself and to put other creditors at such a disadvantage as would compel them to accept such terms of settlement as might be offered, as was done in the case of creditors represented by Williams, thus hindering and delaying them. The deed and bill of sale having been executed and recorded, as was before stated, Snipes returned to The Dalles, and May went there also. No third person was put in charge of the property which was released from the attachments, and everything seemed to be in the possession of Mrs. May as before. But it was shown that, whereas Mr. May had before man-

aged the business and property as the agent of Mrs. May, he was now appointed to manage it as the agent of Mr. Snipes, with the exception that the mill was now managed by the miller. Mrs. May's name was painted out of the store sign, leaving the space blank. Business at the store was resumed, and goods sold for cash and on credit; accounts were collected, buildings were rented, farm products were gathered and sold, and in a few instances local creditors of Mrs. May were allowed to credit goods sold them upon their claims, with the knowledge and assent of Snipes. In like manner, in other instances notes held by Mrs. May at the time of the transfer were given to her creditors, and the proceeds allowed to be retained by them in satisfaction of their demands. No new goods were purchased, but Snipes did not pay any personal attention to matters, and rarely saw any of his property. It was said that new books were opened the next day after the transfer, but, although strenuously demanded at the hearing, they were not produced, with the exception of one, which will be alluded to further on. These books, however, were not claimed to have contained any statement of account between Snipes and his agent, May. No cash account whatever was kept. No agreement was made with May as to his compensation for his services as agent, and no settlement was ever made between the employer and his agent, although it was stated by Mrs. May that the money received was turned over to Mr. Snipes; but when, and how much, did not appear, and Snipes did not so testify. This state of things continued from December 11, 1883, until a certain day in June, 1885, when owing to disagreements between May and his wife, he left Yakima, never to return. A divorce was procured by her soon after; May going into the employ of Snipes elsewhere, and Mrs. May remaining at Yakima. The significant matter in this was that, although it was claimed that May was the agent, he went away, while the wife remained, and, without any word of arrangement between her and Snipes, went on with the business as though her husband had never been there. Mrs. May kept on gradually closing out the goods until July, 1886, when a mere remnant remained, and when, with this remnant and \$600 in money, furnished her by Snipes, she removed to North Yakima, and set up a millinery and fancy goods store. This store, she testified, belonged to Snipes, she acting as his agent for a percentage of the profits, but what percentage she could not state; and the fact was that she conducted it as her own business, and advertised it in the papers as hers. But of this stock, even, goods were given to one of her old creditors on account until the testimony was being taken in this case.

From these facts appellants contend the proper deduction to be that the deed and bill of sale of Mrs. May were colorable only, and were intended, while they secured Snipes, to leave her to do practically as she pleased with the personal property at least, and the rents and proceeds of the lots and land, without possibility of inter-

ference from her creditors. Concerning the value of the property there was much controversy. The values fixed by the court below, however, were just what was admitted by the defendants, and nothing more, viz., the mill and appurtenances, \$5,000; the stock of goods, \$14,000; the other personal property, \$3,500; a total of \$22,500. It also allowed a balance on the books of Mrs. May against Snipes of \$5,939.48, but where this came from we are unable to ascertain. Nobody testified to it, or anything like it, except that Snipes said that was the amount agreed upon when the transfer was made. The only ledger produced by the defendants showed a balance of account due Mrs. May from Snipes, June 27, 1882, of \$9,325.24. The journal following immediately upon this ledger, and running to December 11, 1883, contained further charges against Snipes of \$4,530; and other memorandum account-books covering the same period contain charges against him of \$840. These made a total of \$14,795.24. Upon the same journal and memorandum books appear credits to Snipes of \$7,945.50, including a disputed item of \$7,000. Deducting the credits from the charges, the balance is \$6,849.74, which seems to be correct, and made an error in Snipes' favor of \$910.26. Again, Snipes admitted that the merchandise he obtained from Mrs. May was to be credited upon his note; but no credit was ever made, and he was allowed interest on the whole principal to the date of the transfer—two years and nine months—at 1 per cent. per month, amounting to \$5,159.75. Had there been a careful settlement of the matter between the parties, each being mindful of his rights, this interest charge would have been reduced by nearly one-half. Next, although the transfer included all the accounts, etc., held by Mrs. May, no value whatever was allowed for them. As the face of the books presented, it was not disputed that some \$30,000 of charged accounts appeared, exclusive of those against Snipes, all, with the exception of about \$2,000, having been entered since June 27, 1882. The court below made no finding at all as to these accounts. They were of some value, for it was proven that certain of them were paid after the transfer; but we cannot undertake to say more than that they actually increased the value of the property to some extent. Lastly, the real estate. The court below estimated all of it, exclusive of that upon which the mill stood, at \$12,223, just \$2.25 less than the consideration expressed in the deed. There was no testimony whatever to support this valuation, excepting that of Snipes, who fixed no value upon any parcel but the town lots. These he admitted to have been worth \$50 each, or \$3,300 for the 66; and the improvements at \$1,600; and remarked that he paid more than lots and land were worth. The land amounted to about 400 acres, and cost him \$7,423, or \$18.55 per acre. Plaintiffs called five disinterested witnesses of the vicinity, fairly qualified to judge of the values of the real property. Of these the lowest gave the value of the land at \$13,000, of the lots \$6,600, and of the improvements, \$6,400; making a total

of \$26,000, as against \$12,225.25, admitted to have been paid. None of these witnesses fixed the total value of the property conveyed, exclusive of the book-accounts, at less than \$48,960. In the face of such testimony we can see no reason why the statement of the defendants should have been accepted as verity, unaccompanied as it was with any particularization, and unsupported by any disinterested witness; and we conclude that the property conveyed was undervalued to the extent of at least \$20,000, so that Snipes, instead of paying \$10,500 to the Mays, should have paid nearly or quite three times that amount on any fair basis of calculation.

Mrs. May kept a set of mercantile books from the inception of her business in 1879 until the date of the transfer, December 11, 1883. From that time on, it was claimed, a new set of books was kept, at least until June, 1885, when her husband went away. Mr. May was the book-keeper. At the hearing before the referee, which commenced in February, 1886, and on May 4th thereafter, the referee ordered the defendants to produce their books. Various adjournments were had until July 30th before any books were forthcoming. Mr. May in the mean time testified that on May 30, 1884, three of the important books were taken from the store by some one unknown, and he was able to produce only Mrs. May's first ledger, covering her business from 1879 to June 27, 1882; her journal day-book from the last date to and including December 10, 1883; 19 small memorandum books, from some of which the journal appears to have been posted, and the last of which stops with December 10; and one sale memorandum book, commencing December 12, 1883, and running to September 23, 1884, "Exhibit E." The ledger was well kept, and showed long and hard usage, and with a single exception the accounts in it ended July 27, 1882, and where they were unbalanced showed transfers to "Ledger B." But the account of Leonard Thorp was continued to the 2d of August following. The journal or day-book was a very much newer book, and had few signs of wear, though it covered a period of 16½ months, and had nearly 500 pages of entry. Appellants claim that this book was made up by defendant May between the time the books were called for in May, 1886, and the time when they were produced in July. This we think to be a well-founded claim, based upon three grounds, viz.: At the head of several pages near the beginning of the book the year 1882 is written over the date 1883, a thing not likely to occur when a book is posted up with any regularity; some forty names of persons here and there appear with items charged or credited, and no amounts carried out, showing hasty work, and no posting to a ledger; and, lastly, the items in the ledger account of Leonard Thorp, which were presumably posted from this journal, on the debtor side, show them as transferred from pages 16, 27, 52, 57, and 59, whereas in the journal they appear on pages 11, 15, 36, 41, and 42, and on the credit side items from pages 6, 16, and 27 appear in the journal at pages 4, 11, and 19, showing almost

to a demonstration that this journal has been shortened up, so that the business recorded in it does not occupy as many pages as the book from which the ledger was posted. But no great moment would be attached to these matters, since the journal in the main contains a correct transcript of the memorandum books, were it not that the item of \$7,000, alleged by Snipes to have been given to May, September 20, 1882, has no other support than that it appears on that date in the memorandum book No. 9, and at the corresponding place in the journal. No writing whatever was taken by Snipes for this advance, and no time was stipulated for its return. The entry in the memorandum book was made in lead-pencil, as were all the other entries in it, but this one was clearly made over other previous entries which were partially rubbed out with an eraser. It is at the top of the page, and the same entry was made on the bottom line of the same page, and partly rubbed and partly scratched out. Had the defendants been examined upon the condition of these books, and of this item especially, as it appears in the books, and had they given no reasonable explanation of the matter, we should reject the item of \$7,000 as fraudulent; but no question was asked them concerning it, and it will therefore stand. The way in which the defendants treated the matter of the books is one of the strongest proofs against them. From early in 1884 they knew that creditors were claiming their transaction of December 11, 1883, to have been fraudulent, and suits were pending against Mrs. May which were intended to be the basis of this suit. Snipes was a man of very large business affairs, with mills, stores, cattle, and other property scattered over a large area in Oregon and Washington. He was not a book-keeper himself, and had no knowledge of accounts; but he knew the importance of them, and had his agents in other branches of his business keep them; and it is beyond conception that in so questionable a transaction as this was on the face of it, he should entirely have neglected so important an element of defense by suffering honestly kept books of account to be lost when there was a very expensive safe among the very property turned over to him. This concludes the review of the main facts as disclosed by the evidence.

The law of the case is very simple. It is that, when such facts are shown to exist, they tend to prove a legal fraud upon creditors; and when many such facts exist together, each with its tendency to prove fraud, they compel the belief that a fraud was intended by the Mays, and was assisted in by Snipes. If it were otherwise, the defendants, though having the opportunity, wholly neglected to explain any of the many damaging circumstances appearing against them. Therefore the judgment of the lower court must be reversed. The judgment will be that the bill of sale and deed of December 11, 1883, be declared null and void as against the appellants' several judgments; that the property covered thereby, and still remaining in the hands of the defendants, or either of

them, and not transferred to innocent third parties, or so much thereof as may be necessary, be sold, and the proceeds paid to the appellants, according to their said judgments; that if the said proceeds of sale shall not be sufficient to pay said judgments, then the said defendant Snipes is adjudged to be liable for the deficiency to the extent of \$17,500, being the admitted value of personal property received by him, with interest thereon at the rate of 10 per cent. per annum from December 11, 1883, and upon the ascertainment of the amount of said deficiency, if any, execution may issue against the property of said Snipes therefor. Costs to appellants.

ANDERS, C. J., and HOYT, DUNBAR, and SCOTT, JJ., concur.

(2 Wash. St. 198)

REED *et ux.* v. TACOMA BLDG. & SAV.  
ASS'N.

(Supreme Court of Washington. March 7, 1891.)

BOUNDARIES—EVIDENCE—DEED—DESCRIPTION—  
COURSES—PRESUMPTION.

Plaintiff's deed described the land as "commencing at a point 60 rods west of the north-east corner of section 8, \* \* \* running thence west \* \* \*." The north line of the section did not run due west, as indicated by the true meridian. Held, that the presumption is that the line commenced at a point west of the north-east corner of section 8, according to the true meridian, but may be rebutted by extraneous testimony.

Appeal from superior court, Pierce county.

Ejectment by the Tacoma Building & Savings Association against Alexander Reed and Louise D. Reed, his wife. Judgment for plaintiff, and defendants appeal.

Doolittle, Pritchard & Stevens and R. B. Lehman, for appellants. Garretson, Bracket & Rosling, for appellee.

DUNBAR, J. The description of the lands in the deed to plaintiff's grantor of that tract of land which is claimed to have been platted into Cavender's first addition is in the words and figures following, to-wit: "Situate, lying, and being in the county of Pierce, territory of Washington, and bounded and described as follows, to-wit: Commencing at a point 60 rods west of the north-east corner of section 8, in township 20 north, of range 3 east; running thence west 20 rods, south 8 rods; thence east 20 rods; thence north 8 rods,—containing one acre." The plaintiff proved a straight title to the premises in question from the United States patent down to and including the deed received by him from his grantor; but the north line of said section 8 did not run due west, as indicated by the true meridian, or, in other words, it did not run parallel with the meridian line, but diverged from the true west line to the north. So that the main question was as to the actual location on the face of the earth of the north line of the north-east quarter of section 8 as the same runs west from the north-east corner of said section, and whether the deed should be construed to mean west according to the true meridian, or west according to the government survey. On this question the court in-

structed the jury as follows: "Plaintiff also introduces in evidence a duly-certified copy of the several deeds and plats under which it claims title to said lots of land. I instruct you as a matter of law, therefore, that, according to the meaning of the language in those deeds, the north line of Cavender's first addition to Tacoma, W. T., in Pierce county, should be laid out on an east and west line starting from the north-east corner of section 8, in township 20 north, of range 3 east, and running thence west according to the United States survey; and that when those deeds upon which the plaintiff relies for its title mentioned as a beginning point sixty rods west of the north-east corner of said section 8, the construction in law is that such beginning point is on the north line of section 8 according to the United States survey thereof,—which instruction defendant duly excepted to, and assigns as error herein. There were some subsequent instructions that might tend somewhat to modify the rule laid down by the court in the instruction quoted; but that the court substantially instructed the jury that the presumption was conclusive, that west in said deed meant west according to the government survey, and that that was plaintiff's theory of the case, is borne out by the oral argument of the attorneys for appellee, as well as by the statement in his brief that, "unless defendants' counsel can maintain their claim upon the main question of a right to controvert the government's surveys, the rulings and instructions are clearly right. If they can maintain that claim it would be a waste of time to discuss the rulings, as they assume the contrary." We think it is clear that under the description above set forth the government surveys may be contradicted, or, probably more properly stated, ignored. Of the many cases cited by counsel we have been unable to find any that will elucidate or throw any light on the very practical question involved in this case. We do not think that the mere reference to the north-east corner of section 8, as it is referred to in the deed, is sufficient to raise the presumption that the parties intended to be governed by the United States surveys, but that it was referred to simply as a known point, the same as any monument or specific permanent object might be referred to. If the language of the deed had been, "60 rods west of the north-east corner of section 8 on said section line," then the word "west" would have been construed in connection with the section line, and the presumption would have been that the conveyance was made with reference to the established government survey; but the language is quite different. If the words of a deed are ambiguous, or susceptible of two constructions, testimony will be allowed to prove the meaning of the deed, although this manner of ascertaining the intention of the parties must not be invoked when the description can be ascertained from the deed itself. Title to land must not rest upon the fallible memory of witnesses when it can be avoided. Appellee in this case argues with a considerable degree of plausibility that there is nothing doubtful

in the language of this deed; that the word "west" means "west;" that it is in no sense ambiguous, and will not admit of any construction to explain its meaning. However, considering the importance of this decision to the public, and recognising the probability that the city of Tacoma was uniformly platted and located according to one or the other of the theories urged here, and that structures and improvements amounting to many millions of dollars have been made throughout the city, which would probably be affected by this decision, its results reaching far beyond the parties to this action, we are of the opinion that public policy demands that the custom of surveyors, in locating town plats in the state of Washington, and especially in the city of Tacoma, may be submitted to the jury, to aid them in construing the intention of the parties to the deed. The jury should be instructed that, under the language of the deed in question, the presumption is that the north line of Cavender's first addition commences at a point 60 rods west, according to the true meridian, of the N. E. corner of section 8 in township 20 N., of range 3 E., and running thence west, according to the true meridian, etc.; but that such presumption may be rebutted by extraneous testimony. The judgment is reversed, and the case remanded to the court below, with instructions to proceed in accordance with this opinion, with leave to amend pleadings.

HOYT and SCOTT, JJ., concur. STILES, J., disqualified.

(2 Wash. St. 203)

CLARK et ux. v. TACOMA BLDG. & SAV. Ass'n.

(Supreme Court of Washington. March 7, 1891.)

Appeal from superior court, Pierce county.

Parker & Williamson, for appellants. Garretson, Bracket & Rosling, for appellee.

DUNBAR, J. This cause was brought here on substantially the same allegation of error, and involves the same questions, raised and discussed in the case of Reed v. Association, ante, 252; and for the reasons assigned in the opinion in that case the judgment in this case will be reversed, and the case remanded for a new trial in accordance therewith, with leave to amend pleadings.

HOYT and SCOTT, JJ., concur. ANDERS, C. J., concurs in the result. STILES, J., disqualified.

(2 Wash. St. 172)

TRADERS' BANK OF TACOMA et al. v. VAN WAGENEN et al.

(Supreme Court of Washington. March 4, 1891.)

INSOLVENCY—STAY OF PROCEEDINGS—ATTACHMENT.

1. Code Wash. § 2032, requires the court, when ordering the meeting of creditors in insolvency proceedings, to stay all actions against the debtor, providing that such stay shall not prevent the appointment of a receiver to care for the debtor's property "for the benefit of all his creditors." Held that, after an assignment, appointment of receiver, and stay of proceedings the court has no authority to set the stay aside, and permit attachments to issue.

2. Section 2046 provides that, after the surrender of the debtor's property, it shall not be liable to execution, but shall "be fully vested" in the assignee, who may claim and recover it all "for the benefit of creditors." Held that, when once vested in the assignee, the debtor's property

cannot be divested or affected by his failure to receive a discharge.

Appeal from superior court, Pierce county.

Seymour, Griggs & Lockwood, Doolittle, Pritchard, Stevens & Grosscup, E. T. Dunning, and Effinger & Abbott, for appellants.

An attachment lien is sufficient to support a creditors' bill. Case v. Beauregard, 101 U. S. 688; Falconer v. Freeman, 4 Sandf. Ch. 602; Heyneman v. Dannenberg, 6 Cal. 876; Scales v. Scott, 13 Cal. 77; Robert v. Hodges, 16 N. J. Eq. 290; Curry v. Glass, 25 N. J. Eq. 108; Tappan v. Evans, 11 N. H. 811; Russell v. Clarke, 7 Cranch, 89; Edson v. Cumings, (Mich.) 17 N. W. Rep. 693; Shaw v. Dwight, 27 N. Y. 244; Stephens v. Beal, 4 Ga. 319; Stone v. Anderson, 26 N. H. 506; Drake, Attachm. § 225; Bump, Fraud. Conv. 524; Perkins v. Fourniquet, 14 How. 314; Kahn v. Salmon, 10 Sawy. 183, 20 Fed. Rep. 801, cited with approval in Thompson v. Caton, 3 Wash. T. 31, 18 Pac. Rep. 185.

Judson, Sharpstein & Sullivan, for appellees C. E. Sackett, F. D. Van Wagenen, Rolla M. Sackett, and Eleanor V. Van Wagenen.

William H. Reid, for appellees William and Sarah Ann Page.

Attachment is insufficient to support a creditors' bill. See Wait, Fraud. Conv. § 81, and cases cited; Weil v. Lankins, 8 Neb. 384; Tennent v. Battey, 18 Kan. 324; Martin v. Michael, 23 Mo. 50; Greenleaf v. Mumford, 19 Abb. Pr. 409; Mills v. Block, 30 Barb. 549; Melville v. Brown, 16 N. J. Law, 364; Brooks v. Stone, 19 How. Pr. 395; Bigelow v. Address, 31 Ill. 322; Thurber v. Blanck, 50 N. Y. 80.

DUNBAR, J. This is a suit in equity in the nature of a creditors' bill, brought by the plaintiffs in error in their own behalf against the defendants to obtain relief by having various conveyances executed by the individual defendants F. D. Van Wagenen, C. E. Sackett, and William Page to their wives set aside, canceled, and decreed to be fraudulent and void as against creditors. To this bill certain of the defendants, among them, F. D. Van Wagenen and wife, C. E. Sackett and wife, and William Page and wife, demurred. It appears by the bill of complaint demurred to that the defendants F. D. Van Wagenen, C. E. Sackett, and William Page were copartners in trade under the firm name of the Buckley Lumber & Shingle Manufacturing Company, and as such copartners had become indebted by notes and accounts at different times to the plaintiffs, respectively, in different amounts. That said copartners owned property, both real and personal, as copartners, on the 22d day of January, 1890, at which time they executed and filed application to the superior court of Pierce county as "insolvent debtors" for a discharge from their debts, and made and delivered therewith an assignment of all their property; and an order staying all proceedings upon the part of their creditors was thereupon duly made by the court, and the usual order to show cause was made by the court and published, and a receiver to take charge



of the property was duly appointed. Afterwards, upon application of the plaintiffs severally applying, said superior court set aside the stay of proceedings previously ordered, and allowed each of the plaintiffs to commence an action at law upon their several notes and accounts, and to issue attachments against the assigned property and such other property of said insolvents as might be found. That afterwards, and under color of said attachments, the sheriff of Pierce county attempted to levy the same upon certain premises or lands of the defendant Sarah Ann Page, described in the complaint, which was land acquired previous to the formation of said copartnership by the joint labors of said William Page and Sarah Ann Page, his wife, which was held by them as community property until the 28th day of September, 1889, when a portion thereof was transferred by him to her for a valuable consideration, and on the 18th day of January, 1890, the remainder thereof was likewise sold and deeded to his said wife, who was then the sole owner. That after filing notice of levy of aforesaid attachments upon said premises the plaintiffs, by leave of the court, upon separate motion filed the bill of complaint herein, to which defendants separately demurred. That said several individual actions at law in which said several attachments were issued have not been tried, and the plaintiffs have not obtained judgment in any of said actions, but have jointly filed the bill of complaint herein upon the same several alleged claims and indebtedness set forth for cause of action in each of said actions at law pending and upon which said attachments were issued.

The grounds of demurrer alleged were "that the court had no jurisdiction of the persons of defendants or the subject-matter of the action; that there was another action pending between the same parties for the same cause; that several causes of action were improperly united in said complaint; that the plaintiffs had no legal capacity to sue; that there was a defect of parties defendant; that the complaint did not state facts sufficient to constitute a cause of action." Certain of the defendants also interposed motions to the complaint embracing substantially the same grounds of objection as set forth in the demurrer. There were two separate demurrers filed by counsel representing different defendants, but they raise substantially the same questions and will here be considered together. The demurrers were sustained by the court below, and an order made dismissing the bill of complaint. From this order plaintiffs have appealed to this court.

The constitutionality of the insolvent act is questioned in appellants' brief, but was practically abandoned in the oral argument of the case. No sufficient reason appears for pronouncing the law unconstitutional. It is contended by appellees that an attachment lien before judgment is not a sufficient basis for an action in the nature of a creditors' bill. On the other hand, while it is conceded by appellants that formerly it was the generally recognized rule that a creditors' bill to set aside

fraudulent conveyances could not be obtained until after judgment, the issuing of execution, and the return of *nulla bona*, yet it is contended that the current of authorities is to the effect that a creditor having an attachment lien may maintain a creditors' bill, especially where it is shown that he has exhausted all legal remedies; and many authorities are cited in support of both contentions. Whatever may be the law as to the general proposition, there is one element in this case that is not reached by the cases cited by the appellants; that is the question whether or not, conceding that a creditors' bill can be maintained by virtue of an attachment lien, it can be maintained against a defendant who has surrendered his estate for the benefit of his creditors under an insolvency law similar to the insolvency law of the Code of Washington, and especially by virtue of an attachment issued in an action commenced after proceedings in insolvency have been instituted. Several cases have been cited from New Jersey, but there the statute by special provision makes the levying of the attachment a lien for the equal benefit of all the creditors who shall apply to the court or to the auditor for that purpose; and holds the property of the defendant bound for the satisfaction of all the applying creditors. The case of *Kahn v. Salmon*, 10 Sawy. 183, 20 Fed. Rep. 801, is an Oregon case, and the attachment was issued prior to the assignment. Also under the laws of Oregon an attachment can only issue upon due proof of the plaintiff's claim, (Code Civil Proc. § 143;) and the court in the case cited commented upon that provision as follows: "As between the parties to the action, the fact of the indebtedness is thereby established until the attachment is vacated or discharged." In this state no proof is required, and no presumption obtains that the claim of the attaching creditor is a valid one, but the writ issues by the clerk upon the filing of the affidavit and bond. It is admitted by the appellants that their only basis of action is their attachment lien, and they bring their action for the benefit of themselves and all other creditors who will join them in the action and share the expenses of the suit. Under this theory of the case, if the creditors not having attachment liens were to join them, there would certainly be a misjoinder of parties plaintiff, for those not having the attachment liens would have no legal capacity to sue in this action. On the other hand, if the creditors not having liens cannot come in, the result would be that the action of the court in allowing appellants' attachment proceedings would result in a discrimination against all other creditors, and that, when the assets were marshaled according to the prayer of the petitioner, the division could only be made between the creditors who were parties to the writ; and this is a result, the obtaining of which the appellants, in their argument, disclaim. And this brings us to the investigation of a proposition lying at the very threshold of the case, viz., the action of the court in allowing appellants' attachment proceedings after the institution of

the proceedings in insolvency. Section 2022 of the insolvency act, under which these proceedings were had, provides that "when issuing the order for the meeting of the creditors the judge shall order that all proceedings against the debtor be stayed." This provision seems to be plain, imperative, and susceptible of no two constructions; and the only proviso is one necessary to make the act operative, viz., that the said stay of proceedings shall not prevent the judge who shall have granted it from appointing a receiver to take possession of all property of the debtor for the benefit of all his creditors, if one or more of his creditors shall apply, etc. Some force must be given to this mandatory provision of the statute, and the force to be given is the force expressed, viz., to stay the proceedings. The evident reason for this mandatory provision is to prevent a multiplicity of actions, and the squandering of the estate in costs until the question of the debtor's discharge is settled by the court; and there is no provision in any subsequent section of the act authorizing the court to set aside the stay commanded by section 2022, or to allow any other proceedings to be commenced; and, in the absence of such authority, the action of the court was illegal, and the attachment proceedings were void. Whatever may be the potency and effect of an attachment levied prior to the cession of the estate, we cannot understand upon what theory a court will allow an attachment to issue against property which is already under the control of the court. It is placed there by virtue of the insolvency proceedings for the benefit of all the creditors. Certainly, when property is placed in custody so high as this, it will not be subject to a scramble of the creditors to obtain liens upon it to the exclusion of the rights of other creditors. The usefulness of the court, by such a practice as this, would be entirely destroyed. With one hand it would attempt to destroy the very thing which the other hand was protecting. By such a practice, not only would the mandatory provision of section 2022 become a dead letter, but the whole object of the law would be thwarted. Courts are authorized to take charge of insolvent estates for the benefit of all the creditors, and not to create preferred creditors on *ex parte* applications or otherwise. The statute of insolvency, though possibly awkward in its expressions, is full and complete in itself; and it is evidently contemplated that all the questions relating to the fraud of the debtor should be tried in the insolvency proceedings.

Section 2033 provides that, in case after the appointment of said assignees any one of the creditors of the insolvent debtor should deem it necessary to oppose it on the ground of some fraud having been committed by the said insolvent debtor, or of the appointment not having been legally made, he shall, within 10 days next following the appointment of said assignee, lay before the court or judge which has already taken cognizance of the case his written opposition, stating especially the several facts of nullity of the said appoint-

ment or of fraud by him alleged against the insolvent debtor; whereupon, in case of accusation of fraud after having received said insolvent debtor's answer, the court or judge shall order a jury of not less than six men to be summoned in the same manner as jurors are summoned in the district court, for the purpose of deciding on the said accusation. Sec. 2034 provides for the proof of the notice. Sec. 2035 provides that, where the accusation is fraud, the creditor shall have a chance to interrogate the insolvent debtor on his oath concerning the state of affairs, and the several transactions in which he may have been engaged anterior to his failure, as he shall think proper, and the insolvent shall answer such interrogations, etc. Section 2036 provides that "if the jury declare in their verdict that said insolvent shall be guilty of fraud, the said debtor shall forever be deprived of the benefit of the laws passed for the relief of insolvent debtors in this territory." Thus it will be seen that the act itself points out specifically the manner in which the question offered is to be determined by the court. It is true that in the case of *Thomas v. Hilton*, (Wash. T.) 17 Pac. Rep. 882, it was held by a divided court that the provision for a jury of a less number than 12 was unconstitutional, but the same court gave effect to the finding of the judge on the testimony under the succeeding sections. The insolvency law is very different from a common-law assignment, and authorities cited to prove that the common-law assignments could be attacked collaterally by suits in equity are not in point. There there was no other remedy. If the assignment was thought to be fraudulent, the proceedings were not in court, and there were no provisions made for the investigation of the question of fraud; but the insolvency law here was made for the benefit of both debtor and creditor. Nor do we think, as alleged by appellants, that they are unavailing to the creditors to obtain satisfaction of their claims. It is their object to protect as well the rights of the creditors as the debtor, and every investigation can be made, and every inquiry put on foot, in the proceeding that could be in a collateral suit. The assignee is the agent of the creditors. He is elected by them, is presumably in sympathy with them, and is their representative. They need not rest content with the property turned over by the debtor if they think he has not made a full return, but the assignee has power to bring all actions which may be necessary to be brought to protect the rights either of the insolvent or the creditors. See section 2027.

The last contention of the appellants is that the insolvency law furnishes no remedy for the creditors, because, if the insolvency proceeding fail and the debtor is not discharged the estate cannot be distributed among the creditors. On this proposition is cited section 2041 of the Code of Washington, and *Sanborn v. His Creditors*, 37 Cal. 609. We do not see in what way the section of the Code referred to confirms this position. It simply provides that, if the debtor is convicted of a certain character of fraud, he shall be debarred of

the benefit of this chapter. That simply means that he shall not obtain his discharge. It cannot mean that he cannot apply for the benefits of this chapter, for he has already applied. There is no provision or implication, however, that his estate shall be returned to him. If the California statute is the same as ours, we cannot indorse the conclusion arrived at by the court in the case cited.

Section 2046 of the Code of Washington reads as follows: "From and after the surrender of the property of the insolvent debtor all property of such insolvent shall be fully vested in his assignee or assignees for the benefit of his creditors, and shall not be liable to be seized, attached, taken, or levied on by virtue of any execution issued against the property of said insolvent; and the assignees who may be appointed shall take possession of and be entitled to claim and recover all the said property." Language could not well be made stronger than this. When property once becomes fully vested for the benefit of the creditors, that vested right in it cannot be destroyed or affected by the subsequent determination of the question of the debtor's discharge. There is no reason why it should be. He owes these debts. His exempt property has already been set aside by the court. He is in no worse position than he was before the proceedings commenced, for this identical property would then have been liable to an execution of his creditors. The first thing he must do under this law is to make the assignment for the benefit of his creditors. When that is done the property is fully vested in them. The question of "discharge" is for subsequent consideration. If the debtor fails to receive it, it is presumed to be on account of his fraudulent acts, and cannot affect the property which he has seen fit to surrender. Any other construction of the law would result in placing a premium on fraud, and would work a hardship on creditors who, by reason of such surrender, had been put to the trouble and expense of appearing in the proceedings. With this view of the proposition discussed, it is not necessary to discuss the other propositions argued by counsel. The judgment of the court below is affirmed, with costs to appellees.

ANDERS, C. J., and HOYT and SCOTT, JJ., concur.

STILES, J., (*concurring*) 'concur in the decision, and desire to say further that the bill in this case clearly set forth that the property sought to be affected by it was purchased by the partners with money fraudulently diverted by them from the partnership funds. If that is the fact, it is still, in equity, partnership property, although the legal title may have been taken in the name of the partners' wives; and, although it was not included in the partnership schedules, the assignee can sue for and recover it for the benefit of all creditors. If the assignee, upon being put in possession of the facts, neglects or refuses to

proceed, he can be compelled to proceed by the court upon the motion of any creditor. The question of discharge cannot affect the case in any way. It is very difficult to see how there can be a discharge in a case of partnership insolvency where the partners do not schedule their individual property and liabilities.

TURNER *et al.* v. IOWA NAT. BANK.

(*Supreme Court of Washington.* March 5, 1891.)

FRAUDULENT CONVEYANCES — PREFERENCE OF CREDITORS.

In Washington, a debtor, though in failing circumstances, may in good faith mortgage all of his property to secure one or more of his creditors, leaving other debts unsatisfied.

Appeal from superior court, Kittitas county; GRAVES, Judge.

L. A. Vincent, for appellants. Pruyn & Ready, for appellee.

SCOTT, J. Lloyd & Co. were engaged in the mercantile business, and, being considerably indebted to various parties, they executed mortgages to certain of their creditors, to secure the amounts they were owing them respectively. The Iowa National Bank, having been so secured, began an action to foreclose the mortgage. Appellants Turner & Jay, being judgment creditors, and not secured, sought to intervene in said suit. Their petition in intervention alleges that Lloyd & Co. were indebted largely in excess of their ability to pay; that the mortgages aforesaid covered all of their property, and were all executed on the same day; and that the execution of such mortgages, under the circumstances, was in effect an assignment of their property for the benefit of the parties to whom the mortgages were made, and that it was fraudulent as to appellants. Appellants asked that the mortgage be adjudged void as to them, and the property held subject to execution for the satisfaction of their judgment. An execution had been issued thereon and returned *nulla bona* prior to said intervention. The plaintiffs demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer. There is no law in this state to prevent a debtor, even though he be in failing circumstances, from paying or securing a portion of his creditors, so long as he does so in good faith, although he should dispose of his entire property in that way, and leave other debts unsatisfied. It is not disputed that this mortgage, and also the others, were given for the purpose of securing *bona fide* debts. There is no reason in justice or equity why this particular mortgage should be held void, and the mortgagee deprived of its security, in order that the property may be made available to satisfy the claim of these intervening creditors. The judgment is affirmed.

ANDERS, C. J., and DUNBAR, HOYT, and STILES, JJ., concur.

## COLUMBIA NAT. BANK OF DAYTON v. EMBREE.

(Supreme Court of Washington. March 14, 1891.)

## COMMUNITY PROPERTY—LIABILITY FOR SEPARATE DEBTS.

Code Wash. 1881, § 2411, giving each spouse, without restriction, the power to devise one-half of the community property, and section 2405, providing that neither spouse shall be liable for the separate debts of the other, do not withdraw the community property of a deceased spouse from liability for his or her separate debts. The sections requiring the personal representative to take possession of the deceased's "estate," and pay the debts of the "estate," apply to community as well as separate property and debts.

Appeal from superior court, Columbia county.

*Edmiston & Miller*, for appellant. *M. M. Godman* and *C. G. Cosgrove*, for appellee.

SCOTT, J. The facts agreed upon are, in substance, that one William McGee died testate, his wife surviving him; that said parties owned community property in Columbia county at the time of his decease; that one Embree was appointed executor of his will; that said McGee owed the Columbia National Bank \$140, being a suretyship debt; that he left a small amount of separate estate, but not sufficient to pay the claim; that the community debts were paid by the executor, and a surplus of money was left in his hands arising from a sale of the community property; that the claim was duly presented and allowed, the separate property of deceased exhausted, and a balance of said debt remained unsatisfied. The court decreed that said indebtedness was a separate debt of the deceased, and that it was not a charge upon the community estate, or upon the decedent's interest therein. It is not contended that this particular debt is not a separate debt of the deceased, and the sole question presented to us is whether the unpaid balance should be paid out of the decedent's interest in the community property, or whether said property should go to his devisees relieved from liability therefrom. It is not claimed that his said interest in the community property is exempted from the payment of this debt, on any other ground than that it is a separate debt, for which it is urged that no part of the community property is liable in any event. Under our law (Code 1881, § 2411) the power to devise one-half of the community property exists in each spouse without restriction. The persons interested in the community may be entirely excluded, and the property given at will to a stranger. Certainly the separate debts of the deceased should be paid therefrom when the community debts are paid, and there is not separate property to pay them, unless such payment is prohibited by the statute. Considering all the statutes thereon, we do not think there is any such prohibition, although the section cited only expressly makes such devise subject to community debts. It is true, as contended, that it was useless in such a case to mention this class,—as the liability therefor would have existed without

it,—unless there was an intention to exclude all others; but it seems rather to have come from inadvertence or an excess of caution,—the liability for separate debts is not expressly excluded. Section 2405 provides that either spouse shall not be liable for the separate debts of the other. This only protects the separate property of the spouse not having contracted them, and his or her half of the community property, and by implication would leave the other half of the community property liable therefor. These laws were evidently passed at the same time, and it might be said with equal force that, in so far as separate debts contracted after marriage are concerned, in the light of our other statutes relating thereto, there was no reason for this particular statute if section 2411 (and 2412, where party dies intestate) prohibits the payment of separate debts from the community property, for the separate property of the other spouse, or such spouse's interest in the community property would not have been liable therefor without section 2405. While the law relating to our probate practice is somewhat confused, yet it is apparent—as no other way is provided—that upon the death of a person his separate estate and his interest in the community property is administered upon in the same proceeding, even though there may be no express provision therefor, and although his interest in partnership property is particularly mentioned. See section 1435 and following sections. This would clearly be so in the execution of a will, and it must necessarily be the case where a person dies intestate. Section 1419 provides that when, by reason of a suit concerning the proof of a will or from any other cause, there shall be a delay in granting letters testamentary or of administration, a special administrator shall be appointed to collect and preserve the effects of the deceased. Section 1444 gives every executor or administrator a right to the immediate possession of all the real as well as personal estate of the deceased, and section 1445 requires him to make a true inventory thereof. By section 1465 the executor or administrator is required to publish a notice to the creditors of the deceased requiring all persons having claims against the deceased to present them, etc. Section 1479 prohibits the issuance of an execution upon any judgment rendered against the testator or intestate. Section 1528 requires the executor or administrator to take into his possession all the estate of the deceased, and section 1562 requires the debts of the estate to be paid in the order there specified; the fifth classification relates to judgments against the deceased. The word "estate" must be held to relate to the separate property of the deceased, and as well to his interest in the community property, and the debts referred to include separate debts as well as those against the community. There are other provisions of the same general purport, to which it is unnecessary to further allude. It is urged that these statutes were passed before the law relating to community property was adopted here, and that consequently they can have no

bearing. But considering the fact that no other provision has been made for administering upon the estate, separate or community, and of the practice that has obtained, it must be held that it was understood, when the community laws relating to husband wife were passed, that they were enacted in view of the probate law as it then existed, and that it was sufficient for a general and complete administration, even if there was no other answer. His separate estate not otherwise exempt would be liable for the community debts, at any rate after the separate debts were paid and the community property exhausted. The only reason for exempting community property from the separate debts of either spouse is for the benefit of the community, and when this is dissolved the reason no longer exists. We do not decide that the interest in the community property of a contracting spouse may not be reached during the lifetime of the community for a separate debt, although such exemption may necessarily follow. But when the community is dissolved by death, or in any other way, the interest in the property thereof of the party owing a separate debt, which interest is not required to pay the community debts, and not otherwise exempt, is held liable for such separate debt when the separate property is exhausted. Reversed and remanded.

ANDERS, C. J., and DUNBAR, J., concur.

(2 Wash. St. 231)

EDWARDS v. STATE.

Supreme Court of Washington. March 13, 1891.)

MURDER — CHANGE OF VENUE — ACCOMPLICE — STATE'S EVIDENCE — CORROBORATION.

1. Under Code Wash. § 1073, which leaves a change of venue in criminal cases in the discretion of the trial court, the denial of such a motion, although supported by numerous affidavits, showing the circulation of some intemperate newspaper articles, and considerable hostility in the community, will not be reviewed, where only 26 jurors were examined, and there was no complaint of misconduct.

2. Section 1093, providing that the court, in a "prosecution" against several, may direct any defendant to be discharged that he may be a witness for the state, allows one indicted with the prisoner, but not on trial with him, to be a witness, while still under indictment.

3. On a trial for murder, the principal witness was an accomplice, who had told a number of conflicting stories, sometimes taking the murder entirely upon himself, and at other times charging it upon others. He admitted numerous falsehoods, and testified that defendant committed the murder, and that he himself had no previous knowledge that murder was intended. The only corroborating evidence was that defendant, when intoxicated, had mentioned "that poor woman," and had called her name, and said that he "might kill a man, but couldn't kill a woman," with other kindred expressions. Held, that a conviction could not be sustained.

Scott, J., dissenting.

Appeal from superior court, Pacific county; N. H. BLOOMFIELD, Judge.

Caples, Hurley, Allen & F. D. Winton, and Kanaga, Holcomb & Elwood, for appellant. C. W. Fulton, George J. Moody,

Pros. Atty., and A. G. Hardesty, for the State.

STILES, J. The appellant was indicted jointly with John B. Rose, George F. Rose, and James E. Gibbons for the murder of Sina Frederickson, near South Bend, in Pacific county, on Thursday, January 30, 1890, and was tried separately. Before the trial a motion to change the place of trial to another county, on the ground of prejudice on the part of the community against the accused, supported by numerous affidavits, showing the circulation of some intemperate newspaper articles among the people of the county, and considerable hostile feeling in the neighborhood of where the alleged crime was committed, was made and denied. But, inasmuch as the statute (Code, § 1073) seems to vest the matter of a change of venue in a criminal case entirely in the discretion of the trial court, we should not feel warranted in reversing a conviction, unless the discretion had been most clearly abused. Here, however, but 26 jurors were examined, and there is no complaint of any misconduct on the part of the jury selected. It seems to be probable that, while it was true that the persons qualified to act as jurors who lived in the vicinity of South Bend would have been very few by reason of the excitement they were under, still there was a large portion of the county, from which the jury was actually drawn, where the excitement did not exist.

The prosecution in this case relied entirely upon the testimony of George Rose. Without his statement there were some circumstances which might have pointed to the accused as the person, or one of the persons, who had committed the homicide; but, under the theory of the state upon the trial, these circumstances were entirely laid aside, and became of no value. George Rose was the first witness called for the prosecution, and the defense at once objected to his being allowed to testify, on the ground that, being jointly indicted with the prisoner on trial, he could not be a witness until he had been discharged. The court overruled the objection, and permitted him to testify, which appellant urges as error. But under the liberal system we have, which permits almost every person to testify in any cause, whether civil or criminal, we think it was not error to allow one indicted with the prisoner, but not put upon trial with him, to be used as a witness. The language of section 1092 of the Code is: "When two or more persons are included in one prosecution, the court may, at any time before the defendant has gone into his defense, direct any defendant to be discharged, that he may be a witness for the state;" and it will thus be seen that we interpret the word "prosecution" to mean "trial." It can work no substantial injury to the accused whether the witness has been discharged or not. While still under indictment, the witness cannot be used as such, unless by his consent; and by his willingness, and his voluntary act of testifying, which he should never be allowed to do unless it is clearly necessary for the case

of the state, he earns the equitable right to a discharge, which will always follow where he has been straightforward and honest with the court; whereas, on the other hand, if he has been discharged, and then in his testimony plays false with the court, the order of discharge will be set aside, and he will be put upon trial, even on his own confession. Therefore the temptation to press hard upon the accused in giving his testimony is equal in either case, and his credibility, not his competency, must be the point of attack.

The deceased, Sina Frederickson, was undoubtedly the victim of a most brutal murder, somewhere near the time alleged, (January 30, 1890,) and it is almost equally certain that at nearly the same time, and by the same hand or hands, her husband, Jens Frederickson, met a like violent death. Both were probably instantly killed,—she by a rifle bullet, he by a load of small shot and percussion caps, both being shot through the head. Their bodies were found about a mile apart,—hers being buried under the refuse of a hog-pen upon the premises of John B. Rose, near the shore of Shoalwater bay, about four miles below South Bend, and on the opposite side of Willapa river; and his being laid in a trail made by cattle, close to some large logs, further to the west, and within a few rods of high-water mark on the bay. The grave in which Mrs. Frederickson was buried had been excavated to a depth of two or three feet; but her husband lay in the hollow made by the cattle in jumping over the logs where the ground was swampy, and was covered by very little earth and some coarse sods, just enough to hide him. His body was discovered accidentally by searchers, while hers was pointed out by George Rose, when all the efforts of the searchers to find it had failed. These two unfortunate young people, only a month before their death, had taken up their residence upon certain government land adjoining the land of John B. Rose, and were living in a boat-house floated up on some logs at high-water mark. The land had been previously several times occupied by different claimants, who had abandoned it, and Frederickson intended to prosecute a contest in the land-office to clear the record or former filings. The Rose place consisted of something over a hundred acres, and had upon it a farm-house and outbuildings, an orchard, etc. It had been settled for many years, and was used by Rose as a place to keep cattle and poultry, and for the raising of supplies for his hotel in South Bend, where he lived. No other person lived in the vicinity of this land, and the country around was wild, rough, and uncultivated. The only means of travel upon it seems to have been the waters of the bay and river. Edwards, the appellant, was a young man, employed by Rose to attend to the cattle and other property at the ranch, and lived there alone; but it had been for some time arranged that he should quit his employment, and a man named Prickett, with a family, had been engaged by Rose to take his place. Edwards left this ranch on Sunday, February 2d, and in all probability, had it not been for the revelations of

George Rose, he would have been more than suspected of this double crime, although the body of the woman might never have been found. But, as will appear in the aspect in which the case was presented at the trial, this presence of Edwards so close to the scene of the crime, and so near the time when the Fredericksons were missed, cut no figure at all as a circumstance tending to prove his guilt.

George Rose was the first witness for the state, and the only witness, excepting those who were called to corroborate him by showing the language and actions of Edwards after he was suspected of participation in the crime. After stating that he was 18 years old, and that he knew the Fredericksons, he was asked to tell the story of the killing of the Fredericksons in his own way, which he did in these words: "Well, on the 29th day of January father came to me in the evening, and says to me he wanted me to go down to the place the next day with him to look after some cattle. And Ed. Gibbons stood about ten or twelve feet from him, and he said he would like to go down with us. So the next morning we went down about half past six o'clock in the morning,—left South Bend. And all three went down to the place, and when we got down there we saw Edwards was there; and we went in the house, and father and Gibbons and Edwards was standing there talking awhile in front of the house, by the gate. Father says to Edwards: 'You better go up and get Frederickson to help bring the cattle down;' so father and Edwards went off after Frederickson, to bring the cattle down, and brought him down, and went down after the cattle. And we walked along the bluff, and there was a hawk set up on a tree, and Gibbons says to me, 'Give me your gun, and I will see if I can kill that hawk;' and I let him have the gun, and after he shot the hawk he kept the gun, thinking he might see some geese to shoot at; and we walked down until we got down by the cow trail, and Gibbons walked ahead, father next, and I was behind father, and Frederickson behind. And I heard Gibbons say to Frederickson, 'Look here, Frederickson,' and just then he shot; and I turned around and said, 'That's a pretty way to use a man after calling him to help drive the cattle up;' and Gibbons says, 'That's the kind of cattle we came down after.' I told him if I had known that I would not have come down with them. So after Gibbons shot Frederickson, Edwards walked into the brush, and got a spade out, and began to look around for a place to bury him; and it was in the cow trail; and father says, 'That's good enough place right here;' and Edwards went to work and dug the grave, and I went off ten or fifteen feet from where they was, and sat down on a log, and never looked up at them until after they had the grave ready, and called me to help lay him in the grave. They had his gum boots pulled off and gum coat, and laid them down where he was dropped; and I helped put him in the grave, and threw over what loose dirt there was, and then they pulled some grass sod up, and put it on top of him;

and after that father picked up his gum coat and boots, and threwed them down in the slough, as we walked along about a hundred yards from where he was buried; and we walked up to the house, and as we got along the beach father said, 'Better hurry up and get Mrs. Frederickson down; she may suspect something,—go away; so they went up and got Mrs. Frederickson, and when we were going by the house Edwards said to me, 'Give me your shotgun.' I told him I would not let him have it, and father commenced cursing and swearing at me because I would not let him have it; and Edwards said, 'I will go and get the rifle; don't make any fuss about it;' and they was gone up after Mrs. Frederickson about twenty minutes; and I heard some one scream, and I went out and looked, and saw her coming along the fence; father had hold of one arm, and Edwards had hold of the other; dragging her through the mud-hole; and after they got through the mud-hole Edwards walked ahead, and father walked behind, and just as they got inside the gate Edwards picked up the rifle and walked up about ten feet from the gate, and Mrs. Frederickson got inside, and asked what they had done with her husband. Edwards says, 'We shot him;' and she says, 'Then kill me; I don't want to live any longer;' and Edwards raised the rifle and shot her, and they buried her right there behind the pig-pen, and Edwards dug the grave; and after the grave was dug father called me to help put her in the grave; and I came up to help put her in the grave; and we covered her up, and threw some suds on top of her, so they would not see the loose dirt; and father and Edwards came back to Frederickson's house, and locked the door; and when they came down Edwards carried the shotgun, and Gibbons carried the revolver; and father called me out to the front of the house by the gate, and he had \$50, and gave it to me, and he said if he ever found out that I told this on him I would be dead first; and, furthermore, if I went down to the place next week, and it came up stormy, and anybody asked what became of Frederickson, to say that I saw them go out the day of the storm; and before we left that evening Gibbons gave me the revolver. I told him that I did not want it, but he gave it to me, and I kept it until the next— We, father, Gibbons, and I, left the place about five o'clock that afternoon, and got up to South Bend about half past seven, and had supper by ourselves, my sister Frances preparing it. Edwards stayed at the house. He was to take the boat (Frederickson's) and put it out and sink it that night in the river; swamp it." Asked what any of them stated as the reason for killing these people, he said, "Well, father wanted to get that 160 acres of land there, is the reason he killed them;" and that, in December previous, Edwards had cleared a spot on the Frederickson land to build a house on, and told Rose he would take the place for him.

We have given this statement in full, in the words of the witness, for the reason that, taken with the other facts in the

case, it is one of the most remarkable cases in the history of criminal law. Here is a boy of 18, who accuses his father, a man past 70 years of age, of planning and executing this horrible crime, and of carrying his son into it, as a witness of a double murder, for the pitiful motive of clearing the way to the possible acquisition of a parcel of almost worthless land, at the same time that neither the father, Edwards, or Gibbons provides himself with any weapon whatever when going on their expedition of murder, but depends entirely upon the chance shotgun in the hands of the boy. George, on cross-examination, admitted having had in his possession a pistol belonging to Frederickson; that it had had a leather handle; that he had cut the leather off, and also Frederickson's initials from the wood beneath the leather; that he kept it under his bed, where his mother found it; and that, in response to his father's question where he got it, he had answered that he bought it of a man at South Bend. He also stated that he had been to the ranch with one Conley on Saturday, February 1st, to assist Edwards in killing a beef; and that on Saturday afternoon, having got "pretty full of liquor," he went down to the ranch in his boat to take Edwards' place until Prickett should arrive, and remained there alone Sunday and Monday. It further appeared that George, shortly after his return from the ranch on Monday, had mentioned in the hearing of various people that he had seen the Fredericksons go out on the bay in their boat, and disappear in a sudden squall. This set the people of South Bend to searching for the bodies, with the result of finding Frederickson in the latter part of February. Suspicion was immediately directed towards George Rose, and he was arrested, and charged with the crime of murder. Then began, on his part, a series of statements and confessions, which continued until March 31st, each being different from all the others. At various times he admitted having done both the murders himself on Sunday, February 2d, his excuse being that he had been very drunk, and the circumstances that he had procured Frederickson to go out with him to relieve some cattle that were mired, when, being behind him, he had said, "Look here, Frederickson," and when the latter turned around he had shot him down; that he had gone to the Frederickson house, and told Mrs. Frederickson that her husband had hurt himself, so that he could not get away from the Rose house, whereupon she accompanied him to the ranch, and was there shot by him with a rifle left in the house for killing cattle; and that he had returned to the Frederickson house, got the pistol and some money there on a shelf, and locked the house, after which he buried the bodies. Again, he charged Edwards with the whole crime, alleging that he had found it out by seeing the fresh earth near the hog-pen, and digging down until he came to the body of Mrs. Frederickson; and that, when Edwards became aware that he knew it, the former charged him to tell the drowning story. Still again, he said that some otherwise



unknown person named Andrew Johnson persuaded him to help kill the Fredericksons, and that they did it at Frederickson's house, carrying the body away the next day, February 3d. On the 29th of March the Edwards statement was reduced to writing, and signed by George Rose, and witnessed by the sheriff and his deputy. On the 30th of March the Johnson statement was likewise signed and witnessed; and on the same day, but later, he made another written statement, in the main corresponding to his testimony in chief at the trial, which was witnessed by the attorneys for the prosecution, the sheriff, and another. On the 31st of March he again took the crime upon himself, in conversation with appellant's counsel, saying that he had implicated the others because the officers would not listen to him when he said he did it alone, but insisted that he had others with him in the murder. At the preliminary examination, on April 3d, he confirmed his last written statement, and seems to have rested with that until about one week before the trial, when, the sheriff having for some reason taken him upon the Rose ranch, he, in the presence of the sheriff and his deputy, reiterated the story that he had himself killed the Fredericksons, and illustrated how it was done. To the making of all these statements the witness excused himself by claiming that, in the first place, his attorney (who was not the attorney of any of the other defendants) had told him that, if he told different stories, the state would not be able to catch him on any of them, and thus he would get off; secondly, that the defendant's counsel had told him, after he had made his written statements, that if he would take all the trouble upon himself, that would clear the others, and then they would turn about and help him to get off.

The prosecution maintained that the second written statement of March 30th was a true one, and, for the purpose of showing wherein it differs from George Rose's testimony, we shall here include a part of it, as follows: "My name is George Rose. My age is 19 years. My father's name is John B. Rose. My father wanted this 160 acres of land that Jens Frederickson took. He wanted Edwards or Gibbons to take it, and pay out on it, and then deed it to my father. They, Gibbons (who is one of the meanest men ever came into the country) and Edwards and my father all made it up as to how they would kill Frederickson and his wife. After Edwards made up his mind to take the place for father, he cut down some trees on the place, but father found out after Frederickson had built a shake shanty on the claim that Frederickson had commenced a contest to get the land. On Wednesday or Thursday of the last week in January, father, Gibbons, and I took a dingee, and crossed the bay to father's ranch, where we found John Edwards. We had it all made up as to how we were to do the killing."

Now, in his testimony George repudiates all knowledge on his part of the purpose of the party up to the instant when Frederickson was shot, whereas in the state-

ment he shows full participation in the scheme before they left South Bend; the bearing of which is that under the statement he was not only an accessory before the fact, but an active *particeps criminis*, whereas, according to his testimony, he was the innocent victim of association, who protested to the extent of refusing his gun at the assassination of the woman, and afterwards merely endeavored to shield his father, which he had a right to do, under the statute. His testimony was therefore, in the presence of his statement, all the more carefully to be scrutinized, as, if believed as he gave it, it exonerated himself from all responsibility for these two crimes, at the expense of his father and the other two men.

On Sunday, February 2d, Edwards went, by way of Astoria, to Portland, where he remained a few days, and then returned to South Bend and the vicinity of Shoal Water bay. Suspicion had been roused against him in connection with the Fredericksons, and he became aware of it. But he did not go away, and on the 17th of March he was at Willapa City, a small village. He was drinking, and there were several men in and about the saloons that he visited, who sought to get him to commit himself in some way by trying to lead him to talk of the Fredericksons, and by listening to his maudlin talk as he sat dozing in drunken stupor over a stove. He evidently knew when awake what they were driving at, and sought to avoid them. But out of it all he seems to have said to one person, "I'm in trouble; I'm watched, and I want to get out of this country;" and when told he mustn't mind such things, he answered, "You would if you were in my place." Another questioned him about the Frederickson land, whereupon Edwards said: "I suppose you have heard about those people being drowned there? Yes; they were drowned, because I was there two days after they were drowned. Oh, that poor woman!" the last expression, as he leaned sorrowfully towards the witness. A third heard him say, as he sat nodding by the stove: "I might kill a man, but I couldn't kill a woman." The same witness described him as staggering drunk. A fourth witness heard him say: "That's all right, Frederickson; that's all right." In the hearing of a fifth he said: "Why, damn it, I didn't kill the woman; I couldn't do such a thing." All this was occurring from 3 o'clock in the afternoon until 3 o'clock the next morning; but nothing more definite than this came out of it. At another time a witness testified he had been talking to Gibbons and John B. Rose in the jail, and both were protesting their innocence; "and the defendant [Edwards] there was sitting with his back toward me. He didn't look at me, but says he: 'I am innocent of this murder, but I would like to tell who the guilty parties are.'" The witness interpreted this as an expression of a desire on the prisoner's part to make some statement, and so told the sheriff, who at once saw Edwards, and asked him if he wished to say anything. He said he did not, and denied having used the expression attrib-

uted to him. Although George Rose did not testify to anything of the sort, the court allowed the prosecution to show that, within a few rods of where Fredrickson's body was found, some time in March, persons had noticed a rectangular hole at the shore end of a little slough. It was about the size of an ordinary grave, and the tide flowed in and out of it from the slough. Its sides looked as though they had been dug with a spade. But George Rose did say that Edwards had got a spade out of the brush near there, within a few minutes after Fredrickson was shot. Therefore the argument was that this hole was a corroboration of the spade part of George's testimony, as well as that this was really a grave dug for the reception of a corpse by Edwards. The same witness, moreover, stated that John Rose, when spoken to about the hole, said that a cow mired there, and had been dug out.

We have now stated the substance of all the prosecution's testimony in the case, and it would seem that it was all that it was possible to produce, as extraordinary efforts were made by the authorities and citizens to secure the conviction of the parties guilty of the Fredrickson murders. During a part at least of the five months from the time of his arrest to the trial of Edwards, George Rose was the willing assistant of the prosecution, able, certainly, and presumably ready, to point out every circumstance which would tend to corroborate his statement. Able counsel were employed to assist the state's prosecutor, both in developing testimony and in trying the case. But to our minds the case went to the jury upon the testimony of George Rose absolutely uncorroborated in any particular whatever; for the drunken whinings of Edwards in the Willapa saloons, even though they contained within them anything more damaging than the maudlin protests of one believing himself surrounded by suspicious enemies, were not corroboration of anything testified to by George Rose, nor did they show any admission or knowledge of any fact connected with the crime charged. The court below apparently thought differently, for a motion to direct an acquittal at the close of the state's case, on the ground that there was no corroboration of George Rose, was denied, although the court in its charge to the jury ruled strongly that, to convict one charged with crime upon the testimony of an accomplice, the accomplice must be corroborated in some material matter tending to show the accused to have been implicated in the commission of the crime. Still, it may be that the court meant to leave it to the jury to say whether George Rose was or was not an accomplice at all; as, if full credit were given to his statement, we have shown that he was guilty only of concealing a crime of which he was a witness, but in which he did not participate. This state of things must appear remarkable to any one looking at this case dispassionately. John B. Rose was a man 70 years old, who had resided in and near South Bend many years. He kept a hotel at which some 40 people

were regular boarders, and was well known to everybody about there. Edwards we have somewhat described. Gibbons was a young man who had, within three weeks only, come to the neighborhood a stranger, boarded at the Rose house, and was engaged with several others in slashing timber near the town. Yet not a single witness was called by the state to show that these men had been seen talking together at any time, or leaving in a boat upon the river, or returning from the river, or taking a supper alone, or in any way consorting together as men having some common purpose of so serious a character as murder in view; something of which, if there had been anything as described by George Rose, must have been developed in the excitement which followed upon the discovery of the foul murder of these two young people.

Upon this appeal the state seems to concede that George Rose was an accomplice; but it maintains that, in the *first* place, there was some corroboration; and that, *secondly*, no corroboration was necessary in law, but that the uncorroborated testimony of an accomplice in this state goes to the jury like the testimony of any other witness, and that the court is bound by the verdict equally as though the witness were in no way complicated with the body of the crime. We have shown how we regard the matters which are claimed to be corroboration; that they are wholly immaterial. As to the other point, it is true that we have no statute requiring the corroboration of an accomplice, such as is found in a few of the states. It is also true that at common law conviction upon the unsupported testimony of an accomplice was upheld, to the extent, at least, that, although the higher courts and law-writers laid it down that a trial court ought to advise the jury not to convict on such testimony, it was not reversible error, even if they did not so advise. Yet the books are full of cases from courts not bound by any statute, both in England and America, where corroboration has been held necessary. 1 Amer. & Eng. Enc. Law, tit. "Accessory," § 18, p. 74. Cases are rare, indeed, where, if the prosecutor has the assistance of a willing accomplice, no corroborative testimony can be produced. In practice it is almost invariably attempted, and juries are told, as in this case, that unless there is corroboration they should acquit. Perhaps the true view of the matter is that in many, if not the most, cases, the evidence of an accomplice, uncorroborated in material matters, will not satisfy the honest judgment beyond a reasonable doubt, and that it is clearly insufficient to authorize a verdict of guilty. But there may occur other cases where, from all the circumstances, the honest judgment will be as thoroughly satisfied from the evidence of the accomplice of the guilt of the defendant as it is possible it could be satisfied from human testimony; and in such cases justice demands that the evidence be accepted, so far as the court is concerned. Collins v. People, 98 Ill. 584. The testimony of George Rose was not of the latter class, and the court below did right to charge

the jury not to convict without corroboration. Here was a boy of 18 or 19 years, who was precocious enough to get "full of liquor;" who never went anywhere without a gun; who, upon his admission made, saw these persons killed; who had the money of Frederickson and his pistol; who slept soundly for two nights, alone in the ranch house, within a few feet of where Mrs. Frederickson lay buried in filth; who spread the news of the drowning of the Fredericksons; who told his stories without number, and equally varied; who stood by with unmoved calmness when strong men sickened in their labor of removing the dead woman from her horrible grave, and would himself have assisted but that the sheriff prevented him; who never suffered a tremor when he encountered his father after implicating him in so desperate a toil; and who, in the course of a trial lasting a week, was apparently the coolest person in the courtroom, admitting frequent falsehoods, but sticking hard to his ghastly story. To say that such a witness should not be distrusted would be to mock at justice, and fling men's lives to the wind. John Edwards may be guilty of participation in this murder, but it is beyond human credibility that George Rose's story should be taken as true in any material particular, unless it be against himself, while it is unsupported by some creditable testimony.

We shall not allude at any length to the defense, which was entirely devoted to proving an *alibi* for George Rose, John B. Rose, and Gibbons. Edwards was, confessedly, at the Rose ranch on Thursday, January 30th. But a dozen or more persons testified that John B. Rose was sick with "la grippe" from Sunday the 26th to Friday the 31st, and that he was confined to his room all day of the 30th; that George was at home Thursday and Friday, doing chores about the house and in the village; and that Gibbons was at his work slashing all the week. Many of the witnesses were clear as to the date, fixing it with reference to the closing of the village school, which occurred Friday afternoon, with an exhibition which George attended, and which he helped arrange for the day and evening before. The teacher, a young lady from Oregon, boarded at the Rose house, and to her the state accorded worthiness of belief. The others were less positive; but the jury evidently disbelieved them all, and gave full credence to George Rose. The verdict was guilty, and the sentence death. For the verdict we see no way to account, except upon the theory that the jury totally misconstrued the value of the testimony offered in corroboration, which they might well do, in view of the court's refusal to direct an acquittal; or there was such prejudice and passion created in their minds that they were incapable of rendering a verdict according to the evidence. There were many assignments of error which we have not touched upon, but we are so thoroughly satisfied that the appellant should have a new trial, on the ground referred to, that it is not necessary to consider them. The judgment is reversed, and a new trial granted.

ANDERS, C. J., and DUNBAR, J., concur.

SCOTT, J. I dissent. I do not think this is a case that should be reversed upon the question of fact. The record discloses no error. There was some corroborating evidence to support the testimony of George Rose, and it, with his testimony, was all before the jury for due consideration. Simply because reading the testimony now might not convince one of the guilt of the defendant will not warrant a reversal. The jury had the advantage of seeing the witnesses upon the stand, and hearing them testify, and the jury's judgment of the facts is the safest to follow. It is going too far to say that there was no sufficient proof of guilt upon which a conviction can be based. I think the evidence for the prosecution shown by the record will bear a more favorable statement than is given in the majority opinion, but, as the case is to be retried, it is perhaps best to refrain from any extended *contra* argument upon the proofs. However, the fact, if it is a fact, that none of George Rose's statements wherein he charged the accused of the crime were entirely true, does not afford ground for reversing the case. He was a man of hardened and abandoned character, and, it seems, at no time repentant, but his conduct does not show that he was especially desirous of shielding himself, although at times such a desire may have operated upon his mind, and in this regard a plausible reason is given for his contradictory statements. That he implicated the others for the reason he is said thereafter to have given, that the officers would not believe him when he said he committed it alone, and insisted that he had assistance, is very unreasonable. At the trial he was kept upon the stand a long time, and was subjected to a rigid and lengthy cross-examination, his testimony in the main was consistent, and there is much that can be said in favor of the truthfulness of his statement as finally given; but quite likely he was actuated at the last moment, when confronted with the solemnity of a trial of that kind, with a desire to shield himself and his father as much as possible, by showing no previous knowledge of his own, and imputing the actual killing to Edwards and Gibbons. The *alibi* the defense undertook to establish was not conclusive; most of the testimony relating thereto might have been true, as it probably was, and yet sufficient time left for the commission of the murders on the morning of January 30th, as alleged. These murders, if committed as claimed, were no doubt under previous consideration for some time by some of the parties. John B. Rose's sickness might easily have been feigned. The corroborating testimony may all have been subject to some explanation compatible with innocence, but the jury had all of this before them, the judge was a competent and careful one, the defendant was assisted by able attorneys, and he apparently had a fair trial, and I do not think the verdict and judgment should be disturbed. Human tribunals are faulty at best, and it is impossible in a case like this to approach absolute certainty, but

every protection is thrown around the accused, under our system of criminal jurisprudence, and the liability to err against him upon the question of fact, while possible, is very remote. Only in extreme cases should the appellate court interfere to set aside a conviction upon that ground, and this is not such a case.

(2 Wash. St. 310)

**ROSE v. STATE.**

(Supreme Court of Washington. March 14, 1891.)

**MURDER—TESTIMONY OF ACCOMPLICE—CORROBORATION—COMPETENCY OF JURORS—EVIDENCE.**

1. On a trial for murder, the principal witness was an accomplice, who had told a number of conflicting stories, sometimes taking the murder entirely upon himself, and sometimes charging it upon others. He admitted numerous falsehoods, and testified that defendant, who was his father, had participated in the murder; and that he himself had no previous knowledge that murder was intended. In corroboration it was shown that defendant, when solicited, had indignantly refused to subscribe money to investigate the murder, saying that he was blamed for it; that he was much agitated by the arrest of his son; that he told him not to talk to any one, but when the case came to trial to tell the truth about how the man and woman went out in a boat, and were drowned; and he gave as a reason for so much shooting that his son had been hunting, but that he did not want anything said about it. Defendant testified that he said the latter incident occurred months before the murder, and was corroborated in this by his son. Several testified that defendant was at home sick on the day of the murder. *Held* not sufficient to sustain a conviction. *Scott, J.*, dissenting.

2. One who states that he has read newspaper accounts of the murder, has heard the opinions of others, and formed, but not expressed, one of his own, but that it will have no influence on him as a juror, and that he can try the case fairly, is competent.

3. A juror stated that he had talked about the case with 30 or 40 people, including one of the jury who had tried a person indicted jointly with the defendant, and had read newspaper reports of the testimony before the coroner's jury and at the preliminary examination; that his opinion was confirmed, and strong evidence would be required to remove it, but that he would be governed by the law and the evidence, and could lay aside all previous impressions. *Held* incompetent. *Scott, J.*, dissenting.

4. Defendant's statement, before the trial, that his son had confessed to him the commission of the murder, cannot be contradicted by the prosecution in its evidence in chief. *Scott, J.*, dissenting.

Appeal from superior court, Pacific county; N. H. BLOOMFIELD, Judge.

*Caples, Hurley, Allen & F. D. Winton and Kanugn, Holcomb & Elwood*, for appellant. *C. W. Fulton, Geo. J. Moody*, Pros. Atty., and *A. G. Hardesty*, for the State.

**STILES, J.** The separate trial of John B. Rose for the murder of Sina Frederickson occurred in the week following that of John Edwards, and with the same result. The testimony of George Rose was produced as before, and other witnesses were called to corroborate him. The same line of proof was followed, viz., that of showing expressions dropped by the accused, which, it was claimed, established a guilty knowledge on his part of the crime, and a participation in it.

Marion Bullard was called as a juror, and upon examination stated that he had read such accounts of the Frederickson affair as were published in the current newspapers; that he had talked with other persons in regard to it, and heard them express opinions; that he had formed, but had not expressed, an impression or opinion of his own; but he further stated that his former impression would have no influence upon him as a juror, and would not cause him to construe the evidence upon the side to which his impression had previously leaned. A challenge for cause was denied, but we think the ruling was correct. Joseph Kaiser was another juror. He was a laborer on the farm of James Albright, one of the jurors on the trial of Edwards; talked with Albright and 30 or 40 others about the case; read the newspapers, including accounts of the testimony before the coroner's jury, and at the preliminary examination; had to a certain extent formed an opinion as to the guilt or innocence of John B. Rose, which had not been changed; it was a confirmed opinion, which it would require evidence to remove; if sworn as a juror it would require strong evidence to remove his opinion as to the guilt or innocence of the defendant; he would be governed by the evidence as given at the trial, and the law as charged by the court; could lay aside all his previous impressions, but still had an opinion, though not a decided opinion. Defendant's challenge for cause was denied. This was error. The liberality of courts in the matter of accepting jurors who have read and heard of what purports to be the facts in a criminal case is very much greater than formerly, but they have not yet reached a point where one who states that he has an opinion which it would take evidence or strong evidence to remove can be taken as a juror in a criminal case where the life of a prisoner is in jeopardy. By the court's ruling the defense was compelled to peremptorily challenge the juror to avoid the danger of his presence with a fixed opinion in his mind. There must have existed in the opinion of the court, notwithstanding his assertion to the contrary, a doubt whether or not he could be fair, which should have been resolved in favor of the prisoner.

The testimony of George Rose was in every material respect the same as in the Edwards Case, ante, 258, excepting that upon his cross-examination he made it clear that when, as alleged, the party, consisting of his father, Gibbons, Edwards, Frederickson, and himself, left the Rose house to go down after the cattle, no member of the party carried or had mentioned in his hearing any gun or weapon of any kind; that he was the last to leave the yard with his shotgun, which was then unloaded; that without any suggestion from the others he carried the gun, and loaded it as he went; and that nothing was said about the gun until Gibbons took it to shoot the hawk. He also particularly described how he spent his time on Sunday and Monday, February 2d and 3d, when he was alone at the ranch, feeding the cattle, preparing his meals, and quietly reading a book. The name of the

book he could not at first give, but finally said it was "Tennis." Counsel suggested "Tennyson," and he agreed that that was the name of it; but beyond that there were stories in "prose," which he afterwards changed to "poetry;" he could not say what anything he read was about. He further said that Monday, February 2d, was a very stormy day.

In this case the corroboration was, if anything, weaker than in the Edwards' Case. John Anderson was active in raising a public subscription of money to employ a detective and a lawyer to investigate the disappearance of the Fredericksons, and went to Rose's house in South Bend to ask him to contribute. Rose was indignant; said he was being blamed for it, and would give nothing. He related what George had said about the Fredericksons going out and being lost on the bay, and appealed to George, who was present, to say if it was not true; and gave as a reason why the bodies did not float that other persons had been drowned there and never been found: his theory being that crabs or seals ate them. Many other people whom the witness met had the same belief as to the drowning, and a number refused to subscribe to the fund. The sheriff arrested George Rose in the presence of his father, at South Bend, and described the old man as being very much agitated by it. He was allowed by the sheriff to have an interview with George in the presence of one Sweet and Elwood, an attorney; and afterwards, when the sheriff was taking his prisoner to the boat for Bay Center, John Rose stepped up to his son and said to him: "Now, George, don't you talk to any one until you come up before the court, and then you tell the truth. You tell the court about seeing Fredericksons go out on that stormy day in the boat, and about a storm coming up, and you thought they were drowned." He asked permission to send a man along in the boat to protect George from mob violence, and, being invited himself to go, replied that he dared not, as threats were being made against his own life by persons who said they would mob him if he went outside of South Bend. Gibbons was sent by Rose to do what he could for George. The defendant Rose left home on Sunday February 2d, and went to Oysterville to attend a session of the county commissioners, and on his return from there visited a newspaper office at South Bend, and told the persons he met there in their conversation that his son George last week, at his place near South Bend, had wounded a wild goose, and by tying a string to its leg had caused it to attract others, so that he was enabled to kill 13 geese. One witness said he added: "I didn't know but what people would think it strange there was so much shooting going on up there, and I thought I would tell you what it is, so if there is anything said about it you would know." Another witness said his remark was: "You needn't mention any names in the paper," witness supposing it was given to him as an item. Another remembered his saying he thought it was a pretty smart trick, but he did not want anything said

about it. Defendant maintained that he said this incident occurred "last fall," instead of last week, as the witnesses gave it. George Rose stated that in fact it did occur in November, 1889, and other witnesses showed that shooting on the flats at the mouth of the Willapa and on the bay was very common.

The testimony in regard to the finding of the alleged grave was repeated. One Prickett, who took the place of Edwards at the ranch, was called to relate a conversation between himself and Rose in regard to a rubber boot-leg, the materiality of which was that Frederickson and everybody else down there uniformly wore rubber boots, Mrs. Frederickson having a pair of them on when she was found; and George Rose had reported finding a boot along the shore, which he had again thrown away. Rose asked Prickett to look up this boot, as well as all the other boots about there, and keep them for any search party that came along. Prickett found a boot-top in the yard on the Rose place, and a number of other rubber boots in the same vicinity, and when he reported the finding of the boot-top to Rose the latter said: "Was the top cut off that boot?" Witness told him it was, when he asked further: "Didn't you or your boy cut it off?" Prickett answered, "No." Then Rose said: "You or your boy must have cut it off." This boot-leg was produced at the trial, and three small spots were pointed out on it as being blood spots. The ingenuity of counsel may have shown this testimony to have been material, but unless it was Frederickson's boot, (which nowhere appears,) and unless the spots were human blood, (which was not attempted to be shown,) there seems to have been nothing connected with it of any importance. Many old boots were scattered around there, and cattle were killed near by every day. The witness who testified to this, although in Rose's employ, was in fact employed by the authorities to watch him, talk with him, and report anything that might escape him. At first the witness said Rose's last remark was: "You must say you cut it off;" but on cross-examination he admitted that he was considerably excited, and that it might be as given above.

At the close of the preliminary examination before a magistrate, according to one of the witnesses, who was among the guard employed by the sheriff, the defendant said he knew George had committed the murder, as he had confessed it to him; that he had got on a drunk, and killed them. The state, using Rose's testimony in the Edwards trial as evidence in chief, had already put in a contradiction by Rose of this alleged conversation. Counsel for the defense strenuously objected to the admission of this testimony, and we think it was error to admit it. The accused was there to meet the charge that he was guilty of the murder by being present and assisting in it; not the charge of knowingly concealing a murder committed by some other person. Taking the testimony of the witness as true, the offense of the father in covering his son's

crime was only a misdemeanor, under the statute.

The defense rested mainly upon the *alibi*, as in the Edwards Case; but there were some features of both cases which we shall notice here. Witnesses outside of the family of the Roses, and who were not shown to have had any connection with them, testified that they knew John B. Rose to have been confined to his room with illness from Sunday, January 26th, to Friday, the 31st; that George Rose was hauling wood on Thursday, the 30th, in the forenoon, from back of the hotel in South Bend to the hotel, and in the afternoon, among other things, went on an errand to the stores, to get ham for a dancing party to be given the school-mistress on Friday evening; that in the evening of the same day, from after supper time until late, Frances, the school-mistress, George, and another young man were in the kitchen making cakes for the party; that on Friday Rose and his wife, during the day, went into the village, and executed and acknowledged a deed of real estate; that Friday forenoon George was engaged clearing out of a new building the *débris* left by carpenters, to prepare the floor for dancing; that in the afternoon he attended the school exhibition, with many others; that the dancing party occurred at the Rose house on Friday night; that on Saturday George went in a boat with another man down to the ranch, and they, with Edwards, killed a beef, and dressed it, and remained there overnight, returning to South Bend early Sunday morning; that on Sunday, Rose, Edwards, and the school-mistress took the boat, and went to Oysterville and beyond, Rose and Edwards being absent several days; that during the day George was about the saloons and was drinking; that in the afternoon about 4 or 5 o'clock he bought a pint bottle of whisky, took it and his gun, and left in his boat for the ranch; and that he did not appear again until Tuesday, when he paid for the whisky with a \$10 gold piece. Two witnesses testified to having seen George on Sunday night, in a wash-room in the rear of his father's house; that they spoke to him, and that he then told them he had seen the Frederickses go out in their boat, but that they disappeared in a squall, and he supposed they were lost. He said he must go to the ranch early in the morning on business. Frances Rose denied having at any time got supper for her father, Gibbons, and George, or any of them, as stated by George.

In response to the testimony of the defense, above epitomized, George gave a flat denial wherever Thursday was included, and also denied having bought the bottle of whisky, and his having been seen on Sunday night. On the day after George made his last written statement, which implicated his father, Gibbons, and Edwards, counsel for the defense, having heard that he had made such a statement, went to the jail to have an interview with him, and there George said to him, referring to the murder: "I don't myself, and I will just tell you how it was. The school ma'am left here Sunday, the 2d day of

February. I was feeling a little blue, and I got full that day. I stayed around town till almost dark. Kept drinking all day. About dark I got a quart bottle of whisky, and started for the farm. Going down to the farm I made up my mind to kill Frederickson. I went to bed that night, and got up in the morning with my head feeling pretty bad. I remember that I had made up my mind to kill Frederickson, and then thought I would not do it. I drank all of the quart bottle of whisky that I had brought down with me during the first two hours after I got up, and then made up my mind that I would kill Frederickson. I was drunk, or I would not have done it. I took the shotgun, and put two cartridges into it, and three more into my pocket, which was all the cartridges I had for the shotgun. I then went to Frederickson's house and told Frederickson that a calf had got its leg between two logs, and that I could not get the logs apart alone, and that I wished he would go with me, and help get the calf out. He went with me. I was ahead, and he followed after me along the trail. When I got over the log where Frederickson's body was found, I turned around, and Frederickson was just getting onto the log. I said, 'Look here, Frederickson.' I had the gun all ready, and, as he looked up, I fired. The charge struck him just below the eye. He dropped down dead. I looked at him a minute, and thought that was a pretty tough way to do business. I started for home, and I thought I had better do some more shooting, to make people think that I was out hunting; so I shot away the rest of the cartridges I had with me. This was before dinner. I waited around the house an hour or two. I then thought I would have to kill Mrs. Frederickson, because she had seen Frederickson go away from the house with me, and when he didn't come back there would be trouble. I had no more cartridges for the shotgun, so I took the rifle and put a cartridge into it, and several more in my pocket, and went down to Frederickson's house, and told Mrs. Frederickson he had broken his leg, and that I could not get him home; that he wanted her to come right up to the house. She put on her rubber boots, and started along with me. When we got up near our hog-pen she seemed to think something was wrong, and she said she would not go any further until I told her what I had done with her husband. I told her I had killed him. She said if I had killed her husband I might as well kill her too; so I took the rifle, and held it close to her temple. She never moved a muscle. I fired, and she fell dead. I then took the gun back to the house, and waited until almost dark. I made up my mind it was a bad job, and that there had got to be something done: so I went and buried Mrs. Frederickson under the manure pile at the hog-pen. I went into the house, and stayed there all night. Next morning I went out to where Frederickson's body was, and buried it just where it laid. I then went to South Bend, and told the folks that I had seen the Frederickses

leave in a dinkey. That shortly after they left there came up a terrible squall, and after the squall was over I could see nothing more of the dinkey, and I thought the dinkey had got swamped, and they were drowned. After I had killed Frederickson I took what money he had out of his pocket. There was \$59.50. It was out of that money I bought several chances in the seal-skin raffle. Father asked me where I got so much money, and I told him that the South Bend Land Company owed me for work that I had done for them the fall before, and that they had paid me." And being asked why he had made the statement implicating the others he said that he had told the authorities the story repeated above, but that they said if he persisted in telling that story they would have nothing more to do with him; that they knew that the other parties arrested were implicated in the murder with him; and that, if he told the truth, and implicated the others, they would do all they could for him.

In this case, as was before remarked, the corroborative testimony was even weaker than in the Edwards Case. The father may have been agitated over his son's arrest for so heinous a crime. It would be strange if he were not. He may have refused contributions; he may have thought his son smart as a goose hunter; he may have relished the confession of his son's guilt. He might have cautioned him to say nothing, or tell the story he had told before, even knowing it to be false; he might send some one friendly to be near in case of mob violence; but how, to the unbiased mind, do any of these things tend to show that George Rose's most remarkable story was true in its material part, wherein it charged his father with participation in this murder? We are unable to see that it should even create a suspicion. The motive assigned, viz., the desire to obtain the Frederickson land, amounted to this: The land was almost worthless for any purpose in itself, and it had lain for years, with occasional claimants, who abandoned it. Rose had himself told one or more parties of its condition, and offered to show it to them if they wished to take it up; but he had made no move towards acquiring it himself, until, as his son charged, he found it necessary to employ assassins to destroy a threatened claim upon it. The duty of this court in the premises is too clear for doubt. The appellant must have a new trial, and it is so ordered.

ANDERS, C. J., and DUNBAR, J., concur.

SCOTT, J., (*dissenting*.) I dissent. All the reasons given for dissenting in the Edwards Case, ante, 258, are applicable here. The record discloses no error in law, and the basis for a reversal can only be upon the insufficiency of the evidence. The juror Joseph Kaiser, spoken of, said he could give the defendant a fair and impartial trial upon the evidence, and the defendant's peremptory challenges were not nearly all exhausted. No point was raised by appellant as to the proof of his statement, made at the preliminary examina-

tion, that he knew George committed the murders; and it was admissible, in any event, as tending to show the guilt of the accused. Nor do I agree to the statement that the corroborating evidence was weaker than in the Edwards Case. The testimony given upon the part of the defense, as stated in the majority opinion, is largely susceptible of explanation, and the corroborating testimony is not fully shown.

(2 Wash. St. 183)

#### ANDERSON v. STATE.

(Supreme Court of Washington. March 5, 1891.)

#### CRIMINAL LAW—SEPARATION OF JURY—MOTION FOR NEW TRIAL—APPEAL.

1. Under Laws Wash. 1885-86, p. 70, § 1, subd. 7, providing that the papers used on the hearing of a motion for a new trial, and the evidence reduced before or at the time to writing, shall constitute a bill of exceptions, affidavits in support of a motion for a new trial are part of the record, and need not be otherwise brought up on appeal.

2. On trial for murder, the separation of the jury before rendering their verdict is reversible error, though defendant's counsel may have consented to a sealed verdict, and the verdict may have been signed, sealed, and delivered to the foreman before separation.

3. Code Wash. § 1089, providing that juries in criminal cases shall not be allowed to separate except by consent of defendant and the prosecuting attorney, only applies to separation during the trial, and does not authorize the jury to deliver to their foreman a sealed verdict, and then separate.

Error from superior court, Kittitas county; C. B. GRAVES, Judge.

Laws Wash. 1885-86, p. 70, § 1, subd. 7, provides that the papers used on the hearing of a motion for a new trial, etc., and the evidence reduced before or at the time to writing, shall constitute a bill of exceptions. Code Wash. § 1089, provides that juries in criminal cases shall not be allowed to separate, except by consent of the defendant and the prosecuting attorney, but shall be kept together without meat or drink, unless otherwise ordered by the court to be furnished at the expense of the county.

*Pruyn & Ready*, for plaintiff in error.  
*W. C. Jones*, Atty. Gen., for the State.

SCOTT, J. Defendant was convicted of murder in the first degree, and is under sentence of death. Only one question is presented by the record. The case was given to the jury in the afternoon of March 25, 1890. It appears by affidavits in support of a motion for a new trial that the jury agreed upon their verdict some time during the night, and the same was signed, sealed up, and delivered to their foreman, and thereupon the jurors left the jury-room, separated, and went around the town for several hours, and did not reassemble until court convened on the morning of the 26th, when the verdict was returned. The defendant's attorney consented that a sealed verdict might be rendered. The state contends that the affidavits in support of the motion for a new trial are no part of the record, and, as no statement of facts or bill of exceptions was settled, that the question is not raised, and, if otherwise, that the point was waived by the consent to a sealed



verdict, and that it was not error. Section 1, subd. 7, of the act, commencing at page 70, Sess. Laws 1885-88, makes such affidavits a part of the record, and this act had not been repealed when this appeal was taken. No precedent has been shown us, nor do we know of any, for allowing a sealed verdict in a capital case. We have no statute authorizing sealed verdicts, and such a separation of the jury was not authorized, at least according to the better authorities, at common law. See *Thomp. Trials*, §§ 2551, 2552, and authorities there cited. It was conceded that, while the rule that the separation of the jury in a criminal case prior to the receipt of its verdict by the court was a misconduct which would entitle the defendant to a new trial was a good one when made, and could not be disregarded at that time without great danger of seriously prejudicing the substantial rights of the defendant, as then the jury could not render a written verdict in a criminal case, but must render it *ore tenus*, and that, under such a provision of law, if a jury were permitted to separate prior to the rendering of the verdict, they might be subjected to influences dangerous to society and subversive of the rights of the defendant, yet it was argued with considerable force that the reasons therefor no longer apply, as our statute requires written verdicts, and that, when the verdict is once written and agreed upon by the jury, and placed in the hands of the foreman or other proper officer, there then remains no reason why the jury should be kept together. But on the whole we think such a separation of the jury, especially in a capital case, is a dangerous practice, and one we would not care to sanction, even though we felt at liberty to lay down a different rule from that heretofore recognized. There is no necessity therefor, nor any very good reason why such a practice should be adopted, at least in cases of the very gravest importance; and we think this was a matter that defendant could not waive. Code, § 1089, only authorizes the separation of the jury during the progress of the trial before the cause is finally submitted to them. It is not expressly so limited by its language, but the fact that there is no law authorizing a sealed verdict in capital cases requires it to be so interpreted. Reversed and remanded for a new trial.

ANDERS, C. J., and DUNBAR, STILES, and HOYT, JJ., concur.

#### WHITCHER V. STATE.

(Supreme Court of Washington. March 12, 1891.)  
ASSAULT WITH INTENT TO RAPE — INFORMATION — VARIANCE.

1. An information charging: "W. is accused \* \* \* of the crime of an assault with intent to commit rape, committed as follows, to-wit: \* \* \*, in and upon one E., \* \* \*,"—though it does not give the female's name in the charging part, is sufficient, under Code Wash. § 1004, requiring the acts constituting the offense to be stated so that a person of common understanding may know what is intended. ANDERS, C. J., and STILES, J., dissenting.

2. Proof of an assault on a female under the age of consent, with her consent, cannot support

an information charging an assault with force, with intent to commit rape. DUNBAR, J., dissenting.

3. Though the laws of Washington make it rape to have carnal knowledge of a female under the age of consent, even with her consent, there can, in the absence of fraud, be no assault with intent to rape, when she consents, since there can be no assault without force or fraud.

Appeal from superior court, Lincoln county.

Code Wash. § 1004, provides that the indictment must contain "a statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended."

N. T. Caton and D. J. Crowley, for appellant. Geo. A. Allen and J. W. Merritt, for the State.

HOYT, J. Plaintiff in error seeks by this appeal to reverse the judgment and sentence of the superior court of Lincoln county, whereby he was convicted of the crime of assault with intent to commit rape, and sentenced therefor. As a first reason for said reversal, plaintiff in error contends that the information does not state facts sufficient to constitute a crime. The information is as follows: "Warren Whitcher is accused by the prosecuting attorney of Lincoln county, state of Washington, by this information, of the crime of an assault with intent to commit rape, committed as follows, to-wit: On the 16th day of June, 1890, in the county of Lincoln, in the state of Washington, in and upon one Annie Estabrook, a female of the age of twelve years and more, an assault did make, and her, the said Annie Estabrook, then and there did beat, bruise, wound, and ill treat, with intent her, the said Annie Estabrook, by force and against her will, feloniously to ravish and carnally know; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the laws of the state of Washington,"—and is, we think, sufficient. It is true, as contended by the appellant, that the name of the defendant is omitted in the charging part of the information, and, were it not aided by our statute, would be bad. But thus aided it is good, as a man of common understanding could see therefrom that the acts charged were clearly intended to be so charged as the acts of the person named in the accusing part of the information.<sup>1</sup>

The court instructed the jury that, if the person upon whom the attempt was made was under the age of 16 years, the fact that she consented to the advances made would constitute no defense. This was error. The indictment charged an assault with force, and to warrant a conviction, thereunder an assault with force must be proved. To prove an attempt without force when the charge was of one with force would be a clear variance. Besides, we do not think there can be such a thing as an assault to commit rape where consent is given. It is true that our statute has provided that having carnal knowledge of a female child under age shall be

<sup>1</sup> Code Wash. § 1004.

rape. Yet such statute has in no manner changed the definition of "assault." And we are unable to conceive of a person being assaulted who consents to the acts which without such consent would constitute an assault. Fraud in obtaining such consent may operate to make the person perpetrating the fraud liable. But, if so, it is upon the theory that the fraud used is equivalent to force. The legislature could provide that any undue familiarity with the person of a female under age should constitute an assault with intent to ravish, but it has not done so. And as the law now stands there can be no felonious assault without the facts necessary to constitute a simple assault being elements thereof; and as we think there can be no simple assault without force, and with consent, it follows that there can be no such thing as an assault with intent to commit rape where, without fraud being practiced, consent is given to all the acts relied upon to establish the crime. Other errors were assigned upon the record, but a decision thereof would not aid the lower court upon a new trial, and we shall not therefore discuss them. The judgment and sentence must be reversed, and the cause remanded for a new trial, and it will be so ordered.

SCOTT, J. I concur in the result; also in holding the information good, and that it was necessary to prove a forcible attempt, force being alleged.

ANDERS, C. J., (*dissenting*.) While I concur in the conclusion that the judgment of the court below should be reversed, I am unable to assent to the proposition that the information in this case states facts sufficient to constitute a crime. Section 1006 of the Code provides that the indictment (information) must be direct and certain as regards the crime charged, the party charged, and the particular circumstances of the crime charged, when they are necessary to constitute a complete crime. It is true that it is stated in the introductory part of the information that the defendant is accused of the crime of an assault with intent to commit rape, but it is nowhere alleged in the information that he did any of the acts constituting the crime of which he is "accused," and which are set forth in the charging part, or body, of the information. The introductory part of an information, which sets forth the name of the crime, is nothing more than a formal statement of a conclusion of law supposed to result from a certain state of facts, and is useless, unless fully warranted by the facts pleaded. A conclusion of guilt may be drawn from the particular facts and circumstances alleged; but in this case the fact that the defendant did those things alleged in the information can only be inferred from the accusation itself. I am of the opinion that the court erred in overruling the demurrer to the information.

STILES J., concurs.

DUNBAR, J. I dissent. I think with Judges HOYT and SCOTT that the informa-

tion is sufficient. While its construction is awkward, I have no doubt that a person of common understanding could tell from reading it what was intended; that is the object of an indictment or information, and all that is necessary; anything more than that is simply verbiage, and its omission ought not to defeat the ends of justice. But I do not agree with the majority that the court erred in instructing the jury that if the person upon whom the attempt was made was under the age of 16 years, the fact that she consented to the advances would constitute no defense. I agree with the proposition that there cannot be such a thing as an assault to commit a rape where consent is given; but I think within the meaning of the law no consent can be given where the female is under the age of 16 years. It is the mental consent that the law contemplates, not the physical consent, and the theory of the law is that a female under the age of 16 years is not of a consenting mind, and therefore cannot consent, or, in other words, the law will not allow her to consent. The judgment should be affirmed.

(3 Wash. St. 155)

#### CLINE v. HARMON.

(*Supreme Court of Washington. Feb. 24, 1891.*)

#### APPEAL—ORDER OF ARREST IN CIVIL ACTIONS.

Under Laws Wash. 1889-90, p. 336, § 1, which provides that "an appeal may be taken from the superior courts in all actions and proceedings" except where the amount involved does not exceed \$200, an order of arrest before final judgment in a civil action is appealable. *Per SCOTT, J., dissenting.*

For majority opinion, see ante, 191.

SCOTT, J. I dissent. While the order of arrest and its prosecution were in a measure incidental to the main action, yet it was substantially an independent proceeding, and no error committed therein would afford any ground for reversing or affect the judgment rendered in the suit. It is urged that if the door is open to such appeals there is no place to draw the line; that an order overruling or sustaining a demurrer and other like matters would also be appealable; that it would practically allow a separate appeal from every order made in the progress of a cause, etc. While I do not undertake specifically to enumerate every proceeding in which I think a party is entitled to an appeal, it seems to me a line can be drawn excluding everything founded upon matters litigated in the suit, and upon which the judgment is based, as such matters injuriously affecting a party can be reviewed by appealing the action. Such an interpretation would give an appeal in every matter affecting a substantial right, and I believe this to be a fair interpretation of the statute. An attachment proceeding should be held appealable, or the matters relating thereto should be determined by the judgment in the action in finding that a ground existed therefor, and directing a sale of the property so seized, or otherwise, according to the facts, so that the same could be reviewed upon an appeal from such judgment, and the judgment re-

versed or modified if error existed in such proceeding to the prejudice of the party appealing. A finding therein upon a question of fact would not be reviewed, but an entire absence of proof upon some essential point would be fatal. Also in the matter of a preliminary injunction or restraining order addressed to the sound discretion of the court an appeal should be held to lie, so that a reversal or modification might be had in case of a clear abuse of such discretion. Such other proceedings as are entirely unconnected with any action are essentially actions in themselves, though, perhaps, not technically so. The authorities bearing upon the right to such appeals are conflicting. The greater number of cases may sustain the position taken by the court here. It is a question upon the construction of a statute, however, which we have before us, and such cases were based on constitutional or statutory provisions differing from ours, with possibly an exception of one or two, where there may have been no substantial difference in the language used. Whether they were passed as amendments, and what the previous situation was, is not apparent, and these matters are always considered in interpreting or construing statutes. Although great respect should be paid to cases elsewhere decided pertinent to the question, more should be given to principle, clearly cut; and there is little danger in recognizing one so plainly delineated as the one upon which this appeal is founded. A person illegally restrained of his liberty should certainly be entitled to a hearing and deliverance. I think it must be held to be within the intention of the law to allow him an appeal, and that the statute is sufficiently definite for such purpose. Section 1, Sess. Laws, 1889-90, p. 333, which the present statute amended, reads as follows: "An appeal may be taken to the supreme court from the following decisions, orders, or judgments of superior courts, and from none other: *First*, from all final decisions; *second*, from a final order made in special proceedings affecting a substantial right therein, or made on a summary application in an action after judgment; *third*, from an order granting a new trial, or granting or refusing, continuing or modifying a temporary injunction or restraining order in cases where the principal object of the action is to obtain injunctive relief; *fourth*, from a final order or judgment on *habeas corpus*." The statute in question (Id. p. 336) amends the said section to read as follows: "An appeal may be taken to the supreme court from the superior courts in all actions and proceedings excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or property when the original amount in controversy or the value of the property does not exceed the sum of two hundred (200) dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute;" following the constitutional provision, section 4, art. 4, State Const. It seems to me there is more reason for holding that the last act was intended to enlarge, rather

than restrict, the matters from which appeals might be taken as provided in the former statute. These acts were both passed by the same legislature. The first act specified certain matters from which appeals might be taken, and excluded all others. The restrictive words, "and from none other," and the specification are omitted from the last act, and an appeal is therein allowed in all actions and proceedings; the act only containing the constitutional restriction regarding the amount in litigation, which, of course, operated upon the former statute. Herein the only restriction placed upon appeals—and this should have considerable weight in determining what is allowed—is as to matters connected with the amount involved where the sum claimed or the value of the property does not exceed \$200, and nothing else is limited; otherwise an appeal may be taken. See *Conant v. Conant*, 10 Cal. 249. Section 2 provides that "a person desiring to appeal from any such decision, order, or judgment, may, by himself or attorney, give notice," etc. Had it been intended to narrow the scope of the former act, and exclude some of the matters from which it allowed an appeal, it is likely such an intention would have found expression in more appropriate language. On the other hand, quite likely it was feared that some matters wherein an appeal should properly lie had been omitted from the former provisions, and that it was the intention to go to the fullest extent permissible under the constitutional limitation, leaving this general provision for the court to apply. The words "an appeal" are equivalent to one appeal in each action and proceeding wherein a substantial right is affected by a final decision therein. Consequently any such prejudicial matter affecting a substantial right that would come up in an appeal of the main action could be passed upon in such appeal, and it is evident that a separate appeal therefrom was not intended, but that in all others, whether in a proceeding connected with an action or in an entirely independent proceeding, an appeal might be had. This is only a fair interpretation, calculated to give effect to the act, and could not be deemed what is sometimes called "legislation by the court" in any sense. Such an interpretation does not go beyond the recognized authority or duty of courts, and in this view the statute is sufficiently definite.

Our constitutional and legislative provisions for appellate jurisdiction are liberal. The single bare exclusion relating to money values of \$200 or less is practically so insignificant that the citizen may feel safe and secure in all his valuable rights; and if, by such a proceeding as this, his home is invaded, and he is carried to prison, that he may have a review thereof on an appeal to the supreme court, after a final decision in the proceeding. The proceedings in arrest in this case were wholly unwarranted. Section 17, art. 1, of the state constitution, provides that "there shall be no imprisonment for debt, except in cases of absconding debtors." This rendered the statute, (see chapter 9 of the Code,) under which these pro-

ceedings were had, nugatory. There is no provision there, and there was none elsewhere, by statute authorizing the arrest of absconding debtors before judgment. This case presents peculiar hardships. A judgment on the sole issue formed by the complaint in this action founded upon an account amounting to less than \$200, and the answer admitting the greater part thereof, would come within the limitation referred to. It could not be brought here for review, and in no event could that judgment affect the wrong that this judgment has inflicted. The judgment brought here for review is one given in a statutory proceeding, instituted and carried to the final ending under a statute which was at the time void; a judgment that declared the arrest and imprisonment which the appellant had suffered to be lawful, and declared the statute under which the proceedings were had to be valid; a proceeding that cannot be commenced nor carried on except by force and virtue of statutory law. This proceeding and this judgment involved not the matter of one or two hundred dollars. All that it involves is distinctly different from that. It involves that which is most sacred and dear to the citizen. Therein the freeman is made a prisoner, the citizen a victim to violence and outrage. This judgment is a final one in the proceeding, and ripe for review. The amount for which an action has been brought and judgment may be given is entirely immaterial, so far as imprisonment proceedings are concerned, for the wrong of an imprisonment is the same whatever the amount involved in the action. The validity of this statute could not be involved in the judgment upon the debt demand in the complaint stated, even if that demand and judgment thereon were large enough to warrant an appeal therefrom, for the statute affected the proceeding only,—the order and warrant in arrest. Furthermore, it is provided that the appeal from any order, decision, or judgment must be taken within six months after its rendition. More than six months may elapse between the judgment on the arrest proceedings and the judgment on the debt demand, so that it must be apparent from every point of view that this judgment on the issue involved in the arrest and imprisonment proceedings is in every way a distinct judgment affecting such rights as make it a judgment that can be reviewed here. Such an appeal is inherently right in principle, and, I believe, in accord with the conception of the framers of our constitution, and within the expression thereof and our legislative enactments thereunder. According to the holding in this case, a party would in some proceedings have no remedy for error; an action on a bond could not be held to be one; and *habeas corpus*, while available in a proceeding like this, where the person is seized and detained in custody, sometimes might not lie or afford any relief, as, for instance, where bail had been given. Under the law relating to the writ applicable to this court it, when issuable, would not reach beyond one jurisdictional question,—the bare power to issue the warrant. No

other error could be raised by it. See *In re Lybarger*, 25 Pac. Rep. 1075, (decided at this session.) It has been the policy of other states to grant appeals in such proceedings. See *Wright v. Brown*, 67 N. Y. 1; *Morris v. Talcott*, 96 N. Y. 100. Also, see *Spitley v. Frost*, 15 Fed. Rep. 299. The motion to dismiss the appeal should have been denied, and the defendant discharged.

(20 Or. 410)

#### STOTT v. FRANEY *et al.*

(*Supreme Court of Oregon.* March 31, 1891.)

#### ASSIGNMENT OF RIGHT TO CITY WARRANTS — EQUITY JURISDICTION.

1. A contractor to do work on the streets of a city may assign his right to receive the warrants for such work, and such assignment creates an equitable interest in such expectancy, which a court of equity will protect by decreeing the delivery of the warrants when issued. The interest created by such an assignment is equitable, not legal.

2. Section 16 of charter 1885 of the city of East Portland does not prevent the president of the council from taking an assignment of the right to receive warrants to be issued in the future for work already performed on the streets of the city, and such an assignment is not unlawful.

#### (*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

The facts out of which this controversy has arisen are briefly these: The defendant Franey and one John E. Woods jointly contracted with the city of East Portland to do the grading and graveling of Twelfth street in said city, and to construct the side and cross walks thereon. These parties had a prior arrangement between themselves whereby each was to do certain specified parts of the work without sharing profits or losses with each other. About July 17, 1889, Woods, having substantially completed his part of the work, for a valuable consideration, sold, assigned, and transferred in writing to the plaintiff all warrants to be issued by the city of East Portland to Franey & Woods for laying the side and cross walks in front of and abutting certain specified blocks on said street. On the 20th day of July, 1890, Woods made a similar sale and assignment of other warrants to be issued for work of the same character in front of other specified blocks on said street to Hall Bros., who assigned the same to the plaintiff. That thereafter the city of East Portland issued the warrants in controversy in the name of Franey & Woods, and left them in the hands of the recorder Llewellyn, who, upon the expiration of his term of office, delivered the same to his successor, the defendant Mayo. That the warrants were not actually issued until September, 1889, at which time, by the request of Franey & Woods, separate warrants were issued for the grading and graveling, and for the side and cross walks, and those for grading and graveling were delivered to the defendant Franey in compensation for his part of said work, and those issued for the cross and side walks, being the warrants now in controversy, were intended for said Woods in payment for his part of said work. Another object of this suit was to enjoin an action at law, which Franey had commenced in the name

of Franey & Woods, to recover the said warrants now in controversy, and then in the possession of the defendant Llewelyn. The plaintiff had a decree, from which the defendant Franey has appealed to this court.

*R. Citron and James Gleason*, for appellant. *John H. Hall and W. E. Showers*, for respondent.

STRAHAN, C. J., (after stating the facts as above.) Upon the argument of this cause, several objections were made to the plaintiff's right to maintain this suit, which will be separately noticed so far as may be necessary to a proper disposition of this cause.

1. It is first claimed by the appellant that this suit cannot be maintained for the reason that its object is purely legal, that is, to recover the possession of the warrants in controversy; but this objection overlooks one element in the plaintiff's case. At the time of the assignment of the warrants, they were not in existence, and such assignments therefore could not create a strictly legal title. At most, it could only create an equity, that is, a right of interest over which courts of equity have been accustomed to exercise jurisdiction, and, in proper cases, to protect and make effectual according to the intention and rights of the parties. The principle is stated in 1 Pom. Eq. Jur. § 168, as follows: "The assignee of an expectancy, possibility, or contingency acquired at once a present equitable right over the future proceeds of the expectancy, possibility, or contingency, which was of such a certain and fixed nature that it was sure to ripen into an ordinary equitable property right over those proceeds as soon as they came into existence by a transformation of the possibility or contingency into an interest in possession. There was an equitable ownership or property in abeyance, so to speak, which finally changed into an absolute property, upon the happening of the future event. Equity permitted the creation and transfer of such an ownership." After stating the effect of modern legislation upon this rule, the learned author continues: "Whatever may be the effect of these statutes in abridging, or rather in removing occasion for, the jurisdiction of equity, it is plain that the jurisdiction must still exist in the cases where a thing in action or demand, purely equitable in its nature, is assigned, and where the assignment itself is equitable, that is, does not operate as an assignment at law,—and where any species of possibility or expectancy not within the scope of the statutes is transferred." And 2 Amer. Law Reg. (N. S.) 527, recognizes the rule of law. This ancient head of equity jurisdiction is not destroyed by any statute that I am aware of, and must therefore still exist, and I think the case made by the plaintiff falls precisely within it. The fact that the plaintiff sought to enjoin the action at law in no way impairs the jurisdiction of equity. It is manifest that the complaint, or that part of it which seeks to lay a foundation for an injunction, is wanting in fullness and particularity of statement; but, as we have seen, the

complaint would still be sufficient on the other ground suggested, if all relating to the injunction were stricken out.

2. At the time the plaintiff took the assignments of these warrants, he was president of the common council of the city of East Portland, and it is claimed that, by reason of a particular provision of the charter of the city, he could acquire no title to such warrants. The provision is as follows: "No member of the common council or any officer of the city shall be interested in any contract or job the expenses of which are paid out of the city treasury." Acts 1885, p. 314, § 16. This is a wise and proper provision, and if we could see that the assignment of these warrants to the plaintiff made him "interested in the contract or job," within the meaning of this prohibition, it would be our plain duty to turn him out of court without any kind of redress. But here the evidence shows that the contract was completely executed before the assignment. All the contractors were to do had been performed, and what the plaintiff did was to take an assignment which entitled him to receive Woods' part of the warrants. This fact does not bring the plaintiff within the purpose of this inhibition, or within the letter of the statute.

3. The defendant Franey does not claim to own these warrants, but his contention is that, the contract being joint, Woods bought lumber for side and cross walks, and is still indebted therefor, and that a claim is being made against him for payment, and that Woods' creditors seek to charge him as a partner. Woods and Franey not being partners, Woods could do no act that would charge Franey as a partner, or in any manner render him liable on Woods' account, without his own acquiescence or consent; and the fact that some person may set up a claim against Franey which, so far as appears, is without foundation, would furnish no reason for taking these warrants for which the plaintiff and Hall Bros. have paid a full consideration and turn them over to Franey, to indemnify him against such a possibility. We think the decree of the court below is right, and the same is affirmed.

#### WISEMAN v. NORTHERN PAC. R. CO.

(Supreme Court of Oregon. March 31, 1891.)

#### SECONDARY EVIDENCE—WHEN ADMISSIBLE—DILIGENCE.

1. Secondary evidence of the contents of a writing is admitted on the theory that the original writing cannot be produced by the party by whom the evidence is offered, within a reasonable time, by the exercise of reasonable diligence.

2. No precise rule can be laid down as to what shall be considered a reasonable effort, but the party alleging the loss or destruction of the document is expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which are accessible to him.

3. The degree of diligence which shall be considered necessary in any case will depend on the circumstances of the particular case, the character and importance of the paper, the purposes for which it is proposed to use it, and the place

where a paper of that kind may naturally be supposed to be found.

4. Where the cause of action or defense is founded upon an alleged writing, and both the execution and contents of the writing are denied, and the alleged writing is shown to be in the possession of a person residing outside of the state, secondary evidence of its contents is not admissible, unless a proper effort is made to obtain the original.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

On March 19, 1890, the plaintiff, J. J. Wiseman, commenced an action in the circuit court of the state of Oregon for the county of Multnomah against the defendant, to recover the sum of \$398.72, the value of certain household goods claimed to have been lost by defendant in transit. The complaint alleges that on or about the 8th day of April, 1889, at Nunica, Mich., the plaintiff delivered to the Detroit, Grand Haven & Milwaukee Railway Company a shipment of six boxes, one trunk, one roll of carpet, and two barrels containing household goods, the property of the plaintiff, for transportation to Salem, Or.; that said shipment was in due time delivered in good order to the defendant as a connecting carrier; and that one of said boxes and one of said barrels, with their entire contents, were destroyed, and never delivered to plaintiff, which household goods so destroyed were of the value of \$373.05. The defendant, in its answer to the complaint, admits the shipment by plaintiff, and the delivery to the Detroit, Grand Haven & Milwaukee Railway Company, of the household goods in question, and that the same was in due time received by defendant from the Detroit, Grand Haven & Milwaukee Railway Company, a connecting carrier, admits that one of the boxes and one of the barrels, with the contents, were destroyed, but denies any knowledge as to the contents or value thereof. For a further and separate answer and defense, defendant alleged that the shipment of freight mentioned in the complaint consisted of household goods, and that the same was shipped by plaintiff, and received and accepted by the Detroit, Grand Haven & Milwaukee Railway Company, as well as the defendant, a connecting line, under a contract with plaintiff that, if for any cause there should be a total loss of said freight, and a liability on the part of the common carrier receiving the same, or over whose line the same was being or was transported, the total liability therefor, if any there should be, would be the sum of five dollars per hundred pounds weight of said freight, and the same was received and accepted by defendant and shipped by plaintiff on said condition. The defendant, further answering, and as a separate defense, alleged that at the date of shipment by plaintiff, to-wit, April 8, 1889, in order to obtain the benefit of the reduced rate of freight charges from the ordinary tariff rate charged therefor, the plaintiff and the Detroit, Grand Haven & Milwaukee Railway Company contracted and agreed in writing that, in consideration of such reduced rates, the plaintiff, in case of any damage

or loss to said goods arising by damage by fire while at stations or in transit, would and did release said company, and each and every other company over whose lines said goods might pass to destination, from any and all damage occurring to said goods; that said plaintiff was given and obtained the benefit of said reduced rates, and executed said contract of release accordingly. The reply denies the new matter alleged in the answer. On the trial the plaintiff gave evidence tending to prove the issues on his part, and then rested. Defendant then gave evidence tending to prove the execution by plaintiff of the release and contract mentioned in the answer; that it was executed in duplicate, one copy being attached to the bill of lading, and the other was by the agent of the Detroit, Grand Haven & Milwaukee Railway, at Nunica, Mich., forwarded to the traffic manager of that road, at Chicago, Ill. Defendant then called Alfred Watts, who was then clerk of the Northern Pacific Railroad, at Portland, Or., who testified that he was clerk in the office of Mr. Fulton, general freight agent of the defendant at Portland; that he had telegraphed to the claim agent of the defendant at St. Paul to ascertain if a release had been made on the plaintiff's shipment of goods from Nunica, and, if so, to send the original release that was signed by Mr. Wiseman; that the claim agent at St. Paul telegraphed back that the files in the office of the traffic manager at Chicago had been searched, and the release could not be found; that the release never was in his office at Portland, and the parties who handled the way-bill of plaintiff's goods said there was no release attached to it when it reached its destination. The defendant then offered the deposition of the agent at Nunica to prove the contents of the release, but the court refused to admit secondary evidence of its contents, to which ruling defendant duly excepted, and assigns the same as error on this appeal.

*Dolph, Bellinger, Mallory & Simon*, for appellant. *J. N. Teal and Sanderson Reed*, for respondent.

BEAN, J., (after stating the facts as above.) By section 691, Hill's Code, it is provided that "there shall be no evidence of the contents of a writing, other than the writing itself, except in the following cases: \* \* \* (2) When the original cannot be produced by the party by whom the evidence is offered, in a reasonable time, with proper diligence, and its absence is not owing to his neglect or default." This section is a declaration of the common-law rule. The theory upon which secondary evidence of the contents of a writing is admitted is that the original writing cannot be produced by the party by whom the evidence is offered, within a reasonable time, by the exercise of reasonable diligence. The question is always one of diligence in the effort to procure the original. No precise rule has been or can be laid down as to what shall be considered a reasonable effort, but the party alleging the loss or destruction of the document is expected to show "that he has in

good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him." 1 Greenl. Ev. § 558; *Simpson v. Dall*, 3 Wall. 460; *Johnson v. Arnwine*, 42 N. J. Law, 451; *Kelsey v. Hanmer*, 18 Conn. 310. Thus, in *Mariner v. Saunders*, 5 Gilman, 117, the court says: "From the nature of the subject there is some difficulty in laying down a general rule defining the extent and vigilance of the search which a party must make before the court may conclude that the paper is destroyed or lost. \* \* \* As a general rule, however, we may say that when, from the ownership, nature, or object of a paper, it has properly a particular place of deposit, or where, from the evidence, it is shown to have been in a particular place, or in particular hands, then that place must be searched by the witness proving the loss, or the person produced into whose hands it has been traced. The extent of the search to be made in such place or by such person must depend in a great degree upon the circumstances. Ordinarily it is not sufficient that the paper is not found in its usual place of deposit, but all papers in the office or place should be examined. \* \* \* On the whole, the court must be satisfied that the paper is destroyed, and cannot be found. It is true the party need not search every possible place where it might be found, for then the search might be interminable, but he must search every place where there is a reasonable probability that it may be found." This rule is founded on reason and justice, and to require any less degree of diligence would be to defeat the object of reducing agreements to writing. As was said in *Rankin v. Crow*, 19 Ill. 620: "The party wishing to avail himself of the benefit of such secondary evidence should be required to make at least the same effort that is expected the party would make if he were to lose the benefit of the evidence if the instrument were not found." The degree of diligence which shall be considered necessary, in any case, will depend upon the character and importance of the document, and the purposes for which it is expected to be used, and the place where a paper of that kind may naturally be supposed to be found. If the document be a valuable and important one, which the owner would be likely to preserve, a more diligent search will be required than if the document is of little or no value. The purposes for which it is proposed to use it on the trial will also have an important bearing in determining the degree of diligence required. If the cause of action or defense is founded on the supposed writing, the party offering the evidence will be required to show a greater degree of diligence in the attempt to produce the original than if it is desired to be used as evidence in some collateral matter. The proof of search and proof of loss required is always proportionate to the character and value of the paper supposed to be lost. *Insurance Co. v. Rosenagle*, 77 Pa. St. 514. The existence and contents of the supposed contract, as well as the claim of defendant based upon it, is denied by the plaintiff in

the case at bar. The issue thus being joined, its execution and contents were very material to defendant in establishing its defense. Indeed, defendant seeks to exempt itself from liability solely by reason of this contract. It admits having received, as a common carrier, plaintiff's goods, and that while in its possession they were destroyed, but it seeks to escape liability by virtue of this contract. It then became of the utmost importance to both plaintiff and defendant that the original contract, if such a contract was made at all, be produced on the trial, so that there might be no controversy as to its contents, and that the court might declare its legal effect to the jury. Before defendant should be permitted to give secondary evidence of its contents it should prove that it had exercised the utmost diligence to procure the original, (*Smith v. Cox*, 9 Or. 327,) and this it failed to do. No competent evidence whatever was offered to prove any search in the office of the traffic manager at Chicago, where it was shown the document was most likely to be found. All that the witness Watts said about the supposed search was clearly hearsay and incompetent evidence. *Lawrence v. Fulton*, 19 Cal. 683. It did not in any way tend to prove that any effort had been made in the Chicago office to find the original paper. The testimony of the traffic manager, or some person in his office, having the custody of such papers, should have been had, or some proper effort made to obtain it, showing what effort, if any, had been made to find the original.

Indeed, counsel for defendant did not seriously contend that it had brought itself within the rule concerning the admission of secondary evidence, if proof of the loss of the original is required, but he claimed that all that was necessary for defendant to do was to show that the original was in the possession of a person outside of this state, and that no further proof was required; that, when it showed that the original contract was in Chicago, it was entitled to give secondary evidence of its contents without further proof; and in support of his position cites the following authorities: *Burton v. Driggs*, 20 Wall. 134; *Gordon v. Searing*, 8 Cal. 49; *Beattie v. Hilliard*, 55 N. H. 428; *Brown v. Woods*, 19 Mo. 475; *Shepard v. Giddings*, 22 Conn. 282; *Ralph v. Brown*, 3 Watts & S. 395; *Gordon v. Tweedy*, 74 Ala. 232. The broad doctrine is stated in these authorities that, if books or papers necessary as evidence in a court in one state be in the possession of a person living in another state, secondary evidence, without further showing, may be given to prove the contents of such papers. As we have already said, in effect, each case must largely depend on its own particular circumstances as to what showing is sufficient in order to admit secondary evidence of the contents of a writing, and the language used in the cases above cited must be interpreted in the light of the facts of each case. None of these cases go so far as to hold that where a defendant relies upon the contents of a writing to exempt himself from liability, and both the execution



and contents of the supposed writing are denied, and the alleged writing is shown to be in the possession of a person outside of the state, secondary evidence of the contents of such writing is admissible unless an effort is made to produce it. And, besides, the doctrine stated in these authorities is denied by authorities of equal weight, and even by some of the same courts. Thus, in *Turner v. Yates*, 16 How. 14, it was held that proof that an invoice of goods was in London was not a sufficient showing to admit secondary evidence of its contents, in the circuit court of the United States for the district of Maryland, the court saying: "If the paper was in the hands of the consignees in London, secondary evidence was not admissible; if as parties, they were entitled to notice to produce the paper; if as third persons, their depositions should have been taken, or some proper attempt made to obtain it." To the same effect are *Hoyt v. McNeil*, 13 Minn. 394, (Gil. 362; *Dickinson v. Breeden*, 25 Ill. 186; *McGregor v. Montgomery*, 4 Pa. St. 237; *Whart. Ev.* § 130. The rule laid down in the authorities just cited, we think, is founded on reason and justice, and imposes no hardship on the defendant. By defendant's own showing the last known place of deposit of the contract it claims plaintiff executed was in the office of the traffic manager in Chicago, and the law provides an easy and simple method of taking the deposition of a witness residing out of the state, and his deposition should have been taken or some proper effort made to obtain it. The fact that the person to whose possession the paper was traced resided out of the state did not excuse defendant from a diligent effort to procure it. Judgment of the court below is therefore affirmed.

#### YICK KEE v. DUNBAR.

(*Supreme Court of Oregon.* March 31, 1891.)

##### VERDICT IN REPLEVIN.

Where, in replevin, the plaintiff alleged that he was the owner of certain personal property, and entitled to its possession, which the defendant wrongfully detained, etc., and, upon issue joined, the jury found that the plaintiff was entitled to the possession of the property, and assessed its value, etc., but did not pass upon the fact of ownership of the property, *held*, that the verdict was defective in substance, and that a judgment upon it that the plaintiff was owner is not sustained by the verdict.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

A. C. Emmons and W. H. Adams, for appellant. E. Bingham, for respondent.

LORD, J. This was an action in replevin, brought by the plaintiff to recover specific personal property described in his complaint, and of which he alleges his possession and ownership, its value, and the wrongful taking and detention, and his damages by reason thereof. The defendant, by his answer, put in issue all the material matters alleged in the complaint. On the trial the jury found as follows: "We, the jury in the above-entitled action,

find that the plaintiff is entitled to the possession of the property described in the complaint, and assess the value thereof at \$3,000, and that plaintiff has been damaged by the detention thereof \$——." Upon this verdict the court rendered the following judgment: "That plaintiff, Yick Kee, is the owner, and entitled to the immediate possession, of the property described in his complaint, to-wit," etc.; "that the same be forthwith delivered by the defendant, Wm. Dunbar, to said plaintiff, or, in case delivery thereof cannot be had, then said plaintiff have and recover of and from said defendant the sum of three thousand dollars, the value of said books," etc. The point of objection is that the jury did not by their verdict pass upon the ownership of the property, and that the judgment does not conform to the verdict. In replevin the rule is that the verdict should be responsive to and dispose of all the material matters put in issue by the pleadings. A verdict that fails in this respect does not respond to the issues raised, and is defective in substance. Nor can the judgment be broader than the verdict. It must follow the verdict, and cannot properly embrace issues not determined by the jury. The plaintiff in his complaint alleged his title or ownership of the property, and that it was wrongfully taken from his possession, and the defendant traversed these facts by his answer. The effect was to put in issue all the material matters alleged, and the jury should have passed upon these issues. Among these was the fact of ownership or title to the property, which the jury were called upon to try and to determine by their verdict; for, as was said by CHIEF JUSTICE: "However the case might have been varied had the defendant in error not alleged in the complaint that he owned the property, but merely that he was entitled to the possession of it, etc., which fact had been controverted by the adverse party, and put in issue by the pleadings, still as the title of the property was alleged to be in him, and this, as well as all other facts, denied, how could the question of title be ignored by the jury?" *Child v. Child*, 13 Wis. 18. In that case, as in the case at bar, the complaint alleged that the plaintiff was the owner of certain personal property which the defendant unlawfully detained, and, upon issue being joined, the jury found that the plaintiff was entitled to the possession of the property, and assessed its value and damages for its detention, but did not pass upon the question of ownership of the property, and the court held that the verdict was defective in substance, and that a new trial should be awarded, and also that the judgment that the plaintiff was the owner of the property is not sustained by the verdict. The same doctrine was subsequently declared by DIXON, C. J., in *Appleton v. Barrett*, 22 Wis. 569, as follows: "The title of the property, as well as the right of possession, was in issue by the pleadings. The jury have found only that the plaintiff is entitled to the possession of the property specified in the verdict. The issue as to the title is undetermined. In actions of replevin both parties are con-

sidered actors. It may be that the title to the property was in the defendant, the plaintiff having only the present right of possession. The question of title, therefore, is, or it may be, one of much interest to the defendant, and he is entitled to have it settled in this action. The verdict being in this respect defective, the judgment must be reversed, and a new trial awarded." The same principle has been recognized and declared by this court. In *Phipps v. Taylor*, 15 Or. 487, 16 Pac. Rep. 171, STRAHAN, J., said: "But this verdict is insufficient for another reason. By the complaint the plaintiffs claimed to be the owners of the lumber in controversy, as well as to be entitled to its possession. The verdict is silent as to the ownership of the property, and that issue remains undetermined. In such case, no judgment can be rendered for the plaintiffs." Nor is there anything decided in the case of *Corbell v. Childers*, (Or.) 21 Pac. Rep. 671, inconsistent or in conflict with the principle thus declared. In that case the plaintiff alleged title to the property in himself, and the jury found "for the plaintiff," and that "he was entitled to the immediate return and possession of the property described in the complaint," etc.; and STRAHAN, J., said: "In this case the verdict is 'for the plaintiff,' and that he is entitled to the immediate return and possession of the property described in the complaint, and then the property and its value is set out. To exact a greater degree of particularity would be to go beyond the requirements of the statute, which I do not think we could properly do." This verdict was responsive to the issues raised, and disposed of all the material matters which the jury were called upon to try and determine. While it would be more formal and specific, and perhaps more desirable, that the verdict should find the right of ownership and the right of possession, value, etc., yet a finding "for the plaintiff" is equivalent to finding the issues in favor of the plaintiff, which STRAHAN, J., thought within the terms of the statute, and should be upheld. Necessarily, such a verdict included the right of possession as well as the ownership of the property, as both facts were put in issue by the pleadings. In this view, the general verdict, responding to the issues raised, rendered it unnecessary to express a finding upon each averment. And so the authorities run. In *Krause v. Cutting*, 28 Wis. 655, it was held that a general verdict "for the plaintiff" finds all the issues in his favor. As in replevin, where both his title and his right of possession are in issue, a verdict "in favor of the plaintiff," assessing the value and damages for detention, determines that he is the owner, and entitled to the possession. So, in *Payne v. June*, 92 Ind. 257, the verdict was: "We, the jury, find for the plaintiff, and that the engine in controversy is of the value of \$600, and is in possession of the defendants;" and the court said: "The alleged defects are that the verdict does not find that the plaintiffs are the owners and entitled to the possession of the engine. The general finding for the plaintiffs was a finding of both these facts;" citing

*Rowan v. Teague*, 24 Ind. 304; *Crocker v. Hoffman*, 48 Ind. 207. So that there is nothing decided in the case of *Corbell v. Childers*, supra, which can lend any support to sustain the verdict in the case at bar. Here there is no finding "for the plaintiff," so as to cover the issues raised, but a finding that he is entitled to the possession of the property, when the issues required the jury to pass upon the fact of ownership or title to the property, and upon which the verdict is silent and undetermined. As such, the verdict is defective in substance, and upon this point the judgment is not sustained by the verdict, as it embraces issues not determined by the verdict of the jury. It results that the judgment must be reversed, and a new trial ordered.

(30 Or. 421)

## PORTLAND NAT. BANK V. SCOTT.

(Supreme Court of Oregon. March 31, 1891.)

## PROMISSORY NOTE — CONTEMPORANEOUS PAROL AGREEMENT — NATIONAL BANKS — ILLEGAL LOANS.

1. In an action upon a promissory note, where no illegality or fraud is charged, it is not competent to allege or prove a contemporaneous parol agreement, for the purpose of changing, varying, or in any manner altering the legal effect of such promissory note.

2. The construction of a statute of the United States by the supreme court of the United States is binding upon the state courts.

3. A loan made by a national bank to an association or person of a greater amount or proportion than is permitted by this section does not render the security taken for such loan void.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

This action is founded upon three several promissory notes made by the defendant to the plaintiff. The complaint is in the usual form. The answer, in effect, admits the execution and delivery of the notes, but denies there is anything due thereon. The answer, for a further and separate defense, then alleges that at the time of the execution of said notes, and each of them, it was understood and agreed between the plaintiff and the defendant and the Portland & Willamette Valley Railway Company, a corporation, in consideration of the execution and delivery of said notes by the defendant, that the said plaintiff would and should look to the said Portland & Willamette Valley Railway Company for the payment thereof, the latter named corporation having received the entire consideration upon which said notes were made, and would not and should not charge, or seek to charge or hold, this defendant liable in any manner on either of said promissory notes. The answer contains a further defense, as follows: "That the said notes were signed by the defendant upon the procurement and at the instigation of one William Reid, then and now president of the plaintiff corporation, and then president of a railway corporation known as the 'Portland & Willamette Valley Railway Company.' That said railway company, at the time of the execution of said notes, owed large sums of money to said bank and divers persons, and that under the laws and the national bank act men-

tioned in complaint, and the rules of the treasury department of the United States, plaintiff was not permitted and could not loan further sums of money to said railway company upon notes signed directly by the said railway company, or otherwise; and for the purpose of contravening and violating said laws and rules, and deceiving the government of the United States, and its national bank examiners, and the stockholders of said bank, the said William Reid, as such president, conspiring and colluding with intent to so contravene and violate the law and said rules, and deceive the said government of the United States, and said bank examiners and stockholders, falsely and fraudulently procured this defendant to execute said notes, the consideration therein named being paid to the said Portland & Willamette Valley Railway Company, with the understanding and agreement, in consideration of the execution of said notes by the defendant, that defendant was not to be liable thereon for any sum or amount whatever." To these separate defenses the plaintiff demurred, which demurrer was sustained by the court, and final judgment rendered in favor of the plaintiff, from which this appeal is taken.

W. T. Muir, for appellant. C. J. McDougall, for respondent.

STRAHAN, C. J., (after stating the facts as above.) This record presents but two questions, both arising upon the plaintiff's demurrer to the new matter contained in the defendant's answer.

1. The first separate defense pleaded presents the question whether or not, where there is no allegation of illegality or fraud, a contemporaneous parol agreement may be pleaded as a defense to an action on these notes, which shows that by the terms of such agreement the notes were never to be paid by the maker; in other words, whether or not, in such case, it is competent to vary and contradict the writing by a separate parol agreement made at the time the notes sued on were signed. The law is too well settled in such case to admit of any doubt, at least in this court. *Hoxie v. Hodges*, 1 Or. 251; *Lee v. Summers*, 2 Or. 260; *Smith v. Caro*, 9 Or. 278; *Looney v. Rankin*, 15 Or. 617, 16 Pac. Rep. 660; *Beezley v. Crossen*, 16 Or. 72, 17 Pac. Rep. 577; *Stoddard v. Nelson*, 17 Or. 417, 21 Pac. Rep. 456. Under these authorities it was not error in the trial court to sustain a demurrer to the defendant's first separate defense.

2. The second separate defense presents the question whether or not the contract made with William Reid, president of the plaintiff corporation, is sufficient to defeat the plaintiff's action. This depends on the construction to be given to section 5200, Rev. St. U. S., which is as follows: "The total liabilities to any association, of any person, or of any company, corporation, or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in. But the discount of the bills of exchange drawn in

good faith against actually existing values, and the discount of business or commercial paper actually owned by the person negotiating the same, shall not be considered as money borrowed." This statute has been construed by the federal courts, and their construction is binding on us, for the same reasons that our construction of the constitution and statutes of this state is binding upon the federal courts. In deciding the question presented, then, we have only to ascertain what construction this statute has received in the federal courts. In *Wyman v. Bank*, 29 Fed. Rep. 734, it was held that, when a bank organized under this statute violates this provision by lending to one person an amount in excess of the limit, such person cannot set up the violation of the statute as a defense to his liability on the note. If a penalty is to be enforced against the bank, it can be done only at the instance of the government. A contract entered into by the bank in violation of this section is not void. And in *Gold Min. Co. v. National Bank*, 96 U. S. 640, in passing upon the identical question now before us, the court said: "We do not think that public policy requires, or that congress intended, that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of the money actually received by him. This would be to injure the interests of creditors, stockholders, and all who have an interest in the safety and prosperity of the bank. We are of the opinion that this objection is not well taken." The same construction prevails in the state courts. *O'Hare v. Bank*, 77 Pa. St. 96; *Bank v. Perry*, (Iowa,) 83 N. W. Rep. 341. And in cases strongly akin to these in principle the same doctrine has been applied. *Pangborn v. Westlake*, 36 Iowa, 546; *Vining v. Bricker*, 14 Ohio St. 331. We are therefore of the opinion that the court did not err in sustaining the demurrer to the second separate defense pleaded in the defendant's answer. Finding no error in the judgment appealed from, the same must be affirmed.

#### HUMMELL v. SEVENTH STREET TERRACE CO.

(Supreme Court of Oregon. March 31, 1891.)

#### NEGLIGENCE—INJURY TO ADJOINING OWNER.

1. A party, in the exercise of a right upon his own land which involves danger to the property of his neighbor, is bound to provide against such by all reasonable prudence and care.

2. Where a defendant undertakes to construct a retaining wall on his own land which materially increases the risk of the adjoining property to land-slides, he is bound to exercise his right in a way not to expose the property of the plaintiff to any risks which might be provided against by the exercise of ordinary diligence, which would require that the defendant in its construction should take into account or anticipate such storms or rain-falls as might reasonably be expected to occur.

3. No weakness or defect in such wall, caused by the negligence of the defendant, or which the exercise of ordinary care and skill would have avoided in its construction, although combined with the act of God, would excuse liability for damage to the adjoining property.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

This was an action to recover damages from the defendant for negligence in the construction of a certain retaining wall and road-way upon its property above the plaintiff, whereby his fruit-trees and buildings were injured, and his land covered with a large amount of rock and other debris by the sliding down of the same, etc. The defendant, after denying the negligence alleged, or any fault in the construction of such wall and road-way, as a separate answer and defense, averred that such wall and road-way were properly constructed upon its lands, and capable of resisting all ordinary weather, and such storms as could have been reasonably anticipated, and that the carrying away of the same, and the damages, arose from *vis major*, namely, an unprecedented rainfall and storm, lasting several days, and doing great damage throughout the state. The denial putting in issue the new matter alleged as a defense, a trial was had, resulting in a verdict and judgment for the plaintiff, from which this appeal is taken.

C. J. McDougall and C. H. Carey, for appellant. Killen, Starr & Thomas, for respondent.

LORD, J., (after stating the facts as above.) The errors assigned relate wholly to exceptions to the charge of the court. The charge, certified to us, consists of a series of instructions, submitting the whole question of negligence to the jury, to each one of which an exception was reserved. The criticisms of the argument were directed mainly to the first, third, and fifth instructions, which examined separately, or as isolated propositions, one of them, at least, would need to be qualified and explained. As it is the duty of the jury to consider all the instructions together, when the record discloses that an instruction in the series, although not stating the law correctly, is qualified or explained by others, so that the jury will not be likely to be misled, the error will be obviated. *Anderson v. Walter*, 34 Mich. 113. Thus in the case of *Losee v. Buchanan*, 51 N. Y. 492, EARL, C., said: "We must look at the whole charge, and judge of it from its whole scope, and if, taking it altogether, it presented the question of law fairly to the jury so as not to mislead them, exceptions to separate propositions in it, or to detached portions of it, will not be upheld." So that, upon a record like this, if the charge as a whole conveyed to the jury the correct rule of law applicable to the question to be determined by them, the judgment will not be reversed because some one of them fails to state the law correctly, or with sufficient qualification, when the defects are cured by other instructions. The plaintiff owned lands adjacent to and lying below the land of the defendant. To make it desirable for building sites, the defendant constructed a road-way winding about it, with a view to subdivide and terrace it. At one place the road-way passed directly above the land of the plaintiff, and to support the embankment, and to pre-

vent the road-way from washing out, the defendant built a retaining wall. The giving way of this wall, and the injury consequent thereto to the adjacent property, as arising from its negligent construction, is the foundation of the action. Incorporated in the bill of exceptions enough of the evidence has been set forth to show the applicability of the instructions to the facts in issue, and the sense in which they must have been understood by the jury. The evidence for the plaintiff tended to show that the retaining wall, which was about 16 feet high, was built of boulders and rock of inferior quality. "There was rotten bed-rock, good sound rock, and honey-comb rock, which would crumble as soon as the air and weather struck it, built in the wall, which was the cause of its coming down. When the rain came, the honey-comb stone melted, and the coarse heavy stone came down, and the weight from behind pushed it out. The terrace did not give way. The wall fell down itself. The wall crumbled out. These rocks rolled and fell down on the place that the president of the defendant company was notified that it was being insecurely built; that a slide took place when the defendant was building the road," etc. The evidence for the defendant tended to show that "nothing but good rock was put into the wall;" that there was "instructions given to the foreman to use nothing but rock, and the best men that could be got;" that there was "one man that had done some bad work, but that, when the foreman's attention was called to it, it was taken out and replaced in a substantial manner;" "that the company desired the best wall that could be made, and spared no money to make the best wall;" "that the rotten stone spoken of was put behind the wall for filling, and not in the wall;" "that an engineer was employed to oversee the work, a man of a great deal of skill and ability, and that the work was built under his instructions." The evidence further proceeds to show how the work was done, and the material used, and that it was done substantially, and to the satisfaction of the son of the plaintiff, who seemed to act for his father, etc., that, immediately before the wall was carried away, an extraordinary storm raged for several days, causing land-slides and bridges to be washed out all over the country, and causing the washout of the top of the wall, etc., and the injury to the adjoining property of the plaintiff. The first instruction of which error is assigned charges the jury that "the plaintiff had the right to require of the defendant that it should not, by any structures, or any acts which it did upon its own land, materially increase his risk, or his liability to injury from the sliding down of the soil upon his land." The point of the objection is that the wall was a lawful structure, though it may have materially increased the risk, but if it was not negligently constructed and maintained the defendant is not liable. It will be noted that the objection admits liability, if the injury from the falling of the wall was caused by its negligent construction. Conceding this objection to be well

taken, it is plainly cured of the defects complained of by the instruction which immediately succeeds, and is designed to apply directly to the facts of the case. This instruction is that "the defendant, in making a road-way, or in putting structures on its land, was required to so conduct itself as not to expose the plaintiff to any risk which might be provided against by ordinary diligence. It should build its walls or construct its road-way so as to stand firm during all such storms as usually come, and such unusual storms as might be reasonably expected sometimes to occur." The phraseology of this last clause might be subjected to a technical criticism, and pronounced not strictly accurate, but its meaning is obvious, and could not have misled the jury. This instruction casts upon the owner the duty of seeing that reasonable care and skill shall be employed in the construction of such wall and road-way upon its land, when it involves any danger or risk to the adjoining property. The company was bound to provide against such risk by the exercise of all reasonable prudence and care. In constructing its wall and road-way, the defendant was bound to exercise its right in a way not to expose the plaintiff to any risk which might be provided against by the exercise of ordinary diligence; that this would require of the defendant in the construction of its retaining wall to anticipate and provide against such storms or rain-falls as might reasonably be expected to occur. The instruction does not assert that the defendant was bound to provide against extraordinary or unprecedented storms, such as could not be reasonably anticipated, but only to make provision for such as might reasonably be expected to happen, which would involve taking into consideration the locality and the nature or character of the storms which have previously occurred.

As the putting up of such a structure involved risk to the adjacent owner, the instruction declares, in terms, that ordinary diligence required that the defendant build its retaining wall strong enough to meet the exigency of any storm which might reasonably be expected to occur; and as a consequence, if it did so, it would not be liable for an injury to the property of such adjoining owner, arising from the insufficiency or failure of the retaining wall to resist the pressure of an extraordinary storm, such as could not be reasonably anticipated. Now, taking the instructions together, they announce the principle that, when an owner on his own land builds or erects any wall or structure which materially increases the risks to a neighboring owner, he is bound to exert all reasonable diligence and care to prevent injury or damage to such adjoining owner from such risk; that, as the facts show these risks mainly to be from landslides in times of storms or rain-falls, the exercise of reasonable diligence and care require that the wall or structure should be so built or constructed as to avoid all injuries or damage likely to happen from such storms or rain-falls as might reasonably be anticipated. So that when the first instruction and second instruction

are read together, or the former in the light of the latter, with reference to the facts, the plain and obvious meaning is that the plaintiff had no right to build a wall or structure without making some provision against the risk to which it exposed the adjacent property; that the rule of law requires that the defendant exercise reasonable diligence in the construction of such wall, so as to avoid the risk to which it exposed the property of the plaintiff, and, as a consequence, if the company did not take some such precautions, or built its wall negligently and insufficient to resist the pressure of storms or rain-falls likely to happen, and which might be reasonably expected, it would be liable. It results that these instructions recognize the right of the defendant to erect such structures upon its land, provided the company exercises reasonable care and skill in their construction to avoid liability to damage to the adjacent property, and, as a consequence in such case, the law imposes no liability.

The next objection is directed to the third and fifth instructions, and the criticism is that they only recognize the excuse of *vis major* in case the wall had no weakness or defect therein which contributed to produce the injury complained of. The third instruction, after stating that the act of God excuses liability, if the storm was irresistible, and such as no reasonable man of experience and acquaintance in the country and with the action of the elements would have expected to occur, states that it "would be an excuse for the defendant in the construction of its works, if it so constructed its works as that no weakness or defects therein contributed with the act of God to produce the result complained of." It is insisted that the words "no weakness or defect" in the wall or structure mean any weakness or defect, however slight or fanciful or speculative, or which may have in the least degree caused the injury; that the effect of this instruction is to require the construction of the wall to be so perfect that no weakness or defect therein, no matter how slight or remote, was discoverable therein, even by the test of *vis major*, or the defendant was liable; that if a slight defect existed, no matter how remote the cause, the defendant would be liable, though ordinary prudence could not have provided against the risk or injury. It must be admitted, if the instruction is susceptible of this construction, viewed in the light of the issue and the facts to which it was directed, it is inconsistent with the theory of the law as declared in the preceding instructions. The evidence for the plaintiff tended to show that the wall was negligently constructed, and of inferior material, and so insecure and insufficient as to be incapable of resisting such storms as could have been reasonably anticipated. In the preceding instructions the court had charged the jury that it was the duty of the defendant to exercise reasonable care and skill in the construction of its wall, to prevent injury to the adjacent property of the plaintiff, and that this duty, which the law imposed, required the defendant to build the wall strong and firm enough to encounter the

pressure of such storms as might reasonably be expected to occur. If the defendant neglected to build the wall in a way and of material which was calculated to resist the pressure of such storms as might reasonably be expected to happen, it neglected to provide against the risks to which its structures exposed the property of the plaintiff, and was guilty of negligence and a want of ordinary care,—not remote or speculative negligence, but actual negligence in failing to do what the law required of the defendant, namely, that a party, in the exercise of a right upon his own land which involves danger to the property of his neighbor, is bound to provide against such danger by all reasonable prudence and care. To this extent the defendant must perform its duty before it can claim exemption from the act of God. It is clear, then, that the weakness and defect in the wall of which the instruction required it to be free was such as was caused by negligence, and against which the defendant was bound to provide in the first instance by ordinary diligence. In other words, “no weakness and defect” arising from the negligence of the defendant in the construction of the wall, combined with the act of God in producing the injury, could relieve the defendant, upon the excuse of *vis major*, from liability. As the defendant’s act created the risk, it must perform its duty in the first instance by providing against it to the extent of ordinary diligence; and if it fail to do it, and a defect in the wall is the result, that defect is caused by its negligence, and it is not in a condition to invoke *vis major* against the plaintiff. It was the diligence and care and skill required in the construction of the wall under the circumstances, and the consequence of defect and weakness therein from negligence or a want of ordinary care, that was the subject under consideration in connection with the act of God. This being so, “no weakness and defect” in the wall could have been referred to or meant, except such as were caused by the negligence of the defendant, or its failure to observe ordinary care in the construction of the wall; and consequently the instruction cannot mean or include defects in the wall which may arise or exist where ordinary care and diligence has been observed. It is “defect and weakness” which the exercise of ordinary care would have avoided, and ought not to be present and exist when the act of God occurs. The court was not instructing about any weakness or defect in the wall which might exist despite the exercise of ordinary care and skill, or which ordinary prudence could not provide against; but such as was caused by the negligence of the defendant, and which the exercise of ordinary care would have avoided. The words, therefore, in the instruction, “no weakness and defect therein,” mean “no weakness and defect” in the wall which the exercise of ordinary care and skill in its construction could have prevented, contributing, with the act of God, in producing the injury complained of, could relieve the defendant, upon the excuse of *vis major*, from liability for such injury. It is weakness and defect in the

wall, caused by the negligence of the defendant in its construction, to which the instructions refer as a producing cause of the injury, and which cannot be reckoned as remote or fanciful or speculative negligence. This view disposes of the construction suggested, and the legal inferences drawn from it, and declares the law in conformity with the contention of counsel for the appellant, and in no event, if properly applied to the facts by the jury, can work the defendant any wrong or injustice. The same view applies to the fifth instruction: “If this damage occurred by the negligence and want of proper care of the defendant, united with the act of God, the defendant is liable therefor;” that is, if the damage to the plaintiff is caused by a defect due to the negligence of the defendant, or which the exercise of ordinary care would have avoided in the construction of the wall, united with the act of God, the defendant is liable therefor. The jury were instructed that they must find that the loss or injury would have happened without such defect or negligence,—without such producing cause,—“in order to make the defense—the act of God—an excuse in this case.” Upon the defendant’s phase of the evidence, in respect to the care and skill employed in the construction of the work, the fourth instruction was full and explicit. It is true, although excepted to, it was not criticised, but passed by at the argument and in the brief. It illustrates the care of the learned judge below to present the law properly and correctly, so as to guard and protect the rights of all concerned. The jury were instructed that if the defendant had done all that a reasonable man could have done in the employment of a competent and skillful engineer and other employes to do the work, and that they have put their knowledge and skill into exercise for the proper construction of the work, “that would be an excuse that would exonerate the defendant from liability for the defects of the work and negligence of these employes.” The record discloses that the jury were permitted to view the *locus in quo*, and with the evidence before them, and the law as declared by the court, we do not see how they could err, or, if they did, how we could correct it. The judgment must be affirmed.

MOONEY v. DETRICK. (No. 12,551.)

(*Supreme Court of California*. Sept. 10, 1890.)

INSOLVENCY—DISCHARGE—EFFECT.

Section 37 of the insolvent act of California provides that all debts existing at the time of the adjudication of insolvency, though not payable until a future time, may be proved against the estate of the debtor. Section 40 provides for the allowance of contingent claims at their present value. Section 53 provides that the discharge shall release the debtor from all debts and liabilities which were or might have been proved against his estate. *Held*, that the discharge in insolvency is a bar to an action for breach of a contract of hiring for a definite period, even as to money which became due thereon after the filing of the petition in insolvency and after the discharge. *SHARPSTEIN and THORNTON, JJ.*, dissenting. Reversing 22 Pac. Rep. 1111.

In-bank. Appeal from superior court, city and county of San Francisco.

On rehearing. For decision in department 2, see 22 Pac. Rep. 1111.

*Kellogg & King*, for appellant. *Dorn & Dorn*, for respondent.

PATERSON, J. This is an action for the recovery of money alleged to be due plaintiff from defendants under a contract between them, to the following effect: Plaintiff having sold and assigned a patent-right to defendants, in consideration thereof promised to serve said defendants in and about their business for the term of five years from the 1st day of January, 1881; and the defendants agreed to employ the plaintiff during said entire period of five years, and to pay him for every day of his employment, Sundays and holidays excepted, the sum of four and one-half dollars. Pursuant to the terms of said agreement, defendants employed plaintiff in and about their business constantly, and paid him in full therefor until the 1st day of March, 1884. Since March 1, 1884, defendants have failed and refused to give plaintiff employment, except for the space of 166 days, and refused to pay plaintiff anything more than \$654 under the contract. Judgment was entered in favor of plaintiff and against the defendants for the sum of \$1,333.40, interest and costs. Defendants' motion for a new trial was overruled, and from that order and the judgment this appeal is taken by defendant Detrick. The defendants, in their answer, allege that as a firm and individually they and each of them were on the 1st of July, 1884, discharged of and from all debts, liabilities, and claims whatever except such as were by the insolvent laws excepted from their operation, and that the claim sued on in this action is not one of the claims so excepted. The petition of the defendants as a firm and individuals was filed on the 28th day of February, 1884, and the plaintiff's cause of action, if any, has accrued since that date. The discharge and proceedings leading up to it are well pleaded, and the allegations of the defendants in relation thereto are admitted by the plaintiff to be true. The plaintiff presented his claim against the defendants to the assignee in insolvency, and he refused to allow it; whereupon plaintiff applied to the court in which the insolvency proceedings were pending for leave to sue the assignee, but such application was denied.

Section 37 of the insolvent act provides that "all debts due and payable from a debtor at the time of the adjudication of insolvency, and all debts then existing, but not payable until a future time, \* \* \* may be proved against the estate of the debtor." Section 40 provides that "in all cases of contingent debts and liabilities contracted by the debtor, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends if the contingency shall happen before the order for the final dividend, or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated;" and section 53 provides that "a discharge \* \* \* shall release the debtor from all claims,

debts, liabilities, and demands set forth in his schedule, or which were or might have been proved against his estate." We think that under these provisions of the insolvent act the plaintiff's claim against the insolvents was barred by the discharge in insolvency. It is admitted that the defendants complied with all the provisions of the act. A personal covenant creates certainly a "liability," if not a "debt," within the meaning of the act. If the assignment had been made for an annuity payable during the remainder of the life of the plaintiff, the obligation would be discharged by the discharge in insolvency. *Heywood v. Shreve*, 44 N. J. Law, 94. In this case there was no continuing benefit direct to the insolvents, such as would constitute a consideration and a new debt. The benefit went to the assignee, and through him whatever advantages the defendants had gained under the contract passed to the creditors, for the patents became the assets of the estate, and no services thereafter were rendered by the plaintiff. In cases of lease, where the occupancy is by the insolvent, he, and not his creditors, derives the benefit subsequent to bankruptcy. In such case the discharge will not bar a recovery. Judgment and order reversed, and cause remanded for a new trial.

BEATTY, C. J., and WORKS and MCFARLAND, JJ., concur. SHARPSTEIN, J., dissents.

THORNTON, J. I dissent, and adopt the opinion delivered in department 2 in this case as my opinion herein.

Fox, J., being disqualified, did not participate in the decision of the above cause.

Rehearing denied.

65 Cal. 583

MEYER v. BROWN *et al.* (No. 8,896.)<sup>1</sup>

(*Supreme Court of California*. Sept. 1883.)

MUNICIPAL BONDS — IRREFRAGABLE CONTRACT—  
MANDAMUS TO COMPEL TAX LEVY.

1. Act Cal. April 24, 1858, consolidating the city and county of Sacramento, provided for "liquidating, funding, and paying" the outstanding debts of the old city government by the issuance of interest-bearing bonds. To pay the accruing interest and redeem the bonds, 55 per cent. of the city revenue was set aside as a sinking fund, and the board of supervisors of the new consolidated government was required to levy an annual tax of 100 cents on the \$100 for municipal purposes. *Held*, that the surrender of their claims by the creditors of the old city government, and their acceptance of the bonds issued by the new consolidated government on the faith of the above provisions for their payment, constituted a contract between the creditors and the consolidated government which cannot be affected by subsequent legislation, and that *mandamus* would issue on the application of the bondholders to compel the levy of the taxes by the legal successor of the consolidated city and county.

2. The fact that the bonds were issued by the officers of the consolidated government in payment of claims which they knew to be illegal

<sup>1</sup> This case, filed September, 1883, is now published by request, with others, in order that the *Pacific Reporter* may cover all the cases in volume 65, *California Reports*.



will not effect the validity of the bonds in the hands of *bona fide* holders, as the only question in such case is as to the power of the municipality to issue them.

**In bank.** On application for *mandamus*.

Daniel Meyer, the petitioner, is the holder of certain bonds issued by the city and county of Sacramento. He made this application to compel defendants, John Q. Brown and others, trustees of the city of Sacramento, which was created the legal successor of the city and county of Sacramento, to levy a tax for the payment of the bonds. Defendants demurred to the petition.

*S. C. Denson and Rosenbaum & Scheeline*, for petitioner. *W. A. Anderson and McKune & George*, for respondents.

Ross, J. On the 27th day of February, 1850, the legislature of the state passed an act, by which it was declared that all that tract of land lying within certain designated limits should thereafter be known by the name of "Sacramento City," for the government of which there should be a mayor, recorder, and council, to consist of nine members, one of whom should be elected president; that the mayor, recorder, and councilmen should be a body politic and corporate by the name and style of "The Mayor, Recorder, and Common Council of Sacramento City," and by that name they and their successors should be known in law, have perpetual succession, sue and be sued in all courts, and in all actions whatsoever, etc. St. 1850, p. 70 et seq. By an act passed March 26, 1851, the legislature declared that the same territory should thereafter be known by the name of "The City of Sacramento," for the government of which there should be a mayor, recorder, and council, to consist of nine members; that the mayor, recorder, and councilmen should be a body politic and corporate by the name and style of "The Mayor and Common Council of the City of Sacramento," and by that name they and their successors should be known in law, have perpetual succession, sue and be sued, in all courts and actions whatsoever, etc. By the seventh section of the act last mentioned the council was, among other things, given power to cause the streets to be cleaned and repaired; to provide for the making and improving of sidewalks; to lay out, extend, alter, or widen streets and alleys; to alter, improve, keep, and repair, and have full control of the levee; to establish and regulate a police, to be subject to the supervision of the mayor; to make appropriations for any object of city expenditure; to erect and maintain poor-houses and hospitals for the support of the indigent, sick, and insane; to prevent the introduction and spreading of diseases; to erect, repair, and regulate wharves; to provide for the prevention and extinguishment of fires, etc. On the 24th of April, 1853, the legislature passed an act consolidating the city and county governments, the first and second sections of which are as follows: "Section 1. For the government of that territory now known as 'The City and County of Sacramento,' there shall be a board of

supervisors; and the said board of supervisors and their successors in office shall be a body politic and corporate under the name and style of 'The City and County of Sacramento,' and by that name they shall be known in law; may make, have, keep, alter, and renew a common seal, different and distinct from the seal of the county clerk; shall have perpetual succession; may sue in all courts, and in all actions whatsoever; may, under the limitations hereinafter provided, purchase and hold real estate or personal property, and receive and hold the same by legacy or donation for the city and county, or in trust for the use of public schools, or the fire department, or for a poor-house and indigent sick; and they may do all such other things, and exercise all such other powers as by this act or by any other law are or may be granted or allowed to them to do; but the city and county shall not be sued in any action whatever; nor shall any of its lands, buildings, improvements, property, franchises, taxes, revenues, actions, choses in actions, and effects be subject to any attachment, levy, or sale, or any process whatever, either mesne or final. Sec. 2. The city and county of Sacramento is hereby made and constituted the successor of the corporation by this act dissolved, and heretofore known as 'The Mayor and Common Council of the City of Sacramento.' The lands, public and private buildings, property, rights of property, actions, rights of actions, moneys, revenues, income, and trust now vested in or belonging or in any wise appertaining to the corporation known as 'The Mayor and Common Council of the City of Sacramento,' are hereby transferred to and vested in, and are declared to appertain and belong to the city and county of Sacramento, as hereinafter provided." Sections 37, 38, 34, and 35 of the consolidation act are as follows: "Sec. 37. For the purpose of liquidating, funding, and paying the claims against the city and county of Sacramento, hereinafter specified, the treasurer shall cause to be prepared suitable bonds of the county of Sacramento, not exceeding the sum of six hundred thousand dollars, and for the city of Sacramento, not exceeding the sum of one million six hundred thousand dollars, bearing interest at the rate of six per cent. per annum from the first day of January, one thousand eight hundred and fifty-nine, and payable at the office of the treasurer. Said claims shall be funded in the order of their reception; shall, in the order of reception, be entitled to the shortest time, and one-fourth of the whole amount made payable on the first day of February, one thousand eight hundred and eighty-eight; one-fourth on the first day of February, one thousand eight hundred and ninety-three; one-fourth on the first of February, one thousand eight hundred and ninety-eight; and the balance on the first of February, one thousand nine hundred and three. The interest on said bonds shall be made payable at the office of the treasurer on the first day of January of each year. Said bonds shall be signed by the president of the board of supervisors, countersigned

by the clerk of the board of supervisors, and indorsed by the treasurer, and shall have the seal of the city and county affixed thereto. Coupons for the interest shall be attached to each bond, so that they may be removed without injury to the bond. Said coupons, consecutively numbered, shall be signed by the treasurer. It shall be the duty of the book-keeper of the city and county and the treasurer each to keep a separate record of all bonds issued, showing the number, date, and amount of each bond, to whom issued, upon what claim, and its amount; and none of the claims herein specified shall be liquidated or paid except in the manner herein provided. Sec. 33. The following claims shall be received and funded under the provisions of this act: *First*. All legal debts or liabilities against the county of Sacramento, which may be unpaid and unprovided for by this act on the first day of January, one thousand eight hundred and fifty-nine. The annual interest and principal of all bonds issued for claims mentioned in this section shall be paid from the interest and sinking fund, as provided in section 36, and in the manner otherwise provided in this act. *Second*. All legal debts or liabilities against the city of Sacramento, which may be paid and unprovided for by this act on the first day of January, one thousand eight hundred and fifty-nine. The annual interest and principal of all bonds issued for claims against said city shall be paid from the interest and sinking fund, provided in section 35, and in the manner otherwise provided in this act." "Sec. 34. The board of supervisors shall not have power to levy any greater taxes than as follows, viz.: On the real and personal estate, except such as is exempt by law, throughout the city and county, a tax of one hundred cents on the one hundred dollars; such state taxes as the laws may require; and, in addition thereto, they shall levy, for municipal purposes, on all real and personal property within the city limits, except as is exempt by law, a tax of one hundred cents on the one hundred dollars; also a tax for road purposes, of five cents on the one hundred dollars on the property outside the city limits. All of which taxes shall be levied and collected strictly in accordance with the revenue laws of the state, except as may be otherwise provided in this act: provided, that nothing contained in this section shall prevent the board of supervisors from levying, in addition, a tax in accordance with an act passed February, [March,] one thousand eight hundred and fifty-eight, entitled 'An act to amend an act passed April twenty-seventh, one thousand eight hundred and fifty-seven, entitled "An act to submit to the people of the counties of Sacramento and El Dorado a proposition for the construction of a wagon road."' Sec. 35. The revenue derived from and within the city limits for municipal purposes, viz., taxes, licenses, harbor dues, water-rents, and fines collected in the mayor's court or otherwise, when paid into the treasury, shall be set apart and appropriated as follows: Fifty-five per cent. to an interest and sinking

fund, which shall be applied to the payment of the annual interest and the final redemption of bonds issued for city indebtedness in accordance with the provisions of this act; fifteen per cent. to a salary fund, which shall be applied to the payment of the salaries of municipal officers as provided in this act; eight per cent. to a school fund, which shall be applied to the support of schools within the city limits; and the balance—twenty-two per cent.—to a fund to be used for all such necessary municipal expenses as are not otherwise provided for in this section, and shall be called the 'contingent fund.'

By the second section of the act of consolidation all of the property and rights theretofore belonging or pertaining to the corporation known as "The Mayor and Common Council of the City of Sacramento" were vested in and declared to appertain and belong to the consolidated government. But in dissolving the old city government and transferring all of its property and rights to a new corporation the legislature did not forget that there were outstanding claims against the old one. Recognizing that fact, it made provision in and by the act of consolidation for "liquidating, funding, and paying" those claims. Suitable bonds were directed to be prepared for the city of Sacramento, not exceeding \$1,600,000, with interest coupons at the rate of 6 per cent. per annum, payable on the 1st day of January of each year, with which the legal claims against the old city government were to be paid and discharged. To pay the interest as it should accrue and to redeem the bonds it was provided by the act of consolidation that 55 per cent. of the revenue derived from and within the city limits for municipal purposes—that is to say, taxes, licenses, harbor dues, water-rents, and fines collected—should be set apart and appropriated to an interest and sinking fund, which should be applied to the payment of the annual interest and the final redemption of the bonds; and the governing body of the consolidated government, viz., the board of supervisors, was required to levy for municipal purposes, on all real and personal property within the city limits, except such as is exempt by law, a tax of 100 cents on the \$100. Having thus made provision for the payment annually of the interest on the bonds, and ultimately for their redemption, the legislature offered them in payment of the legal claims against the old city government. The offer was accepted, and the holders of the latter surrendered their claims, in consideration of which the consolidated government issued to them its bonds, pursuant to the provisions of the act. The bonds carried with them the pledge of an annual tax for municipal purposes on all real and personal property within the city limits, except such as is exempt by law, of 100 cents on the \$100, 55 per cent. of which to be set apart and appropriated to an interest and sinking fund, to be applied to the payment of the annual interest upon the bonds, and to their final redemption. The tax was the chief security offered the creditors as an inducement to accept the

bonds in payment of their claims. When the bonds for whose payment, with interest, provision was thus made, were issued and accepted by the creditors of the old city government, a contract was made, as solemn and binding, and as much beyond subsequent legislation, as it would have been if made between private persons. These views will be found sustained and amplified in an able opinion recently rendered by the supreme court of the United States in a case entitled *Louisiana v. Pilsbury*, reported in 105 U. S. 278. It is well occasionally to recall the fact that there is no more reason to permit a municipal government to repudiate its solemn obligations entered into for value than there is to permit an individual to do so. Good faith and fair dealing should be exacted of the one equally with the other.

Some minor objections are made to the petition, which is for a writ of mandate compelling the city authorities to levy the tax referred to, none of which, in our opinion, are well taken. Demurrer overruled, and defendants allowed 10 days within which to answer.

McKINSTRY, J., MYRICK, J., SHARPSTEIN, J., THORNTON, J., and McKEE, J., concur.

#### ON THE MERITS.

(June 4, 1884.)

PER CURIAM. We are satisfied with the opinion delivered when this case was considered on demurrer to the petition. (The preceding opinion, by Mr. Justice Ross.) The views then expressed are decisive of the case as now presented in favor of the petitioner. It is therefore ordered that a writ of mandate issue to the municipality and its authorities annually to levy and collect for municipal purposes on all real and personal property within the city limits, except such as is exempt by law, a tax of 100 cents on the \$100, and that 55 per cent. of the revenue thus derived within the city limits for municipal purposes be set apart and appropriated to an interest and sinking fund, to be applied to the annual interest and final redemption of the bonds issued for the city indebtedness, in accordance with the act of the legislature of the state, adopted April 24, 1858.

#### ON MOTION FOR NEW TRIAL.

(Sept. 10, 1884.)

PER CURIAM. This is a motion for a new trial. At the trial before the referee defendants offered to prove facts which it is claimed would have shown that certain of the bonds described in the complaint herein, the payment of which is sought to be enforced by the mandate of this court, were issued in consideration of the surrender of bonds purporting to represent indebtedness of the city of Sacramento, which bonds (last named) had been illegally issued, and did not constitute valid claims against the said city. It is contended by the defendants that the referee erred in rejecting the evidence offered. We deem it unnecessary to inquire whether, assuming the facts to be as implied by the defendants' offer of evidence,

the bonds in lieu of which the bonds in suit were issued were invalid. True, the act of 1858 (St. 1858, p. 280) provided that all "legal" claims might be funded, but, as we understand the provisions of that act, the president of the board of supervisors, the clerk of the board, and the treasurer were authorized to determine, on the behalf of the city and county of Sacramento, the legality of each claim presented, and, if satisfied of its legality, to issue a bond or bonds therefor. Even if the evidence offered would have shown that the officers mentioned violated their duty by deciding some claims to be legal which they knew were illegal, there was no offer to prove that the claims alleged to be the consideration for the bonds sought to be enforced by this proceeding were presented by plaintiff, or that any of such bonds issued to him. There is no averment in the answer, nor is there any finding in the record, or any evidence tending to prove, that plaintiff is other than a holder *bona fide* of the bonds. The bonds recite that they were issued in accordance with the law of 1858. They and the coupons attached are signed and authenticated, as required by that law. They are exactly such bonds as would have been authorized had the officers of the city and county indisputably allowed only "legal debts and liabilities" of the former corporation,—the city of Sacramento. At the trial, the *bona fides* of the plaintiffs being conceded, there was but one question to be decided, to-wit, were the bonds such as the city and county had power to issue? No question of irregularity, or even fraud, on the part of the agents of the municipality could be considered. *Roneda v. Jersey City*, 17 Reporter, 263; *East Lincoln v. Davenport*, 94 U. S. 801; *Pompton v. Cooper Union*, 101 U. S. 196; *Sherman Co. v. Simons*, 109 U. S. 737, 3 Sup. Ct. Rep. 502; *Louisiana v. Pilsbury*, 105 U. S. 278. Hereafter, in cases like the present, where the facts shall be found by a referee appointed by this court, and either party shall have given notice of a motion for a new trial within 10 days after receiving notice that findings have been filed, the argument of the cause will not be heard until the motion for a new trial shall have been determined. Nor will argument be heard upon the findings of a referee (no notice of motion for a new trial having been served) unless 10 days shall have expired after notice of the filing of such findings. Motion denied.

(7 Utah, 192)

#### WILLARD CITY v. WOODLAND.

(Supreme Court of Utah. April 8, 1891.)

JUSTICE'S COURT—JURISDICTION—SUIT FOR TAXES—BILL OF EXCEPTIONS.

1. In an action by a city in the justice's court for taxes, where the complaint alleges that defendant is indebted to the city in a certain amount for taxes on real estate, and asks judgment, and the answer is a mere denial, and is not verified, no issue involving the title to real property or the legality of a tax is raised, so as to oust the justice of jurisdiction under Comp. Laws Utah 1888, § 3543.

2. Where a motion to set aside a verdict and judgment is overruled, and defendant waits for over a month before presenting his bill of exceptions, without asking an extension of time, the

judge may refuse to sign the same, since Comp. Laws Utah 1888, § 3395, requires the bill, within 10 days after notice of entry of the judgment, or within such further time as the court may allow, to be presented to the adverse party, who shall have 10 days to propose amendments, 10 days after which it shall be presented to the court for allowance.

Appeal from district court, first district; JAMES A. MINER, Justice.

Comp. Laws Utah 1888, § 3395, provides that when a party desires to have exceptions taken at a trial settled in the bill of exceptions he may, within 10 days after the entry of judgment, if the action was tried with a jury, or after receiving notice of the entry of judgment if the action was tried without a jury, or such further time as the court in which the action is pending, or a judge thereof may allow, prepare the draft of a bill, and serve the same upon the adverse party, who may within 10 days propose amendments thereto, the bill and amendments within ten days thereafter to be presented to the judge.

*Muloney & Perkins*, for appellant.  
*Smith & Smith*, for respondent.

ANDERSON, J. The plaintiff brought suit against the defendant before a justice of the peace for taxes in the sum of \$5.10. As the questions we are called upon to decide arise on the pleadings, it becomes necessary to set them out in full. The complaint is as follows, to-wit: "Plaintiff complains and alleges that defendant became, and was on the 31st day of October last, (1889,) indebted to plaintiff in the sum of five dollars and ten cents (\$5.10) as and for taxes due said city for the year 1889 on real estate and personal property of said defendant in said city, which defendant has refused and neglects to pay, though requested to do so. Plaintiff demands judgment against the defendant for five dollars and ten cents (\$5.10) and costs." To the complaint the defendant filed the following answer: "Now comes said defendant, and for answer to plaintiff's complaint denies each and every allegation in said complaint, and as fully and completely as though each and every allegation was separately denied." There was a trial before the justice of the peace, and judgment was given for the plaintiff and against the defendant for \$5.10 and costs. From this judgment the defendant appealed to the district court, where there was a trial before the court and jury on the 15th day of October, 1890, the defendant making no appearance, and a verdict returned in favor of the plaintiff for \$5.45 under the direction of the court, on which judgment was rendered. There was a motion to set aside the verdict and judgment, which was overruled, and from the order overruling said motion and from the judgment this appeal is taken.

Counsel for defendant contend that the pleadings put in issue the title to real property and the legality of the tax sought to be collected, and that, under section 3543, vol. 2, Comp. Laws 1888, the justice of the peace had no jurisdiction to hear and determine the case, and that the district court acquired no jurisdiction by the appeal, and that the question of jurisdiction

can be raised for the first time in this court. The section of the statute above referred to is as follows: "Sec. 3543. The parties to an action in a justice's court, cannot give evidence upon any questions which involve the title or possession of real property, or which involve the legality of any tax; \* \* \* nor can any issue presenting such question be tried by such court, and, if it appear from the answer of the defendant, verified by his oath, or that of his agent or attorney, that the determination of the action will necessarily involve the question of title or possession to real property, or involve the legality of any tax, \* \* \* the justice must suspend all further proceedings in the action, and certify the pleadings, and, if any of the pleadings are oral, a transcript of the same from his docket to the clerk of the district court of the district in which such justice's precinct is situated, and from the time of filing such pleadings or transcript with the clerk the district court has over the action the same jurisdiction as if it had been commenced therein." No issue respecting the title or possession of real property, nor the legality of the tax, was raised by the pleadings before the justice; nor would evidence on either of these questions have been proper or necessary under the issues made by the pleadings. The complaint having tendered no issue as to the title to real property or the legality of the tax, the defendant, in order to oust the jurisdiction of the justice, should by a verified answer have pleaded specially such facts as would have presented such issues. Neither the complaint nor the answer was verified, and the answer, containing only a general denial, raised no issue affecting the jurisdiction of the justice. As the justice's court acquired jurisdiction of the parties and had jurisdiction of the subject-matter of the action, it had jurisdiction to hear and determine the case as presented, and the district court likewise acquired jurisdiction by the appeal. In *Schroeder v. Wittram*, 66 Cal. 636, 6 Pac. Rep. 737, it was held, under a statute similar to the Utah statute, that a justice's court had jurisdiction of an action to recover a deposit made by a vendor under an executory contract for the sale of land, by which he agreed to purchase the land if the title was good, and in which it was stipulated that, if the title was not good, the deposit was to be returned. In that case the plaintiff gave evidence that the abstract furnished him disclosed two unpaid mortgages on the land, and that, on discovering this fact, he declined to complete the purchase, and demanded a return of his deposit, and the court held that the title to the land was not drawn in question thereby, and that the jurisdiction of the justice's court over such an action is not ousted by the fact that the title to the land is incidentally called in question on the trial; that to occasion a loss of jurisdiction the title or right of possession must be directly involved. The action was for money had and received, and the answer was a general denial, and neither the complaint nor the answer was verified, and the court say that there was no question of title or possession of real property presented by

the complaint, nor in the issues raised by the complaint and answer. See, also, *Jordan v. Walker*, 52 Iowa, 647, 3 N. W. Rep. 479, and 56 Iowa, 686, 10 N. W. Rep. 232. *Williams v. McCartney*, 69 Cal. 556, 11 Pac. Rep. 186, was an action in a justice's court to recover \$123.50 under a contract with the superintendent of the streets for the city of San Francisco, under which plaintiff paved the street in front of the defendant's property in said city. The complaint set out facts showing the defective condition of the streets, the service of a notice by the superintendent of streets upon defendant, requiring him to make the necessary repairs; his failure to make such repairs; the adoption of a resolution of the board of supervisors, directing the superintendent to contract for the repairs, etc. The answer denied the allegations of the complaint, and was not verified. The court held that the answer raised no question as to the legality of the indebtedness; that such an issue must be made by answer verified by the oath of the defendant, and, unless so raised, no evidence as to such legality could be received. No notice of intention to move for a new trial, nor any motion for a new trial, as provided in section 3402, Comp. Laws, was made in this case. The motion to set aside the verdict and judgment was made under section 3256, Comp. Laws, on affidavits and oral evidence, and was heard October 25 and overruled October 27, 1890. On the 8th day of December, 1890, counsel for defendant presented to the trial judge a bill of exceptions, and requested that the same be signed and made a part of the record, which the judge refused to do, because the same was not presented within the time provided by statute, no extension of time within which to present it having been granted. In this there was no error. Comp. Laws 1888, §§ 3394, 3395. The appeal is on the judgment roll alone. We find no error in the record, and the judgment of the district court is affirmed.

ZANE, C. J., and BLACKBURN, J., concur.

(7 Utah 199)

HENDERSON *et al.* v. OGDEN CITY RY. CO.  
*et al.*

(Supreme Court of Utah. April 1, 1891.)

STREET RAILWAYS—FRANCHISE—EXCLUSIVE RIGHTS  
—INJUNCTIONS.

1. Under 2 Comp. Laws Utah 1888, § 3300, providing that an injunction may be granted when it appears by the complaint that plaintiff is entitled to the relief demanded, which consists in restraining the "commission or continuance" of the act complained of, the court may grant a mandatory, as well as a preventive, writ to a street-railroad company against a defendant who has piled obstructions on its road-bed.

2. Act Cong. July 30, 1886, providing that territorial legislatures shall not pass local or special laws in certain cases, among them, "granting to any corporation, association, or individual the right to lay down railroad tracks," and "granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise," does not prevent a city from granting to a corporation, in the exercise of a reasonable discretion, the right to lay down railway tracks in its streets, under general laws of the territorial legislature.

3. Such privilege may be granted to individuals as well as to corporations.

4. A grant to a street-railway company of the exclusive right to use the streets of a city is *ultra vires*, and cannot prevent the city authorities, in the exercise of the police power, when the public interest demands it, from granting another corporation or individual the right to use the same streets for a similar purpose.

Appeal from district court, first district; JAMES A. MINER, Justice.

L. R. Rhodes and T. J. Hudson, for appellants. H. P. Henderson and Ogden Hiles, for respondents.

ZANE, C. J. This is an appeal from an order granting an injunction restraining the defendants from incumbering the alleged road-bed of the plaintiffs' street railway, and from permitting the incumbrance placed thereon by them to remain. The order was made upon the complaint and answer, the oral testimony, and documentary evidence, and after the argument of the solicitors of the respective parties had been heard. The facts of the case, so far as we deem it necessary to state them, are as follows: On the 7th day of August, 1883, the city council of Ogden City adopted a resolution giving to the Ogden City Railway Company permission to construct and operate on Washington avenue a single or double tracked street railway. The resolution contained the following, with other conditions: "In cases such company shall not commence and prosecute the construction of its road as mentioned in this resolution, and shall not prosecute its extensions thereafter at least one mile every four years, the city reserves the right to grant to others the privilege of constructing railways upon all streets or parts of streets not actually occupied by Ogden City Railway Company's tracks." In pursuance of the resolution the company built a single line of railway track on Washington avenue, and in all respects complied with the resolution. The other defendant claims as mortgagee of the Ogden City Railway Company, and is acting under the rights thus acquired. On the 19th day of September, 1890, the plaintiffs obtained from Ogden City permission to lay a single or double track electric railway on Washington avenue and other streets of the city. Under this permission the respondents commenced the construction of their railway on the east side of the street, and on that portion unoccupied by the appellants' track, and laid down a part of it, and excavated and prepared other portions of the road-bed thereof, when the appellants took possession of it, and put ties and other obstructions thereon. The respondents filed their complaint to enjoin the alleged trespass and incumbrances, and upon a hearing upon an order to show cause the court granted a temporary injunction, that was restorative as well as preventive.

The contentions of the solicitors as to the rights of the parties upon the foregoing facts impose upon the court the consideration and decision of the following propositions: (1) Was the order appealed from erroneous because it was mandatory as well as preventive? (2) Was the permission given to the respondents to lay down their track contrary to the act of

congress prohibiting the territorial legislature from granting special or exclusive privileges? (3) Was the license under which the plaintiffs were constructing their railway invalid because given to individuals? (4) Under the resolution, was the appellant's right of way exclusive?

As to the first proposition: While it is undoubtedly true that injunctions are usually employed to prevent future injuries, they are sometimes granted to restore rights that have been lost. When the advantage to the wrong-doer that constitutes the injury has been gained surreptitiously or by fraud, and the retention of it constitutes a continuing injury, and the law affords no adequate remedy, equity will not withhold such remedial process. In such exigencies mandatory injunctions may issue on interlocutory applications. 1 High, Inj. (3d Ed.) §§ 2, 708. The evidence in the record shows that the plaintiffs, while engaged in constructing their road, suspended work during Sunday, and that the appellants in the interval took possession of it, and placed wooden ties and other obstructions upon it, and that the trespass was a continuing one, for which an action at law would not have been an adequate remedy. But counsel insist that the statutes of Utah only authorize a preventive writ; that a mandatory one is not included. The statute is as follows: "An injunction may be granted in the following cases: (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually." 2 Comp. Laws Utah 1888, § 3300. This statute provides that the commission or the continuance of the act may be restrained. By suffering their property to remain on respondents' road-bed the appellants continued the wrong. The act of placing it there had been done, but appellants were still occupying plaintiffs' works with their ties and other property. They were continuing the trespass. To prevent that continuation a mandatory injunction was necessary. We are of opinion that the legislature, by the law referred to, did not intend to deprive the courts of Utah of any part of that equitable jurisdiction with respect to injunctions recognized by that beneficent system of rules which constitutes equity. We hold that the district courts of Utah have the power, in proper cases, to issue mandatory as well as preventive injunctions.

With respect to the second proposition: The act of congress of July 30, 1886, is as follows: "The legislatures of the territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases." And after mentioning a number of subjects, the following language is used: "Granting to any corporation, association, or individual the right to lay down railroad tracks, or amending existing charters for such purpose. Granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever." The first clause quoted prohibits the ter-

ritorial legislature from granting to any corporation, association, or individual the right to lay down railroad tracks; and because the legislature could not grant to any corporation or individual such right it is argued that Ogden City could not give such permission. If that were so, then there would be no way by which any company or individual could obtain the right of way for a railway on any street in Ogden City or any other city in the territory, because there would be no other authority to which application could be legally made. The second clause above quoted prohibits the granting of any special or exclusive privilege, immunity, or franchise whatever by the legislature; and if the legislature may not enact a general law in pursuance of which a franchise may be secured in each case by application to the courts, (as it has done,) then no more companies can be incorporated in the territories. And if the rule is that the city cannot grant the right of way to any particular company or person because the legislature cannot do so itself, that rule is equally applicable to a large number of other subjects as to which it cannot act specially. As instances, the legislature cannot grant divorces, or change the names of persons; and if it cannot by general laws authorize some other tribunals or some officers or offices to exercise the necessary authority, then no more divorces can be granted or names changed; and so as to a great many other subjects. Upon a careful examination of the law under consideration the intent of congress is apparent. The law was designed to prohibit special legislation, and to prevent the evils thereof. The purpose was not to prevent the legislature from enacting general laws in pursuance of which such special duties might be performed by some other tribunal or by some officer. We are of the opinion that the city council of Ogden City, in the exercise of a reasonable discretion, may grant the right to lay down railway tracks in its streets.

The consideration and decision of the third point involves the right of natural persons as such to construct and operate railroads. In the nature of things, is there any sufficient reason why individuals, as such, should not be permitted to construct and operate railroads as well as natural persons through the instrumentality of corporations? A private corporation is a legal person, with power to act as a natural one to the extent that its charter authorizes it to. When the road is owned and operated by a corporation the stockholders own the road through the agency of the corporation, but the use is in the public. When individuals, as such, own and operate it, the property is in them, and the use is then in the public. In the first case, the proceeds of the business, after deducting expenses, is paid to the stockholders as dividends. In the latter, the individuals retain such earnings as are not consumed by expenses. Either can acquire the right of way by contract or in the exercise of the right of eminent domain when the law authorizes it; and neither can acquire it in the latter way without

such a statute. The rights of natural persons through the instrumentality of corporations are usually limited to one department or class of business; but without such instrumentality their rights extend to every field which their enterprise, their skill, or business capacity and inclinations may enable and cause them to enter. We do not find anything in business methods or in the fitness of things to prevent natural persons from constructing and operating railroads when they have the inclination, and can command the pecuniary means to do so; nor do we know of any statute in force in Utah, or any rule of law or adjudged case, against it. 1 Rorer, R. R. 8.

Lastly, was the appellants' right of way on the street exclusive? Equality before the law is a fundamental principle of all just governments. Competition in supply and demand regulates wages, prices, and values. The moral sense, the self-interest, and the inclinations of mankind amid the employments, pursuits, and transactions of civilized life give to competition this effect. It is the response of nature to the interrogations of human affairs. It is an important principle of that philosophy known as "political economy;" and laws preventing competition are usually regarded as contrary to public policy, and held to be of no effect. But sometimes the conditions of a particular business prevent competition. Reasonable tariffs and rates might enable one railway to accommodate the public when insufficient to support two or more; and one railway on a street might be sufficient to accommodate the travel on it; but it might be convenient for travel coming in from different neighborhoods to pass to a business center or other neighborhood on the same street for short distances, and they should be permitted to occupy a reasonable portion of it for that purpose. They should not be allowed to obstruct travel in other ways, or to interfere with the approaches to abutting property. To prevent this they should be confined to the common use of the same track. This could be accomplished by the imposition of suitable conditions at the time of granting the permission, or, when such conditions have not been exacted, by a resort to the law of eminent domain. Streets can only be occupied by railroads for public uses, not for private. Railways are permitted on the streets because they are believed to be beneficial to the public in furnishing a prompt, economical, and convenient mode of traveling upon them; and being in the public streets, the public, through its authorities, the city government, has a right to direct the location of their tracks therein, and to determine how much of the streets they may occupy; and such public authorities have also the power to adopt reasonable rules for the regulation of their business. Such railroads and their business are subject to the police power, which the government cannot divest itself of by contract or otherwise, and, being so possessed of it, it is its duty to make use of it whenever the public good demands that it shall. The legislature did not authorize the city council of Ogden City to grant to the appellants

the exclusive right of way upon the street in question, nor do we think it had the power to do it. Elliott, Roads & S. 565, 566; Jackson Co. Horse R. Co. v. Interstate Rapid Transit Ry. Co., 24 Fed. Rep. 306. We find no error in this record. The judgment of the court below is affirmed.

ANDERSON and BLACKBURN, JJ., concur.

(7 Utah 207)

OGDEN CITY RY. CO. v. OGDEN CITY *et al.*

(Supreme Court of Utah. April 1, 1891.)

EMINENT DOMAIN—STREET RAILWAYS.

1. Comp. Laws Utah 1888, § 8941 *et seq.*, provide that the right of eminent domain may be exercised in behalf of "steam and horse railroads," and that all rights of way for such purposes may be crossed or intersected by any other right of way or improvement, and may be subject to a limited use in common with the owner, when necessary for the public benefit. *Held*, that such right may be exercised in behalf of electrical street railroads.

2. A city granted plaintiff railway company the right to lay a double track in a street, and afterwards granted defendants the right to lay a double track electric railway in the same street. Before defendants commenced work, plaintiff sued to enjoin them from laying their tracks, and to have the ordinance giving them a right of way declared void, alleging that it (plaintiff) had constructed a single track, and that, if it were to lay down its other track, and defendants their two tracks, other modes of public travel would be obstructed, and also that defendants' poles and wires would interfere with plaintiff's rights as the owner of property abutting on the street. *Held*, that a demurrer to the complaint was properly sustained.

Appeal from district court, first district; JAMES A. MINER, Justice.

L. R. Rhodes and T. J. Hudson, for appellant. A. P. Heywood, H. P. Henderson, and Ogden Hiles, for respondents.

ZANE, C. J. The complaint filed in the court below in this case, among other things, alleged that on August 7, 1883, the city council of Ogden city adopted an ordinance granting to the plaintiff permission to lay down a double-tracked street railway on Twenty-Fifth street and Washington avenue, and that in June, 1890, the city, upon certain conditions named in the ordinance, gave the defendants permission to construct a double-track railway on the same streets, to be operated by electricity; that these are the main business streets of the city; that the plaintiff had constructed on them a single track, with turn-outs; that, if it were to lay down another, the two would occupy about 20 feet in width; and that, if two additional tracks, as threatened by the defendants, should be laid down, the streets would be so obstructed by the four tracks as to greatly interfere with other modes of travel; and that, if poles and wires, as threatened, should be placed in front of the property owned by plaintiff, it would be seriously damaged thereby. The complaint prays that the ordinance granting the permission to defendants to lay down their tracks may be declared null and void so far as it purports to grant to defendants any right to construct their road on the streets, and that they be enjoined from filing the bond exacted as one of the condi-



tions of the permit. A prayer for general relief is also added. To the complaint the defendants interposed a demurrer, which the court below sustained, and also refused an injunction. From the decision of the court the plaintiff has appealed to this court, and assigns it as error.

The points urged by plaintiff upon the argument of this appeal call for a consideration of the authority of the city council to give permission to individuals and corporations to construct railways upon the public streets, and to control their location and operation thereon. The city council of Ogden city, by virtue of its general authority over such streets, was authorized to permit street-car companies to construct and operate their roads upon them; but without special authority the council could not permit ordinary railroads, with trains propelled by steam-power, to do so. The permission is given to facilitate public travel, and for the benefit and convenience of the public. The permission to such companies cannot confer upon them an exclusive right. The right so given exists in common with the right to travel on the streets in wagons and by other vehicles, and on horseback and on foot, in all legitimate ways. Such persons or companies, in the observance of all reasonable care and caution, have the right to pass their cars over their tracks as often as the public convenience requires and the demand will justify. The cars have the right of way, and the travel by other means and in other ways must turn out, because it can and the cars cannot. The city authorities have the right to require the tracks to be so constructed and kept in repair that travel by other modes can conveniently and safely use them. It is the right and duty of the city to exercise such reasonable control over the construction, repair, operation, and business of street railways as the safety, convenience, and good of the public demands. The private rights of the owners and occupants of property abutting on the street must also be protected, for the law is that such abutters have an easement in the street appurtenant to their property of which they cannot be deprived without their consent, or without just compensation in pursuance of the law of eminent domain; and the council has the power, and it is its duty, to say that no more than a reasonable portion of the street shall be occupied by street railways, and it has no right to consent that more shall be so used. In his work on Municipal Corporations, Judge Dillon says: "The author regards the appropriation under legislative authority of a reasonable portion of the street for a horse railway, constructed on the gradual surface of the street, and used under municipal regulation in the ordinary mode, to be such a use as falls within the purposes for which the streets are dedicated or acquired under the power of eminent domain. When thus authorized, and so regulated by the public authorities as not to destroy the ordinary and usual street uses, this is a public use within the fair scope of the intention of the proprietor when he dedicated the street or was paid for property

to be used as a street. Such proprietor must be taken to contemplate all improved and more convenient modes of use which are reasonably consistent with the use of the street by ordinary vehicles and in the usual modes. \* \* \* The limitations being that such use must not deprive the abutter of his property rights and easements in the streets, or destroy the ordinary uses of the streets as a public and common highway open to all." If separate tracks for two or more railroad companies on a street with cars operated on them would increase the hazards, or seriously obstruct travel thereon in other ways, or interfere with the rights of abutters, such individuals or companies should be limited to the common use of the same track or tracks. This could be done by suitable conditions, reservations, or limitations at the time of the grant of the right of way, or, in the absence of them, in pursuance of the law of eminent domain. Section 3841 of the Compiled Laws of Utah is as follows: "The right of eminent domain may be exercised in behalf of the following public uses: \* \* \* (3) Wharves, \* \* \* steam and horse railroads. \* \* \* Sec. 3843. The private property which may be taken under this chapter includes. (1) All real property belonging to any person. (2) Lands belonging to this territory, or to any county, incorporated city, village, or town, not appropriated to some public use. (3) Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated. \* \* \* (5) All rights of way for any and all purposes mentioned in section 3841, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed, or intersected by any other right of way or improvement or structure thereon. They shall also be subject to a limited use in common with the owner thereof when necessary; but such uses of crossings, intersections, and connections shall be made in manner most compatible with the greatest public benefit and least private injury." Electrical railways were not mentioned in the act, but horse and steam railways were. At that time horse and steam power was used, because thought to be the best. Electricity was not then known as a car-motor; but ingenuity and invention have since subjected it to that use, and it is being substituted largely for the others; and we have no hesitation in holding that under the statute the right of eminent domain may be exercised, in proper cases, in behalf of electrical roads as well as for steam and horse railways.

While the owner of a railway may have an interest in its property, that interest is not more inviolable and sacred than other interests in property. The private interest is one thing, and the public use is another. The property is taken for the public use, not to transfer the interest that one person has in the property to another person. Such transfer incidentally and necessarily follows in order that the public benefit may be enjoyed. When the

tracks of one company on a street are sufficient for the business of two or more companies they should all be required to use them, and the hazards and inconveniences and obstructions to travel by other modes should be limited to the tracks of the one company. If the interest of each company in the railroad property used in common is sufficient to enable them to accommodate the public travel, that is sufficient. It appears from the allegations of the complaint that the plaintiff had laid down but one track on the streets named, and that the defendants had not commenced the construction of theirs. The court below was asked to declare the ordinance giving the defendants the right of way on them void. If it had been so decreed the defendants could not have laid down one track, and it does not appear that one additional track would have materially obstructed travel by other modes, or that it would have interfered with plaintiff's private easement on the streets appurtenant to its abutting property. The effect of the decree asked by the plaintiff would have been to deny the defendants any permission on the street, even under the law of eminent domain; for any rights obtained under that law would not have authorized them to construct their road on the street without the permission of the city council. The allegations of fact are not sufficient to warrant an injunction on the ground that the construction of the defendants' railway would damage the abutting property by materially interfering with rights appurtenant thereto. Except so far as we have considered this case it is analogous to the case of *Henderson v. Railway Co.*, ante, 286. (decided at the present term.) The judgment of the court below is affirmed.

ANDERSON and BLACKBURN, JJ., concur.

(7 Utah, 215)

STOWELL *et al.* v. JOHNSON *et al.*

(Supreme Court of Utah. April 2, 1891.)

IRRIGATION—APPROPRIATION OF WATER—RIPARIAN RIGHTS.

1. Plaintiffs sued to enjoin defendants from interfering with their right to divert and use the waters of certain creeks, to furnish water to a city during the winter season, from November 15th to April 15th. Defendants objected on the ground that, when plaintiffs' land was public land, they owned land below it, and claimed the right to use the water of said creeks for irrigation purposes, from April 1st to November 1st. The court's findings did not show that defendants needed during the winter season more water than was left them, and it appeared that they had got along with it for a number of years. *Held*, that an injunction was properly granted.

2. The doctrine of riparian rights is not in force in Utah, so as to prevent the owner of land from diverting the waters of a stream for purposes of irrigation and domestic use, under the laws of the territory.

Appeal from district court, first district.

*F. M. Allison, Jr., and Smith & Smith*, for appellants. *Kimball & White and L. R. Rogers*, for respondents.

BLACKBURN, J. The appeal in this case is taken for the purpose of modifying the decree made in the first district court, and

the claim to have the decree modified is based upon the findings of facts made by the court, (the evidence not being in the record,) and the common-law doctrine of riparian rights. The parts of the decree complained of are as follows: "That the plaintiffs are the owners of the right to use all the waters of said Waterfall Canon creek and one-half of the waters of said Strong's Canon creek during the winter season, to-wit, between the 15th day of November and the 15th day of the following April of each and every winter season, for domestic purposes, and for the purpose of furnishing the inhabitants of Ogden City with water, and the enjoining of defendants from interfering with such use." The findings of facts by the court, so far as the questions made are concerned, are substantially as follows: "That the plaintiffs are the owners of certain lands described in the complaint; that the defendants are the owners in fee of distinct parcels of land lying west of the lands of the plaintiffs; that they have been such owners since and prior to the year 1880; that defendants' lands are cultivated, and all of the lands of both plaintiffs and defendants require irrigation. (3) Waterfall Canon creek and Strong's Canon creek rise in the mountains east of the lands of plaintiffs, and flow across the lands of the plaintiffs, making a junction about the west line of plaintiffs' lands, and after the junction the stream is called and known as 'Canfield Creek,' and that this Canfield creek flows westerly in its natural channel across the lands of defendants. (4) That these streams are the only sources of water available for the irrigation of the lands of plaintiffs and defendants. (5) That the several defendants in this action, and their grantors and predecessors in interest, and while the several pieces and parcels of land described in the complaint as owned in severalty by the plaintiffs were unoccupied, unimproved, uncultivated, and unclaimed lands of the United States, to-wit, in the year 1848, by means of dams placed in and across the channel of Canfield creek below and west of the two streams and also in and across the channel of Strong's Canon creek, above and east of the junction of the aforesaid streams, and also by means of ditches and canals tapping the said Strong's Canon creek at various places, and leading therefrom, conveyed and appropriated to, in, and upon the several pieces of land so owned by the defendants, their grantors and predecessors in interest, for the irrigation of the said lands of the said defendants, and for domestic purpose, all of the waters of said Canfield creek, which creek was then, and ever since has been, and now is, composed of the waters of Waterfall Canon creek and Strong's Canon creek, which use aforesaid was a necessary and beneficial use thereof. (6) That use, diversion, and appropriation by the defendants and their grantors and predecessors in interest of all of the waters of said Canfield creek was so made fully and completely during each and every part of each and every year while the said pieces and parcels of land now owned by the several plaintiffs herein were unclaimed, unimproved, and

unoccupied lands of the United States, and the several defendants, their grantors and predecessors in interest, did so use, during each and every part of each and every year, and until the interruption in said use hereinafter named, all of the waters of Canfield creek, and of the two said tributaries thereof, except," etc. "(10) The irrigating season is from the 1st of April until the 1st of November. (11) That between the 1st of November, 1882, and the 1st of April, 1883, the plaintiffs, by means of pipes laid for the purpose, diverted one-half of Strong's Canon creek, and all of the waters of Waterfall Canon creek, during the winter season, and up to the commencement of this suit, and have continued to so divert it, for the purpose of furnishing Ogden with water. (12) That the plaintiffs have ever since November, 1882, and up to the beginning of this suit, continued to divert one-half of Strong's Canon creek, and all of the waters of Canfield creek below the junction.

We think the findings of fact support that part of the decree complained of. It is not found that the defendants need on their lands water for irrigation during the winter season, but the finding is that the irrigating season is from April to November. Nor is it found that the defendants need during the winter season more water than one-half of the waters of Strong's Canon creek, and all of the waters of Canfield creek below the junction. On the contrary, they seem to have got along with that amount of water from 1882 until this suit was commenced. Therefore this decree ought to be affirmed, unless the other contention of the defendants is the law of this territory; that is, that the common-law doctrine of riparian rights is in force, and that when they, their grantors and predecessors in interest, purchased their land from the United States, the land above them was unoccupied, and the water unappropriated, and that they now are legally entitled to have the water flow as it was wont to flow when they, their grantors and predecessors in interest, purchased it, undiminished in quantity, and not deteriorated in quality.

Riparian rights have never been recognized in this territory, or in any state or territory where irrigation is necessary; for the appropriation of water for the purpose of irrigation is entirely and unavoidably in conflict with the common-law doctrine of riparian proprietorship. If that had been recognized and applied in this territory, it would still be a desert; for a man owning 10 acres of land on a stream of water capable of irrigating a thousand acres of land or more, near its mouth, could prevent the settlement of all the land above him. For at common law the riparian proprietor is entitled to have the water flow in quantity and quality past his land as it was wont to do when he acquired title thereto, and this right is utterly irreconcilable with the use of water for irrigation. The legislature of this territory has always ignored this claim of riparian proprietors, and the practice and usages of the inhabitants have never considered it applicable, and have never regarded it. So with Colorado, early in

its history, by a decision of its highest court, it was set aside. *Yunker v. Nichols*, 1 Colo. 551. But defendants contended that their right to have water flow in Canfield creek, as it was wont to when their grantors and predecessors in interest acquired title to the land, is a vested right, and is not a rightful subject of legislation. In this arid country, that must remain a desert without the use of water for irrigation, if anything is a rightful subject of legislation it is the ownership of the water, and use and appropriation of the waters of the running streams for irrigation and domestic use. In support of their contention, the defendants cite *Sturr v. Beck*, 133 U.S. 541, 10 Sup. Ct. Rep. 350. That decision was made in an appeal from the supreme court of the territory of Dakota, where the statutes and climatic conditions are very different from those in this territory. The full force and pith of the opinion is founded in its concluding paragraph: "Thus under the laws of congress and the territory, and the applicable custom, priority of possession gives priority of right. The question is not as to the extent of Smith's interest in the homestead, as against the government, but whether, as against Sturr, his lawful occupancy, under the settlement and entry, was not a prior appropriation which Sturr could not displace. We have no doubt it was one of the statutes of Dakota upon which this decision is made, and it is as follows: 'Sec. 255, (Civil Code.) The owner of land owns water standing therein, and flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature, over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same.' How unlike this statute is to the whole course of legislation in this territory in reference to water-rights. Our views are supported by *Pom. Rip. Rights*, § 105. We think there is no error in this decree. Therefore the judgment is affirmed.

ZANE, C. J., and ANDERSON and MINER, JJ., concur.

(7 Utah 227)

HARKNESS *et al.* v. WOODMANSEE.

(*Supreme Court of Utah*. April 2, 1891.)

RIGHT OF WAY—PRESCRIPTION—ADVERSE POSSESSION.

1. 2 Comp. Laws Utah 1888, §§ 3132, 3133, 3137, require that a person defending an action against one holding adversely must have been in possession within seven years before commencement of the action, and provide that possession will be deemed adverse only where the land has been protected by a substantial inclosure, or where it has been cultivated, or the expense of irrigation paid, and that in all cases the taxes must have been paid by the adverse claimant. *Held*, that one who merely uses part of an adjoining lot as a means of exit to the street for the statutory period does not acquire a right of way by adverse possession.

2. Where a person opens a way for the use of his own premises, and another uses it without causing damage, the presumption is that his use was permissive, and, in the absence of evidence

to the contrary, he does not acquire a right of way by prescription.

Appeal from district court, first district; H. P. HENDERSON, Justice.

*Smith & Smith*, for appellants. *N. Tanner, Jr.*, for respondent.

**ZANE, C. J.** It appears from the evidence in this record that defendant owned a lot with improvements thereon in Ogden City; that the lot had a north frontage of 60 feet on Twenty-Fourth street, and that it extended south 100 feet, and was bounded on the west by Grant Avenue; that adjoining this lot on the east the plaintiffs own a lot, with improvements on it, and that they claim a right of way from their lot to Grant Avenue over the south 10 feet of defendant's lot. The defendant having erected a building on this 10 feet, the plaintiffs filed their complaint, asking the court to decree the removal of it, and that defendant might be enjoined from obstructing their right of way. Upon a hearing of the case the court found that the plaintiffs had no right of way over defendant's land, and so decreed. The plaintiffs have brought the case here by appeal from that decree.

While the public may acquire a right of way over private property in either of three ways, viz.: (1) By condemnation in pursuance of the law of eminent domain; (2) by dedication; (3) by such continued use as gives a prescriptive right,—a private way can only be obtained in one of the two modes last mentioned. The owner may expressly set his land apart to be used as a public road or a private way; and the public in the one case, or the private person in the other, may accept the offer, and complete the dedication. An intent to dedicate must be expressed or implied from language or conduct, and an intent to accept must be expressed or implied from language or conduct, to make the dedication. The right to a public road or private way by prescription arises from the uninterrupted adverse enjoyment of it under a claim of right known to the owner for the requisite length of time. Anciently the right to the easement arose by prescription from the use of the land for so long a time that there was no existing evidence as to when such use commenced. Its origin must have been at a time "whereof the memory of man runneth not to the contrary." Later the rule was changed by limiting the time of uninterrupted possession to 20 years. Washburne, in his work on Easements, says: "The fiction of presuming a grant from twenty years' possession or use was invented by the English courts in the eighteenth century, to avoid the absurdities of their rule of legal memory, and was derived by analogy from the limitation prescribed by the statute of 21 Jac. I. c. 21, for actions of ejectment, not upon a belief that a grant in any particular case has been made, but on general presumption. \* \* \* This period, unless other provision was made in local statutes of the state in which the questions have arisen, has been assumed to be the term of twenty years. \* \* \* The result has therefore been that the modern doctrine of prescrip-

tion requires merely a use and enjoyment of at least twenty years, instead of the former requirement of immemorial enjoyment." Washb. Easem. (4th Ed.) 125, 126. The rule as to time of use or enjoyment necessary to create a presumptive grant has been further changed by analogy to the periods of limitation for quieting titles to land. "What shall be taken to be a sufficiently long period of use or enjoyment to create a prescription or presumptive grant in the modern use of the term is understood to correspond with the local period of limitation for quieting titles to land." Id. 148. While the right of the owner of one parcel of land, by reason of such ownership, to use the land of another as a private way, as claimed in this case, is not inconsistent with the general property being in the owner, yet that general property without the use is of but little value. The title to land is of no value with the right to the permanent use in another person or in the public. Therefore all the facts from which the statute of limitations in effect presumes the grant must exist before the right of prescription arises by analogy to such statute. The presumption is in effect the same whether the right is by prescription or by the statute. The provisions of the seven-years statute of limitations of this territory, upon which the plaintiffs rely, are as follows: "No cause of action or defense to an action founded upon the title to real property, or to rents or profits out of the same, shall be effectual unless it appears that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person was seised or possessed of the premises in question within seven years before the commencement of the act in respect to which such action is prosecuted or defense made." "In every action for the recovery of real property or the possession thereof the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title for seven years before the commencement of the action." "For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only: (1) Where it has been protected by a substantial inclosure; (2) where it has been usually cultivated or improved; (3) where labor or money has been expended \* \* \* for the purpose of irrigating said lands, amounting to the sum of five dollars per acre: provided, however, that in no case shall adverse possession be considered established under the provisions of any section or sections of this Code unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and the party or persons, their

predecessors and grantors, have paid all the taxes \* \* \* which have been levied and assessed upon such land according to law." 2 Comp. Laws Utah 1888, §§ 3132, 3133, 3137. The statute does not, in effect, presume a grant and give the person relying upon it the title from seven years' possession alone. The presumption is made from the fact that the land was held adversely; and to make the holding adverse the land must have been protected by a substantial inclosure, or it must have been usually cultivated or improved, or labor or money must have been expended to irrigate it, amounting to the sum of five dollars per acre. And in either case the occupation and claim must have been continuous for the seven years, and during that time the claimant, his predecessors or grantors, must have paid all taxes levied and assessed upon the land according to law. This statute does not apply to rights of way or any other class of easement by prescription. It can only be applied by analogy. The plaintiffs' use and enjoyment of the land in dispute, or the facts attending the same, were not such as the statute above quoted required, or their equivalent; hence a prescriptive right cannot arise in favor of the plaintiffs therefrom by analogy thereto. It is conceded that the use and enjoyment, such as it was, was for less than 20 years, so that period of limitation cannot apply. The evidence in the record proves that defendant was using the strip of land in dispute as a way to the rear of his own building; that he had gates on it a part of the time; that he maintained a platform on the side next to his building a large portion of the time, which occupied three or four feet of the way; and that his tenant was accustomed to keep a team standing south of the platform, and at such times the entire way was occupied thereby; that defendant also had a privy on the ground a portion of the time. The evidence tends to establish that the plaintiffs' use was simply permissive, and that defendant was not aware that plaintiffs were using his land under a claim of right. Where a person opens a way for the use of his own premises, and another person uses it also without causing damage, the presumption is, in the absence of evidence to the contrary, that such use by the latter was permissive, and not under a claim of right. Washb. Easem. 151. The decree of the court below is affirmed.

ANDERSON, MINER, and BLACKBURN, JJ.,  
concur.

(7 Utah, 235)

SPANISH FORK CITY *et al.* v. HOPPER *et al.*

(Supreme Court of Utah. April 1, 1891.)

LIMITATIONS OF ACTIONS — PLEADING STATUTE —  
WATER-RIGHTS — DEMURRER — WAIVER.

An answer, which merely alleges that an action for taking and diverting water was barred by the statute of limitations, is not a good plea of that statute, as it does not state the section of the Code relied on, as required by Comp. Laws Utah, § 3244, nor set out the facts constituting the defense.

2. Parties whose rights are subordinate to those of plaintiffs need not be joined, although

they and plaintiffs are tenants in common of the water.

8. Where defendants, after answering, demurred to the complaint, and the demurrer was overruled, exception thereto was waived by going to trial on the answer, when it contained no objection to the complaint.

Appeal from district court, first district;  
J. W. BLACKBURN, Justice.

Comp. Laws Utah, § 3244, is as follows: "In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section [giving the number of the section and subdivision thereof, if it is so divided, relied upon] of the Code of Civil Procedure; and if such allegation be controverted the party pleading must establish, on the trial, the facts showing that the cause of action is so barred."

Booth, Wilson & Wilson, for appellants.  
W. H. King, A. Saxey, George Sutherland,  
and S. R. Thurman, for respondents.

MINER, J. This action was commenced by the plaintiffs against the defendants in the first district court at Provo, June 4, 1889, to prevent and restrain the defendants from taking, diverting, or obstructing any of the waters of the Spanish Fork river or its tributaries in Utah county; plaintiffs claiming to be joint owners by prior appropriation and use of the waters of said river for irrigation and domestic purposes. The several separate answers of the defendants were filed June 15, 1889, and a joint demurrer filed May 9, 1890, was overruled May 12, 1890, and the court proceeded to try the case without a jury, at the close of which trial a decree was entered for the plaintiffs. The defendants appeal. The defendants assign the following errors of law and fact: "First. The third finding is unsustainable, for the reason that no proof of transfer of water-right from prior appropriators to the plaintiffs was before the court. (1) The court erred in overruling the demurrer of defendants to the complaint herein. (2) The court erred in finding for the plaintiffs in this: that no special damages to the plaintiffs was alleged or proven. (3) The court erred in finding for the plaintiffs in this: that the decision is not the legal result of the evidence, and that it is against the law, for the reason that the defendants have held open, peaceable, uninterrupted, and continuous use of the waters in dispute for the period of 7 years. (4) The court erred in distributing by its decree water to a party not a party to the action, namely, the South-East Irrigation Company. (5) The court erred in making a decree where all the parties in interest were not before the court in this: that the Lake Shore Canal Company, and the East Bench Canal Company were not represented in the action. (6) The Lake Shore Canal Company and the East Bench Canal Company were not before the court.

We have not been favored with the defendants' brief, but from the record we conclude that as to the first assignment of error the evidence tends to show that the original appropriators of the water organized themselves into the various irri-

gation companies, who were plaintiffs in this case, and thereafter received their water through the companies. Soon after the irrigation companies were organized they took charge of the water, and distributed it upon the lands of their stockholders and others, who were the original appropriators. There was also proof that the transfer of the water-rights had been made by the appropriators to some of the irrigating companies. If the transfer of water-rights was not strictly formal it was not a matter which the defendants could take advantage of. The testimony tends to show that the plaintiffs and their predecessors in interest had appropriated all the waters which were awarded to them prior to the date that any of the defendants made any appropriation, and, although there is a conflict in the proof bearing upon this question, the court below seems to have passed correctly on the matter presented.

1. The demurrer of the defendants to the complaint was filed several months after their answer, and was overruled by the court, and the defendants thereupon went to trial upon their answer. No objection to the complaint appears in the answer. They therefore waive their exception to the order of the court in overruling the demurrer.

2. The statute of limitations was not pleaded. The answer simply says that the action is barred by the statute of limitations. This is clearly an insufficient plea, and raises no issue in the case. The answer should have stated and pleaded the section of the Code of Civil Procedure relied upon, or should have stated the facts constituting the defense. 2 Comp. Laws Utah, p. 251, § 3244; Tunnel Co. v. Stranahan, 31 Cal. 387; Howell v. Rogers, 47 Cal. 201; Caulfield v. Sanders, 17 Cal. 569.

3. The South-East Irrigation Company is not mentioned in the decree, and the court did not attempt to distribute any water to them. Their case was in no way considered by the court in its final determination.

4. The Lake Shore and East Bench Companies were not joined as plaintiffs, nor were their rights considered in this case. It appeared incidentally in the testimony that whatever rights they had were subordinate to those of the plaintiffs. It was not necessary to join them in the suit, even though they were tenants in common with the plaintiffs. The rule is well settled that one tenant in common of water may sue alone to protect or recover it from a trespasser, or one using it without right. Water Co. v. Perdew, 65 Cal. 453, 4 Pac. Rep. 426; Carpentier v. Webster, 27 Cal. 524; Waring v. Crow, 11 Cal. 367. Upon the whole record we discover no error. The judgment and decree of the lower court is affirmed.

ZANE, C. J., and ANDERSON, J., concur.  
(7 Utah, 233)

COCHRANE v. BUSSCHE.

(Supreme Court of Utah. April 1, 1891.)

APPEAL—REVIEW—PRESUMPTIONS—DEFECTIVE RECORD.

Where an attachment sued out on the ground of defendant's non-residence is dissolved

by the trial court, and the evidence on which its action is based is not all contained in the record on appeal, the supreme court will assume that the trial court acted on sufficient evidence.

Appeal from district court, third district; C. S. ZANE, Justice.

Stephens & Schroeder, for appellant.  
Bennett, Marshall & Bradley, for respondent.

ANDERSON, J. This is an appeal from an order of the third district court dissolving an attachment sued out in this action on the ground that the defendant was not residing within the territory. The defendant was residing in Salt Lake City from March, 1888, to August, 1889, with his wife and child. On the date last named his wife separated from him, and went to Denver, Colo., to live, and where she still resides. McCornick & Co. and Walter Pavey were summoned as garnishees, and answered that Pavey held certain moneys belonging to McCornick & Co. and the defendant, to which each were entitled to certain portions thereof. The affidavits further tended to show that the defendant was not assessed with any property in Salt Lake City for the year 1890, and that the defendant had left this territory with the expressed intention of going to Galveston to make investments. The defendant has filed an amended or additional abstract, from which it appears that the defendant resided in Salt Lake City from February 12, 1888, to April 8, 1890, when he left for Galveston, intending to proceed thence to Europe for his health; that he did not go to Galveston, but proceeded directly to Europe, and remained there until August, 1890; that while absent from Utah Territory, he had a room in Salt Lake City, in which he slept when there, and in which he stored his furniture, and left the same in the care of one McHugh; that while absent he continued to pay the rent of the room, and never thought of changing his residence; that his stay in Europe was prolonged because of ill health; that he left his business interests in Salt Lake City in charge of W. S. Pavey, giving a list of property left by him in the hands of Pavey, and that he had no business interests outside of Utah. Also the affidavit of Pavey was filed to the effect that the defendant had told him he was going to Galveston on a visit, and thence to Europe for his health, and would soon return to Utah; that his absence would be temporary only; that while absent he corresponded with affiant, and in his letters frequently expressed his intention of returning to Utah, and to there continue the conduct of his ordinary business. The court dissolved the attachment, and this appeal is from the order of dissolution made by the court.

The record shows that the motion to dissolve the attachment was heard and determined upon affidavits on behalf of the respective parties, and upon the oral testimony of O. W. Powers, whose testimony is not contained in the record. The court dissolved the attachment upon the ground that the defendant was not a non-resident of the territory. All the evidence before the court, and on which the

court acted in dissolving the attachment, not being in the record, we must presume the order of the court dissolving the attachment was based on sufficient evidence. The order of the district court is therefore affirmed.

MINER and BLACKBURN, JJ., concur.

(7 Utah, 182)

KNAUSS *et al.* v. CAHOON *et al.*

(Supreme Court of Utah. April 1, 1891.)

JOINT VENDEES—DEED TO ONE—ACCOUNTING.

Plaintiffs and defendants agreed to purchase land at a certain price, each to pay one-third of the purchase money. The first installment was paid, but defendants, in whose names the deed was taken, paid the balance without notice to plaintiffs, and sold the land at an increased price. *Held*, that plaintiffs were entitled to one-third of the sale price, less the balance due from them on the purchase price.

Appeal from district court, first district; H. P. HENDERSON, Justice.

*Kimball & Allison, and Smith & Smith*, for appellants. *Sutherland & Judd and Wenner & Maloney*, for respondents.

BLACKBURN, J. In this cause both parties appeal. The plaintiffs appeal from the amount of recovery. It is to be decided only on the pleadings, findings of facts, conclusions of law, and judgment, as the evidence taken at the trial is not in the record. We do not think a lengthy opinion on the plaintiffs' appeal is necessary. It is sufficient to say that it is not well taken. One of the findings of fact is that Edwards, one of the plaintiffs, Cahoon and Robinson, two of the defendants, entered into an agreement to purchase certain lands of the Union Pacific Railroad Company, to share equally in the payment for the land, and to own equal interests when paid for, and the deed, when taken, was to be in the name of Edwards for the benefit of the three. The land was bought and paid for, and the deed taken in the name of Cahoon and Robinson. Also Edwards sold one-half of his interest to the other plaintiff, Knauss. The purchase price was over \$1,000. Afterwards Cahoon and Robinson sold the land for \$12,000. The court found as a matter of fact this enterprise was a partnership one, and the basis of recovery by the plaintiffs, if they were entitled to recover at all, was the price for which the land was sold. We think that decision was right, if the property was partnership; and we are bound by the findings of the court, the evidence not being in the record. The partners, in settling among themselves, each was entitled only to his share of the profits of the enterprise, calculated on the basis of what the property sold for, unless the partner making the sale fraudulently sold the property for less than it was worth; and the trial court did not so find. Therefore, in so far as the appeal of the plaintiffs is concerned, the judgment of the trial court is affirmed. The trial court found the facts substantially as follows: "The land in question was owned by the Union Pacific Railroad Company, and was for sale at a certain price, to be paid for in install-

ments. Edwards, one of the plaintiffs, entered into an agreement with the defendants Cahoon and Robinson that they would buy the land, each paying one-third of the purchase money, and each own one-third of the land when paid for. Edwards sold one-half of his interest to the other plaintiff, Knauss. The first installment on the land of \$240 was paid; the plaintiffs paying \$80, and the defendants Cahoon and Robinson each paying \$80. The intermediate installments were not paid, and the company, when the last installment fell due, notified Cahoon and Robinson that payment must be made, or the contract would be forfeited. This notice was concealed from the plaintiffs, and Cahoon and Robinson paid up for the land, and took the deed in their own names, and afterwards sold it for \$12,000, a great advance on the price paid. When Knauss found out the facts he offered his share in the purchase money, and demanded a settlement of Cahoon and Robinson, and they refused to allow him or Edwards anything." The court on these facts decreed that, after deducting the excess of the purchase money they had paid, they should account to the plaintiffs for the sale price of the property, and gave the plaintiffs a judgment therefor. We think the judgment is right. How the court could have decreed otherwise, keeping in view the equities of the parties, is beyond our comprehension; and it makes no difference whether the venture was a partnership, or whether the parties took several interests in the land as tenants in common. We think the statute of frauds has no application to the case whatever. The principles of equity upon which this decision is made are familiar and rudimentary, and no authorities need be cited in their support. The decree of the lower court is affirmed.

ZANE, C. J., and ANDERSON and MINER, JJ., concur.

(7 Utah, 186)

HELFRICH v. OGDEN CITY RY. CO.

(Supreme Court of Utah. April 1, 1891.)

INJURY TO RAILROAD EMPLOYE—CONTRIBUTORY NEGLIGENCE—REVIEW ON APPEAL.

1. Defendant, a railroad company, maintained and operated its track about 12 to 18 inches from a line of telegraph poles. Deceased, an engineer, running one of defendant's locomotives, put his head and shoulders outside of the cab while in motion, and was looking backwards, when his head was crushed against one of the poles, and he was killed. Defendant had been running the engine about eight days before he was killed, and prior to his employment had gone over the line. Upon the day of the accident he was told to keep his head inside of the cab, or he would get hurt. *Held*, that the carelessness of deceased was the proximate cause of his death, and defendant was not liable therefor.

2. Where the verdict of the jury is manifestly against the evidence, and the trial judge refuses to set aside the verdict, it is the duty of the appellate court to reverse the case, and grant a new trial.

Appeal from district court, first district; H. P. HENDERSON, Justice.

*Smith & Smith, Kimball & Allison, Miller & Maginnis, and Bowman & Rogers*, for appellants. *O. W. Powers and W. H. Dickson*, for appellee.



**BLACKBURN, J.** This suit is brought to recover damages for the death of O'Hare, claimed to have been caused by the negligence of the defendant. The deceased was in the employ of the defendant company as engineer managing the locomotives that moved its trains. The negligence claimed is the maintenance by the defendant company of its track too near a line of telegraph poles. It appears from the undisputed evidence that the deceased went the whole length of the track of the road before he was employed, and knew how close to the track the poles were; that he had been running the engine about eight days before he was killed; that the day he was killed he was told he had better keep his head inside the cab, or he would get hurt; that he put his head and shoulders outside the cab while the engine was in motion, and was looking back, and his head was crushed against one of the poles, and he was killed. It further appears that the defendant company maintained its track about 12 to 18 inches from the line of telegraph poles, and operated it in that condition. We think it was negligence in the company in maintaining and operating its road so near the line of telegraph poles; but this case turns upon the question as to whether the carelessness of the deceased caused his death. If he was negligent, and did not use due care, reasonable in the situation, and his want of such care contributed to his injury, the plaintiff cannot recover. This doctrine is so well known and understood that no authority need be cited in its support; but we cite *Quibell v. Railway Co.*, 25 Pac. Rep. 734, (decided at this term of this court.) In this case the evidence without contradiction shows that the decedent at the time he was killed had his head and shoulders to half way between his shoulders and elbows outside of the cab window, and was looking back, and in this position his head crashed against one of the poles, and he was killed. His act not only seems careless, but more like the rash act of a man reckless of his life. We think the verdict of the jury is so manifestly against the undisputed evidence that the court below should have granted a new trial. The rule is that, where the verdict of the jury is manifestly against the evidence, and the trial judge refuses to set aside the verdict, it is the duty of the appellate court to reverse the case, and grant a new trial. *Keaggy v. Hite*, 12 Ill. 100; *Hilliard*, New Trials & App. 336, 339, and authorities therein cited. In this case the carelessness of the decedent clearly was the proximate cause of his death, and the jury ought to have found for the defendant. The case is reversed, and a *venire de novo* awarded.

ZANE, C. J., and ANDERSON and MINER, JJ., concur.

*BATE et al. v. AMERICAN FORK CITY et al.*  
(Supreme Court of Utah. April 2, 1891.)

REVIEW ON APPEAL—EVIDENCE—NEW TRIAL.

The supreme court will not reverse an order setting aside a verdict for plaintiff, and granting a new trial, where the evidence is vague

and uncertain, and does not so appear in the record that the court can reach a satisfactory conclusion as to its effect.

Appeal from district court, first district; J. W. BLACKBURN, Justice.

*D. Evans and W. H. Dickson*, for appellants. *Thurman & King, Geo. Sutherland, J. G. Sutherland, and Arthur Brown*, for respondents.

**ZANE, C. J.** The plaintiffs alleged in their complaint in this case that they were the owners of a certain bathing and pleasure resort on Utah lake; and that they were the owners of, and in the lawful possession of, bath-houses, a pavilion, dancing hall, refreshment room, and other buildings used by them in carrying on and conducting their business; and that defendants unlawfully, wantonly, and maliciously entered upon their premises, tore down and destroyed their buildings, and broke up and destroyed their business. For this alleged trespass the plaintiffs claimed damages in the sum of \$2,500. The defendants filed an answer to the complaint, in which they denied the plaintiffs' ownership, and their right of possession of the ground from which plaintiffs' buildings were removed, and alleged that plaintiffs were wrongfully occupying with such buildings and business a public street of American Fork City, and that such buildings were removed by direction of such city; and that no unnecessary injury was done to them in such removal. Upon the issues so found, the case was twice tried in the district court, and both the verdicts were rendered against the defendants. The last verdict was for \$900, and from the judgment of the court setting it aside, and granting a new trial, this appeal was taken. Several grounds for the new trial were insisted upon by the defendants, and the record does not show which of them the court regarded as sufficient. We assume, however, that the verdict was set aside upon the second ground; which is, in substance, that a clear preponderance of the evidence showed that the land upon which the buildings removed stood were within a public street of American Fork City, that this land had been dedicated to the uses of a public street opened by the city, and used as such by the public. The pleadings and the evidence and proceedings on the trial cover 280 printed pages. A diagram was used on the trial to which witnesses referred that is not found on the record, and without it much of the testimony cannot be fully understood; and much of the evidence is vague and uncertain. Owing to this, we are unable to reach a perfectly satisfactory conclusion as to the effect of the evidence. We presume that the judge of the trial court set aside the verdict, because he found that a clear preponderance of the evidence showed that the buildings removed were upon land that had been dedicated to the uses of a public street, and that, being in a street, it was the right and duty of the city to cause them to be removed, and that they were removed without unnecessary injury to them. In view of the evidence, we are unable to say that the court reached a wrong conclusion. This court

will not reverse a judgment of the lower court, except for manifest error. The judgment appealed from is affirmed.

ANDERSON and MINER, JJ., concur.

(7 Utah, 239)

ALLEN v. UNION PAC. RY. CO.

(Supreme Court of Utah. April 2, 1891.)

MASTER AND SERVANT—DEFECTIVE APPLIANCES—  
NEGLECTANCE.

1. In an action against a railroad company for personal injuries to a freight brakeman caused by the giving way of a round of a car ladder by reason of the rottenness of the wood, plaintiff cannot be asked as an expert railroad man whether, in his opinion, the inspectors would have discovered the defect if the car had been examined.

2. Inspectors of railroad cars are not bound to apply physical force to the rounds of the ladder on a freight car, in order to test its condition, unless they see some indication of weakness.

3. A railroad company is not liable for injuries to its employees caused by defects in its cars, unless by the use of reasonable diligence the defect could have been discovered.

Appeal from district court, first district; JAMES A. MINER, Justice.

P. L. Williams, for appellant. L. R. Rogers, and Smith & Smith, for respondent.

ZANE, C. J. This is an appeal from a judgment of the district court held at Ogden. The plaintiff was employed by defendant as a brakeman on one of its freight trains, and while ascending a ladder on a car which it was hauling for another company a step gave way, and he fell to the ground, and the fingers of one of his hands were crushed under a wheel. The car was an old one; one witness stated that it was not an "exceedingly old car, and yet it was not a new one." It appears from the evidence that the wood around the screw that held one end of the round was rotten, and that the weight of the plaintiff pulled it out; that the round was fastened to the car in the ordinary way. The evidence fails to show that the defect could have been discovered by inspection without the application of manual or other physical force; and we do not think that the inspectors were required to apply such tests to the steps of the ladder, unless some indication of weakness or a defect was perceived upon a careful inspection in the ordinary way by the eye. Undoubtedly the company was required to make use of all reasonable means to discover defects that might endanger human life, not only in its own cars, but in such as it was hauling that belonged to other companies as well. The defect that caused the injury was not in the round or in the screws that held it; the wood of the car into which the screw reached had become unsound. On the trial of the case plaintiff's counsel asked him the following question: "State whether or not, in your opinion, as an expert railroad man, if the car from which you fell had been thoroughly examined at Omaha, Green River, or Evanston by the defendant through its proper employees, the defect of the round which gave way would have been discovered." The defendant interposed an objection to the

question which the court overruled, and the witness answered: "Yes, sir." To this ruling of the court the defendant excepted, and now assigns it as error. The witness was not asked to express an opinion on conceded facts or upon facts proven or on facts enumerated in an hypothetical question. The rule as to expert testimony has been stated thus: "On questions of science, skill, or trade, or others of the like kind, persons of skill sometimes called 'experts,' may not only testify to facts, but are permitted to give their opinions in evidence. \* \* \* And such opinions are admissible in evidence, though the witness founds them, not on his own personal observation, but on the case itself as proved by the witnesses on the trial. But, where scientific men are called as witnesses, they cannot give their own opinion as to the general weight of the case, but only their opinions upon the facts proved. And if the facts are doubtful, and remain to be found by the jury, it has been held improper to ask an expert, who has heard the evidence, what is his opinion upon the case on trial, though he may be asked his opinion upon a similar case hypothetically stated." 1 Greenl. Ev. (14th Ed.) § 440. Because the defect was not discovered, the inference is that the witness inferred that the car had not been thoroughly examined; or, in other words, he was of the opinion that the inspectors were negligent because they did not find the defect that caused the injury. The witness may have understood that a thorough examination included the application of force to each round to determine whether it could be easily pulled off of the car. When the facts from which an expert is to draw an inference, and express it as an opinion, are conceded or satisfactorily proven, the expert may enumerate them, or they may be enumerated for him, and he can draw his inference from them, and express it as his opinion. If the facts upon which the opinion of the expert is asked are doubtful, they must be embraced in an hypothetical question. In overruling the objection to the question above quoted, and in permitting the witness to answer it, we are of the opinion that the court erred.

The defendant excepted to the following portion of the charge of the court to the jury: "Now, as requested by plaintiff, I instruct you, subject to such modifications as I may make hereafter to these and the other instructions already given. I instruct you, first, that it was the duty of the defendant to furnish, provide, and maintain sufficient, safe, adequate, and suitable machinery and cars for the use of the plaintiff, and the failure to do so would be negligence on the part of the defendant." In this the court instructed the jury that the defendant was negligent if it did not furnish sufficient, safe, and adequate cars; that though the defect which caused the injury was hidden, and could not be discovered by a competent inspector in the use of all reasonable care and diligence, the defendant was still negligent. The company is not liable, because it does not discover all defects in such

cars of other companies as come onto its road that may produce injury, but only such as should have been discovered by reasonable skill and diligence. The defendant also excepted to and assigns as error the giving by the court of the following portion of the charge: "It was the duty of the defendant to use due care, and provide a ladder by which the plaintiff was to perform the work for which he was employed safe for his use, and to keep the ladder in repair and good order, so as not to unnecessarily expose the plaintiff to danger; and when the defendant does this, as I have stated, the plaintiff then assumes the risks and dangers incident to the employment in which he is engaged. Now the question comes, could the defendant, by the use of ordinary care, have learned of the defective condition of the ladder in question a reasonable time before the injury? If the defendant could have learned these facts, then it is chargeable with notice of its defective condition at the time of the injury, which would amount to negligence; and if the plaintiff was injured as claimed, by reason of such defective ladder, while in the performance of his duty as an employe of the defendant, and without his fault or negligence, or without knowledge on his part of the defective condition of the ladder, then he is entitled to recover for the injury sued for in this case, and charged in his complaint. Or, under the same circumstances just stated, if the plaintiff did not know the car in question was a foreign car, (or knew it was a foreign car, but did not know of any rule of the defendant for dispensing with the inspection thereof by defendant's inspectors, or that there was a rule of such kind by the defendant company,) then he would have a right to expect the ladder to be in a reasonably safe condition at the time, and if injured by the defects complained of and without negligence on his part, then he would be entitled to recover as heretofore explained." The objection to this extract from the charge is that the jury might understand it to mean that the plaintiff should recover if he was injured in consequence of the defective ladder, without negligence on his part, without proof of negligence on the part of the defendant. The burden is upon the plaintiff of proving that the injury complained of was caused by the negligence of the defendant. We are of the opinion that the court erred in this portion of its charge. The judgment of the court below is reversed.

ANDERSON and BLACKBURN, JJ., concur.

(27 Utah 543)

WOODLAND *et al.* v. UNION PAC. RY. CO.

(Supreme Court of Utah. April 2, 1891.)

RAILROAD COMPANIES — KILLING STOCK — SUFFICIENCY OF EVIDENCE.

1. In an action against a railway company for killing a horse it appeared that the horse was about 100 feet from the track in an unfenced pasture; that on the approach of the train he ran obliquely about 100 yards towards the track, getting upon it a short distance ahead of the engine, and was killed, that no obstructions prevented the engineer from seeing him, and that the train was running a little down grade, but not fast.

*Held*, that a verdict for plaintiff will not be set aside.

2. Plaintiff was entitled to legal interest on the value of the horse from the time of instituting suit.

Appeal from district court, first district; JAMES A. MINER, Justice.

*P. L. Williams and Waldemar Van Cott*, for appellant. *Evans & Rogers*, for respondents.

ZANE, C. J. This action was instituted in the district court to recover damages for the killing of five horses of the plaintiffs in consequence, as alleged, of the negligence of the agents of the defendant in running its trains. In the complaint the killing of each horse is set out separately as a cause of action. In answer to the complaint the defendant denied both the killing and the negligence. A jury was sworn to try the issues, and, after hearing the evidence, and receiving the charge of the court, it retired, and returned a verdict against the defendant on all the counts; and on this verdict the court entered judgment, from which the defendant appealed to this court. The defendant insists that the judgment was erroneous, because the evidence did not prove that the horse mentioned in the fifth count of the complaint was killed in consequence of its negligence. It appears from the evidence that the defendant's road passed through plaintiffs' pasture, and that it was unfenced; that plaintiff's horse was grazing about 100 feet east of the track, and that some other horses were on the west side; that, as a freight train of the defendant approached, the horse ran in a south-westerly direction, and towards the horses on the west side; that, after running about 100 yards he got onto the track a short distance ahead of the engine, and was there overtaken and killed; that no obstructions prevented the engineer or other person on the engine from seeing the horse; that the train was running a little down grade, but not fast. In view of the evidence we do not find that the verdict of the jury was so palpably and clearly wrong as to require the court to set it aside. In its charge the court informed the jurors that if they found that the horses were killed in consequence of the negligence of the defendant they should find their value at the time they were killed, and that they might add to that sum 10 per cent. interest upon it from the time of instituting the suit. The charge as to interest the defendant alleges as error. When the property of one person is destroyed by the wrongful or negligent act of another person justice demands that the latter shall compensate the former for the loss. The latter is entitled to compensation at the time of the loss, and if the person doing the injury does not do so, and retains the compensation, he ought to pay the person whom he has wrongfully kept out of it a sum equal to the value of its use. The rate of interest should be fixed by analogy to the per cent. allowed by the law regulating interest. The authorities are not in harmony, but the weight of them is to the effect, as we think, that interest may be given as dam-

ages, where the plaintiff has been deprived of his property by the wrongful act or neglect of the defendant, and the latter delays payment. Some of the authorities hold that interest should be computed on the value of the property, and added from the time of its destruction; others, from the time of instituting the suit. *Railroad Co. v. Marley*, (Neb.) 40 N. W. Rep. 948; *Whitney v. Railway Co.*, 27 Wis. 327; *Chapman v. Railway Co.*, 26 Wis. 295; *Parrott v. Ice Co.*, 46 N. Y. 361; 1 Suth. Dam. p. 473. We find no error in this record. The judgment of the court below is affirmed.

ANDERSON and BLACKBURN, JJ., concur.

(7 Utah 245)

HAMER v. BRAINARD *et al.*

(Supreme Court of Utah. April 2, 1891.)

FORGED DRAFTS—LIABILITY OF INDORSERS—DEMAND AND NOTICE.

The indorsee of a forged bill of exchange, on its dishonor, may maintain an action against his indorsers for a recovery of the consideration, which has failed, without proof of demand and notice.

Appeal from district court, first district; JAMES A. MINER, Justice.

*Smith & Smith*, for appellants. *Evans & Rogers* and *Jacob S. Boreman*, for respondent.

ZANE, C. J. It appears from the evidence in this record that Zion's Savings Bank & Trust Company, by its cashier, drew a bill of exchange for the sum of \$6.50 on C. B. Richards & Co., of New York, payable to the order of one J. S. Field; that the latter indorsed it to Brainard & Roberson, and that they assigned it to the plaintiff for the consideration of \$500 in cash and \$100 due on a real-estate transaction. It also appears that the draft had been raised to \$600 dollars before the assignment to the plaintiff. The plaintiff also assigned the bill; and when the forgery was discovered, and the maker refused to pay, the plaintiff refunded the \$500 to his assignee, and brought this suit against the defendants to recover the amount so paid by him to the defendants. Upon the trial the jury found a verdict for the plaintiff for that amount and interest, and, a motion for a new trial having been denied by the court, a judgment was by it entered upon the verdict. From this judgment the defendants have appealed, and insist that it was erroneous, because the evidence was insufficient to authorize the verdict, in the absence of proof of demand and notice.

This is not an action based upon the assignment. It is an action to recover the amount paid by the plaintiff to the defendants without any consideration and under a mistake. To permit them to retain such consideration would, in effect, give them so much of plaintiff's money, obtained under a mistake, and without any consideration to plaintiff, and without fault on his part. There is a conflict in the authorities as to the necessity of demand and notice when the indorser does not receive the consideration for the transfer of title, as when he is a mere accommodation indorser. The drawee of a bill is

presumed to know the signature of the drawer, and he must determine as to its genuineness and refuse payment; if not, he pays at his peril. Not so, however, as to the other signatures on it, or the writing in the body of it. As to those and such writing he must use reasonable care to prevent being imposed upon; and so, as to the drawer, he is presumed to know his own signature, and to be able to determine whether the amount named in it has been raised, and the law requires him to give prompt notice to the drawee of such forgeries. Some cases hold that demand and notice should be averred and proven when the action is upon the assignment to recover back the consideration paid; but when the action is to recover on the ground of want of consideration and mistake they hold no such demand or notice necessary to be averred or proven. The law applicable to the facts of this case is stated, as we hold, in sections 669a and b, Daniels, Neg. Inst.: "The indorser engages (1) that the bill or note will be accepted or paid, as the case may be, according to its purport; but this engagement is conditional upon due presentment or demand and notice; he also engages (2) that it is in every respect genuine; (3) that it is the valid instrument it purports to be; (4) that the ostensible parties are competent; (5) and that he has lawful title to it and the right to indorse it. And if it turns out that any of these engagements but that first named are not fulfilled, the indorser may be sued for a recovery of the original consideration which has failed, or be held liable as a party without proof of demand and notice. The doctrine of the text that in such cases the indorser is bound without demand or notice undoubtedly applies when he indorses with knowledge of the infirmity that renders the instrument void; and such knowledge is necessary to make him so liable, according to some authorities. But the better opinion is, we think, that he is at least bound to refund the consideration paid him upon the transfer if the instrument is void, for it is not then the thing which it purported to be, and which he impliedly represented it to be. If he be a mere accommodation indorser, receiving no part of the consideration, it has been cogently argued and has been held that he is not responsible for any alteration which may have avoided the instrument, unless there were due demand and notice. But the consideration paid the party accommodated is in such case attributable to him, and he would seem to us to stand as a surety, bound to refund it; and the rule exacting notice to hold an indorser liable seems to us, to apply to cases in which he warrants payment at maturity and not to those cases in which he passes an instrument affected by some vice, which renders it in fact not the bill or note it purports to be." Under the facts of this case we hold that an offer to return the bill or a demand and notice was not necessary to be averred and proven. We find no error in the record. Judgment of the court below affirmed.

ANDERSON and BLACKBURN, JJ., concur.

(7 Utah 249)

AYERS *et al.* v. JACK.

SAME v. LEGGITT.

(Supreme Court of Utah. April 2, 1891.)

VENDOR AND VENDEE — BONA FIDE PURCHASERS.

1. In ejectment it appeared that A. and B. made an oral partition of land. Respondent's husband bought and paid for B.'s parcel, and took possession, but took no deed, and subsequently, by a decree of divorce, the land was awarded to respondent, who occupied it up to the suit. Thereafter A. and B. conveyed the land to appellant, both grantors and grantee having knowledge of the sale to respondent's husband, and her acquisition and occupancy of the premises. *Held*, that respondent had an equitable title thereto, and appellants, having bought with knowledge of her rights independent of the record, took nothing by their deed.

2. The fact that respondent's husband was the administrator of the estate of B.'s ancestor at the time of his purchase does not affect the case, as B. was of full age, and received what he considered a fair price for the land.

Appeal from district court, third district; T. J. ANDERSON, Justice.

*Le Grand Young and Zane & Putnam*, for appellants. *John A. Marshall and Waldemar Van Cott*, for appellee.

BLACKBURN, J. This is a suit in ejectment, and on a cross-complaint by the defendant asking to have her title quieted. Decree for defendant quieting her title. The land in controversy was a part of the estate of Thomas Cope, deceased. There was an oral partition of the estate, and this land was set apart to Thomas H. Cope while he was a minor, and while he lived with his step-mother, Janet Cope. One Thomas Jack was appointed administrator of the estate of Thomas Cope, deceased, and rented the land, and paid the rent to Janet Cope and Thomas H. Cope until September 3, 1874, and after Thomas H. Cope came of full age. He then bought this land of Thomas H. Cope, and paid part of the purchase money, and went into possession as owner. He was, as part of the purchase money, to put up a house for Janet Cope on a lot in Salt Lake City, and pay the balance when it was demanded. The house was put up, and the purchase price fully paid. Jack continued in the possession of the land until, in a suit for divorce, between him and his wife, it was decreed to the defendant, Mary Ann Jack, and she has continued in its actual occupancy until this suit was brought, excepting a part which she sold to one Leggitt. When Leggitt bought he went into immediate possession, and built a house upon his part. Janet Cope knew of the sale to Jack, and said it was all right, and over \$200 of the purchase money was spent in building a house upon her own lot. Thomas H. Cope did not make a deed to Jack for the land because, in 1882, the suit for divorce was pending, and he was warned by Jack not to do it. Plaintiffs claim through a deed made by Janet Cope and Thomas H. Cope and his wife, made April 29, 1889. Defendant claims through an equitable title acquired by paying for the land, and occupying the same under the purchase by her and her husband, through whom she claims, since 1874. We think the evidence fully sustains defendant's equitable title to the land,

and her actual occupancy of the land at the time of plaintiff's purchase was notice to them of all her rights, both legal and equitable, wholly independent of what the record showed; and when they bought they were informed that they took all the chances of the purchase; and the evidence shows very clearly that they thought they had discovered a defect in defendant's title, and would buy Thomas H. Cope's and Janet Cope's interest at a low price, and make a speculation by their shrewdness in making the discovery. We think, therefore, that the defendant has an equitable title that ought to be protected and enforced, and that plaintiffs, having bought with knowledge of her rights, can take nothing by their deed. In support of these views we cite *Pom. Eq. Jur.* § 314, and citations. The case is not affected by the fact that Thomas Jack was the administrator of the estate of Thomas Cope, deceased, when he purchased, for Thomas H. Cope was of full age, and knew fully his rights, and got what was considered a fair price for the land at the time. Plaintiffs ought not to complain. They bought \$12,000 worth of land, if the title had been good, for \$2,500, supposing the parties in possession had a defective title, and it seems they overreached themselves and lost. They should pocket their loss without a murmur. The decree is affirmed.

This opinion disposes also of the case of the *Same Parties Plaintiff vs. Leggitt*; and in that case the decree is affirmed.

MINER, J., concurs. ZANE, C. J., having been of counsel, did not participate in this case.

(7 Utah 254)

PRATT *et al.* v. CLAWSON *et al.*

(Supreme Court of Utah. April 2, 1891.)

REVIEW ON APPEAL—WEIGHT OF EVIDENCE.

A verdict will not be set aside merely because the evidence is conflicting, or because the court, looking at the testimony as written, would have come to a different conclusion than that reached by the jury, who had the witnesses before them.

Appeal from district court, third district; C. S. ZANE, Justice.

*E. B. Critchlow and J. H. Moyle*, for appellants. *Stephens & Schroeder*, for respondents.

ANDERSON, J. This is an action by plaintiffs to recover a commission of \$200, alleged to be due them from the defendants for furnishing a purchaser for certain real estate owned by defendants, for the sale of which plaintiffs claimed to be the agents of the defendants, which agency was denied by the defendants, and this question of fact was the only question in the case in the court below. The action was begun in a commissioner's court, where plaintiffs recovered a judgment of \$200 and costs of suit. The defendants appealed to the district court, where the cause was tried before the court and jury, and resulted in a verdict and judgment in favor of plaintiffs for \$200 and costs. The defendants made a motion for a new trial, which was overruled by the court, and

from the order overruling such motion and from its judgment the defendants bring this appeal. The defendants rely for reversal upon the fact that, as they claim, the preponderance of the testimony shows that the only contract of agency made with plaintiffs was by the defendant Selden Clawson, and that the contract was conditional upon obtaining the consent thereto of the defendant Walter Clawson, the real estate being owned by the defendants jointly, and that Walter Clawson never gave his consent to the contract of agency. We have examined the evidence as set out in the record, and while, from a reading of it, the preponderance in favor of plaintiffs is by no means clear, yet there is a substantial conflict in the evidence, and, the jury being the judge of the credibility of the witnesses, the weight of the evidence, and the facts of the case, and having found the facts in favor of the plaintiffs, we are not prepared to say that their verdict is so far unsupported by the evidence as to justify a reversal of the case; and besides this, the record does not purport to contain all the evidence, nor an abridgement or abstract thereof, and hence it would be impossible for this court to say the jury did not have sufficient evidence before them to justify their verdict. An appellate court will not disturb a verdict merely because the evidence is conflicting, or because the court, looking at the testimony as written, would have come to a different conclusion than that reached by the jury, who had the witnesses before them. Hayne, New Trials & App. § 288; Hill, New Trials, p. 50. The judgment of the district court is affirmed.

MINER and BLACKBURN, JJ., concur.

#### HEMENWAY v. FRANCIS.

(Supreme Court of Oregon. April 6, 1891.)

##### PLEADING—EJECTMENT—ANSWER—NEW TRIAL.

1. In an action of ejectment, if the defendant does not defend for the whole of the property, under section 319, Hill's Code, the answer must specify for what particular part he does defend. An answer which does not plead the ultimate fact upon which the defendant relies, but sets up the evidence of such fact, is defective; but if no objection be taken thereto, until after verdict and judgment, and then only on appeal to the supreme court, such answer will be held sufficient.

2. The sufficiency of an answer is not raised by a motion for a new trial, but may be by a motion for judgment, notwithstanding the verdict, if the objection has not been taken by demurrer.

3. In an action of ejectment a specification in defendant's answer of the part for which he defends, which describes it as "about 120 acres of said land,—the farming land on the north side of the county road, with the buildings thereon,"—is very indefinite, and would be held insufficient if properly objected to before trial, but after verdict and judgment, on objection in the supreme court for the first time, it must be intended that the proper evidence was introduced upon the trial to identify the land.

(Syllabus by the Court.)

Appeal from circuit court, Lane county; M. L. PIPES, Judge.

This is an action to recover real property. The complaint describes a number of

tracts and parcels, some by legal subdivisions and others by courses and distances, and it is alleged that the defendant is in possession and unlawfully holds all of the real property described in the complaint. The complaint contains the other necessary allegations under the statute. The answer admits the ownership of said property, but denies that the defendant wrongfully withholds the possession of said real property, or any part thereof, or that the plaintiff is thereby damaged \$100 or any sum. For a further defense the answer alleges "that on the 4th day of August, 1890, said plaintiff leased to the defendant about 120 acres of said land,—the farming land on the north side of the county road, with the buildings thereon,—for the term of one year, with the privilege to keep on said premises one span of mares, three colts, one yearling, and two cows, and the further privilege to keep upon the said premises described in plaintiff's complaint ten head of cattle the coming winter for two or three months, if defendant so desired, and the use of the granary on the south side of said road." Other terms of the lease are also stated. The answer then alleges "that plaintiff was to continue in the use of said premises described in complaint, except the said farming land aforesaid, the description of which is not known to the defendant, and the plaintiff has had and now has and had, at the commencement of this action, all of said land described in the complaint in his possession, except the said 120 acres aforesaid; that the defendant is now in the lawful possession of the said 120 acres, and claims to hold the same by virtue of said lease, and has had no notice to quit." Defendant further alleges that he was a tenant of said plaintiff, and had said land rented at the time of said lease. The reply denied the new matter in the answer. The cause was tried before a jury, and the following verdict returned: "We, the jury, find the defendant entitled to the possession of the 122 acres of land described in his answer in the above-entitled cause, by virtue of the parol lease mentioned therein," upon which a judgment was duly entered for the defendant according to the verdict, from which this appeal is taken. A. C. Woodcock and L. Bilyeu, for appellant. Geo. B. Dorris, for respondent.

STRAHAN, C. J., (after stating the facts as above.) There is but a single question presented on this appeal, and that is the sufficiency of the defendant's answer. The special point of objection is that the defendant only defends as to part of the land described in the complaint, and as to that part it is not described with sufficient certainty. Section 319, Hill's Code, though relating to the answer in this class of actions, does not undertake to prescribe all that an answer shall contain. The defendant's answer must therefore be governed by the general rules of pleading prescribed by the Code, and in addition thereto must comply with section 319. That section requires that, if the defendant does not defend for the whole of the property, he shall specify for what particular part he does defend, and the question is wheth-

er or not the answer in this case contains such specification. The answer does not conform in any respect to the general rules of code pleading. It does not state the ultimate fact upon which the defendant relies. Instead of pleading that he was in possession under an unexpired lease from the plaintiff to defendant, giving the duration of the estate created by the lease, the defendant has undertaken to plead the evidence of such right, or the terms of the lease by which such right was created. If objected to at the proper time, no doubt the court would have caused the answer to be corrected, but no objection was made to the answer until after verdict, and then only by way of a motion to set aside the verdict and grant a new trial. A defect in the answer was no cause for granting a new trial. Hill's Code, § 235. But for a defect in the answer that the facts stated do not constitute a defense to the plaintiff's cause of action, and such objection has not been taken by demurrer, the plaintiff may have judgment notwithstanding the verdict, and the same rights are secured to the defendant in like case where the complaint is fatally defective. Id. § 266. But this motion was not made. The part of the premises described in the complaint for which respondent defends, as specified in the answer, is "about 120 acres of said land,—the farming land on the north side of the county road, with the buildings thereon." This is a very indefinite description, but the plaintiff omitted to object to it before trial, and after verdict and judgment, for the purpose of upholding the same, we must intend, on objection made in this court for the first time, that the proper evidence was introduced upon the trial to satisfy the jury of the location and identity of this piece of land. The fact of the leasing was passed upon by the jury, and when no error is shown to have intervened at the trial prejudicial to the rights of the appellant we do not think we are required to interfere. Counsel for appellant have cited *Jackson v. Lodge*, 36 Cal. 28, and *Gale v. Water Co.*, 44 Cal. 43, but we have examined those cases, and they do not support, or tend to support, counsel's contention. It follows that there is no error in the judgment appealed from, and the same must be affirmed.

#### STATE V. JARVIS.

(Supreme Court of Oregon. April 6, 1891.)

##### INCEST—EVIDENCE OF RAPE—INDICTMENT.

1. On the trial of a defendant charged with the crime of incest it is error to admit evidence tending to prove him guilty of rape.

2. Under section 1873, Hill's Code, the crime of rape by forcible ravishment and incest cannot be committed by the same act. Rape is accomplished by the impelling will of one person, and incest by the concurrent assent of two.

3. Where the evidence discloses that defendant committed the crime of rape, he cannot be convicted under an indictment charging the crime of incest.

4. An indictment under the statute of this state for the crime of incest should allege that the act charged was the joint act of both parties.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

The defendant was indicted, tried, and convicted of the crime of incest, alleged to have been committed with his daughter, Josephine Ross, on the 15th day of April, 1889, in Multnomah county, Or.

*E. Mendenhall and Sears & Beach*, for appellant. *T. A. Stephens*, Dist. Atty., and *W. T. Hume*, for the State.

BEAN, J. In *State v. Jarvis*, 18 Or. 360, 23 Pac. Rep. 251, this defendant had been convicted of incest under an indictment charging him with both the crimes of rape and incest, but this court reversed the judgment, on the ground that the conviction was had on the uncorroborated testimony of the prosecutrix, who was an accomplice in the commission of the crime. After the case was remanded to the court below it would seem another indictment was found against the defendant, charging him with the crime of incest alone, upon which he was tried and convicted, from which he appeals. The first assignment of error necessary to notice is in the admission of the testimony of Mrs. Dr. Murray. The testimony of this witness was to the effect that, three or four or five years before the trial in the court below, she was consulted professionally by the prosecutrix, whom, on an examination, she found suffering from some irritation of the *vagina* caused by some recent violence. This evidence was clearly irrelevant. It did not in any way tend to prove the guilt of this defendant. It is possible the evidence might have been competent had the charge against defendant been rape, and not incest. It could only be competent under the theory that the prosecutrix had been forcibly ravished; but when, as in this case, the crime charged is incest, it could in no way tend to prove that defendant was guilty as charged. Rape and incest are two distinct crimes, and what would be competent evidence in the one would not in the other. What has already been said requires the reversal of this case; but there was another question raised in the argument, which it is proper for us to consider, in view of the probability of another trial in the court below. In the case of *State v. Jarvis*, supra, in which this appellant was defendant, it was held that "in a trial for the crime of incest the party to the crime not on trial is an accomplice, and the other party cannot be convicted on her evidence, unless she be corroborated by such other evidence as tends to connect the defendant with the commission of the crime." It is admitted in the case at bar that the conviction was had upon the uncorroborated testimony of the prosecutrix, but it is sought to avoid the rule announced in the case above cited, by claiming that she was compelled by force and threats to submit to the embraces of defendant, and was not therefore a willing participant in the commission of the crime, and not an accomplice. The prosecutrix testified that the incestuous intercourse commenced in 1884, when she was 16 years old, and continued as often as twice a week, and sometimes oftener, until April, 1889. That at no time did she willingly



consent, but was compelled by force to submit. That at one time defendant presented a pistol at her, and said he would kill her if she refused; at another time he threatened her with an axe; and at another with a board. That she did not complain to any one, because defendant said he would shoot her if she told anybody about the matter. It was argued for the appellant that the crime of incest requires the concurring assent of both parties, and that, under the facts in this case, defendant was guilty of rape, if guilty of any crime, and could not be convicted of the crime of incest. The crime of incest was not indictable at common law, but is so only by statute. 4 Bl. Comm. 64; Bish. St. Crimes, § 723. To the statute alone, then, must we look for a definition of the crime, and for a solution of the question in this case. By section 1873, Hill's Code, it is provided: "If any persons, being within the degrees of consanguinity within which marriages are prohibited by law, shall intermarry with each other, or shall commit adultery or fornication with each other, such persons, or either of them, upon conviction thereof, shall be punished," etc. It will be noticed that the language of the statute is "with each other," which necessarily implies a concurrent act, and the consent of both parties. If one of the parties is compelled by force to submit to the act, there can be no consent of such party, and the act cannot be committed "with each other," as declared by the statute. Similar provisions in the statutes of sister states have been construed by the courts, and the overwhelming weight of authority is in favor of the construction above indicated. Thus, in *People v. Jenness*, 5 Mich. 321, it is said by CHRISTIANCY, J.: "This offense [incest] can only be committed by the concurrent act of two persons of opposite sexes; and the assent or concurrence of the one is as essential to the commission of the offense as that of the other; and, as a general rule, both must be guilty, or neither." In *DeJany v. People*, 10 Mich. 241, the information was based on a statute, the language of which was as follows: "If any man and woman, not being married to each other, shall lewdly and lasciviously associate and cohabit together, every such person shall be punished," etc. Held, that the offense was joint, and both parties must be guilty, or neither. In *De Groat v. People*, 39 Mich. 124, under a statute, the language of which is the same as ours, it was held that conviction could not be had unless the act was by concurrent assent of both parties. COOLEY, J., speaking for the court, said: "Fornication, when the element of near relationship makes it incest, may be an offense equally detestable and heinous, but it still lacks the distinguishing characteristic of rape. The one is accomplished by the impelling will of one person, and the other by the concurrent assent of two." In *Baumer v. State*, 49 Ind. 544, the statute provided: "If any step-mother and her step-son shall have sexual intercourse together," etc., and it was held that the act must be joint, and one of the parties cannot be guilty unless the other is also, and the acquittal of

one is a bar to the trial of the other. So, in *State v. Thomas*, 53 Iowa, 214, 4 N. W. Rep. 908, under a statute which provided that "if any persons within the prohibited degrees \* \* \* carnally know each other, they shall be deemed guilty of incest," it was held that the crimes of rape and incest cannot be committed by the same act; the consent of both parties to the connection being necessary to constitute the crime of incest under the statute. In *Yeoman v. State*, 21 Neb. 171, 31 N. W. Rep. 669, the statute provided that "persons within certain degrees, who shall commit adultery or fornication with each other, shall be punished," etc. It was held that one of the parties might be indicted alone, but the court said: "It is true that both must be guilty; that the intermarriage, cohabitation, adultery, or fornication must be by a union of minds as well as of actions." In *State v. Ellis*, 74 Mo. 385, it was held that, where the evidence proves the crime of rape, the party cannot be convicted of the crime of incest. So in *People v. Harriden*, 1 Parker Crim. R. 344, it was held, under a statute similar to ours, that when the illicit connection is accomplished by force the defendant cannot be convicted of incest, but only of rape. In *Noble v. State*, 22 Ohio St. 545, by way of argument, it is said: "The crime of incest is committed by two willing parties." A doctrine contrary to that laid down in the authorities before referred to has been held in *Mercer v. State*, 17 Tex. App. 452, and *People v. Barnes*, (Idaho,) 9 Pac. Rep. 532. The Texas case is based upon former decisions of the same court and one Michigan *nisi prius* case, which has been repudiated by the court of last resort of that state, as we have already seen. The Idaho case is not in point in the case before us. The statement of the law as given in 10 Amer. & Eng. Enc. Law, 341, is not believed to be supported by the weight of authority. The only cases cited as authority for the statement are the Texas and Michigan *nisi prius* cases above referred to, and *Norton v. State*, 106 Ind. 163, 6 N. E. Rep. 126, which was under a statute wholly different from ours, while none of the adjudged cases announcing a contrary doctrine are cited, except *People v. Harriden*, supra. We think the decided weight of authority is that, under a statute like ours, the crime of rape by forcible ravishment and incest cannot be committed by the same act, but that of incest requires the concurring assent of both parties. We do not desire to be understood as holding it necessary that both parties must be guilty of the crime of incest before the guilty one can be punished. That question is not before us, and it will be time enough to decide it when presented. Possibly, if the assent of one party was induced by fraud or deception, the party perpetrating the fraud might be guilty of incest, while the innocent party would not, or one party might be ignorant of the relationship, while the other had full knowledge of it, and so other circumstances might arise, under which one party would be guilty and the other innocent. In the case before us the defendant accomplished his purpose, either by the

consent of the prosecutrix or by force. If by her assent, she was an accomplice, and a conviction could not be had on her uncorroborated testimony. (*State v. Jarvis*, supra;) and if by force, the crime was not incest, and the conviction cannot stand. Counsel for appellant contended on the hearing that the indictment is insufficient, in not alleging that the illicit intercourse was by the concurring assent of both parties. This question seems to have been raised in this court for the first time, and perhaps the indictment is sufficient after judgment, but the logical conclusion from the authorities heretofore cited with approval is that the indictment in cases of this kind should allege the act as joint, since it is only by the concurring assent of both parties that the crime can be committed. The judgment of the court below is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

#### SOUTHERN PAC. R. CO. v. RUSSELL.

(*Supreme Court of Oregon*. April 6, 1891.)

##### JURISDICTION OF JUSTICE—ALIAS SUMMONS.

1. When a justice once obtains jurisdiction over the subject-matter of the action, his jurisdiction continues until the action is legally disposed of by such justice.

2. Where a complaint was filed against a defendant, and a void judgment rendered by the justice, such judgment does not terminate the action so as to prevent such justice from issuing an *alias* summons, and acquiring jurisdiction of the person of the defendant.

(*Syllabus by the Court*.)

Appeal from circuit court, Marion county; R. P. Boise, Judge.

E. H. Peery, for appellant. J. K. Weatherford, for respondent.

LORD, J. This is an appeal from a judgment of the circuit court dismissing a writ of review issued out of said court to review and set aside a judgment rendered in a justice's court in favor of the defendant and against the plaintiff in the writ, for the wrongful killing of a horse. In substance, the facts are these: That Russell, as plaintiff, commenced an action in a justice's court against the railroad company, as defendant, for the wrongful killing of a horse of the alleged value of \$225, by filing his complaint, and that on the same day a summons was issued, directed, not to the defendant, but to one Johnson, agent of the defendant, etc.; that at the time specified for trial, no one appearing for the defendant, the court undertook to render judgment against the defendant company for the amount alleged; that subsequently the plaintiff, by his attorney, moved the justice's court to set aside the judgment rendered aforesaid, on the ground that the summons and service were insufficient to confer jurisdiction and authorize such pretended judgment, which being allowed, such pretended judgment was set aside, and a summons issued directed to the defendant company, and due service thereof obtained; that, after said pretended judgment had been set aside and summons issued, the defendant sued out the writ aforesaid to review and set aside

such pretended judgment, but at the time specified in the summons appeared in the justice's court, and filed an answer in abatement, to which the defendant interposed a demurrer, and, the court sustaining it, the defendant refused to answer or further plead when judgment was rendered against it. It is conceded that the summons directed to one Johnson, and served upon him, was insufficient to obtain jurisdiction over the defendant, and to authorize the judgment rendered. In fact, no summons had been issued and served upon the defendant company, and, as a consequence, it was not possible for the justice's court to acquire jurisdiction to render any judgment against it. Being without the semblance of authority to act in the premises, its judgment was a nullity. The contention for the company is that, upon the rendition of the judgment, the power of the justice became *functus officio*, and that he could not afterwards vacate or annul such judgment, much less to cause to be issued an *alias* summons on the complaint filed therein. The Code provides that the complaint must be made and filed with the justice before the summons can issue, and such making and filing of the complaint is a commencement of the action, and that it continues pending until legally disposed of. So that, when a complaint was made and filed against the defendant, an action was commenced against the defendant, and pending until it was disposed of legally. It is true, as a matter of fact, there was a judgment rendered against the defendant, and entered by the justice upon his docket, but it was a void judgment, and incapable of enforcement. In legal contemplation the case stood as if no judgment had been rendered or entered upon the docket, with only a complaint filed against the defendant making the commencement of the action, and upon which a summons is authorized to be issued. The action of the justice in allowing the motion to vacate the judgment only sought to make the face of the docket conform in fact to the legal *status* of the case. Unless the presence of such void judgment had the effect to terminate the action, and exhaust the power of the justice to issue an *alias* summons, it is difficult to understand how its vacation or expunging it from the docket can make any difference. That the rendition of a void judgment does not terminate the action, so as to prevent such justice from issuing an *alias* summons, and acquiring jurisdiction of the person of the defendant, was expressly held in *Knapp v. King*, 6 Or. 246, Boise, J., saying: "After jurisdiction is acquired by filing the complaint, the court has only power to review an amended complaint, or dismiss the case on motion of complainant, except to issue process to acquire jurisdiction of the defendant, or to issue mesne or auxiliary processes, such as attachments or the like. Until he acquires jurisdiction of the defendant, he can render no valid judgment against him. If he render judgment against the defendant without jurisdiction of his person, it is simply void, and no judgment, and can be disregarded in any collateral proceeding

when such want of jurisdiction appears on the record. And in this case the judgment rendered on the 9th of September was a mere nullity, and the case then stood in the same manner as though the summons had been returned indorsed *non est inventus*; for he had a cause pending, and, having failed to get service on the defendant, he had a right to move for an *alias* summons, and it did not prejudice the rights of the defendant," etc. It is immaterial whether the void judgment was vacated or not. It was, as BOISE, J., said, "no judgment,"—of no binding force or effect against the defendant,—and in its legal aspect the record stood with only a complaint filed against the defendant, upon which, as we have seen, an *alias* summons might be issued for service upon the defendant. No right of the defendant was prejudiced by it, and the action of the justice in the premises was exactly what the circuit court, upon a writ of review, would have directed him to do, if the judgment had been allowed to remain, and no summons issued or further action taken, namely, to vacate the judgment, and issue an *alias* summons against the defendant. It is clear, then, both on authority and principle, that the power of the justice was not exhausted and the case terminated, but that he was authorized to issue an *alias* summons, and acquire jurisdiction of the defendant, which, when obtained, continued until the case was disposed of legally. The facts disclosed that the defendant did appear as required by the *alias* summons, and filed a plea in abatement, to which a demurrer was sustained, and the defendant refusing to further plead, judgment was rendered against it. It is now suggested that the defendant has not had an opportunity to be heard on the merits. But this is not so. The defendant appeared and was in court, and when the demurrer to the answer was sustained refused to further plead, and thereby of its own volition deprived itself of the opportunity of being heard on the merits. We think there was no error, and that the judgment must be affirmed.

#### PILZ v. KILLINGSWORTH.

(Supreme Court of Oregon. April 6, 1891.)

LABORER'S LIEN—GRADING CITY LOT—FORECLOSURE—AVERMENTS OF NOTICE OF LIEN.

1. When a person is employed by the owner of a lot in an incorporated city, to grade, fill in, or otherwise improve the same, and he employs laborers to assist him in performing the work, the services of such laborers will be considered as having been rendered at the request of the owner, within the meaning of section 3676, Hill's Code.

2. A "lot," within the meaning of section 3676 of Hill's Code, is evidently not to be understood as synonymous with "tract" or "parcel," but in the sense of a city lot, as bounded and described on the recorded plats of the city, or as subdivided and bounded by conveyances of the owners thereof, or by other acts done by themselves, or the city authorities, in exercising the right of eminent domain in opening and establishing streets.

3. It must affirmatively appear from the complaint, in a suit to foreclose a mechanic's or laborer's lien, that the notice filed contained all the essential provisions required by statute.

(Syllabus by the Court.)

v.20p.no.6—20

Appeal from circuit court, Multnomah county; L. B. STREANS, Judge.

This is a suit to foreclose a mechanic's lien alleged to exist in favor of respondent and several other persons, for clearing a tract of land within the corporate limits of the city of Albina. The complaint alleges, for first cause of suit, that defendant, Killingsworth, is the owner of a certain tract of land in the corporate limits of the city of Albina, which is particularly described; that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the true date of which is to plaintiff unknown, the defendant Killingsworth duly made and entered into a contract with the defendant Vennigerholz to clear, improve, and grade the land above described; that during the year 1890 the said defendant Vennigerholz employed this plaintiff to do work and labor for him on said land, under said contract, and this plaintiff performed work and labor under said employment for the period of 27¼ days, at the agreed price of \$1.75 a day, amounting in the aggregate to the sum of \$47.68; that no part of said sum has been paid, and there is now due and owing to plaintiff therefor the sum of \$45.93; that on the 20th day of June, 1890, plaintiff duly made out and filed in the office of the recorder of conveyances for Multnomah county, Or., his notice that he intended to, and did, hold a lien upon the land above described, to secure the payment of said sum; that said lien was so filed within 30 days after plaintiff ceased to work under said contract, and was duly recorded at page 119 of Book B of Record of Mechanic's Liens for Multnomah county, Or., where the same has ever since remained of record and unsatisfied; and there is now due and owing to plaintiff the sum of \$45.93, the payment of which is secured by said lien, together with interest from date of said lien, and that \$10 is a reasonable attorney's fee for foreclosing said lien, and plaintiff paid \$1 for the recording of said lien. The remaining causes of suit are mere repetitions of the first, except as to names and amounts. Defendant demurred to the complaint, because it did not state facts sufficient to constitute a cause of suit; which being overruled, and defendant declining to answer further, a decree was entered foreclosing the liens, and ordering the sale of the property, and hence this appeal.

Sears & Beach, for appellant. J. C. Moreland and W. Y. Masters, for respondent.

BEAN, J., (after stating the facts as above.) By section 3676, Hill's Code, it is provided that "any person who shall, at the request of the owner of any lot in any incorporated city town, grade, fill in, or otherwise improve the same, or the street in front of or adjoining the same, shall have a lien upon such lot for his work done and materials furnished in grading, filling in, or otherwise improving the same; and all the provisions of this act respecting the securing and enforcing of mechanics' liens shall apply thereto." The lien in this case is claimed by virtue of the provisions of this section of the statute. The contention of defendant is that the complaint does not state facts

sufficient to bring the case within this provision of the law, because (1) it does not appear that the work was done at the request of the owner of the property; and (2) that the property described in the complaint is not a "lot," within the meaning of this section.

1. It appears that defendant made a contract with Vennigerholz to clear, improve, and grade this property. This authorized the latter to do all acts necessary and proper to enable him to fulfill his contract. It must have been understood that this work was not wholly to be done by the contractor with his own hands. He was fully empowered to employ such assistance as might be necessary to enable him to complete his contract. The consent of the owner to the employment of laborers by the contractor is a necessary and inevitable implication from the contract under which the work was done. We think a fair and reasonable construction of the section under consideration is that when a person is employed by the owner of a lot, in an incorporated city or town, to grade, fill in, or otherwise improve the same, and he employs laborers to assist him in performing the work, that the services of such laborers must be considered as having been rendered at the request of the owner, within the meaning of section 3676. *Parker v. Bell*, 7 Gray, 429; *Sweet v. James*, 2 R. 1. 270; *Weeks v. Wolcott*, 15 Gray, 54; *Clark v. Kingsley*, 8 Allen, 543. This construction is confirmed by the latter clause of the section, which is that "all the provisions of this act respecting the securing and enforcing of mechanics' liens shall apply thereto." Section 3669 of the Code, which is section 1 of the act, makes every contractor, subcontractor, etc., having charge of the construction, etc., of any building or other improvement, the agent of the owner for the purposes of the act; so that any work done at the request of the contractor is deemed to be done at the request of the owner. The evident intention of the legislature was, by the latter clause of section 3676, to make the provisions of section 3669, so far as it made the contractor the agent of the owner, applicable to liens for grading, filling in, or otherwise improving any lot in an incorporated city or town. The object and purpose of the act is to protect those persons who by their labor, skill, or material have contributed to the enhancement in value of the owner's property, and this object should be kept in view in interpreting the language used. The word "securing," as used in section 3676, must, we think, be held as applicable to the creation of the lien, and not to its protection, as contended for by appellant. The legislature, having made all the necessary provisions in section 1 for securing the lien, deemed unnecessary to repeat them again in section 8, but simply made them applicable by a general provision.

2. The right to a lien is in derogation of the common law, and can only be established by a clear compliance with the requirements of the statute. The right is conferred by statute, and the party claiming such lien must show a substantial compliance with the statute, and by his

complaint must bring himself within its provisions. *Allen v. Rowe*, 19 Or. 188, 23 Pac. Rep. 901; *Kneel. Mech. Liens*, 221. The complaint in this case does not allege that the property therein described is a lot within Albina, but describes the same by metes and bounds, without stating the quantity, although on the argument it was assumed that it contained 10 acres. The mere fact that property may be within an incorporated city or town is not sufficient to subject it to a lien for labor bestowed in grading, clearing, or improving the same. In addition to being within the incorporation, it must be a lot. The word "lot," when applied to real estate, is indefinite in its dimensions, but is a portion of land that has been set off or allotted, whether great or small. There is no definite and fixed meaning to the word which is applicable to all cases alike. What would be deemed a "lot" of land in the country would not be so considered in a city or town. Its ordinarily accepted meaning, when applied to property within an incorporated city or town, is evidently not to be understood as synonymous with the word "tract" or "parcel," but in the sense of a city lot, as bounded and described on the recorded plats of the city, or as subdivided and bounded by conveyances of the owners thereof, or by other acts done by themselves, or the city authorities in exercising the right of eminent domain in opening and establishing streets. It must be property so situated and subdivided, with reference to streets, as to have impressed upon it the character of urban, as contradistinguished from rural, use. *City of Evansville v. Page*, 23 Ind. 525; *Collins v. City of New Albany*, 59 Ind. 396; *Fitzgerald v. Thomas*, 61 Mo. 499; *Gardner v. Eberhart*, 82 Ill. 316; *Wilson v. Proctor*, 28 Minn. 13, 8 N. W. Rep. 830. The legislature must have intended to use the term "lot" in the sense of a city as contradistinguished from a rural lot, for it is provided that such lot must be within an incorporated city or town, and that a lien may be had on the lot for grading, filling in, or otherwise improving the street in front of the same. The including of wild or farming land within the corporate limits of a city would not make such land a lot, within the meaning of the law, nor could a laborer claim a lien thereon for work done in grading or improving the same. The complaint in this suit does not allege that the property upon which it is sought to hold a lien is in any sense a city lot, nor does it allege anything from which the court can infer that it is anything more than a 10-acre tract of land which is within the corporate limits of the city, and this, we have already said, is not sufficient to give plaintiff a lien upon the land for the value of his labor. Until plaintiff shall, by the allegations of his complaint, bring his case within the provisions of the law, his complaint will be vulnerable to a demurrer.

3. There is yet another fatal objection to the complaint here. The only averment of the filing of the notice required by law is that it was duly made out and filed. This is but a conclusion of law, and is clearly insufficient. It must affirmatively

appear from the complaint that the notice filed contained all the essential provisions required by statute; that it was proper in form, verified as required, and filed within the time prescribed. *Hallagan v. Herbert*, 2 Daly, 253; *Gault v. Soldani*, 34 Mo. 150; *Jones, Liens*, §§ 1588, 1589; *Kneel. Liens*, § 202; *Estee, Pl. & Pr. (Pomeroy's Ed.)* § 2344. The decree of the court below must therefore be reversed, and the cause remanded, with directions to sustain the demurrer.

STATE v. MYER *et al.*

(*Supreme Court of Oregon. April 6, 1891.*)

JURISDICTION OF COUNTY COURT—OBSTRUCTING HIGHWAY.

1. The county court, in exercising its jurisdiction in laying out and establishing a public highway, is a court of special and limited jurisdiction, and the necessary jurisdictional facts must appear.

2. It is only when such courts have acquired jurisdiction that the same intendments obtain in favor of the regularity of their proceedings as prevail in courts of general jurisdiction. Where a party was convicted of obstructing a public highway, and the record of its laying out and establishment by the county court was insufficient to show the necessary jurisdictional facts, held, that the judgment of conviction must be reversed.

(*Syllabus by the Court.*)

Appeal from circuit court, Jackson county; L. R. WEBSTER, Judge.

C. B. Watson and L. L. Burtenshaw, for appellant. Wm. M. Colvig, Dist. Atty., for the State.

**LORD, J.** The defendants were indicted, tried, and convicted for obstructing a public highway. The cause was tried by the court without the intervention of a jury, upon the express consent, by stipulation, of the defendants, and no objection is urged or error assigned on that account. The facts stipulated admit that the defendants did cut the tree alleged in the indictment, and that thereby it became an obstruction to the alleged highway; that the defendant Myer is the owner of the land covered by one-half of the width of said highway at the point where said obstruction was placed, and also the land upon which said tree was growing at the time it was felled. In the progress of the trial, to prove the public highway alleged, the state offered in evidence the record of the county court for the location and establishment of said highway for obstructing which the defendants were indicted. To the introduction of this record as evidence the defendant objected for various reasons, namely, that there was no sufficient proof of posting notices; that the petition was insufficient, and likewise the description of the proposed highway; that no plat of the same was filed, as required by law, nor any order of the county court declaring the alleged highway to be a county road, etc.; but the court overruled the objections, and received the record in evidence. As this record involves the only question necessary to be considered, it is sufficient to say that the court found, among other things, that the county court, on the day specified, had ordered the alleged public highway

opened to public travel, and that the same was and is a regularly laid out and duly-established public highway of said county, and that the defendants obstructed said highway, as set forth in the indictment; and, as a conclusion of law from these facts, that the defendants were guilty as charged, and sentenced them to pay a fine.

From this statement it will be seen that the defense relied upon is that the road set forth in the indictment is not a lawfully established public highway, mainly because the county court never acquired jurisdiction to make it one, and for the further reason that there never has been any order of the county court declaring it a public highway. The question then to be determined is whether the record of the county court discloses the necessary jurisdictional facts to show that the road alleged to have been obstructed was a legally established public highway. In this state the county court, in exercising its jurisdiction in laying out and establishing a public highway, is to be regarded as a court of special and limited jurisdiction, and that the necessary jurisdictional facts must affirmatively appear. In *State v. Officer*, 4 Or. 182, where the defendant was convicted on an indictment charging him with having obstructed a public highway, the question raised, like the one at bar, was whether the record of the county court disclosed the necessary jurisdictional facts to entitle it to be read in evidence to prove that the road charged to have been obstructed was a legally established public highway; and, as the question to be determined involved a collateral attack upon the jurisdiction of the county court, it was deemed necessary to consider the character of such court from a constitutional standpoint, and the result reached was that such court, so far as it exercises judicial power, as a board of county commissioners, in laying out and establishing public highways, was a court of special and limited jurisdiction; and, the record offered in evidence being insufficient to show the necessary jurisdictional facts, the judgment of conviction was reversed. In *Bewley v. Graves*, 17 Or. 282, 20 Pac. Rep. 322, *STRAHAN, J.*, said: "It is settled by a line of uniform decisions in this state that the county courts, when they exercise the power of laying out roads, are courts of limited and inferior jurisdiction." *Thompson v. Multnomah Co.*, 2 Or. 34; *Johns v. Marion Co.*, 4 Or. 46; *Road Co. v. Douglas Co.*, 5 Or. 280. It is only when such courts have acquired jurisdiction, or jurisdiction has attached, that the same intendments obtain in favor of the regularity of their proceedings as prevail in courts of general jurisdiction. The case before us, then, is that of an adjacent owner of land prosecuted for obstructing a highway, objecting to record evidence material to establish the charge against him, not on the ground of irregularity merely in the proceedings to establish the alleged highway, but because such record discloses affirmatively on its face that the court was without authority to exercise its jurisdiction in the premises to lay out and establish such highway.

The existence of a road as a highway is to be proven by the record of its establishment, (*Naylor v. Beeks*, 1 Or. 217;) and "the court has no power over the subject until a petition of the prescribed character and proof of notice is presented, and it is necessary that the record should show affirmatively that jurisdiction has been thus acquired, or the proceeding cannot be sustained."

It thus appears that the jurisdiction of the county court in laying out or locating a county road rests upon the petition and the proof of posting notices, and, when these fall short of the requirements prescribed by the statute, the court does not acquire jurisdiction, and the proceeding fails for the want of it. That the record of the proceedings offered in evidence—and especially as to the proof of posting notices—to disclose the necessary jurisdictional facts to show that the road charged to have been obstructed was a legally established public highway was not gainsaid or questioned, but the contention of the prosecution was that, under the peculiar form in which the action was tried, the finding of facts were conclusive upon the court, and not subject to be reviewed, and, consequently, beyond the reach of the objection urged. But this is not so. The bill of exceptions discloses that the objection was made when the record of the court was offered in evidence, and the court overruled it, necessarily holding that it exhibited the necessary jurisdictional facts; and, as we are satisfied, within the rulings of this court, that the record discloses a want of jurisdiction, and is insufficient for the purposes of proof offered, it ought to have been rejected, and cannot be made to sustain the finding that the road alleged to have been obstructed was a legally laid out and established public highway.

Where a finding is excepted to as being without any evidence to support it, and that fact is made to appear by the bill of exceptions containing all the evidence upon that point, such finding will be disregarded. This was expressly ruled in *Hicklin v. McClear*, 18 Or. 138, 22 Pac. Rep. 1057, *THAYER, C. J.*, saying: "If the findings of the circuit court are wholly unsupported by the evidence, and that fact is made to appear by a bill of exceptions purporting to contain all the evidence upon the point, this court would disregard the findings." It is where there is some evidence having a tendency to support the finding, as shown by the bill of exceptions, that the finding is to be regarded as conclusive, and not subject to review. Although this phase of the case was argued to sustain the finding and conviction, it is clear that it could not avail, for the reason that the bill of exceptions discloses the evidence upon that point, which shows the finding is wholly unsupported by the evidence. But the objection to the record as evidence here was taken to its admission for the purposes offered, precisely as if the case had been pending before a jury, and is so certified to us; and, as this objection is fatal, and ought to have been sustained, the case properly ended there, and with it the contention

now urged for the state, which has likewise been shown to be without merit. In whatever view, therefore, the case may be considered by this record, the judgment must be reversed.

#### KYLE v. RIPPEY *et al.*

(*Supreme Court of Oregon*. April 6, 1891.)

REAL-ESTATE BROKER — POWER TO SELL — PERFORMANCE—COMMISSIONS.

1. A real-estate broker empowered to sell real property for a commission performs his part of such contract, so as to be entitled to his commission, when he brings to his employer a purchaser able, ready, and willing to purchase the property on the terms and conditions authorized by his employer, although the sale may not be completed because of a defect in the title shown by the abstract furnished by the seller to such proposed purchaser.

2. A principal cannot accept that part of his agent's acts which are to his advantage, and reject another part of his acts, in the same transaction. He must either accept or reject the transaction in its entirety.

(*Syllabus by the Court.*)

Appeal from circuit court, Jackson county; L. R. WEBSTER, Judge.

The questions of law argued on this appeal arise on the findings of the trial court, which are as follows:

"(1) On the 17th of April, 1889, the plaintiff and defendants made an agreement that, if the plaintiff, who was a real-estate agent, would sell for the defendants a certain tract of land containing two hundred and fifty acres, owned by them, they would pay him two hundred and fifty dollars for his services in making such sale. There was no time stated in this agreement wherein this sale was to be made.

"(2) On the 17th of April, 1889, the plaintiff began negotiations with one E. C. Kane for the sale of said land to him, and as the result of said negotiations Kane orally agreed to purchase the land at the price, and, upon the terms, as set out in the written agreement, which is incorporated in the third finding of facts herein. It was admitted upon the trial that Kane was able to purchase this land.

"(3) Plaintiff prepared a written agreement containing the terms of the proposed sale, which the defendant signed. Kane did not sign this agreement, though he was willing to do so, afterwards thought he had signed it, and it was through an oversight, and for no other reason, that he did not sign it. The agreement is as follows: 'Articles of Agreement for Warranty Deed. Articles of agreement made this 17th day of April in the year of our Lord eighteen hundred and eighty-nine, (1889,) between Chas. G. Rippey and Frank Amy, both of Central Point, Jackson county, Oregon, parties of the first part, and E. C. Kane, of Ashland, Jackson county, Oregon, party of the second part, witnesseth: That the said parties of the first part hereby covenant and agree that, if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on his part to be made and performed, the said parties of the first part will convey and assure the party of the second part in fee-simple, clear of all incumbrances whatsoever,

by a good and sufficient warranty deed and abstract of title, the following lot, piece, or parcel of ground, viz.: The west two hundred and fifty (250) acres of what is known as the "Watson Place," and situate about one mile north of Central Point, Oregon, and further described as the two hundred and fifty acres lying adjacent to the railroad track. And the said party of the second part hereby covenants and agrees to pay to the said parties of the first part the sum of forty dollars (\$40) per acre, and is to take two hundred and fifty acres, more or less, according to the following provisions, viz.: If there be, when surveyed, two hundred and fifty acres on the west or north-west side of Bear creek, or further described as the portion adjacent to the railroad track, then the party of the second part agrees to take two hundred and fifty acres of land; but if it should appear from the survey, in getting together two hundred and fifty acres of land, that five acres, or less than five acres, should come on the east or north-east side of said stream, the parties of the first part agree to keep that amount out of the two hundred and fifty acres; and the party of the second part also agrees that if more than five acres should by a survey be shown to come on the east or north-east side of said stream, and being a part and parcel necessary to make the said two hundred and fifty acres, then the party of the second part agrees to accept of said land on the east or north-east side of said stream. Payments to be made in the following manner, viz.: Five hundred dollars in hand paid, the receipt whereof is hereby acknowledged, and the balance in two payments, as follows, viz.: Three thousand dollars at the time of the delivery of a good and sufficient warranty deed and abstract of title to said land; six thousand five hundred dollars on or before three years from date of last above payment, interest to be paid at the rate of eight percent, per annum on deferred payments, payable annually, all in U. S. gold coin of the United States; the latter amount, six thousand five hundred dollars, to be secured by a note and mortgage on said land; and it is understood that said mortgage shall be released on part or all of said land at any time that the party of the second part may pay the amount due; and, in case of any failure of the party of the second part to make any of the payments or perform any of the covenants on his part hereby made and entered into, this contract shall, at the option of the parties of the first part, be forfeited and determined, and the party of the second part shall forfeit all claims made by him on this contract, and such payments shall be retained by said parties of the first part in full satisfaction and liquidation of all damages by them sustained, and they shall have the right to re-enter and take possession of the premises aforesaid, with all the improvements and appurtenances thereunto belonging. It is also mutually agreed that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, administrators, and assigns of the respective parties. In evidence whereof the parties

of these presents have hereunto set their hands and seals the day and year first above written. [Seal] CHAS. G. RIPPEY. [Seal] FRANK AMY. Done in the presence of C. W. AYERS, FRANK LENNART, A. T. KYLE, Jr.'

"(4) As soon as the contract set out in the third finding of fact was signed by the defendants, Kane paid them five hundred dollars under said contract, which they accepted.

"(5) Within a short time after the execution of the agreement as set out in the third finding of fact, and the payment of the five hundred dollars thereunder as set out in the fourth finding of fact, the defendants furnished to Kane an abstract of title of the land mentioned in said agreement, prepared by an abstractor mutually agreed upon by Kane and the defendants. Kane submitted this abstract to his attorney, who advised him that the title of the defendants to said land was defective.

"(6) Within a short time after said abstract mentioned in the fifth finding of fact had been furnished, the defendants executed their warranty deed for said land to said Kane, and tendered the same to him, and they were willing and ready to complete the sale of said land to him.

"(7) Kane refused to accept the deed so tendered to him as found in the sixth finding of fact, and refused to accept the land under said deed, and refused to complete the purchase of said land, and to pay therefor, as provided in the agreement, alleging as a reason for such refusal that the title of said defendants was not perfect, that he had been so advised by his attorney, and that the title was not satisfactory to him.

"(8) After the deed had been tendered to Kane, as found in the sixth finding of fact, Kane exhibited to Chas. G. Rippey, one of the defendants, a purse containing a quantity of gold coin, and said he was ready to pay the three thousand dollars if defendants could and would make him a good deed, and give him a clear title to the land, and asked to see the deed, which Rippey thereupon showed him. After looking at the deed, he remarked that it was all right if it was not for the abstract. Rippey said that was all the deed they could make, and Kane took his money and left.

"(9) Kane would have accepted said land, and paid for it according to the terms of said agreement set out in the third finding of fact, if the title of the defendants thereto had been satisfactory to him.

"(10) The defendants have not paid the plaintiff the amount claimed by him in this action, nor any part thereof.

"As a conclusion of law from the foregoing conclusions of fact, I find that the plaintiff is not entitled to recover in this action, but that the defendants are entitled to recover from the plaintiff their costs and disbursements therein. It is therefore ordered and adjudged that the defendants do have and recover of and from the plaintiff their costs and disbursements herein, taxed at — dollars and — cents.

[Signed] "LIONEL R. WEBSTER, Judge."



*Hammond & Briggs*, for appellant. *Wm. M. Colvig* and *C. W. Kahler*, for respondents.

STRAHAN, C. J., (after stating the facts as above.) This is a second appeal. The result of the former appeal is reported in 19 Or. 186, 25 Pac. Rep. 141. The only question presented by this record is whether or not the court drew the correct conclusion of law from the facts found. The plaintiff was a real-estate broker, and was employed by the defendants to negotiate a sale of certain real estate in Jackson county, for which service he was to receive an agreed sum of \$250. The plaintiff produced a purchaser ready, able, and willing to purchase the property on the terms prescribed by the defendants, and the defendants received on said contract \$500, and were to furnish an abstract and make deed, etc. When the abstract was furnished it was submitted by Kane, the proposed purchaser, to his attorney for his advice, who advised him that such abstract did not show a clear title in the defendants, and for that reason alone he declined to complete the purchase after having paid \$500 thereon. In construing the language of the contract between the plaintiff and defendants, its objects and purposes must not be overlooked. The plaintiff had no power, by virtue of that contract, to complete a sale. All he could do was to find a purchaser ready, able, and willing to buy the property on the terms offered by the defendants; when he had done this he had performed his contract, and was entitled to the compensation agreed upon. 16 Cent. Law J. 442; 22 Cent. Law J. 126; *Hamlin v. Schulte*, (Minn.) 27 N. W. Rep. 301; *Lincoln v. McClatchie*, 10 Amer. Law Reg. 637; 1 Warv. Vend. p. 237, § 26; *Lockwood v. Rose*, (Ind.) 25 N. E. Rep. 710; *Phelps v. Prusch*, (Cal.) 23 Pac. Rep. 1111; *Heinrich v. Koon*, 4 Daly, 74; *Rutenberg v. Main*, 47 Cal. 214; *Casady v. Seely*, (Iowa,) 29 N. W. Rep. 432; *Phelan v. Gardner*, 43 Cal. 306; *Reed's Ex'rs v. Reed*, 82 Pa. St. 420; *Duclos v. Cunningham*, 102 N. Y. 678, 6 N. E. Rep. 790; *Reynolds v. Tompkins*, 23 W. Va. 229; *Conklin v. Krakauer*, (Tex.) 11 S. W. Rep. 117; *Tombs v. Alexander*, 101 Mass. 255; *Tyler v. Parr*, 52 Mo. 249; *Carpenter v. Rynders*, Id. 278; *Fox v. Rouse*, 47 Mich. 558. 10 N. W. Rep. 384; *Doty v. Miller*, 43 Barb. 529; *Kock v. Emmerling*, 22 How. 69; *McGavock v. Woodlief*, 20 How. 221; *Bell v. Kaiser*, 50 Mo. 150; *Hart v. Hoffman*, 44 How. Pr. 168; *Barnard v. Monnot*, \*42 N. Y. 203. These authorities, and numerous others that might be cited, conclusively establish the proposition contended for by the appellant; but it was claimed on behalf of the respondents that, because the proposed purchaser did not sign the contract set out in the findings, the plaintiff was not entitled to his commissions. It does not appear through whose oversight that omission occurred, nor is it material. The plaintiff brought the defendants a purchaser, and they undertook to enter into a contract in writing with him, and received \$500 thereon. If the omission occurred by the plaintiff's fault, the defendants waived their right of objection by ac-

cepting and retaining the \$500 paid under the contract; if through their own fault, they cannot complain. *Winpenny v. French*, 18 Ohio St. 469. This is upon the well-settled rule that a principal cannot accept that portion of his agent's work that is to his advantage, and repudiate the residue. He must accept it in its entirety, or not at all. It is evident from the findings that the abstract furnished by the defendants upon its face showed some defect in the defendants' title. Whether it was a real defect, or one that was only apparent, is not shown by the findings. If it was a real defect, and the sale failed for that reason, the plaintiff would be entitled to his commission. He was not responsible for the condition of the defendants' title. If the defendants offered for sale a piece of land the title to which was not marketable it was not the plaintiff's fault. In the ordinary course of business, the title would probably not be examined until a purchaser was found, and it was the defendants' fault not to know the state of their title before they put it upon the market. On the other hand, if the defect shown by the abstract was only apparent,—some cloud that could have been readily removed,—it was the defendants' duty to have caused its removal at once, so that the sale should not have failed for that reason. Without further examination of the subject, we are satisfied that the learned circuit judge erred in his findings of law, and that the same should have been that the plaintiff was entitled to recover against the defendants the amount sued for. The judgment must therefore be reversed, and the cause remanded to the court below, with directions to find the law in accordance with this opinion, and to render judgment thereon for the plaintiff.

(3 Ariz. 302)

PERSONS, ETC., IN DELINQUENT LIST OF MARICOPA COUNTY FOR 1888-89 *v.* TERRITORY.

*In re PHOENIX & M. R. Co.*

(Supreme Court of Arizona. Feb. 9, 1891.)

INDIAN RESERVATIONS—TERRITORIAL JURISDICTION—TAXATION OF RAILROADS.

1. In the absence of treaty or other express exclusion, the different Indian reservations become a part of the territory where situate, and subject to territorial legislative jurisdiction, subject, however, to the power of the general government to make regulations respecting the Indians, etc.

2. A railroad built across an Indian reservation in the territory is subject to taxation by the territory, where there is no treaty stipulation or express exclusion against the jurisdiction of the territory.

(Syllabus by the Court.)

Appeal from district court, Maricopa county.

*Clark Churchill*, Atty. Gen., and *Frank Cox*, for appellant. *H. N. Alexander*, for the Territory.

GOODING, C. J. The territory of Arizona, appellee, recovered judgment against the Phoenix & Maricopa Railroad Company, appellant, in the court below for taxes on that part of the Phoenix & Maricopa Rail-

road lying in the boundaries of the Gila River Indian Reservation, in this territory. It is claimed by appellant that the territory has no jurisdiction within the said reservation, or legislative control over, and consequently no power to tax, property situate therein. If the reservation is to be considered as exclusively under the jurisdiction of the United States, the same as places purchased by the United States within the boundaries of states, and with the consent of said states, and for the purpose of forts, arsenals, magazines, dock-yards, etc., as seems to be assumed by appellant, then the contention of appellant would be unsupported by a great weight of authority, and would prevail in this case, provided the proposition applied to a railroad track part of which is situate within and part without the boundaries of the reservation. In other words, we conceive it to be the law that property situate wholly within boundaries exclusively within the jurisdiction of the legislative power of the United States cannot be taxed by the territory within which it may be situate. But is the reservation within or outside of the legislative control of this territory? The organic act provides as follows: "Sec. 1839. Nothing in this title shall be construed to impair the rights of personal property [should be 'persons or property'] pertaining to the Indians in any territory, so long as such rights remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of such tribe, embraced within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of any territory now or hereafter organized until such tribe signifies its assent to the president to be embraced within a particular territory. Sec. 1840. Nor shall anything in this title be construed to affect the authority of the United States to make any regulations respecting the Indians of any territory, their lands, property, or rights, by treaty, law, or otherwise, in the same manner as might be made if no temporary government existed, or as hereafter established in any such territory." Section 1839 provides, in short, that where there is a treaty with an Indian tribe, providing that they shall not be included in any territory without their assent expressed to the president, they shall not be included until their assent is given. If there exists a treaty between the government of the United States and the Pima and Maricopa Indians containing such a provision, then their reservation is outside of the political jurisdiction of this territory. If there is no such treaty, and there is no act of congress excepting their reservation out of the operation of the organic act, then it would seem that the reservation becomes a part of the territory for legislative and judicial control. Section 1840 provides that nothing contained in this title shall be construed to affect the authority of the United States to make any regulations respecting the Indians of the territory, their lands, proper-

ty, or rights, etc. Thus it will be seen that the authority of the United States over the Indians is not to be interfered with by the territory. Of course, so long as it is a territory, the authority of congress is paramount in and outside of the reservation. But this does not prevent the exercise of the territorial legislative functions in or outside of the reservation. In the absence of treaty or other express exclusion, the reservation becomes a part of the territory, subject, however, to the power of the general government to make regulations respecting the Indians, etc.

There is nothing to show, nor does the court know judicially or otherwise, that there ever was any treaty between the government and the Indian tribe or tribes on the reservation. The case in 102 U. S. 145, (*Langford v. Monteith*), is directly in point. We make the following quotations: "*Langford*, the plaintiff in error, who was plaintiff below, brought an action before a justice of the peace in the nature of forcible detainer, to recover of Charles E. Monteith the possession of buildings and grounds occupied by the latter under the agent for the United States for the Nez Perce Indians." Passing the first ground of defense, the opinion says: "Another allegation of the defense is that the property is situated within an Indian reservation, to which the Indian title has never been extinguished, and therefore forms no part of the territory of Idaho. Of course, if this latter allegation be true, neither the justice of the peace before whom the case was tried first, nor the district court to which it afterwards came by appeal, had any jurisdiction over it. The opinion of this court in *Harkness v. Hyde*, 98 U. S. 476, is relied on by the defendant. The principle announced in that case is sound, namely, that when, by an act of congress organizing a territorial government, lands are excepted out of the jurisdiction of the government thus brought into existence, they constitute no part of such territory, although they are included within its boundaries. Congress, from which the power to exercise the new jurisdiction emanates, has undoubted authority to exclude therefrom any part of the soil of the United States, or of that whereto the Indians have the possessory title, when by our solemn treaties with them a stipulation to that effect had been made." The opinion further says: "This court in *Harkness v. Hyde*, supra, relying upon an imperfect extract found in the brief of counsel, inadvertently inferred that the treaty with the Shoshones, like that with the Shawnees, contains a clause excluding the lands of the tribe from territorial or state jurisdiction. In this case it seems we were laboring under a mistake. Where no such clause, or language equivalent to it, is found in a treaty with Indians within the exterior limits of Idaho, the lands held by them are a part of the territory, and subject to its jurisdiction, so that process may run there, however the Indians themselves may be exempt from that jurisdiction. As there is no such treaty with the Nez Perce tribe, on whose reservation the premises in dispute are situated, and as

this is a suit between white men, citizens of the United States, the justice of the peace had jurisdiction of the parties, if the subject-matter was one of which he could take cognizance." The title to real estate having been raised, it was held that he had not jurisdiction of the subject-matter. This is a decision of the supreme court of the United States to the effect that, in the absence of treaty stipulation, a justice of the peace would have jurisdiction over persons and property on a reservation. The Idaho act was substantially, and almost literally, the same as the organic act of this territory in that particular. In *U. S. v. McBratney*, 104 U. S. 621, it is held that the circuit court of the United States for the district of Colorado had no jurisdiction to try a white man for the murder of a white man on the Ute reservation, in the state of Colorado. There a treaty existed between the United States and the Ute Indians, and among other provisions there was the provision "that a certain district of country therein described should be set apart for the absolute and undisputed use and occupation of the Indians therein named, \* \* \* and that no persons except those therein authorized so to do, and except such officers, agents, and employees of the government as might be authorized to enter upon Indian reservations in discharge of the duties enjoined by law, should ever be permitted to pass over, settle upon, or reside in the territory so described, except as otherwise provided in the treaty." The act admitting Colorado into the Union as a state provided for its admission upon an equal footing with the original states in all respects whatsoever. It was held that this language, notwithstanding the treaty, subjecting the reservation to the state jurisdiction, transferred the jurisdiction to try the defendant for murder within the reservation to the state court, the reservation not being expressly excepted out of the state jurisdiction. In *U. S. v. Ward*, 1 Woolw. 1, the circuit court held that the state courts had no jurisdiction in the lands of the Shawnees. But there was a treaty that their lands should never be brought within the bounds of any state or territory, or subject to the laws thereof.

The appellant is evidently misled by failing to note the distinction between reservations with treaties providing against their being included in territorial and state jurisdictions and reservations having no such treaty stipulation. But, even if there had been such treaty stipulation, a subsequent act of congress in conflict with it would prevail over it. *Cherokee Tobacco*, 11 Wall. 621, says: "A treaty may supersede a prior act of congress, and an act of congress may supersede a prior treaty." But appellant cites a number of cases holding the authority of the United States to be exclusive in certain places and districts, and denying the authority of state or territory therein. These cases are, however, a class unto themselves, and come under a provision of the constitution of the United States. The provision is as follows: "Congress shall have power to exercise exclusive legisla-

tion in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of congress, become the seat of the government of the United States, and exercise like authority over all such places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." The origin and effect of this provision is somewhat curious and interesting. The origin and scope of the provision is to be found in *Railroad Co. v. Lowe*, 114 U. S. 529, 5 Sup. Ct. Rep. 995. It is there said: "The necessity of the supreme legislative authority over the seat of government was forcibly impressed upon the members of the constitutional convention by occurrences which took place near the close of the revolutionary war. At that time, while congress was in session in Philadelphia, it was surrounded and insulted by a body of mutineers of the continental army." In giving an account of this proceeding, Mr. Rawle, in his treatise on the Constitution, says of the action of congress: "It applied to the executive authority of Pennsylvania for defense, but, under the ill-conceived constitution of the state at that time, the executive power was vested in a council consisting of thirteen members, and they possessed or exhibited so little energy and such apparent intimidation that the congress indignantly removed to New Jersey, whose inhabitants welcomed it with promises of defending it. It remained for some time at Princeton without being again insulted, till, for the sake of greater convenience, it adjourned to Annapolis. The general dissatisfaction with the proceedings of the executive authority of Pennsylvania, and the degrading spectacle of a fugitive congress, suggested the remedial provisions now under consideration."

The effect and scope of this constitutional provision is illustrated in a number of cases, extracts from several of which are set out in 114 U. S. 529, 5 Sup. Ct. Rep. 997, which case is cited and relied upon by appellant. We will notice a few of these cases, and it will be readily seen that they are very different from the case under consideration. In *Com. v. Clary*, 8 Mass. 72, "the supreme court of Massachusetts held that the courts of the commonwealth could not take cognizance of offenses committed upon lands in the town of Springfield purchased with the consent of the commonwealth by the United States, for the purpose of erecting arsenals upon them. That was the case of a prosecution against the defendant for selling spirituous liquors on the lands without a license, contrary to a statute of the state, but the court held that the law had no operation within the lands mentioned. 'The territory,' it says, 'on which the offense charged is agreed to have been committed is the territory of the United States, over which the congress have the exclusive power of legislation.'" In *Mitchell v. Tibbetts*, 17 Pick. 298, it was held "that a vessel employed in transporting stone from Maine to the navy-yard in Charleston, Mass., a place purchased by

the United States with the consent of the state, was not employed in transporting stone within the commonwealth, and therefore committed no offense in disregarding the statute making certain requirements of vessels thus employed." The court said: "To bring a vessel within the description of the statute, she must be employed in landing stone at, or taking stone from, some place in the commonwealth, and that the law of Massachusetts did not extend to and operate within the territory ceded; adopting the principle of its previous decision in 8 Mass." "In *Sinks v. Rees*, 19 Ohio St. 306, the question came before the supreme court of Ohio as to the effect of a proviso in an act of that state ceding to the United States its jurisdiction over land within her limits for the purposes of a national asylum for disabled volunteer soldiers, which was that nothing in the act should be considered to prevent the officers, employees, and inmates of the asylum who were qualified voters of the state from exercising the right of suffrage at all township, county, and state elections in the township in which the national asylum should be located; and it was held that upon the purchase of the territory by the United States, with the consent of the legislature of the state, the general government became invested with exclusive jurisdiction over it and its appurtenances, in all cases whatsoever, and that the inmates of said asylum resident within the territory, being within such exclusive jurisdiction, were not residents of the state so as to entitle them to vote, within the meaning of the constitution which conferred elective franchise upon residents alone."

But these cases are clearly distinguishable from this case. They come within the provision of the constitution conferring exclusive jurisdiction "over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." The reason and purpose of the exclusive jurisdiction in such places does not exist on Indian reservations. Story, in his *Commentaries on the Constitution*, says: "If there has been no cession by the state of the place, although it has been constantly occupied and used, under purchase or otherwise, by the United States for a fort or arsenal, or other constitutional purpose, the state jurisdiction still remains complete and perfect;" and in support of his statement refers to *People v. Godfrey*, 17 Johns. 225. In that case the court says: "If the United States had the right of exclusive legislation over the fortress of Niagara, they would have also exclusive jurisdiction. But we are of opinion that the right of exclusive legislation within the territorial limits of any state can be acquired by the United States only in the mode pointed out in the constitution,—by purchase by consent of the legislature of the state in which the same shall be,—for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. The essence of that provision is that the state shall freely cede the particular place to the United States for one of the specific

and enumerated objects." \* \* \* Where, therefore, lands are acquired in any other way by the United States within the limits of the state than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed." Appellant contends that the owner of the right of way is the Indians, says so in express terms, and says: "You can't tax it, and no lien can exist on such land." The right of way is distinct from the ownership of the soil. The government has granted the right of way, and the Indians have consented to it. That they have no title to the soil, but a mere occupancy, is well settled. In *Johnson v. McIntosh*, 8 Wheat. 574, it is decided that the title to the soil is in the sovereign, though the land may be in the occupancy of the Indian tribes; that the right of the Indians consists in the right of occupancy, and does not interfere with the transfer of the soil by the sovereign or its grantees. This conclusion is reached after a careful and exhaustive review of the whole subject, in a case where the grantee of the Indian title held by a perfect title, if the Indians could acquire and convey a good title to the soil. But it is argued that the land belongs to the Indians upon and over which the track and improvements exist, and cannot be sold for taxes. That the rights of the Indians, whatever they may be, cannot be sold for taxes, is quite clear. The proceeding is not to sell anything not belonging to appellant. The track of the railroad, and its right of way, is charged with the taxes assessed against it, and only the property upon which the charge exists is liable to sale, and the title to no other property would pass thereby. That the railroad track and right of way may be sold for taxes is, we think, too obvious to require argument or citation of authority. That part of it within the reservation may, in our opinion, be fairly considered as subject to taxation by reason of the grant of the government and the consent of the Indians, and as being a part of a great public highway for railroad purposes, independent of the question of general jurisdiction, above discussed and decided. The item of interest from May 6, 1889, to February 6, 1890, amounting to \$106.20, being interest on taxes, is disallowed. There is no other error, and judgment will be entered for the proper amount.

KIBBEY and SLOAN, JJ., concur.

(16 Colo. 61)

STRICKLER v. CITY OF COLORADO SPRINGS.  
(*Supreme Court of Colorado*. April 3, 1891.)

WATER-RIGHTS — PRIOR APPROPRIATION — TRANSFER OF RIGHT — COMPENSATION — CONSTITUTIONAL LAW.

1. The fundamental principle of our system of water-rights is that priority in point of time

gives superiority of right among appropriators for like beneficial purposes.

2. The rights of a prior appropriator from a stream cannot be impaired by subsequent appropriations of water from its tributaries.

3. A prior appropriator of water from a stream may change the point of diversion and the place of use without losing his priority, provided the rights of others are not injuriously affected by such change.

4. A priority to the use of water for irrigation is a property right, and may be sold and transferred separately from the land in connection with which the right ripened.

5. Rights acquired to the use of water for irrigation, prior to the adoption of our state constitution, cannot be taken by a city for the domestic use of its inhabitants, without compensation.

6. The provisions of the constitution operate prospectively only, unless a contrary intention clearly appears from the words employed.

*(Syllabus by the Court.)*

Error to district court, El Paso county.

This is an agreed case submitted for decision without suit, under chapter 24 of the Code. The section permitting the submission reads as follows: "Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought; but it must appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties. The court shall thereupon hear and determine the case, and render judgment thereon, as if an action were depending." Section 278, Code 1887. The present controversy has reference to an attempted increase by the city of Colorado Springs of its water supply, such increase becoming necessary on account of the growth of the city; the city being about to purchase from the owners of water-rights for agriculture such rights, to the end that the water may be diverted to the use of the city. The plaintiff, a citizen and tax-payer of the city, and an owner of a water-right for irrigation purposes upon Fountain creek, hereinafter mentioned, seeks to restrain the city authorities from its contemplated action. The agreed statement of facts is as follows: "(1) That the defendant is a municipal corporation, being a city of the second class of this state, and has and maintains a system of water-works for the purpose of furnishing, and through which it furnishes, its inhabitants with water. (2) That the plaintiff is a citizen and tax-payer of the city of Colorado Springs, and an owner of a water-right for irrigation purposes, upon the Fountain creek, hereinafter mentioned, that is prior in right to any appropriation of water made by the defendant, and which is impaired by the defendant's appropriations of water. (3) That heretofore, in the year 1878, defendant constructed a pipeline and reservoir, and supplied and still supplies them with water, from Ruxton creek, above the town of Manitou; and that in the year 1889, to supply the increased wants of its inhabitants, defendant greatly enlarged the capacity of said pipeline, reservoir, and water-works sys-

tem, and to supply them now requires about \* \* \* million gallons of water daily, and exceeding the flow of water in said Ruxton creek; that the waters of the Ruxton and the Fountain creeks flow together in the town of Manitou, and that the waters of said creeks at their junction are naturally of about equal volume; that said Ruxton creek is about five miles in length, and is fed and formed by a number of streams coming together above the place of intake of defendant's pipeline, all of which is substantially shown by the map herewith filed. (4) That defendant has, for the purpose of supplying its said water-works, the first priority of water-rights upon said Ruxton creek, but that there are upon the Fountain creek, below the point where said Ruxton creek and Fountain creek flow together, a great number of water-rights for irrigation and ranch purposes, prior to defendant's right, upon said Ruxton creek, sufficient to take all the waters of Fountain creek, after receiving the waters of Ruxton creek. (5) That defendant takes, and will continue to take, for its said use, substantially all of the waters of Ruxton creek, so that no water of Ruxton creek will reach Fountain creek. (6) That, in addition to the said pipeline, said defendant is the owner of a certain ditch or canal, known as the 'El Paso County Canal,' which takes water directly from the said Fountain creek, for the use of its inhabitants. (7) That defendant requires both the said pipeline and the said ditch to furnish the necessary supply of water for the use of its inhabitants. (8) That the water taken from Ruxton creek aforesaid, through defendant's pipeline, is continuously used by its inhabitants, through its hydrants, for culinary, drinking, general household purposes, sprinkling lawns and streets, in business houses, livery stables, etc., while the water taken through said ditch or canal is used by defendant to irrigate lawns, parks, trees upon its streets, small gardens, truck patches, etc., continuously from April to October of each year. (9) That the defendant's said ditch was by the district court of El Paso county. In the year 1882, in the adjudication of the priorities of water-rights of water district No. 10, adjudicated to be No. 32, and said original pipeline was then in like manner adjudicated to be No. 1 on Ruxton creek, and that there are 31 appropriations of water upon said Fountain creek that are prior to the defendant's said ditch, which are of capacities sufficient, in times of scarcity, to take all of the waters of said creek for agricultural purposes; so that, in order that defendant have the use of water when it needs it, it must to a great extent interfere with said appropriations that are prior to its ditch and pipeline, and including the said water-rights of plaintiff. (10) That the defendant has continuously, including the months from April to October of each year, since the year 1871 to the present year, taken from the waters of said Fountain creek, through its said El Paso county canal, water to the capacity of said canal; and also has taken continuously, through its said original pipeline, of the water of said Ruxton

creek, continuously since the year 1878, waters to the full capacity of said original pipe-line, claiming it had a right so to do; and though the plaintiff and other prior appropriators of water of said Fountain creek have been to a greater or less degree, for and during each of said periods, injuriously affected thereby, they have failed to object thereto, and to assert any prior rights of appropriation he or they had to the water so taken by the defendant; yet said persons, including the plaintiff, now claim damages therefor of the defendant, and the full amount of their respective original appropriations, without diminution of the amounts so taken and appropriated by the defendant, which defendant will pay to them unless enjoined by this court. (11) That many of the persons holding priorities upon said Fountain creek over the defendant, and who are injuriously affected by defendant's said appropriation of water, do not take, and never have taken, through their respective canals or ditches, water to the amount decreed to them in and by the decree aforesaid, because either that their said ditches are not of sufficient capacity to carry such decreed appropriation, or that sufficient water has not been contained in the said creek to supply the amounts so decreed, or that such person has not had under cultivation sufficient land to receive such decreed amount of water; yet, nevertheless, such persons demand of the defendant damages upon the full decreed amount of their respective appropriations, and, unless restrained by this honorable court, the defendant will settle their damages upon such basis. (12) That the defendant has been negotiating for and is about to purchase some of the water-rights for agricultural irrigation purposes that are prior to the defendant's ditch and pipe-line, with the view of taking the water belonging to such prior water-rights, through its said ditch and pipe-line, for the use of its inhabitants. (13) That defendant is about to negotiate for such of said water-rights as are prior to its pipe-line and its ditch, under and pursuant to subdivision 78 of section 3312 of the General Statutes, upon the basis that such priorities as it so settles for, either by consent or condemnation, deprives such prior appropriator of all his right, title, claim, and priority in and to the waters of said Fountain creek, and by such settlement defendant will pay to such prior appropriators sums of money greatly in excess of what it would pay by settling with such prior appropriators upon the basis that by such settlement or condemnation the said rights remain intact, subject only to diminution to the extent of defendant's uses." Plaintiff prays that defendant be enjoined from purchasing water-rights from said Fountain creek, etc., and for general relief. The court below, upon a final hearing, denied the relief sought by the plaintiff, and entered judgment accordingly.

*T. A. McMorris*, for plaintiff in error.  
*Wm. Harrison*, for defendant in error.

HAYT, J., (after stating the facts as above.) The points upon which a de-

cision is asked, as given upon the oral argument, may be stated as follows: (1) Are the rights of a junior appropriator of water from a tributary stream subject to the rights of a prior appropriator from the main stream below? (2) Can the priority of a farmer to the use of water for agricultural purposes be transferred by sale to a city for city purposes, so that it may succeed to the rights of the original appropriator? (3) To the extent the use made by the city is purely for domestic purposes, has it the right, without compensation, to take waters theretofore appropriated for agricultural purposes? That an affirmative answer must be given to the first of the above questions seems obvious. A negative answer would wipe out the doctrine of priorities upon which our elaborate system is based,—a system generally recognized as among the best yet devised, and upon which vast property rights have been built. The fundamental principle of this system is that priority in point of time gives superiority of right among appropriators for like beneficial purposes. To now say that an appropriator from the main stream is subject to subsequent appropriations from its tributaries would be the overthrow of the entire doctrine. All large streams are dependent upon tributaries for a supply of water. To cut off the water from such tributaries would be to destroy the capacity of the stream, to the injury of those below. It would result in ruinous and useless expenditures of money in a race between rival claimants in the extension of ditches towards the source of water supply, and reward success at the expense of the rights of prior appropriators. But counsel say: "The waters of the Ruxton lose their identity upon reaching the Fountain. For all purposes to the appropriator, below the point of confluence, Ruxton creek does not exist; it cannot be identified. That being so, how can it be said by the appropriator upon the Fountain creek that the appropriator upon Ruxton creek has taken his water?" It is shown by the stipulation that Ruxton creek is fed and formed by a number of streams coming together above the place of intake of defendant's pipe-line. Now, if plaintiff in error be correct, and the appropriator of water from a stream be held to have no claim upon the water of the tributaries of that stream, then defendant's water supply is liable to be cut off by settlers above at any time,—a conclusion so manifestly unjust that it must be discarded. It is not a question of identity, as counsel seem to suppose, but one of supply. It is of no consequence to the appropriator below whether the water supplied to him comes from Ruxton creek or from some other tributary to the Fountain; this is entirely immaterial, so long as his supply is adequate. When it is lessened by junior appropriators to his injury, he has cause to complain, no matter whether the diminution results from such appropriators taking the water direct from the Fountain, or from some of its tributaries, before it reaches the main stream.

2. Upon the next proposition plaintiff in error insists that a water-right cannot

be transferred by sale separate from the land. The question raised is one of first impresson in this court. Its importance is apparent. In *Fuller v. Mining Co.*, 12 Colo. 12, 19 Pac. Rep. 836, a nearer approach was made to its consideration than in any other decided case. It was there held that one who has the right by appropriation to divert the waters of a stream may change the place of diversion, and also the place of use. This disposes of plaintiff's contention that the water is only appropriated for a particular tract of land, and that the appropriation will not hold for any other; for, although the decision is based upon diversion for mining purposes, no reason is perceived why the rule in reference to appropriations for agricultural uses should not be the same, the requirement in all cases being that the water diverted from the stream shall be applied to a beneficial use. After reviewing the authorities, the court said: "It seems to be well settled by these decisions that a prior appropriator of water from a stream may change the point of diversion and the place of use, without affecting his rights of priority, and all the cases reviewed, except the case of *Davis v. Gale*, 32 Cal. 27, make the right to make such change dependent upon the condition that the change shall not injuriously affect others. We think that the rule announced in *Kidd v. Laird*, 15 Cal. 162, 'that, in the absence of injurious consequences to others, any change which the party chooses to make is legal and proper,' is the only rule under which the rights of the prior appropriator can be fully exercised, and his rights, and the rights of all other persons, fully protected. The right to change, so limited, includes the point of diversion, and place and character of use."

The rule, as thus stated, seems to be fair to all parties concerned. If A. is the owner of 160 acres of land, with a water-right for only 80 acres, it may be of great benefit to him to change the place of use as the soil upon a portion of the tract becomes exhausted or impoverished by the raising of crops. To deny the right to change the place of use under such circumstances would result in injury to the prior appropriator, with no corresponding benefit to others. The wisdom of the rule in *Fuller v. Mining Co.* is apparent when applied in such a case. And no reason is perceived why, if the place of use may be changed to a tract adjoining the one in connection with which the priority came into existence, it may not as well be changed to a piece of land at a greater distance. The principle permitting the first change to be made being established, the exercise of the right cannot be made to depend upon the *locus* of the use, provided the rights of others are not injuriously affected by the change. The authority for changing the place of use from one part of a quarter section of land to another place upon the same quarter section will permit the purchase of land elsewhere, and utilizing the water in its cultivation. Thus, if the owner of land near Ruxton creek, with a water-right therefor, may purchase land further away from the source of water supply, say at Colora-

do Springs, and utilize his appropriation for such land, in turn he may sell and convey this land with such water-rights as he may have therefor; and there is nothing to prevent the said city from purchasing both, and thereafter changing the place of use, the same as any other appropriator. But why force the city to buy the land if it only needs the water?

An examination of the case in 12 Colo. and 19 Pac. Rep. will show the conclusions there announced to be well supported upon principle and authority; and, it being thereby established that the place of use may be changed, it logically follows that the right to the use of the water for irrigation is a right not so inseparably connected with the land that it may not be separated therefrom. The right has been treated and held as a property right in numerous cases. In *Kidd v. Laird*, 15 Cal. 162, it is said: "The court has never departed from the doctrine that running water, so long as it continues to flow in its natural course, is not and cannot be made the subject of private ownership. A right may be acquired to its use which will be regarded and protected as property, but it has been distinctly declared in such cases that the right carries with it no specific property in the water itself." Mr. Gould, in his work on *Water-Rights*, at section 234, says: "The right to water acquired by priority is the subject of property, and may be sold and conveyed." "The exclusive right to divert and use the water of a stream as well as the ditch or other structure through which the diversion is affected, may be transferred and conveyed like other property, or rights analogous to property." *Pom. Rip. Rights*, § 58.

The authorities seem to concur in the conclusion that the priority to the use of water is a property right. To limit its transfer, as contended by appellee, would in many instances destroy much of its value. It may happen that the soil for which the original appropriation was made has been washed away and lost to the owner, as the result of a freshet or otherwise. To say, under such circumstances, that he could not sell the water-right to be used upon other land would be to deprive him of all benefit from such right. We grant that the water itself is the property of the public. Its use, however, is subject to appropriation, and in this case it is conceded that the owner has the paramount right to such use. In our opinion this right may be transferred by sale so long as the rights of others, as in this case, are not injuriously affected thereby. If the priority to the use of water for agricultural purposes is a right of property, then the right to sell it is as essential and sacred as the right to possess and use. Blackstone says: "The third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." 1 Bl. Comm. p. 138. What difference can it make to others whether the owner of the priority in this case uses it upon his own land, or sells it to others to be used



upon other lands? There is no claim of waste occurring between the present points of diversion and the place where the city is to take the water. Where a material waste results from the change, a new feature is introduced which need not be considered here. In chapter 5 of Angell on Water-Courses, a number of instances are cited where at common law water-rights were declared to be the subject of sale, and although with us such rights are acquired by appropriation rather than by grant or prescription, as at common law, this certainly cannot affect the right of alienation. In *Hurd v. Curtis*, 7 Metc. (Mass.) 94, several owners of mill privileges had apportioned the water among themselves by a written agreement. By the terms of this instrument one W., the owner of a fulling-mill, was entitled to a certain portion of the water for the use of his mill, "or for other machinery requiring equal power;" and it was held that the water-right was not inseparably connected with the building or site at which the water was then used, but that it might be used elsewhere. In *De Witt v. Harvey*, 4 Gray, 486, a deed had been given of land bordering on a canal supplying mills, "with the privilege of crossing to and from and around the same, and of erecting and using tenter-bars in some convenient place near the same, with the privilege also of drawing water from said canal at all times when it may be done without injury to the said mills, sufficient for the purpose of a fulling-mill and shearing-machine, but for no other purposes whatever." And it was held that the right to use the water for a fulling-mill and shearing-machine is not made appurtenant to the land grant, and also that such right was not extinguished by the dam being subsequently taken down by the owners of water-power at that spot, and rebuilt in such a manner as to overflow the land granted by the deed; the court being of opinion that the rights of water were not appurtenant to the particular parcel of land granted, but that the owner might use the water at any place, or in any manner, so long as the rights of others were not thereby impaired. When, therefore, the land became submerged, it was held that the right of the owner to use the water at any other mill, or upon any other parcel of land situated on the same dam, should be sustained. There is no controversy in the present case in reference to the mode and manner in which the right to the water may be conveyed, the contention extending further back; the claim being that the right cannot be conveyed at all, except with the land. The claim is not well founded. As we have seen, the right is the subject of property, and may be transferred accordingly; the sole limitation being that the rights of others shall not be injuriously affected by such transfer.

3. Has the city the right to take the water without compensation? This right is claimed under section 6, art. 16, of our constitution. The section relied upon and the preceding section read as follows: "Sec. 5. The water of every natural stream, not heretofore appropriated,

within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation, as hereinafter provided. Sec. 6. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right, as between those using the water for the same purpose; but, when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

As the rights desired by the city accrued prior to the adoption of these constitutional provisions, a well-understood rule of construction, applicable alike to constitutions and statutes, exempts this case from the operation of the constitution in this respect. That instrument operates prospectively only, unless a contrary intention clearly appears from the words employed. *Cooley*, Const. Lim. 62, 63. No such intention appears in the provision quoted; in fact, the use of the words, "not heretofore appropriated," in section 5, and "unappropriated waters," in section 6, clearly indicates an intention to limit the application of these provisions to the future. If, as urged by plaintiff in error, these provisions were intended to confer upon cities, towns, or individuals the right to take without compensation, for domestic use, water appropriated for agricultural and other purposes before its adoption, they would fall under the ban of the fourteenth amendment to the federal constitution, which provides that no person shall be "deprived of life, liberty, or property without due process of law." As we have already seen, a priority to the use of water is a property right. The construction contended for would also bring the provisions quoted from the state constitution in conflict with several other provisions of that instrument, notably, section 3 of the bill of rights, in which it is declared "that all persons have certain rights, among which may be reckoned that of acquiring, possessing, and protecting property;" and section 15, which provides that "private property shall not be taken or damaged for public or private use without just compensation;" and section 25, which contains the same language as that just quoted from the national constitution. And for this reason it should be rejected, it being equally open to a construction that will at once harmonize and make effective the entire provisions of the instrument in relation to the subject. Our conclusion, therefore, is that the constitutional provisions relied upon were not intended to affect, and do not affect, prior vested rights, but that all owners of such rights are entitled to compensation therefor before the same can be taken or injuriously affected. This is in accordance with the express terms of the statute under which the city is attempting to ac-

quire a supply of water, as the same was enacted at the first session of the legislature convened after the adoption of the constitution. "They shall have the right and privilege of taking water in sufficient quantity, for the purpose hereinbefore mentioned, from any stream, creek, gulch, or spring in the state: provided, that if the taking of water in such quantity shall materially interfere with or impair the vested rights of any person or persons or corporation, heretofore acquired, residing upon such creek, gulch, or stream, or doing any milling or manufacturing business thereon, they shall first obtain the consent of such person or persons or corporation, or acquire the right of domain, by condemnation, as prescribed by the constitution and laws upon the subject, and make full compensation or satisfaction for all the damages thereby occasioned to such person or persons or corporation." Section 73, Gen. St. 1883, p. 974. The statute is instructive, as a contemporaneous legislative interpretation of the constitution, aside from the argument to be based upon the fact of the city being purely a creature of statute, and can therefore only exercise the powers conferred in the manner provided by the legislative department. From anything that we have predicated upon the fact that the water-rights desired by the city antedate the adoption of our constitution, we are not to be understood as intimating that, if the contrary had been the fact, the rule requiring compensation to be made, when such rights are taken for a higher use, would be different. The determination of this question is not involved in this case. The right of a tax-payer to bring an action of this nature has not been raised or considered; for, accepting the agreement of counsel that he may do so, we are of the opinion, for the reasons given, that the facts relied upon do not constitute a cause of action. The judgment of the district court denying relief must therefore be affirmed.

**HENRY V. TRAVELERS' INS. CO. et al.**

(Supreme Court of Colorado. Feb. 13, 1891.)

**APPEAL—DISMISSAL—INTERVENTION—REVIEW—FORECLOSURE OF TRUST-DEED.**

1. An application to dismiss a proceeding in this court for non-compliance with the rules respecting briefs must be made and insisted on in apt time.
2. The denial of an application to intervene is a final judgment as to the petitioner, which may be reviewed in this court upon writ of error.
3. In determining whether an application to intervene should be allowed, the averments of the petition, so far as the same are well pleaded, must be taken as true.
4. The interest which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment.
5. Where bonds are secured by deed of trust, the trustee, if acting in good faith and as an impartial representative of all the bondholders, is the proper party to control foreclosure proceedings to secure payment of the bonds. Nevertheless a person holding certain of the bonds, and owning an interest in the property sought to be subjected to their payment, is entitled to inter-

vene for the protection of his interests, when it is shown that the trustee is not acting in good faith, and that the litigation is being conducted upon a false and fraudulent basis, prejudicial to his rights.

(Syllabus by the Court.)

Error to district court, Rio Grande county.

The pleadings in this cause are very voluminous, containing over 200 folios. A brief summary of them will suffice for an understanding of the opinion. The Travelers' Insurance Company, plaintiff, hereinafter called the "Insurance Company," commenced this action as the holder of certain bonds executed by the Citizens' Ditch & Land Company, hereinafter called the "Ditch Company." The bonds were secured by a deed of trust to Gustavus F. Davis, as trustee, upon the property of the ditch company. The ditch company and Davis were made parties defendant. The object of the action was to secure the appointment of a receiver to take charge of the mortgaged property, and for other relief; the plaintiff alleging that the ditch company was insolvent, and that its property was deteriorating and going to waste for lack of funds to keep it in repair, whereby the security for the bonds was greatly impaired. The defendant Davis appeared and filed a cross-complaint, in which he alleged that he had not been derelict in any of his duties as trustee; that he had not been called upon by any of the bondholders to institute proceedings in their behalf, and had not refused to act in their interest. He further alleged that the indebtedness secured by the trust-deed was due and unpaid. He prayed for a foreclosure of the trust-deed and for the sale of the property, and that he be allowed to control the suit in the same manner as if it had been brought by him originally as plaintiff. The insurance company and the ditch company each filed its answer to the cross-complaint of Davis, trustee, admitting all the allegations thereof to be true. Before final judgment or decree was rendered in the cause, Theodore C. Henry appeared and presented to the court his petition as intervenor. The petition sets forth circumstantially, and with great particularity, the alleged equities of said Henry in the subject-matter of the original suit. Among many other matters, the petition states, in substance, that the whole issue of the ditch company bonds sought to be foreclosed amounted to \$200,000 par value; that the petitioner, Henry, is the owner of \$10,000 thereof; that he is also the owner of a majority of the stock of the ditch company, and had pledged the same as security for advances made to him, or to the ditch company, or for other purposes; that said issue of \$200,000 was made for the purpose of paying a former issue of bonds of the par value of \$100,000, and certain other indebtedness against the ditch company, including certain mechanics' liens against its property; that certain of this indebtedness was due to the insurance company for advances made to the ditch company; and that the insurance company had agreed to receive and had received bonds of the \$200,000 issue in full payment for such advances, and had

agreed in consideration thereof to discharge the debts and liens aforesaid, and that upon the faith of this agreement said Henry had accepted 10 bonds of the new issue in exchange for a like number of the old; that said mechanics' liens were second liens under the first deed of trust, but became first and prior liens to the second deed of trust, unless paid and discharged, as agreed by the insurance company. The petition then charges that, notwithstanding the insurance company had been thus paid in full, and had agreed to have said mechanics' liens paid and discharged, nevertheless, in fraud of the rights of the ditch company and of Henry, and in violation of its agreement, it had not caused said mechanics' liens to be discharged, but had procured to sell the stock of the ditch company owned by said Henry, but pledged as collateral as aforesaid to the debts thus paid; that by this means the insurance company had obtained control of the ditch company, its officers and agents, and by fraud and collusion with them had procured false and fraudulent judgments to be rendered against the ditch company to the amount of about \$90,000 on account of claims and obligations of the ditch company already paid by its acceptance of bonds of the \$200,000 issue, as above stated; that the conduct of the insurance company in keeping and maintaining of record its said false and fraudulent liens and judgments against the ditch company is greatly prejudicial to the credit of the latter company, rendering it powerless to pay its debts or to carry on its business, and greatly injurious to the interests of said Henry. The petition further charges that said Gustavus F. Davis, trustee as aforesaid, is the vice-president of the insurance company, and is acting wholly under its direction and under the advice of its attorneys in conducting this litigation, and is not a fair and impartial person to act as trustee in the premises. Similar charges are also made against the receiver who had been appointed in the action on the application of the insurance company. It was further claimed in the petition that it would be inequitable, unjust, and damaging to the interests of said Henry and of the ditch company to permit a sale of the property to take place while judgments and liens are standing of record against the same which have been actually paid as aforesaid. The petitioner prayed that the matters aforesaid might be fully ascertained, and that an accounting might be had concerning the indebtedness of the ditch company before rendering a decree foreclosing the trust-deed, and directing a sale of the property of the ditch company to pay its debts. Upon consideration of the petition, in connection with the other pleadings in the action, the court rendered judgment denying Henry's right to intervene. Error is assigned upon this action of the court.

*J. P. Brockway and Teller & Orahoad, for plaintiff in error. Chas. H. Toll, Wolcott & Valle, D. V. Burns, and W. R. Barbour, for defendants in error.*

ELLIOTT, J., (after stating the facts as above.) We shall notice *in limine* some of

the formal objections presented by counsel for defendants in error:

1. It is urged that we should dismiss the writ in this case for the reason that plaintiff in error has failed to file a printed brief, as required by the rules of this court. The brief filed is merely type-written; it is very imperfect and unsatisfactory; it has been of very little assistance to us in the investigation of the questions involved in the record. If a motion to dismiss for non-compliance with the rules in respect to briefs had been insisted upon in apt time, it might have prevailed. Briefs need not be lengthy, but they should conform substantially to the rules of the court, and should be full and clear upon the points relied on for reversal.

2. It is contended that the petition of intervention has not been properly made a part of the record. This objection is without foundation. The record shows that the cause came on to be heard on the complaint, cross-complaint, the separate answers of the several parties, and the petition of intervention of Theodore C. Henry. The record further shows that upon said hearing all objections and exceptions to the formality or regularity of the offer of said petition were expressly waived by all parties; that, upon the denial of said Henry's petition to intervene, exception was duly reserved by the petitioner to such ruling and judgment. The bill of exceptions containing the several matters aforesaid, including the petition of intervention, is signed and sealed by the presiding judge and the same is regularly certified under the seal of the court.

3. It is insisted that there is no final judgment in this case to which a writ of error will lie. This objection is not tenable. Upon the entry of the judgment or order denying Henry's application to intervene the cause was finally determined as to him; and, unless he be entitled to a writ of error from this court, he is precluded from any review of such judgment. *Railroad Co. v. Jackson*, 6 Colo. 340; *Curtis v. Lathrop*, 12 Colo. 169, 20 Pac. Rep. 250. The petition of intervention having been presented in due form and in apt time, the question for our consideration is, does the petition set forth a state of facts in relation to the parties and the subject-matter of the litigation entitling Henry to be made a party to the action as an intervenor? This question must be determined from a consideration of the matters set forth in the petition, taken in connection with the other pleadings and proceedings in the action. In determining this question, whether, upon application to file the petition, or upon motion to strike out the petition, or upon demurrer to the petition for insufficiency, the averments of the petition, so far as the same are well pleaded, must be taken as true, mere uncertainty or ambiguity in the averments of the petition should not be held sufficient to defeat the right of intervention without giving the usual opportunity to amend. The Code of Procedure of this state (section 22) provides: "Any person shall be entitled to intervene in an action who has an interest in the matter in litigation, in the success of either of the

parties to the action, or an interest against both." In *Horn v. Water Co.*, 18 Cal. 69, alacid construction is given to this section by Mr. Justice FIELD, as follows: "The interest which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." The petition in this case states that Henry is the owner of 10 of the ditch company bonds, of the par value of \$10,000, secured by the deed of trust sought to be foreclosed; that he is the owner of a majority of the stock of the ditch company; and that he is unable to appear and defend in behalf of the ditch company by reason of the fraudulent conduct of the insurance company in acquiring the actual control of his ditch stock, and thereby obtaining control of the ditch company, its officers and agents; that the insurance company, by fraud and collusion with the officers of the ditch company, controls its affairs, including the management of this cause, to which the petitioner seeks to be admitted as a party. Undoubtedly Davis, the trustee named in the deed of trust sought to be foreclosed, if acting in good faith, and as an impartial representative of all the bondholders, might properly be admitted as a party to the action commenced by the insurance company, and allowed to control the litigation for the purpose of foreclosing the deed of trust, selling the property, and making application of the proceeds to the payment of the bonds thereby secured. *Jones, Ry. Sec.* § 436; 2 *Jones, Mortg.* § 1385; *Campbell v. Railroad Co.*, 1 Woods, 368. But the action was instituted for additional objects and purposes; besides, the good faith and impartiality of Davis as trustee are directly challenged by the sworn petition of intervention as presented. The complaint avers that the insurance company accepted and holds \$190,000 of the bonds of the ditch company, par value, parcel of the \$200,000 issue, not as owner, but as collateral to secure its former claims and liens against the ditch company. The petition of intervention, on the contrary, alleges that all such claims and liens had in fact been paid and discharged by the insurance company's acceptance of said bonds as its own property, and not as collateral. A sharp issue upon this material question was thus presented for adjudication by the petition of intervention. The ditch company, being a party to the action, might ordinarily be depended upon to defend against an attempt to obtain judgment against it, and against its property, to the amount of \$90,000 in excess of all just demands, and on account of claims and liens which had already been paid and discharged. But the petition shows that the parties seeking to obtain such judgment had fraudulently obtained control of the ditch company, its officers, agents, and attorneys, so that it would neither make nor undertake to make such defense. Under such circumstances, it is plain that the petitioner, Henry, being the owner and holder of \$10,000 of the bonds sought to be fore-

closed, and also being the owner of a majority of the stock of the ditch company, and so an equitable owner of the larger part of the property which plaintiff was thus seeking to subject to false and fraudulent claims, liens, and judgments, had a direct and immediate interest in the matter in litigation, and that he must be directly affected by the legal operation of the judgment sought to be obtained in the action. Hence, under the Code, as well as upon principles of equity and justice, he was entitled to intervene. *Story, Eq. Pl.* § 72 et seq.; *Railroad Co. v. Cowdrey*, 11 Wall. 459; *Grain v. Aldrich*, 38 Cal. 514. The averments of the petition, in reference to a former suit pending in the United States circuit court, are undoubtedly material and relevant to this action. It is shown that both Henry and the insurance company are parties to such former suit; that the suit concerns the same subject-matter as this litigation; that an interlocutory decree has already been rendered in the circuit court declaring the existence of the contract between the insurance company and the ditch company, as alleged in the petition; that an accounting concerning the bonds held or owned by the insurance company has been ordered; and that such accounting is now being carried on. 33 Fed. Rep. 132. But we cannot undertake to determine definitely the effect of the suit pending in the federal court; for, by the lapse of time, the status of the matters thus pending may have greatly changed, and the petition of intervention may require alteration or amendment in respect thereto, and perhaps in respect to other matters also. It is urged that Henry should not be allowed to delay the foreclosure of the trust deed, and thus postpone the rights of other bondholders in order to enable him to litigate his controversies with the insurance company. This objection has little force, in view of the fact that the record shows that there are no other bondholders save Henry and the insurance company, and that they are the only real parties in interest, so far as a recovery of the bonded indebtedness of \$200,000 is sought in the action. No other bondholders, therefore, can be delayed or inconvenienced by the litigation of the matters presented in the petition. Besides, as we have seen, the owners of the ditch stock, of which Henry held the greater share, are directly interested in having the property of the ditch company protected against the false and fraudulent liens, as alleged in the petition; and to secure such protection they must either litigate the same in the foreclosure suit, or await the determination thereof in the federal court. The district court should not have denied Henry's application to intervene, but should have ruled the other parties to the action to answer the petition as they should be advised, and should have allowed the parties to the record to try the matters thus put in issue. The judgment of the district court in denying such application is accordingly reversed, and the cause is remanded for further proceedings in conformity with this opinion. Reversed.

HAYT, J., having determined this application in the court below, did not sit at the hearing in this court.

(18 Colo. 60)

HENRY V. TRAVELERS' INS. CO. et al.

(Supreme Court of Colorado. April 2, 1891.)

JUDGMENT BY STIPULATION — EFFECT AFTER REVERSAL.

A stipulation in reference to the argument and decision of a case, entered into for convenience in this court only, will not, upon a reversal of the judgment, be extended to the retrial of the case below.

(Syllabus by the Court.)

Error to district court, Rio Grande county.

J. P. Brockway and Teller & Orahoad, for plaintiff in error. Wolcott & Vaile, C. H. Toll, D. V. Bevins, and W. R. Barbour, for defendants in error.

PER CURIAM. This cause was brought to this court for the purpose of reviewing the judgment of the court below in sustaining the demurrer to the petition of Theodore C. Henry as intervenor. By a certain instrument of writing signed by the attorneys of each of the parties hereto, and filed herein, it was stipulated "that no printed brief will be required to be filed by either of the parties hereto, but that, as the same questions are involved in this case as in the case of T. C. Henry, Appellant, v. The Travelers' Insurance Company and the Citizens' Ditch & Land Company, Appellees, this case may be heard and determined at the same time with the last-mentioned case, and that the decision of the court in the case of T. C. Henry v. The Travelers' Insurance Company and the Citizens' Ditch & Land Company et al. shall control this case, and that the same judgment may be entered in this case as in that last-mentioned case." The foregoing stipulation appears to have been entered into for convenience in this court only. In view of its provisions, however, we have not felt at liberty to consider the petition of intervention for the purpose of determining its sufficiency as to form or substance, either with or without amendment. Hence the opinion rendered in the case mentioned in the stipulation, wherein the Citizens' Ditch & Land Company is a party defendant, (ante, 318,) is not to be considered as controlling on the retrial of this action in the court below, except so far as the facts and circumstances of the two cases are substantially alike. This case may be considered and determined *de novo* upon its own merits as to the several matters of law and fact involved in the record. With this explanation, and in pursuance of said stipulation, the judgment of the district court is reversed, and the cause remanded for further proceedings. Reversed.

HAYT, J., having determined the application in the district court, did not participate in this decision.

(18 Colo. 95)

RUTTER et al. v. SHUMWAY.

(Supreme Court of Colorado. March 20, 1891.)

BILL OF EXCEPTIONS—MOTIONS—EXEMPTIONS.

1. The general rule is that motions and exceptions cannot be preserved by transcribing them v.26P.no.6—21

into the record proper; nor can they be considered by a court of review, unless duly authenticated by bill of exceptions.

2. Exemption statutes should be liberally construed. The wages of debtors are exempt, according to the terms and conditions of the statute, so long as they are capable of identification. (Syllabus by the Court.)

Error to Boulder county court.

Plaintiffs in error, Rutter & Johnson, recovered judgment against Shumway, the defendant in error, before a justice of the peace for the sum of \$49.60 and costs. They then sought by process of garnishment to subject certain moneys deposited by Shumway in the Boulder National Bank to the payment of said judgment. Shumway claimed said moneys as exempt from garnishment under the act of March 28, 1885, (Sess. Laws, p. 262) which reads as follows. "There shall be exempt from levy under execution or attachment or garnishment the wages and earnings of any debtor to an amount not exceeding one hundred dollars, earned during the thirty days next preceding such levy under execution or attachment or garnishment of the same: provided, such debtor shall, at the time of such levy under execution or attachment or garnishment, be the head of a family, or the wife of the head of a family, and such family is dependent, in whole or in part, upon such wages or earnings for support: provided, further, that no debts incurred prior to the approval of this act shall be affected thereby." Upon the trial in the county court Shumway's claim of exemption was sustained, and judgment was entered accordingly. To reverse said judgment this writ of error is prosecuted.

Chas. M. Campbell, for plaintiffs in error. R. H. Whiteley, Jr., for defendant in error.

ELLIOTT, J., (after stating the facts as above.) The assignment of error based upon the refusal of the county court to dismiss the appeal from the justice's court will not be considered, for the reason that neither the motion nor any exception to the denial thereof is properly preserved in the record. Such motions and exceptions must be preserved, if at all, by a bill of exceptions duly authenticated. The practice of attempting to preserve mere motions or exceptions of this kind by transcribing them into the record proper is not warranted by the common law nor by any provision of our Code of Procedure. The assignment based upon the refusal of the county court to require the appellant, Shumway, to give additional security must fail for the same reason. *Wike v. Campbell*, 5 Colo. 127, and cases there cited. The bill of exceptions in this case makes no reference to any of the foregoing matters; neither does it purport to contain all the evidence produced at the trial in the county court. Hence we cannot consider the assignments of error challenging the sufficiency of the evidence to support the findings and judgment. *Cook v. Hughes*, 1 Colo. 51; *Keith v. Wells*, 14 Colo. 322, 23 Pac. Rep. 991. Upon the trial the county court found as matters of fact that the money garnished was earned as wages by the said Shumway; that he was the

head of a family, and that such family was dependent in whole or in part upon such wages for support. The court further found that Shumway earned \$3 per day during the 31 days of the month of March, 1888, aggregating \$93; that he deposited \$75 of this sum in the Boulder National Bank; and that the \$48.41 garnished in this proceeding of the suit of Rutter & Johnson on April 16, 1888, was a balance of said \$75 remaining in said bank; and, further, that said Shumway did not earn during the 30 days next preceding said levy an amount exceeding the sum of \$100. As a conclusion of law from the foregoing the court found that the sum of \$45 earned by said Shumway during the last 15 days of March, 1888, was not subject to garnishment or levy under execution on April 16, 1888; and so awarded and directed that \$45 of the money so garnished be paid to Shumway, and that the residue—\$3.41—be allowed to Rutter & Johnson.

Our review of this case will be limited to the consideration of the question whether the findings of the trial court support its judgment under the act exempting the wages and earnings of debtors from levy under execution, attachment, or garnishment. *Sess. Laws 1885, p. 262*. The constitution of this state provides that the general assembly shall enact liberal exemption laws. To effectuate the purpose of such provision it is obvious that enactments in pursuance thereof should receive from the judiciary a liberal as well as reasonable construction. *Const. art. 18, § 1; Barnett v. Knight, 7 Colo. 365, 3 Pac. Rep. 747; Martin v. Bond, 14 Colo. 468, 24 Pac. Rep. 326*. It is claimed by counsel for plaintiff in error that the proper construction of the act of 1885, above cited, is that the wages of the debtor are exempt from garnishment while they remain in the hands of the employer before payment, but not afterwards. The statute contains no such limitation or condition. The act declares: "There shall be exempt from levy under execution or attachment or garnishment the wages and earnings of any debtor to an amount not exceeding one hundred dollars, earned during the thirty days next preceding such levy," etc. It is not declared that such wages shall not be levied upon in the hands of the employer, or that they shall not be attached or garnished before payment. The language is unconditional and absolute that such wages "shall be exempt from levy under execution or attachment or garnishment;" and the courts cannot justly add words which would tend to defeat or restrict the manifest purpose of the statute. So long as the wages or earnings of the debtor are capable of identification he is entitled to have them exempt, according to the terms and provisions of the statute. It is argued with much ingenuity that the earnings of the laborer, when received by him, are no longer wages, but capital; that the exemption statute has performed its office when it has enabled the laborer to secure his wages from his employer without let or hindrance; and that thereafter the statute cannot be invoked in his favor. The statute cannot be thus reasoned away. Such a construc-

tion is narrow and illiberal. It would compel the laborer to leave his earnings in the hands of his employer, or else forego the protection of the statute altogether. It would not only deprive him of the privilege of depositing his earnings with any bank or other depository for safe-keeping, but would subject his wages to supplemental proceedings even in his own pocket; for, if earnings once received immediately lose their character as wages, then it is evident that the laborer could never retain his earnings for a single hour without exposing them to the very perils which the statute was designed to avert. Such a construction would practically frustrate the beneficent objects of the statute. To illustrate: A man receives \$100 as his month's wages. He is immediately called upon by legal process to apply the same to an unsatisfied judgment. He answers: "The money is my last month's wages. I am the head of a family dependent upon my earnings for support." Think of the court gravely responding: "Yes, the money was your wages before you received it, and was exempt, but, having received it, it is no longer wages, but capital, and is not exempt. You were entitled to enjoy it before you received it, but not afterwards." What mockery. It is further claimed that the record in this case does not show that the sum which the court adjudged exempt, was the identical \$45 which Shumway earned during the last 15 days of March, or within the period of 30 days next preceding the garnishment. The argument is that he had received \$93 as his month's wages; that he had retained \$18, deposited \$75, checked out all except a balance of \$48.41, and that it is not definitely ascertained that such balance included the identical \$45 earned during the last 15 days of March, as aforesaid. This reasoning is altogether too subtle and refined to be applied to a statute requiring a liberal construction. It is quite probable that all the earnings of the month of March, except the \$48.41 remaining in the bank, had been expended by Shumway or his family before April 16th. It certainly is quite as reasonable to presume that the money first earned was first expended as to suppose the contrary. Again, it is contended that when a general deposit of money is made in a bank the deposit becomes a part of the assets of the bank; that the relation of debtor and creditor is thereby established between the banker and depositor, and that such deposit can be retained as a set-off in favor of any claim which the bank may have against the depositor. None of these principles have any application to the present controversy. The bank claims nothing against the depositor; nor does the depositor seek to evade the equitable doctrine of set-off. The statute does not undertake to exempt the debtor's wages from any lawful set-off. The exemption is from execution, attachment, or garnishment, and that only for the wages of the preceding 30 days, and to the extent of only \$100. It cannot be difficult to distinguish the fruits of labor from the accumulations of capital for that length of time; nor can any considerable earnings

of the debtor elude the pursuit of the creditor while the \$100 limit is retained. None of these considerations require a modification of the rule that the statute should be liberally construed. Giving the statute a liberal construction, and indulging the usual presumptions in favor of the findings of a court of record, we find no ground for disturbing the judgment of the county court. It is accordingly affirmed.

**In re HOUSE RESOLUTIONS CONCERNING  
STREET IMPROVEMENTS.**

(*Supreme Court of Colorado. March 12, 1891.*)

**OPINIONS UPON LEGISLATIVE QUESTIONS — STARE  
DECISIS.**

The decisions of this court, deliberately announced in actual litigated cases, ought not to be overruled upon *ex parte* arguments in response to legislative questions.

(*Syllabus by the Court.*)

The opinion of the court is in response to certain questions by the house of representatives, as follows: "Whereas, there have been introduced into both branches of the general assembly bills concerning amendments to the city charter of the city of Denver, providing that wherever the owners of the majority of lots abutting on a street or alley, or a section thereof, shall petition the city council for the paving or grading, or either or both, or wherever the board of public works shall order the same, and shall notify the city council, such paving or grading, either or both, shall be ordered by ordinance, two-thirds of the total expenses thereof shall be assessed and be a lien upon the property abutting upon the same, and one-third of such expense shall be borne by the city, and providing that the city council shall assess such two-thirds of the total cost as a special tax against the lots so improved, and in proportion as the respective frontage of each lot bears to the frontage of all the lots so improved; and whereas, doubts exist as to whether or not such bills, if enacted into laws, will be constitutional: Therefore, be it resolved by the house of representatives that the honorable supreme court of the state of Colorado be, and are hereby, respectfully requested to give its opinion of such bills containing such provisions, upon the constitutionality of such laws—*First*, as to whether such improvements can, under such laws, be legally ordered by the joint action of the board of public works and city council alone, and the assessments duly made for the cost thereof collected from the abutting property; *second*, as to whether such improvements can, under such laws, be legally ordered, upon such petition of such number of property owners, and the assessments duly made for the cost of such improvements be a lawful lien against the abutting property of those who did not petition therefor, in the district wherein such improvements were ordered made."

**PER CURIAM.** Upon the submission of the foregoing preamble and resolution from the honorable the house of representatives, able arguments were heard before the court in favor of the constitutionality

of the proposed legislation. No one appeared in opposition thereto. It is well understood that during the last 10 years this court has rendered several decisions (commencing with *Palmer v. Way*, 6 Colo. 106, decided in 1881) denying the power of the general assembly, under the constitution, to provide for the grading and paving of public streets (except as to sidewalks) at the special expense of the abutting lot owners. That there are decisions by the courts of other states in opposition as well as in support of the doctrine thus announced must be admitted. But we are decidedly of the opinion that the decisions of this court, deliberately announced in actual litigated cases, ought not to be overruled upon *ex parte* arguments in response to legislative questions. We are impressed with the consideration that, while the city of Denver and its representatives have been zealous to procure a judicial opinion in support of legislation favorable to street improvements at the expense of abutting lot owners, the owners themselves have not been heard upon the subject. Evidently the owners feel that they may reasonably rely upon this court not to reverse its former decisions to their prejudice, without giving them opportunity to be heard in some appropriate action or proceeding in which their constitutional rights shall be thoroughly considered, upon pleas and arguments submitted in their behalf as well as in behalf of the public. Without intimating in any manner what conclusion might be reached in case the questions now presented should be brought before the court in the regular course of litigation, we do not deem it proper to express any further opinion at this time.

**RATHVON et al. v. WHITE.**

(*Supreme Court of Colorado. March 13, 1891.*)

**WITNESS—COMPETENCY—TRANSACTIONS WITH DE-  
CEDENTS.**

Civil Code Colo. 1887, § 58, which provides that, when cross-demands have existed between two persons under such circumstances that if one had brought an action against the other a counter-claim could have been set up, neither party shall be deprived of the benefit thereof by the death of the other, does not by implication repeal Gen. St. Colo. § 3641, which prohibits a party from testifying in his own behalf when the adverse party sues or defends as executor or administrator of any deceased person; and hence, in an action by an administrator, it is proper to reject the testimony of defendant as to a counter-claim set up by him against plaintiff's intestate.

Appeal from district court, Saguache county.

*Jas. M. Denny*, for appellants. *C. D. Jones* and *O. P. Arthur*, for appellee.

**HELM, C. J.** White, as administrator of the estate of James B. Smoot, deceased, brought the present action upon a promissory note given Smoot in his life-time by Rathvon & Co. Defendants pleaded set-offs aggregating upwards of \$230. These set-offs were alleged to have been due and payable prior to Smoot's death. The cause reached the district court by appeal, and judgment was there rendered for plaintiff. At the trial the deposition of Samuel F.



Rathvon, who had been the leading member of the firm of Rathvon & Co., touching the alleged set-offs, was offered in evidence by defendants. Upon objection, this deposition was rejected, under the inhibition imposed by section 3641, Gen. St. The ruling of the court in this regard constitutes the only assignment of error discussed by counsel for appellant. It is therefore the only assignment that will be noticed in the present opinion. The statute referred to provides that "no party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein by his own motion, or in his own behalf, \* \* \* when any adverse party sues or defends \* \* \* the executor or administrator \* \* \* of any deceased person, \* \* \* unless when called as a witness by such adverse party so suing or defending; and also except in the following cases." Rathvon was a party to the suit, and there is no dispute but that he was interested in the result. The alleged counter-claims were due prior to the death of Smoot. It is not asserted that the testimony in question was admissible under any of the exceptions enumerated in the statute. It is clear, therefore, that it was within the legislative inhibition. *Whitsett v. Kershaw*, 4 Colo. 419; *Gilham v. French*, 6 Colo. 196; *Levy v. Dwight*, 12 Colo. 101, 20 Pac. Rep. 12.

But counsel for appellant contends that section 58, Civil Code 1887, so far modifies the foregoing statute as to render the testimony here offered competent. This section reads: "When cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counter-claim could have been set up, neither shall be deprived of the benefit thereof by the assignment or death of the other, but the two demands shall be deemed compensated so far as they equal each other." We cannot accept the view of this provision insisted upon. It is evident that in the legislative mind at least doubt existed as to the *status* of ripened counter-claims in cases of assignment or death. To put this doubt at rest the statute in question was enacted. It simply provides that the happening of either of these events shall not affect the right to plead and rely upon the set-off in case of suit. It does not prescribe a rule of evidence, nor does it purport to affect in any way the mode of proof existing at the time of its adoption. The wisdom and justice of said section 3641 are not questioned. It has been in force for many years, and a similar provision exists in most, if not all, of the states. The construction of the new statute urged upon us obviously nullifies almost entirely the force of that provision, in so far as it relates to suits by executors or administrators of deceased persons. The change thus wrought would be sweeping, and it should be evidenced by unequivocal language. The repeal, if repeal there be, is by implication. But repeals of this kind are not favored; they are never recognized if there is serious doubt concerning the legislative intent. To proclaim such a repeal in the present case would be wholly unwar-

ranted. Therefore, we must hold that the rejection of Rathvon's deposition was not error. There being no error in the ruling challenged, the judgment of the district court is affirmed.

#### GAYNOR *et al.* v. CLEMENTS.

(*Supreme Court of Colorado. March 20, 1891.*)  
ESTOPPEL IN PARS—PLEADING—HARMLESS ERROR  
—ENTRY OF JUDGMENT.

1. An estoppel *in pars* is new matter, and cannot be relied upon in evidence as a defense without being specially pleaded.

2. It is not error to refuse a correct instruction if the substance thereof is otherwise fairly incorporated in the charge as given.

3. The general rule is that a new trial will not be granted merely on the ground of harmless error; nor will a judgment ordinarily be reversed for an error in favor of the party seeking such reversal. These rules are applicable to mistakes of the jury as to matters of fact, as well as to errors of the court as to matters of law.

4. Where the verdict is erroneous simply on the ground that it is for a less sum against defendants than was warranted by the evidence, such error cannot be said to be one affecting their substantial rights; and, if the plaintiff does not complain, the judgment should not be reversed merely on the ground of such error.

5. A judgment is a judicial act. It is what is considered and ordered by the court, and not necessarily what is entered by the clerk. Where the judgment was right, but the entry incorrect, the entry may be amended *nunc pro tunc*.

(*Syllabus by the Court.*)

Appeal from district court, Arapahoe county.

This was an action by Clements, plaintiff below, against Gaynor and Standley. Plaintiff alleged an express contract, by which, in consideration that he should obtain a purchaser for defendant's horses, he should receive 5 per centum of the gross sum realized from the sale; that he procured a purchaser, to whom the horses were sold for a large sum of money, but that defendants had refused to pay his commissions. The answer denied the material averments of the complaint, and also contained a special defense, alleging an express agreement by plaintiff to release defendants from the payment of commissions. The second trial resulted in a verdict for plaintiff in the sum of \$1,000.

*Hugh Butler*, for appellants. *J. P. Brockway*, for appellee.

ELLIOTT, J., (*after stating the facts as above.*) The assignments of error relate to the rulings of the court upon the admission and exclusion of evidence, to the giving and refusing of instructions, to the refusing of defendants' motion for a new trial, and the entering of judgment for plaintiff. No argument having been presented relating to the admission or exclusion of evidence or against the instructions "given," these matters will not be specially considered. It is claimed in argument that plaintiff, by reason of certain language used by him pending the negotiations, is estopped from maintaining his action for commissions against one of the defendants. Defendants' counsel prayed for an instruction to the jury, based upon such supposed conduct of the plaintiff, which was refused, and the refusal is as-

signed for error. No defense of estoppel was set forth in the answer. Under the present practice it is well settled that an estoppel *in pais* is new matter, and cannot be relied upon in evidence as a defense without being specially pleaded. See *De Votie v. McGerr*, 15 Colo. —, 24 Pac. Rep. 923, and authorities there cited. In so far as the refused instruction was pertinent to the defense as pleaded, which was, in effect, that plaintiff had expressly agreed at a certain stage of the negotiations that he should not ask, demand, or receive any commissions from either of the defendants, it was given in substance in another instruction. It is unnecessary to consider further the refused instructions in detail. The instructions as given state the law applicable to the controversy impartially, and with substantial accuracy. The instructions refused were either incorrect or unnecessary. It is not error to refuse a correct instruction if the substance thereof is otherwise fairly incorporated in the charge as given. *Dougherty v. People*, 1 Colo. 524; *Gillett v. Corum*, 7 Kan. 156.

It is contended in behalf of appellant that the verdict is inconsistent with the evidence in any light in which it can be properly viewed under the issues as framed. The argument is that the complaint alleges an express agreement to pay commissions at the rate of 5 per cent. of the gross sum for which the horses should be sold; that the evidence shows the horses were sold or exchanged for other property; and that the price at which the horses were rated in the exchange was \$30,000; hence, that under the contract as alleged plaintiff would be entitled to recover, if at all, a commission of \$1,500, but that the jury awarded him only \$1,000; "manifestly, a compromise verdict," says appellants' counsel. In addition to the horses rated at \$30,000, plaintiff claims that certain other horses were disposed of in the same trade to the same party, rated at \$4,500, on which sum he was also entitled to commissions at the same rate, so that his recovery should have been \$1,725. The record before us shows that the verdict on the first trial was in plaintiff's favor for the latter amount. For what reason such verdict was set aside does not appear. The evidence on the last trial was conflicting. Indulging the usual presumptions in favor of the verdict of the jury in such matters, they were justified in believing that plaintiff was the procuring cause of the sale; that he had performed the contract on his part; and that he had not released defendants from their obligation to pay commissions. A verdict for \$1,500, or perhaps \$1,725, in plaintiff's favor, could not properly be disturbed as being against the evidence by an appellate court. 3 *Grah. & W. New Trials*, 1218, 1219. The defendants did not assign the smallness of the last verdict as a ground of their motion for a new trial. On the contrary, one of the grounds alleged was that "the damages awarded by the jury were excessive." Perhaps the court below might have perceived reasons for granting a new trial if the inconsistency of the verdict with the evidence had been expressly pointed out; but

in this court such an assignment of error cannot ordinarily be viewed with favor. The general rule is that a new trial will not be granted merely on the ground of harmless error; nor will a judgment ordinarily be reversed for an error in favor of the party seeking such reversal. These rules are applicable to mistakes of the jury as to matters of fact, as well as to errors of the court as to matters of law. Where, however, the circumstances or nature of the mistake is such as to indicate intentional misconduct on the part of the jury, a different element of error is involved. Code, § 217. But "misconduct of the jury" was not alleged as a ground of the motion for a new trial. It was not assigned for error; nor does it appear in the evidence. It may be said that the jury erred in judgment; but in a lengthy and complicated trial, with conflicting evidence, and with different theories urged upon their consideration by able and zealous counsel, such error may well be attributed to honest mistake, instead of intentional misconduct. *Hil. New Trials*, c. 3; *Henry v. Smoot*, 1 Miss. 18; *Covy v. State*, 4 Port. (Ala.) 186; *Fuller v. Ruby*, 10 Gray, 288; *State v. Pike*, 20 N. H. 344. If the verdict be erroneous simply on the ground that it is for a less sum against defendants than was warranted by the evidence, such error cannot be said to be one affecting their substantial rights; hence the judgment should not be reversed merely on the ground of such error. Code, § 78. The plaintiff below was the only party prejudiced by the insufficiency of the damages awarded, and he is not complaining on this appeal. There having been two trials of the case, the plaintiff being willing to accept the result of the second trial rather than litigate further, and the trial court having sustained the second verdict, we do not feel at liberty to disturb it.

In disposing of this appeal we find it necessary to notice a matter not assigned for error, nor brought to our attention by counsel for either party. The transcript filed in this court shows a verdict rendered on the second trial, as above stated, for the sum of \$1,000 in favor of plaintiff, and that thereafter, upon overruling the motion for a new trial at the same term, and on May 22, 1888, it was ordered by the court that "judgment be entered upon the verdict herein, and let the same be recorded in the judgment book." On the last-named date judgment appears to have been entered in favor of plaintiff against defendants for the sum of \$1,725, with costs, etc. It will be observed that the judgment as entered was for the amount of the first verdict, instead of the second. The appeal-bond, however, recites the judgment as for \$1,000 and costs. From such data remaining of record it is clear that the judgment actually rendered by the court was for the sum of \$1,000 and costs, and that the entry of the judgment was a clerical mistake or misprision of the clerk amendable at common law, as well as under the statute of jeofails. A judgment is an official act. It is what is considered and ordered by the court, and not necessarily what is entered by the clerk. *Freem. Judgm.* §§ 38, 40; *Moreland v. Ruffin*,

1 Minor, (Ala.) 18. In view of the foregoing, it is manifest that the incorrect entry of the judgment was not in consequence of any error committed by the court, but was the result of carelessness by the clerk in recording the judgment of the court, and that such entry should be amended *nunc pro tunc*. Freem. Judgm. § 61 et seq. This cause is accordingly remanded to the district court of Arapahoe county, with directions to vacate the record entry of the judgment herein, and to re-enter the same in favor of plaintiff against defendants for the sum of \$1,000 and costs as of May 22, 1888, when the judgment was in fact actually rendered for that sum. In view of all the circumstances, neither party shall recover costs incurred by this appeal. Judgment entry modified.

#### BUSBY V. CAMP.

(Supreme Court of Colorado. March 20, 1891.)

##### APPEAL—TIME FOR DOCKETING CAUSE.

Laws Colo. 1887, p. 325, providing that a party appealing shall, within 20 days from the approval of his appeal-bond, pay to the clerk of the court to which he takes an appeal fees necessary to have the cause docketed, and that, in case of failure to do so, the cause shall be dismissed on application of appellee, is peremptory, and the cause should be dismissed on failure to comply with the act, though, at the time of the motion to dismiss, the fees may have been paid and the cause docketed.

Error to Arapahoe county court.

F. A. Williams, for plaintiff in error.  
W. J. Edwards, for defendant in error.

HELM, C. J. This cause was originally brought before a justice of the peace. Judgment being there rendered for defendant, plaintiff perfected an appeal to the county court. The appeal-bond was approved and filed by the justice on January 27, 1888. The record was, however, not lodged in the county court until February 20th following. Defendant by his counsel entered a special appearance in the county court, and moved to dismiss the appeal for a failure to pay the necessary fee, and have the cause docketed within the time required by statute. Sess. Laws 1887, p. 325. This provision reads, *inter alia*: "And provided, further, that the party appealing shall, within twenty days from the date of the approval of his appeal-bond, pay to the clerk of the court to which he takes an appeal all fees necessary to have the cause docketed and placed on the calendar of said court. In case said party appealing fails to pay said fees within said time, then the said cause [appeal] shall be dismissed, on application of the appellee." The record of the county court recites that said motion was denied, "on the ground that this cause was docketed at the time said motion was made." There is nothing to show that defendant, who was appellee in the county court, had, prior to interposing the motion, made any appearance, taken any action, or submitted to any ruling in the cause. There is therefore apparent in the record before us no other ground for denying the motion save that above stated.

The right to have the appeal dismissed upon the failure to comply with the provision in relation to fees is expressly given by statute. The statute is, so far as language can make it, peremptory, and no discretion appears to be reserved to the court. We cannot agree with the trial judge that the fact that appellant had paid the fee and docketed the cause before appellee interposed his motion is alone decisive against dismissal; to so hold would, in large measure, be to disregard or abrogate the express statutory command. See *Hunt v. Arkell*, 13 Colo. 543, 22 Pac. Rep. 826; *Law v. Nelson*, 14 Colo. 409, 24 Pac. Rep. 2,—construing an analogous provision. Had appellee voluntarily entered a full appearance after the cause was docketed, and taken or submitted to some order of court looking to a trial *de novo*, before interposing his motion, we might treat his action as a waiver of the right to have the appeal dismissed. Such is the view of the court upon another statute, substantially similar in this respect to the one before us. *Robertson v. O'Reilly*, 14 Colo. 441, 24 Pac. Rep. 560; *Coby v. Halthusen*, 16 Colo. —, ante, 148. As above shown, however, no such state of facts is now presented. The statute was doubtless framed to prevent delay in retrying cases on appeal from justices of the peace. The time fixed within which the fee is to be paid and the appeal is to be docketed is not unreasonable, and the general purpose of the provision is wise. It may produce hardship in individual cases, and perhaps the interests of justice would be better subserved by a less rigid rule in the premises. But this is a matter for legislative action. The statutory rule is not invalid, and the courts cannot mitigate its alleged severity. It will be observed that the amendment of 1887, made since *Town Co. v. Ives*, 10 Colo. 81, 14 Pac. Rep. 120; *Schofield v. Felt*, 10 Colo. 146, 14 Pac. Rep. 128; and *Railroad Co. v. Rader*, 11 Colo. 538, 19 Pac. Rep. 476,—were decided, materially changes the scope and effect of the statute under consideration. In view of the foregoing, the remaining assignments of error, and the discussion of counsel pertaining thereto, need not be considered. The judgment of the court below is reversed, and the cause remanded, with directions to dismiss the appeal. Reversed.

#### ROBERT E. LEE SILVER MIN. CO. V. OMAHA & GRANT SMELTING & REFINING CO.

(Supreme Court of Colorado. Feb. 13, 1891.)

##### MINING COMPANY—MANAGER—CONTRACTS.

1. Where the by-laws of a mining corporation declare it the duty of the general manager to "take charge of the business of selling the ores mined," he has authority to enter into a contract with a smelting company for the sale to it of all the ores to be mined within a given period.

2. Where the smelting company, in writing, "offers for the product of the mines" of the mining company for a given period a named price, which offer is accepted by the mining company, and the writing is signed by the general manager of each, this constitutes a contract of sale for the time and at the price named, and is upon sufficient consideration.

ELLIOTT, J., dissenting.

Commissioners' decision. Appeal from district court, Lake county.

Appellant (defendant below) was a corporation engaged in mining and producing ores in the years 1883-84, in the county of Lake. Appellee was a corporation engaged in buying, selling, smelting, and reducing ores. Appellant was a large producer of ore, and had been prior to December 1, 1883. It had been for some time disposing of most, if not all, of its ore to the appellee at agreed prices for the silver contained in the ore, deducting therefrom a charge of \$18.50 per ton for treatment. At the date mentioned one E. A. Guilbault was general manager of appellant's mines, and Henry Head was manager of the business of the appellee at Leadville. Appellee being desirous of obtaining control of all the ore produced by appellant, and it being desirous of reducing the price for the reduction and treatment of the ores, entered into negotiations, resulting on the part of appellee in the following offer in writing, which was accepted and signed by Guilbault (manager) for appellant: "Leadville, Col., December 1, 1883. Robert E. Lee Silver Mining Co., Leadville, Col.—Dear Sir: For a period of six months from date we offer for the product of the Robert E. Lee mine as follows: Up to 75 ounces silver per ton, will pay 92 per cent. of New York quotations; 76 to 150 ounces silver per ton, 93½ per cent. of New York quotations; 151 to 250 ounces silver per ton, 94 per cent. of New York quotations; 251 ounces up, silver per ton, 95 per cent. of New York quotations. Deducting seventeen dollars and fifty cents (\$17.50) per ton for working charges. Price of silver based on New York quotations on day of settlement. Yours, truly, OMAHA AND GRANT S. & R. Co. By HENRY HEAD. R. E. LEE S. M. Co. E. A. GUILBAULT, Manager." After the signing of the paper of December 1, 1883, and until about the 15th of February, 1884, both parties proceeded under the terms or stipulations contained in the paper; appellant delivering all the ore produced to appellee, and it receiving it. At about the last date appellant leased its mines to one Fritz, who entered into possession, and after that time controlled and disposed of the ores produced from appellant's mines, and declined or refused to deliver them to appellee under the contract, and sold the ores to other parties. After the expiration of the six months from December 1st appellee brought this suit against appellant to recover damages for breach of the alleged agreement. The case was tried before the court without a jury, and resulted in a judgment in favor of the plaintiff for \$8,262. No question in regard to the amount of damages awarded is raised. A stipulation signed by the counsel of the respective parties was filed in this court, containing the following: "Which amount assessed herein is hereby agreed to be correct, provided the supreme court shall be of opinion that no error in any other respect was committed by the court in the findings and rendition of judgment against the defendant."

L. S. Dixon, for appellant. C. C. Parsons and Patterson & Thomas, for appellee.

REED, C., (after stating the facts as above.) The counsel of appellant in his able argument relies upon two general propositions for the reversal of the judgment. They are stated by him as follows: "First. That the alleged contract sued upon, under the construction claimed for it by the plaintiff, was not within the scope of the powers possessed by the witness Guilbault, as general manager of the defendant company. Second. That the instrument sued upon did not constitute a contract between the plaintiff and defendant companies for the sale and delivery to the plaintiff of all or of any particular portion of the product of the mine of the defendant for the period of time specified in it. It was not an agreement for the sale and delivery of any portion of such product, but was merely an offer or memorandum fixing the price for such portions of the product as the defendant might see fit to deliver to the plaintiff during the period of time limited. To this latter extent, but no further, can it be said to have any of the elements of a contract for sale or delivery between the parties." In discussing the first proposition it becomes necessary to examine that portion of the by-laws of the defendant corporation providing for the appointment and defining the duties and powers of a general manager of its mines. It is as follows: "Art. 8. There shall be a general manager of the company's mines to be employed by the president or board of directors, whose duties shall be to take charge of the business of selling of ores mined, and to look after the development of the mining property, and to attend to all of the details incident to the business of the company at its mines, to keep an accurate account of the receipts and disbursements of the company at the mines, and to furnish monthly statements of the same to the secretary,"—which was put in evidence upon the trial. Other portions of the by-laws pertaining to the officers of the corporation, providing for their election or appointment and defining their duties and powers, were put in evidence, but are not necessarily involved or necessary to be considered in the determination of the question. When unrestricted by the by-laws, or his duties undefined by them, a general manager of a corporation has been defined to be "the person who really has the most general control over the affairs of a corporation, and who has knowledge of all its business and property, and who can act in emergencies on his own responsibility; who may be considered the principal officer." And. Law Dict. And such is the judicial definition given in *Manufacturing Co. v. Lawson*, 57 Wis. 404, 15 N. W. Rep. 398, where it is also said: "The very term implies a general supervision of the affairs of a corporation in all departments." To the same point, *Spangler v. Butterfield*, 6 Colo. 356. In the absence of restrictions or controlling usages and customs in the particular class of corporations in which he is employed, he must be considered the principal officer, to whom is delegated the entire control and management of the corporate property, as far as operating the same is concerned. Such must of necessity

be the construction of his powers when the president is a non-resident, and when the president is present his duties are well defined by law, and do not necessarily extend to the practical management of the property; while directors commonly act at intervals, when called together as a body. All the other officers of a mining corporation, except the general manager, may be, and frequently are, ignorant of the business of mining, hence the wisdom and necessity of delegating to some experienced and skilled person entire control of the property. Upon his ability and integrity, to a great extent, depends the failure or success of the enterprise. He is, as far as the administration of affairs is concerned, the chief officer, and frequently the only responsible officer, at or in the vicinity of the property, capable of binding the corporation by his contracts. In the absence of defined powers, the powers incident to the office and employment would embrace that of employing the necessary labor, opening, developing, and protecting the mine, the purchasing of necessary machinery, tools, and supplies, and mining and selling the ore, with power to bind the corporation for bills necessarily contracted in the prosecution of the work. It also devolves upon him to provide either from the products of the mine, from the funds of the corporation, or some other source, money to discharge the obligations incurred in the prosecution of such work. These would be his duties and powers, and within the scope of his employment, and incident to the office, if his duties and powers were left undefined by the corporation. Other parties in dealing with the corporation have a right to assume, and act upon the presumption, that all the powers pertaining to the office generally are possessed by the individual in question, unless notified of restrictions and limitations. The by-laws of a corporation are not necessarily public and known. They are for the government of the corporation. The learned counsel for appellant put in evidence some portion of the by-laws, and contends in argument that the public, in dealing with the manager, was bound by the authority conferred by the corporation, whether made public or not. The by-law of the corporation, in speaking of the manager, says: "Whose duties shall be to take charge of the business of selling of ores mined, and to look after the development of the mining property, and to attend to all of the details incident to the business of the company at its mines," etc. This is of necessity quite general, does not and could not contain in detail and enumerate all the powers and duties incident to the office, but the latter clause is sufficiently broad and definite to invest him with all the powers incident to the position, while it is fairly inferable from the language used—"at its mines"—that it was contemplated and understood that the other officers were not to be at the mines, and that to him were delegated all the powers and duties necessary for the conduct of the business at that locality. These conclusions are intended to apply only to the managers of mining corporations where, as in

this state, the usages, successful prosecution of mining enterprises, and the protection of parties dealing with such mining corporations, require that the powers and duties of the general manager be defined.

The learned counsel for appellant contends, in a very able and ingenious argument, that the language, "whose duty it shall be to take charge of selling ores mined," in the by-law, can only be construed to authorize the manager to sell ores after they are severed and have become chattel, and are on hand as ores, and cannot extend to the sale of ores to be produced for future delivery. His language is, "The question presented under this by-law is whether authority to take charge of selling ores mined gave to the general manager any power to sell or dispose of ores unmined. That it admits of none but a negative answer seems obvious." This construction of the power and the word "mined" we think too narrow and restricted. Nor do we think the contention that the assumption of the power by the manager for the disposition of ore not yet severed from the realty was an exercise of the power to incur or dispose of the realty of the corporation, or in any way affect it, is tenable. The contract was for the disposition of all the ore produced for a limited time after it became chattel in character,—after it became a product of the realty by being severed. It was no more a contract affecting the realty than would have been the sale for future delivery of a crop of growing grain before maturity. It disposed of no real property of the corporation, nor in any way charged or incumbered the realty, nor was there a contract for any specific quantity that could in any way control or influence the management of the mine. It was only a contract on the part of the appellant to sell, and on the part of appellee to purchase, at fixed prices, all the ore mined, taken out, etc., for six months, after the ore had been mined in the ordinary course, and made personal property. The fact that ore before being mined and separated is a part of the realty in no way affects the character of the ore as personalty after the separation. The mining, breaking, and separating the ore from the mass at once changes its legal character, and it has no more the character of realty than wheat after it is harvested and threshed. Nor has the uncertainty of the tenure of office of the manager, and the fact that he might be at any time removed, any influence in determining the legality of the contract. All officers of a corporation hold office for a limited time, fixed in some instances; in others determinable at the will of the corporation; yet, while filling the office, they can make contracts legally binding upon the corporation for a reasonable time. It appears from the evidence of the general manager that, prior to the agreement in question, the parties had extensive dealings. He said: "The Lee mine was shipping most of their ore to the plaintiff company. I presume it was shipped there for four years and more; to my knowledge, they shipped there continually from the time I came up to the 15th of February, 1884. I

came to Leadville in 1883." And the reason given is the following: "We were treated better with the Omaha & Grant than we were by anybody else." With this knowledge and experience of the fairness of the dealings of the appellee, when it was found that a special contract could be made for all the output of ore for six months, with the further benefit to the company of \$1 per ton in treatment, it was a duty imposed upon the manager by virtue of his office to make a contract. Another consideration that might greatly have influenced the company and its manager was the fact, as shown by the evidence, that appellant was frequently in want of money in advance of its production of ore, and that appellee was able and willing to assist it by advances. It appears that, at the time of making the contract, Pennock, the president, in person, and as a consideration for its acceptance, obtained an advance of \$10,000, pledging the future product of the mine for its payment, and its manager subsequently, on two or more occasions, received advances of from \$2,000 to \$5,000 each. We conclude that the general manager of appellant had power and authority to bind the corporation by the contract as made. It is true that the declaration and statements of an officer of a corporation not under oath of his power and authority are not competent to establish them. But when, as in this instance, his general power and authority is conferred as in the by-law, his own testimony in regard to his powers and duties, as incidental to the general power conferred, must be regarded as conclusive, when called as a witness by the opposing party, and his testimony admitted without objection, and remaining uncontradicted by other officers of his company. He said: "I was manager of the Robert E. Lee, and am still manager, but I had the handling of the ore up to the 15th of February, 1884. I had the general management of the mine on December 1, 1883; also charge of handling and disposing of the ore. \* \* \* I was general financial agent of the corporation. \* \* \* I sold and disposed of all the ore that was mined and shipped from the mine. I had authority to choose the reduction works to which I would ship and to dispose of it in any way that my judgment dictated. I was placed in that position by the president of the corporation, Mr. Pennock." The following authorities support our view of the power of the manager to make a contract: *Story, Ag. § 93; 1 Pars. Cont. 44; Ang. & A. Corp. §§ 297, 298; Bates v. Iron Co., 7 Metc. (Mass.) 224; Smith v. Peoria Co., 59 Ill. 412; Packet Co. v. Parker, Id. 23; Fay v. Noble, 12 Cush. 16; Green's Brice, Ultra Vires, 426, note; Union, etc., Min. Co. v. Rocky Mt. Nat. Bank, 1 Colo. 532, 2 Colo. 248; McKiernan v. Lenzon, 56 Cal. 61.*

There is another view of this case which should not pass unnoticed. The general manager, Gullhault, held that office at the time of the trial, and had also been elected secretary of the corporation, and was naturally prompted to shield his company from damages, as far as he could conscientiously do so. His reluctance to

testify fully is apparent. But it is fairly inferable from his entire evidence that he was not alone responsible for the contract. It appears that Mr. Pennock, the president, had been in treaty with Mr. Eddy, of the Smelting Company, in Denver, in regard to the matter, and that the contract was the result of such negotiations. He was asked, on direct examination: "Question. About the 1st of December, 1883, did you receive any communication from the president in relation to making a contract for the treatment of ore or selling ore for six months? Answer. I had word from him by telegraph, I believe, where to ship the ore; have not got the telegram; I looked for it, but could not find it. It was a direction to ship the ore to the Omaha & Grant smelter. He stated Eddy & James. I made no agreement with the Omaha & Grant smelter with reference to the treatment of ore. The agreement was made by them. They submitted the proposition to me, and I signed it. \* \* \* I had no other purpose in signing the name of the company than to formally accept their proposition in writing. I intended to ship them the ore, and I did not take much notice of it. I signed the proposition after I received the telegram from Mr. Pennock. I think it was in pursuance of the direction I received from Mr. Pennock that I signed this proposition, and thought I was carrying out his directions." He further said: "I made no contract to ship unproduced ores before that time. At the time I received the telegram from Mr. Pennock he was president of the Lee Company, and was on his way from Denver to Chicago. I have searched for that dispatch, and cannot find it. I don't remember, but I presume that dispatch was received about the time the proposition was presented. I have searched for it among my papers where I usually keep those things, and searched last night again diligently, and cannot find it. As near as I can remember, the telegram stated for me to ship the ore to Eddy & James, or words to that effect. Ship all ore to Eddy & James." Again, in speaking of the contract made: "That proposition was signed by me in the office of the Omaha & Grant. It was not prepared in my presence. I presume it had been previously prepared. I think I went there to make a settlement upon ores, and they got to talking of shipping the ore, and what word they had got from Pennock and Mr. Eddy. The talk that Mr. Eddy and Mr. Pennock had had, and from what I could learn, Mr. Eddy had written to Mr. Head to make the contract. I think Mr. Eddy had written to Mr. Head. I think that was what I learned there from the conversation with Mr. Head at the time. Mr. Head represented that he prepared this contract in pursuance of instructions from Mr. Eddy. I cannot make out anything else. He showed me the contract, and I signed it. I presume I did say something to him about receiving a dispatch from Pennock. I cannot say positively. \* \* \* The Eddy & James Company is the same thing as the Omaha & Grant Smelting Company. Mr. Pennock's telegram, as I remember it,

simply directed me to ship the ore to the Omaha & Grant smelter. I think that was all there was to it. I don't remember positively receiving any letter from him (Pennock) soon after that explaining his telegram."

Although the testimony of this witness is evasive, it is fairly inferable from it that the contract originated with Messrs. Pennock and Eddy in Denver, and the execution of it was pursuant to the instructions received by the respective managers. Mr. Head, the manager of appellee, testified: "About the 27th of November I received information from our Denver office in regard to this contract. In pursuance of that information, I submitted this proposition to the manager of the Lee Company. The conversation I had with Mr. Guilbault, as manager of the Lee Company, was to submit to him that proposition in writing, and I asked him at the time if he had been—if he had any word from Mr. Pennock, and, if so, if he was ready to sign the contract; to which he assented, and signed it, and commenced delivering the ore the next day. At the time this proposition was submitted the subject was first broached by Mr. Pennock, of the Lee Company. It was first broached to me by Mr. Eddy. I was not present when the interview took place between Pennock and Eddy, and I know nothing about that, except by the communication I received at the time." A similar contract to the one in question had been made and fulfilled by the same parties previously. Mr. Head testified: "We had a contract during the preceding eight or nine months. They were not bound to deliver the entire product of the mine to us until some time in October, when we made a contract with them to deliver up until the 1st of December. It is usual for the mine owners and the smelter owner to agree as to the price of smelting before the ore is delivered. That is not the invariable custom, but as a rule it is done. Very frequently shipments are made; that was the rule between our company and the Lee Company. There was an agreed price, made always beforehand; the prices varied from time to time on different contracts. The last they had before this contract was made was \$18.-50, 8 per cent off," etc.

By whom these contracts were made on the part of appellant does not appear, but it is fairly presumable that they were made by the manager. It also appears that the contract in question was not materially variant from those formerly made, except as to the length of time. The right to pledge or sell the ore three weeks in advance of the mining would also give the right to sell for six months, or any other reasonable time. In each instance they were for ores unbroken, and for future mining and delivery. This contract was unquestioned until the appellant leased its mines and rendered itself incapable of further compliance. It is true Guilbault says Pennock, the president, repudiated the contract, but this was not until after the suit had been commenced. Guilbault's further examination shows that it was only repudiated to him. Its le-

gality never having been denied to appellee to his knowledge, and the extent of the repudiation, even to him, seems to have been as follows: "Question. In that conversation with Mr. Pennock, I will ask you if Mr. Pennock, either directly or indirectly, attempted to repudiate that contract that you had made. Answer. Yes, sir; not in the presence of Mr. Head, not with Mr. Head, I don't think. I mean not in that conversation Mr. Pennock and I had at the smelter. He said he would go and see Mr. Eddy, and see if he could not cancel the suit; have it arranged so that he could cancel the suit. I do not know as Mr. Pennock denied the liability of the company in that conversation." That Guilbault's testimony remained uncontradicted by the other officers of his company, and that he retained his position as general manager, and was promoted to the secretaryship of the corporation, are circumstances to be considered in determining how the company regarded his acts in making the contract.

The second proposition relied upon, and ably supported by the elaborate argument of counsel, is "that the instrument sued upon did not constitute a contract between the plaintiff and defendant companies," etc.; and contends that the proposition was but a circular letter, amounting to no more than if it had said: "Our charges for reduction, and the prices we will pay for ores from the Robert E. Lee mine for the next six months, will be thus and so. We invite your attention to these, and solicit the continuation of your patronage." The record shows by the evidence, uncontradicted, of Guilbault and Head, that the contract was the result of negotiations entered into by Pennock and Eddy in Denver, and executed by the respective managers at Leadville. The proposition is directed or addressed to the Robert E. Lee Silver Mining Company, Leadville, Colo.; contains a specific offer to purchase the product of the Robert E. Lee mine for six months at certain stipulated prices per ton, paying 95 per cent. of New York prices for the silver as quoted on the day of settlement, deducting \$17.50 per ton for working charges, signed by the company by its manager, Head. It is certainly definite and specific, and we cannot see why all that was necessary to constitute a valid contract was not contained in it when it was accepted by the mining company and appellee notified of its acceptance. True, as urged by the eminent counsel, the proposition did not say we will "buy" and "pay for," nor did the acceptance say we will "sell;" but, in transactions of this kind, words "we offer" must be deemed an equivalent to and synonymous with "we will buy;" and when the words "we offer for" are used, they must be also held to include a promise to pay. Neither in the acceptance is it necessary to say, "I sell;" an acceptance of the offer necessarily embraces the proposition. The only word in the least ambiguous is the word "product," and that does not appear to have been misunderstood or questioned by the parties. Up to the time appellant by its own act in leasing its property incapacitated itself from compliance with its



terms, both parties regarded it as meaning what it imports,—the entire product, the output, all the ore mined and marketable. It is insisted that the contract was void for want of mutuality, and that as appellee was not obligated to mine and furnish any given amount of ore, or in fact any ore, the contract was void. True, there was no contract agreement to furnish any ore, but the business of appellant was mining and producing ore, and it was to be presumed that it would mine and furnish it if in the mine and accessible. It is urged by counsel that the contract was void—*First*, that the contract was void for want of mutuality; *second*, that it was void for want of consideration. We have already fully examined the first, and cannot adopt the contention. In regard to the second, it is shown by the contract and evidence that there was the actual consideration of \$1 per ton reduction in the cost of treatment of all ore to be taken out for six months, and a cash advance of \$10,000 on ores to be mined and delivered in the future; either of which was sufficient consideration, though probably neither was necessary. In *Violett v. Patton*, 5 Cranch, 150, it is said: "To constitute a consideration, it is not absolutely necessary that a benefit should accrue to the person making the promise. It is sufficient that something valuable flows from the person to whom it is made, and that the promise is the inducement to the transaction." See, also, *Townesley v. Sumrall*, 2 Pet. 182; *Hadden v. Dimick*, 31 How. Pr. 196; *Greve v. Gauger*, 36 Wis. 369; *Barton v. McLean*, 5 Hill, 256; *Thorn v. Commissioners*, 32 Beav. 490. An almost parallel case to the one under consideration, in many respects, was *Riggins v. Railroad Co.*, 73 Mo. 598, growing out of the following memorandum: "Kausas City, Mo., November 6, 1872. Lead from Baxter to St. Louis at 22½ per 100. All lead shipped by Chapman & Riggins to be forwarded by M. R. F. S. & G. R. R. at above rates from January 1st, 1873, to January 1st, 1874, and above rates guaranteed for same time. H. J. HAYDEN, G. F. A., RIGGINS & CHAPMAN,"—the breach alleged being that the railroad company refused to transport large quantities of lead offered by plaintiff at the rates mentioned in the proposition. The same defenses were interposed that are here insisted upon in argument, and it was held that, although *Riggins & Chapman* did not agree to ship any definite quantity of lead, they did bind themselves to ship over the road of the company any lead they should ship to St. Louis, and that that was a sufficient consideration for the company's guaranty of rates. It was also urged in that, as in this case, the instrument was not a contract by reason of its uncertainty and indefiniteness; was only an insufficient memorandum; and the court properly held: "Where parties make and sign a memorandum of agreement with the understanding that a formal contract embracing the same stipulations is thereafter to be written out and executed, if they afterwards act upon the memorandum it will be treated as a valid and binding contract, though never written out in a for-

mal manner." See, also, *Paige v. Woolen Co.*, 27 Vt. 485; *Kinder v. Brink*, 82 Ill. 376; *Thorn v. Commissioners*, supra; *Railroad Co. v. Philipson*, 16 C. B. 2. In this case the testimony shows that it was not intended as a memorandum upon which a contract was to be drawn, but a contract entire and complete in itself, and was so understood and acted upon by the parties to it. *Gulbault* testified: "I signed the name of the corporation for which I was manager, the Robert E. Lee Mining Company, by myself as manager. I presume the signature to that was an acceptance of it. I so understood it. I had no other purpose in signing the name of the company than to formally accept the proposition in writing." He also testified: "Immediately after signing this contract, the price changed to \$17.50; all shipments were settled on the basis named in the contract." \* \* \* I think they did receive about \$10,000 advances on this contract, but I am not positive of it. Our books do not show it. I think we shipped mineral to the Omaha & Grant smelter about two months and a half after the execution of this contract, and the new rate fixed by the contract of \$17.50 per ton; we shipped up to February 15, 1884, and all settlements were made on the basis of the price made in the agreement." Mr. Head, manager of appellee, testified, in substance, to the same, and it remains undisputed; showing conclusively that the paper signed was intended to be and was regarded as a valid existing contract, and was acted upon as such by both parties, until the mines of appellant were leased and the disposition of ore passed out of its control. We do not think the court erred in its findings upon the law and facts, and advise that the judgment be affirmed.

RICHMOND and BISSELL, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment of the trial court is affirmed.

ELLIOTT, J., dissenting.

(16 Colo. 103)

# JACKSON v. CRILLY.

(Supreme Court of Colorado. March 13, 1891.)

CARRIERS—DEATH OF PASSENGER—CONTRIBUTORY NEGLIGENCE—EVIDENCE OF DECEASED WITNESS.

1. A passenger on an excursion train, who seats himself on the rear end of an open car, on a railing not exceeding 2½ inches in thickness, with his feet elevated by being placed on the seat directly in front of him, and with no possible opportunity of protecting himself in case of a sudden jolt of the car, when he might have found a safe seat in an adjoining car or stood up in the car in question, is guilty of contributory negligence as a matter of law; and, in an action for his death, caused by falling from his seat while the train was in motion, it is error to submit the question of contributory negligence to the jury.

2. The testimony of a witness, since deceased, given at the coroner's inquest, is not admissible in favor of defendant on the trial for the alleged negligent killing, unless it appears that plaintiff had an opportunity to cross-examine the witness; and a recital in the offer of evidence that the respective counsel in this case were present at the inquest is not sufficient to prove that plain-

tiff had such opportunity, in the absence of a showing in whose behalf, in what capacity, or for what purpose the respective counsel were present.

Commissioners' decision. Appeal from district court, Lake county.

*J. E. Havens and Wolcott & Vaile*, for appellant. *S. J. Hanna and Owen Prentiss*, for appellee.

RICHMOND, C. This action was brought by appellee, plaintiff below, to recover damages for the death of John Crilly, her husband, while a passenger upon the train run and operated by the appellant as receiver of the Denver & Rio Grande Railway Company. The defendant, among other things, pleaded circumstantially that the death of Crilly was caused by his own contributory negligence. The undisputed facts appear to be that the decedent, Crilly, was one of a large number of persons who attended a picnic at or near Mitchell's station on the Red Cliff branch of the Denver & Rio Grande Railway. That on the day of the accident they left Leadville in the morning, and rode safely to the grounds, and spent the day there in the usual manner. That three trains were run to and from the picnic grounds on that day. That Crilly and his friends, some of whom were witnesses in the case, waited until the last train was about to start for Leadville; that the train consisted of passenger coaches and open cars. That the car which Crilly and his friends entered to return to Leadville was an ordinary coal-car with a box about three feet deep, with seats across it on the inside, placed about eighteen inches from the top. That there were seats across each end of the car, the box of the car forming a back to these end seats. That upon entering the car Crilly seated himself upon the rear end of the box, and placed his feet upon the seat. The board or railing upon which he sat was about 2½ inches thick. In this manner Crilly rode some 12 or 15 miles over a mountainous country. That at a point between Malta and Leadville, and while running on an up grade, Crilly fell from the car, and was killed. The testimony of Patrick Cleary is that the car which Crilly and he entered to return to Leadville was crowded; that, failing to find a seat, Crilly sat on the back railing of the car, with his feet between two men who sat on the rear seat. Cleary himself was standing up. The testimony of James Jolly was to the effect that the train left the grounds about seven or eight in the evening, when it was still light. That he climbed on the car after it was full. That Crilly got on after him, and sat next to him; that they were in their seats about a quarter of an hour before the train started. That Crilly had drank a few beers during the day. Just after coming around the curve going up grade, there was a jar. That the jar was caused by the quickening of the speed. That he heard shouting, and learned that Crilly had fallen. He said he could stand on the seat, but could not stand on the floor except by crushing his way in so that it would be uncomfortable. "Question. Then you could have stood up there? Answer. By

crushing in. Q. By a little inconvenience? A. Yes, sir. Q. Instead of sitting on the end of the car? A. Yes, sir. Q. If you could have done that, Mr. Crilly could have done that also, couldn't he? A. Yes, sir." Peter Jolly testifies that he stood up in the car, and that there was room for more to stand; that the train was running about 10 or 12 miles an hour. Joseph Burns testified that at the time of the accident the train was running smoothly. He did not notice any jolt or jar. The testimony also shows that the car next to the one in which deceased rode was not crowded.

The cause was tried upon the theory that the question of contributory negligence is necessarily one of fact for the jury. In this, we think, there was error. The testimony clearly shows that the deceased was in a place of known danger; that he put himself in this place of danger voluntarily, and, it may be said, recklessly. It is beyond all contradiction that the occupancy of the place of danger caused or contributed to his death. If he had been standing up or seated inside the box, or if he had, within the time after entering the car and ascertaining its crowded condition, and before the starting of the train, sought a position in the next or adjoining car, the lamentable accident would probably not have resulted. It is admitted by the testimony and by the strongest witnesses, and, it might be said, by the most willing witnesses, on the part of the plaintiff, that by a little inconvenience to himself he could have stood up in the car as others did, and thus avoided the accident. There was room for him if there were room for others, and he should have taken a place of safety. He was not an infant, nor *non compos*. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter the former could not arise. He took upon himself the right and privilege of riding on the rear end of a box-car, seating himself upon a board not exceeding in thickness 2½ inches, with his feet elevated by being placed upon the seat directly in front of him, and with no possible opportunity of protecting himself in case of a sudden jolt or jar of the car; and we cannot escape the conclusion that his death was due to his own folly and recklessness. He himself was the author of his own misfortune. This is shown with as near an approach of demonstration as anything short of mathematics will permit. It is a well-known principle of law that where a man negligently and without excuse places himself in a place of known danger, and thereby suffers an injury at the hands of another, either wholly or partially by means of his own act, he cannot recover damages for the injury sustained. The contributory negligence which prevents recovery for an injury, however, must be such as co-operates in causing the injury, and without which the injury would not have happened. The true test is: Did the plaintiff's negligence directly contribute to the production of the injury complained of? If it did, there can be no recovery; if it did not, it is not to be considered. "The question

of negligence is ordinarily a question of fact, and ought to be submitted, under proper instructions, to the determination of a jury. Where the facts are disputed, where there is any reasonable doubt as to the inference to be drawn from them, or when the measure of duty is ordinary and reasonable care, and the degree varies according to the circumstances, the question cannot, in the nature of the case, be considered by the court; it must be submitted to the jury. But where the facts and inferences therefrom are undisputed, where the precise measure of duty is determinate, — the same under all circumstances, — where a rule of duty in a given exigency may be certified and accurately defined, the question is for the court, and not for the jury." *Dewald v. Railroad Co.*, (Kan.) 24 Pac. Rep. 1101; *Railroad Co. v. Greiner*, 28 Amer. & Eng. R. Cas. 397; *Lord v. Refining Co.*, 12 Colo. 390, 21 Pac. Rep. 148. The case of *Railroad Co. v. Hoosey*, 99 Pa. St. 492, is one somewhat similar to the case at bar. There a passenger in an excursion car was unable to find a seat, owing to the crowded condition of the cars. Although there was standing room inside, he stepped outside of the car while the train was in rapid motion, and placed himself on or near the edge of the platform, with his back against the window, holding on by an iron rail fixed to the car. In this position he rode for some minutes, when a jolt occurred, which threw him to the ground, and inflicted an injury upon him. Suit having been brought by him against the railroad company to recover damages for the injury done him, held, that he had been guilty of such negligence as to preclude his right of recovery, and that the court should have so instructed the jury. In *Hogan v. Railway Co.*, 15 Amer. & Eng. R. Cas. 439, it was held that "when the facts found lead irresistibly to the conclusion of negligence or the absence of it, the inference of negligence or the absence of it is purely a conclusion of law; but where the facts found may leave the inference of negligence or no negligence in doubt, the question of negligence is for the jury, because other facts not found are necessarily to be considered and determined before the inference can properly be drawn." Measuring the testimony of plaintiff's witnesses as above stated by the rule here announced, the court upon the trial might properly have granted defendant's motion for a nonsuit; and, as the testimony of the defendant's witnesses did not improve the plaintiff's case, the verdict and judgment cannot be sustained. *Horn v. Reiter*, 16 Colo. —, 25 Pac. Rep. 501. There is not in the complaint an averment that in thus providing the box-car for the accommodation of the excursionists the company was negligent or careless. Voluntarily, as one of those who on that day was engaged in the pursuit of pleasure, the deceased entered this crowded car, and assumed a dangerous position, notwithstanding the fact that the adjoining car had ample room in which he could have found convenience, comfort, and safety, and seated himself on the rear end of the car, and in a position which any man of ordinary prudence ought to know

was unsafe, — ought to know that in case of the slightest accident or jolt he was liable to fall. No prudent man of ordinary intelligence, sober, in full possession of his faculties, with a due regard for his life, possessing some knowledge of journeying by railroad, and the liability to accident on occasions similar to the one in which deceased lost his life, could fail to conclude that a more perilous situation could not have been assumed by any one than that taken by Crilly.

The defendant offered in evidence what was conceded to be the testimony given by George H. Andrus before the coroner's jury at an inquest held on the body of John Crilly when "the respective counsel in this case were present." It was conceded also that the witness Andrus was examined and cross-examined and that he had since died; but it was not conceded nor proved in whose behalf, in what capacity, nor for what purpose the respective counsel were present at the coroner's inquest. Hence we cannot say that plaintiff had had an opportunity to cross-examine the deceased witness; and for this reason, if for no other, the court did not err in rejecting the testimony. 1 Greenl. Ev. § 163 et seq.; 1 Whart. Ev. § 177 et seq. We think the judgment should be reversed.

BISSELL and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed.

#### DUNNE et al. v. STOTESBURY.

(Supreme Court of Colorado. April 3, 1891.)

#### DISSOLUTION OF TEMPORARY INJUNCTION—LIMITATIONS IN EQUITY—INTERVENTION.

1. Error in refusing to dissolve a temporary injunction will not justify a reversal of the final judgment, if the record be otherwise free from objection.

2. When the cause of action in an equitable proceeding is one for which plaintiff might have resorted to a common-law remedy, as trover or replevin, the six-years statute of limitations is applicable.

3. A party is entitled to bring his suit in equity at any time within the statute of limitations, except in cases where there has been delay or acquiescence amounting to a recognition of the rights of the opposite party making the assertion of adverse rights inconsistent and unconscionable, or where other equitable considerations equally strong are established.

4. A party is not bound to intervene in an action relating to property claimed by him, but he may seek redress in any court of competent jurisdiction, so long as his right of action is not barred by statute nor otherwise forfeited.

(Syllabus by the Court.)

Appeal from district court, Lake county.

Henry H. Stotesbury was plaintiff below, and by this suit sought to be declared the owner and awarded the possession of a certain certificate for 12,500 shares of the capital stock of the Agassiz Consolidated Mining Company. Injunctive relief was also sought in aid of the action. Of the defendants, James Dunne alone made defense. The plaintiff's ownership of 8,100 shares included in said certificate was not controverted, but Dunne claimed title to the other 4,400 shares. A temporary in-

junction was granted, which the court on motion refused to dissolve. On the final hearing, the court found that plaintiff was the owner of 3,150 of the shares in dispute, and that the defendant Dunne was the owner of the remaining 1,250 shares. Decree was rendered accordingly. An appeal was prosecuted to this court under the act of 1885, from the order of the district court refusing to dissolve the preliminary injunction. Upon the rendering of final judgment sustaining the injunction, except as to the 1,250 shares awarded to the defendant Dunne, another appeal was taken, and the two were consolidated in this court by consent.

*Patterson & Thomas*, for appellants. *J. S. Jones* and *A. T. Gunnell*, for appellee.

**ELLIOTT, J.**, (after stating the facts as above.) The assignments of error upon the first appeal, even if sustained, would not, under the circumstances of the case, justify a reversal of the final judgment, if the record be otherwise free from error; hence such assignments need not be considered in this opinion. *Roberts v. Arthur*, 15 Colo. —, 24 Pac. Rep. 922. The assignments of error upon the last appeal relate to the admission and exclusion of testimony, and to the findings and judgment of the court. The objections to the rulings of the court upon the testimony offered, as shown by the abstract, were not well taken; they require no discussion. From a careful examination of the printed abstract upon which the appeal is submitted, we do not feel warranted in disturbing the court's findings as to the facts and merits of the controversy. The superior advantages enjoyed by the trial court for determining such matters are well understood. The cause of action was one for which the plaintiff might have resorted to a common-law remedy, as trover, or perhaps replevin, the shares of stock being personal property. But under the Code, and probably under the former practice, he was also entitled to invoke equitable relief in a case of this nature. Hence the six-years statute of limitations, as pleaded, was applicable to the action. Gen. St. §§ 241, 2172; Code, § 70, Ang. Lim. § 26; 1 High. Inj. § 30; 2 Story, Eq. Jur. §§ 906, 907; *Boylan v. Huguet*, 8 Nev. 345; *Wilson v. Anthony*, 19 Ark. 18.

Whether or not the evidence sustained the defense of the statute of limitations was a question of fact. The evidence upon such issue, though somewhat conflicting, fairly shows that the cause of action accrued within the statutory period, and, the court below having found against the defense, its judgment thereon cannot properly be reversed on this appeal.

In determining whether or not plaintiff's rights were forfeited by his laches in bringing suit, independent of the statute of limitations, it is necessary to consider somewhat in detail the subject-matter of the controversy, and the relation of the parties thereto. Henry H. Stotesbury, the plaintiff, Adin Alexander, and Sam B. Morgan were the original owners of all the capital stock of the Agassiz Consolidated Mining Company.—50,000 shares, of the par value of \$2,500,000. Plaintiff

owned 25,000 shares; Alexander and Morgan each owned 12,500 shares. Alexander, desiring to dispose of his stock, authorized one James Dunne to sell the whole thereof for \$60,000 cash, net. Plaintiff was also requested to aid Dunne in the sale of the stock. This was early in June, 1879. Alexander's stock was represented by a single certificate, numbered 3. Plaintiff and Dunne were then in New York, and it was arranged between them that they should sell Alexander's stock, or so much thereof as should be necessary, and that they should retain as their commissions for effecting such sale any surplus, either in money realized or stock unsold, after procuring the \$60,000 for Alexander. Eight thousand one hundred shares of certificate No. 3 were accordingly set apart for this purpose, to be sold at the rate, if possible, of 135 shares for \$1,000, which would yield the sum necessary to satisfy Alexander; but it was also agreed that 1,900 shares more might be used as an inducement to purchasers in case of emergency to raise the necessary amount. Thus 2,500 shares would be left for plaintiff and Dunne. Shortly after making these arrangements plaintiff came to Colorado. In the latter part of July, 1879, when about \$20,000 had been subscribed towards the sale of the Alexander stock through the joint efforts and influence of plaintiff and Dunne, and when it appeared that no more stock could be disposed of, plaintiff purchased the entire Alexander interest, subject to the subscriptions already made thereto. Dunne, by letter, heartily approved of this purchase by plaintiff as the only plan that could have been adopted for the sale of the Alexander interest. Plaintiff was in Colorado at the time of his purchase of the Alexander interest; but certificate No. 3, which originally represented that interest, was in New York, where it had been indorsed to Dunne for the purposes of said sale. It appears, however, that plaintiff did not know of such indorsement at the time of his purchase. Immediately and continuously after the purchase of the Alexander stock, plaintiff assumed the entire control thereof, supplying from his own stock the purchasers who had previously subscribed for portions of the Alexander stock. Thus, while plaintiff did not have the manual or corporal possession of certificate No. 3, he was at all times after such purchase practically in the possession and enjoyment of the entire interest in the Agassiz Company originally represented by said certificate. His ownership of the 8,100 shares represented by said certificate seems never to have been disputed, and that he actually controlled and enjoyed the other 4,400 shares continuously after the date of his purchase from Alexander is admitted by the following paragraph from the answer of defendant Dunne: "That during the period of six years the said plaintiff has been practically in control of the defendant company, operating its mines, conducting its business, making leases, without the knowledge or sanction of the directors, and receiving the proceeds of ores mined therefrom without making any account thereof to the said stockholders or

directors; that during said period this defendant was never regarded by plaintiff as a stockholder of said company; that he never received a notice of a stockholders' meeting, nor given any opportunity to assent or dissent concerning the management of said mines, the expenses of said company, or the disposition of its said products, but that plaintiff assumed to represent, own, and have the right to vote and did vote the said 4,400 shares for the purpose of carrying out his own objects, intentions, and policies of and concerning the administration of the affairs of said company." When there has been unreasonable delay in bringing suit, courts of equity sometimes refuse relief, even though the statutory period of limitations has not expired; but this is generally in cases where acquiescence amounts to a tacit recognition of the rights of the party in possession, and where the assertion of adverse rights is regarded as not only inconsistent, but unconscionable, or where other equitable considerations equally strong are established. Courts of equity often act in analogy to the statute of limitations, though not especially applicable to their jurisdiction, and also, in the absence of statutory limitations, upon principles of their own, refuse relief to stale demands. In such cases equity reasons thus: The plaintiff has slept upon his alleged rights. His opponent has long been allowed to possess and enjoy the disputed property without complaint. The controversy has probably been settled. The evidence has been lost or obscured. The plaintiff has sought advantage by delay. His action is an experiment. There can be no justice or equity in his claim. Ang. Lim. §§ 25-30, 171, 172; Ban. Lim. 245 et seq.; 2 Herm. Estop. 1194, 1360; Great West Min. Co. v. Woodmass of Alston Min. Co., 14 Colo. 90, 23 Pac. Rep. 908, and cases there cited; Coffey v. Emigh, 15 Colo. —, 25 Pac. Rep. 83; Wilson v. Anthony, supra; Hamlin v. Mehane, 1 Jones, Eq. 18.

None of the foregoing principles control the present controversy; for, as we have seen, there was a statutory period of limitation applicable to the case, and the same had not elapsed when the action was instituted. Hence the statutory period must control, in the absence of equitable considerations requiring the same to be shortened. Besides, the plaintiff has been practically in the continuous possession and enjoyment of the property in dispute ever since the cause of action arose; he has not recognized his opponent's alleged rights, nor acquiesced in his enjoyment of the property in dispute; nor has he done or said anything in respect thereto calculated to mislead Dunne to his injury. Hence neither the doctrine of laches, nor of acquiescence, nor of estoppel by conduct could properly be invoked as a defense to plaintiff's assertion of his rights to the Alexander stock to the extent of his purchase. The defendant Dunne in his answer alleged that, in a certain action brought by him against the Agassiz Consolidated Mining Company in a New York court, he was decreed to be the owner of the 4,400 shares of stock in controversy,

and that plaintiff is thereby estopped from questioning the judgment rendered therein. The answer further averred that plaintiff was a party defendant to the New York suit, but the exemplified copy of the record of that case introduced in evidence on the trial of this action contradicts such averment. Hence plaintiff was not, *per se*, bound by the New York judgment. His knowledge of the proceedings in that case was, however, allowed to be shown in evidence as bearing upon the question of his alleged laches in bringing this action. Under the circumstances, we are unable to say that the time within which he might bring this action should be abridged by reason of such knowledge. Dunne brought that suit with full knowledge of plaintiff's claim to the disputed stock. Not having made plaintiff a party, he certainly acquired no legal right against him by the proceeding, and it is difficult to perceive that he thereby gained any equitable advantage. The plaintiff was not bound of his own motion to intervene in the New York action. He had the right to seek redress in any court of competent jurisdiction. He selected a forum in the jurisdiction where the property to be affected by the judgment was located. He instituted the suit before judgment was rendered by the New York court, and before the statute of limitations had barred his right of action. The cause having been heard and determined upon legal and equitable principles, without substantial error, the judgment must be affirmed.

(16 Colo. 43)

## HOTTEL v. MASON et al.

(Supreme Court of Colorado. April 8, 1891.)

## PARTNERSHIP — ACCOUNTING — LIABILITY OF SURVIVING PARTNER.

1. During a partnership business, extending over four years, the books were kept under the supervision of both partners, but most of the entries were made by one member of the firm. His copartner, however, was active in conducting the business, had unrestricted access to the books, and might have familiarized himself with the accounts and the manner of keeping them. Held that, after the death of such copartner, it was error, on a settlement of the partnership accounts, to treat the surviving partner as a trustee, and to charge him with all omissions and inaccuracies in the partnership accounts, since both partners were *in part delicto* in so far as the unsatisfactory condition of the firm books were concerned.

2. Where the partnership business was continued for 18 months after the death of the copartner, the surviving partner, who was also one of the executors of the deceased copartner, must be regarded as acting in a fiduciary capacity for the heirs of his copartner, and held to a strict accountability on a settlement of the partnership affairs, though the widow of the deceased partner, who was a capable woman, had access to the partnership books at all times.

3. Shortly before his death, the deceased partner sold a lot of cattle, and received the purchase money therefor. At about the time of this sale the purchaser executed a trust-deed on land to secure a note for an amount about equal to the purchase price, which note was described as payable to the two partners. On a settlement of the partnership accounts before a referee, it appeared that the firm dealt in cattle, and the purchaser admitted that he had had no other dealings of similar import with the partnership or the deceased partner. Held, that these facts were suffi-

cient to overcome the presumption that the sale was made on the deceased partner's individual account, arising from the fact that he had individual property, and that the transaction did not appear on the books of the partnership.

Appeal from district court, Arapahoe county.

Appellant and Joseph Mason were associated as copartners. The firm was the owner of certain mill property, and carried on a milling business. It also became the owner of herds of cattle and horses, and transacted the usual business in connection therewith. On the 11th of February, 1881, Mason suddenly died, and appellees succeeded as legatees to all his property, including his interest in the partnership assets. His will provided for the continuation of the partnership business, notwithstanding his decease, until such time as in the judgment of Mrs. Mason and appellant, who were named as his executrix and executor, it should become desirable to wind up the partnership affairs. By virtue of the foregoing authority in the will, the business of the copartnership was continued for a considerable period. But finally, in connection with the administration upon the estate, an examination of the partnership accounts and assets took place, and on the 18th of September, 1882, an alleged settlement was made. This accounting received the approval of the county court in the final settlement of the estate, and the executrix and executor were duly discharged. In February, 1885, a complaint instituting the present suit in equity for a restatement of the partnership accounts was filed. It is based upon the theory that appellant, by virtue of his familiarity with the partnership business, his superior advantages in manipulating the same, his influence over Mrs. Mason, and especially by virtue of the fact that during Mason's life-time as well as afterwards he attended largely to the keeping of the books, succeeded in overreaching Mrs. Mason, in deceiving the county court, and in procuring a settlement tainted by fraud, and greatly to his own advantage. Various specific acts of fraud were alleged, and the settlement was otherwise impeached. An answer being filed putting in issue all material averments of the complaint, and a sufficient replication thereto being tendered, the cause came on for trial. At this stage of the proceedings, "on motion of plaintiffs' attorneys, the defendant by his own attorneys consenting thereto," it was ordered that a reference be made, the referee to take and state an account of the partnership transactions and other matters referred to in the complaint, to reduce to writing the evidence of the witnesses, to examine all books, vouchers, deeds, and other instruments relating to the partnership affairs, to hear and determine the whole issues, both of law and of fact, and to report to the court the evidence so taken, together with his findings of law and fact, and an account of the transactions mentioned in the complaint; also a judgment or decree in the premises. Upon the investigation and hearing, the referee, in accordance with the foregoing order, reported the evidence, findings of law and fact, and a decree awarding

plaintiffs the sum of \$19,521.39. The report and decree were by the court, after a brief hearing, approved. To review this action the present appeal was taken. Other facts necessary to a full understanding of the opinion are sufficiently narrated therein.

*L. S. Dixon and Ballard & Robinson*, for appellant. *T. D. W. Yonley and Thos. Macon*, for appellees.

HELM, C. J., (*after stating the facts as above*.) The parties differ in this court somewhat as to the specific character of the issues originally made by the pleadings. For reasons that will presently appear, however, we deem it unnecessary to consider this feature of the discussion. The pleadings consisted of a complaint, answer, and replication; no demurrer was filed, nor was any question of law otherwise raised prior to trial. The cause, by consent, went to a referee for the purpose of taking and stating a full and complete account of all the transactions of the firm of Mason & Hottel, both before and after Mason's decease, with instructions to report findings of law and of fact, together with a decree in accordance therewith. The referee found as a legal conclusion that the settlement of September 18, 1882, was obtained by deception and fraud on the part of appellant. There are matters in the record tending to sustain this finding, but its correctness is vigorously denied. We shall assume that the referee was clothed by the order of reference, with power to adjudicate this question; and, for the purposes of the present review, his finding in this regard will be accepted, without, however, a formal investigation and approval. The case will be treated as one for an ordinary accounting and settlement of partnership affairs, and questions of fraud, save as incidental to the accounting, will receive no further notice.

Counsel for appellant insists that the findings of fact by the referee were imperfect. But the regularity of the order of reference, the general conduct of the trial by the referee, the manner of reporting his findings, and the procedure preliminary to the approval thereof, and entry of the decree by the district court, are not seriously challenged. Among the principal matters urged for reversal, in both the oral and printed arguments, are alleged errors of the referee in determining adversely to appellant the *status* of certain items connected with the complicated transactions and accounts of the firm.

Mason sometimes recorded firm debts and credits, but, being a foreigner and unaccustomed to writing in English, he left the keeping of the books mainly to appellant. Appellant's familiarity with the firm affairs gave him an advantage over Mrs. Mason after her husband's death, in connection therewith. Besides, at this time, Mrs. Mason was physically indisposed, and, reposing confidence in appellant, for a considerable period she trusted the firm business to him, though, at the alleged settlement consummated on September 18th, she employed counsel to look after her interests. In view of the forego-

ing circumstances, we commend the careful scrutiny with which all items in the book-account objected to by Mrs. Mason were examined. But the referee seems to have applied against appellant, throughout the entire period of the partnership business, the equitable rule of evidence governing the fiduciary relation of trustee, most earnestly contended for in this court by appellees' counsel. This rule may be stated as follows: A trustee must keep and render full and accurate accounts of all matters connected with the trust-estate; and any omissions or inaccuracies in his accounts, inimical to the interest of his *cestui que trust*, give rise to presumptions against him, which are decisive, unless overcome by collateral proofs affirmatively establishing his perfect fairness and equity in the premises. Pom. Eq. Jur. § 1063, and note; 3 Greenl. Ev. (13th Ed.) § 253. In this respect it seems to us the referee unconsciously erred. The firm business extended through a period of nearly six years. Over four years of this time the books were kept under the supervision of both partners, and appellant did not occupy the position of trustee for Mason. Nor should appellant be subjected to the adverse presumptions indulged by courts of equity against a partner when irregularities or defects in the partnership accounts are due solely to his negligence or other misconduct. For the unsatisfactory condition of the firm books the partners were, during Mason's life-time *in pari delicto*. While appellant made most of the record entries, Mason was active in conducting the business. Both he and Mrs. Mason had unrestricted access to the books. They were or might have been familiar with the accounts, and the manner of keeping them. The partners were on an equal footing, and, for loose habits and negligence in reporting and recording firm transactions, Mason should share the responsibility with appellant. During the remaining 18 months of the partnership, Mrs. Mason, by virtue of the will, became associated with appellant in the business. She appears to have been a capable woman, and had access to the books at all times. But throughout this period we should, perhaps, regard appellant as acting in a fiduciary capacity stronger than that ordinarily existing between partners; for, in addition to his advantages over Mrs. Mason, above mentioned, he was also an executor, co-operating with her in administering upon Mason's estate for the benefit of his children as well as his widow; and, of course, all matters pertaining to the partnership business and the keeping of the partnership accounts, to a greater or less extent, involved the interests of the minor heirs. With these preliminary observations touching generally the facts of the case and the law pertaining thereto, we pass to a brief examination of some of the specific items as to which appellant's counsel challenges the findings of the referee.

Early in the year 1880 Mason sold to one Chaffee one hundred head of cattle, and a short time prior to his death he received from Chaffee \$1,702.35 therefor. A few weeks subsequent to Mason's decease, ap-

pellant, learning of the payment, entered the same upon the firm books as a firm credit. The referee disallowed this item, treating it as an individual transaction of Mason's independent of the firm. Appellant was thus deprived of one-half of the amount collected. The referee bases his action in the premises substantially upon the following grounds: That there is no evidence indicating that Mason was not prompt and honest in reporting matters disposed of by him to the firm; that he did have money outside of the firm business which might have been invested in cattle; that Chaffee says he "supposed" the cattle to have belonged to Mason; also that the firm books show "no such cattle account," and fail to record otherwise anything about the sale. The original transaction having occurred during the life-time of Mason, and the suit being brought by his executrix, appellant was by virtue of section 3641, Gen. St., disqualified from giving testimony on his own behalf concerning the partnership interest therein. But in the *first* place, while at the time of the sale the firm owned a large herd of cattle, there is no evidence in the record even tending to show that Mason was the private owner of one hundred head, or any other considerable number. Appellees' counsel state, as an uncontroverted fact, that Mason conducted the purchase of what was known as the "Farmer" herd, but this herd at once, or very soon thereafter, became firm property. *Secondly*. At or about the precise date of the purchase of these cattle by Chaffee, he executed a trust-deed upon certain realty to secure a promissory note for \$1,566, described as payable "to the order of Joseph Mason and B. F. Hottel," which deed was duly filed for record by Mason. *Thirdly*. Chaffee upon the witness stand, though evidently hostile to appellant, reluctantly admitted on cross-examination that he had no other dealings of similar import and magnitude with Mason & Hottel, or with Mason alone; also that the trust-deed must have been given to secure the purchase price of these cattle, and that the \$1,702.35 was therefore paid by him to Mason in liquidation of the debt described in the deed, with interest. The note itself was not produced in evidence, and Chaffee says that it was doubtless delivered to him when he made the payment, and was lost or destroyed. It may be a matter of some significance that no antecedent record of the sale appears in the firm accounts; but the character of this significance depends upon the integrity and punctuality of Mason in reporting the sale, as well as upon the interest of appellant in making the proper record thereof. We recall attention to the fact that, as to this item, the rule governing a trustee's accounting with his *cestui que trust* is certainly inapplicable. The silence of the books concerning this matter should not, in our judgment, be treated as decisive against the interest of the partnership. Had appellant's reliance in the premises rested solely upon the entry of the item in the account after Mason's death, the action of the referee might perhaps be sustained; al-



though many transactions took place during the six years covered by the firm business that were not recorded with the accuracy of professional book-keeping, or at all. But, as already indicated, appellant produced strong collateral evidence. The recital of the trust-deed given under the circumstances, and unexplained, amounts to proof almost conclusive. Mason appears to have been a good business man, and he would hardly, upon the sale of his own property, have taken a note payable to himself and partner, secured by a trust-deed reciting an apparent firm ownership in the property sold. Had the presumption against appellant, recognized by the referee as arising from the silence of the books concerning the sale, actually existed, it would have been completely overcome. The trust-deed, having been executed under the supervision of Mason, must be regarded as showing his view on the question of title to the cattle sold. If there is any explanation of the matter consistent with Mason's private ownership, the burden of giving it was upon plaintiffs, and not upon appellant. Mason's failure to report the payment in question may be attributed to the fact that his death so quickly followed; and it is not impossible that his neglect to formally record the sale when made, arose from the knowledge that it was so clearly evidenced by the note and trust-deed.

The referee employed an expert accountant for the purpose of examining the books of Mason & Hottel kept during the six years of the partnership, restoring a lost ledger, preparing a trial balance, and rendering other needed assistance. This accountant reported, as one of the results of his investigation, that these books, on September 18, 1882, showed a balance to the credit of the firm of \$17,268.56 in the Poudre Valley Bank of Fort Collins. Governed by this report, the referee treated the sum named as a firm asset, and one-half of it enters into the decree against appellant.

The cashier of this bank was sworn as a witness. The bank-books were produced, and, by agreement of counsel duly certified extracts therefrom were admitted in evidence. These books showed that on the said 18th of September there was a balance to the credit of the firm of but \$1,775.75. Thus it appears by the most reliable evidence that the showing made in the company's books of a bank credit at the date mentioned, of upwards of \$17,000, was wrong, and that the real credit was but little more than one-tenth of that sum. The correctness of the bank-books is not questioned, nor is the accountant charged with inaccurately representing the company's books. Counsel for appellees insist that the difference between the sum actually in the bank to the firm's credit, and the amount that according to the firm books should have been there, must be treated as having been drawn out by appellant, and appropriated to his private use. With reference to this proposition, we suggest that, in the first place, if appellant were actually appropriating to his private use sums of money aggregating upward of \$15,000, he

would naturally have charged, or at least have attempted to charge, the company with sham expenditures sufficient to offset the amount misappropriated. It is hardly in accordance with human experience to suppose that he would willingly or thoughtlessly have left the accounts in a condition to inevitably arouse suspicions of his guilty conduct. *Secondly*, the referee does not return a specific finding imputing to appellant the perpetration of this particular kind of fraud. He does, however, report that no stock account was preserved during the existence of the firm; that the books were carelessly and negligently kept; and that many important transactions were not entered therein at all. The evidence justifies these findings of the referee. It shows that many matters should have been recorded in the firm books which were not. This was especially true as to that portion of the business transacted through banks with which the firm was in the habit of dealing. It appears that, instead of attempting fullness and accuracy in the regular firm books concerning items covered by bank accounts, the practice of the partners was to rely largely upon pass-books, checks, and stubs, vouchers returned, stated settlements, and reports given by the banks from time to time when requested. Sometimes, also, matters that would otherwise have been recorded were omitted on account of the absence of appellant. These explanations tend to show that the large difference between the accountant's report and the bank-books may have been due to legitimate expenditures of the firm by means of checks, drafts, and the like, concerning which no record was preserved in the partnership books. They are consistent with the finding of the referee on the subject of negligence in keeping the books, and do not necessarily indicate dishonesty on the part of appellant or Mason in the business. The sufficiency of the foregoing explanations, however, is a question we do not now propose to consider or determine. There is enough before us to warrant the conclusion that the referee probably dealt with appellant in this matter as a trustee, and gave undue weight to the manifest imperfections of the books, notwithstanding the fact that for more than two-thirds of the period covered by the partnership, Mason was also to blame for these imperfections.

The foregoing discussion with reference to the item from the Poudre Valley Bank is, in the main, equally applicable to the partnership account with "A. K. & E. B. Yount," another banking-house. The expert accountant found that, according to the firm books, there should have been, on the 18th of September, 1882, in the latter bank, to the credit of the firm, \$2,915.29. The books of this bank were not offered in evidence; but Mrs. Yount, who attended to the bank business, testified that some time during the year 1880, Mr. Mason withdrew from the bank the entire deposits of Mason & Hottel, and that thereafter the partnership made no further deposits in that bank; yet, notwithstanding this testimony, which was uncontradicted, the referee adopted the

report of the accountant, and the further sum mentioned, of nearly \$3,000, is also treated as a firm asset. Before passing from the subject of these bank-accounts, one additional matter should perhaps be noticed. It appears that early in August, 1882, when appellant, Mrs. Mason, and Rhodes, her attorney, were examining the firm books and endeavoring to make a statement in connection with the final settlement of the Mason estate, and closing up of the partnership business, appellant reported, and the bank-books showed, a debit by overdraft in the Poudre Valley Bank against the firm of \$6,434.84. Between the date mentioned and the 18th of September following deposits were made sufficiently large to cancel the overdraft, meet current expenses, and leaves the aforesaid balance of \$1,775.75 in favor of the firm. Mrs. Mason and Rhodes both testify that appellant made no subsequent report to them of the change that had taken place in the bank-account, and that the settlement was consummated on September 18th upon the basis of an overdraft of \$6,000 instead of the credit of \$1,700. This omission, and appellant's testimony explanatory thereof, are severely characterized by counsel for appellees.

But counsel for appellant earnestly insists that the mode of settlement adopted rendered it not only unnecessary, but also improper, to consider in the final report the change in question. He asserts that, though the statement of the partnership account was not formally rendered until September 18th, the parties understood that the partnership business was practically closed on the 6th or 7th of August preceding, and their computations rested upon the condition of the bank-account at that date. His position is that from the debts due the firm, treated on August 7th as assets, appellant was to pay this overdraft, together with other firm liabilities, and that, by thus using assets as collected in liquidation of liabilities, no real change in the financial condition of the firm took place; hence he argues the settlement, as made, "was in all respects fair to Mrs. Mason and the estate." To corroborate this theory, counsel refers to the fact that in the memorandum prepared by Rhodes, upon which the settlement ultimately took place, opposite this particular bank item is written the following: "1882, August 4 to 7." The foregoing view of the proceeding in question is not unreasonable. If, however, deliberate fraud in this regard were established, it would doubtless tend to impeach appellant's good faith in other respects, and coupled with additional appropriate proofs, might warrant charging against the firm the supposed bank credit of more than \$17,000. But this, with other matters, is left for reconsideration upon the further hearing of the cause. We do not wish to be understood as now deciding that the referee was wrong in his ultimate conclusions concerning the two bank items above discussed. As already stated, he was probably governed in determining appellant's liability in connection therewith, to a very large extent, by an erro-

neous view of the law applicable thereto; and we must assume that, but for this mistake of law, he might have adjudicated these items differently. For this, as well as for other reasons above given, in our opinion the judgment should be reversed, and the cause remanded for further proceedings. It is unnecessary to discuss the remaining objections urged by appellant against specified conclusions of the referee. Upon a retrial of the case, such mistakes or errors, if any there were, may not be repeated. The parties need not incur the expense of retaking all the evidence; in so far as is practicable, the reconsideration of the cause may be had upon the proofs originally reported by the referee, coupled with such additional evidence as may be produced. Reversed.

DENVER, T. & G. R. CO. v. SIMPSON.

(*Supreme Court of Colorado.* March 20, 1891.)

INJURIES TO BRAKEMEN—UNSAFE LINKS—EVIDENCE.

1. A brakeman who has his hand crushed while attempting to couple in the dark two cars with draw-heads, at an unequal height from the track, can recover for his injuries, where the company had failed to furnish suitable links for such couplings, and the conductor ordered plaintiff to take the unsuitable link with which he attempted to make the coupling.

2. Where the petition avers that the company failed to furnish a sufficient number of safe links, and that the accident resulted from that cause, evidence that the train was not properly supplied with suitable links for the run on which the accident occurred is admissible.

Appeal from district court, Arapahoe county.

The plaintiff's cause of action, as stated in his complaint, omitting the formal allegation, is as follows: "The plaintiff on the 20th day of December, 1887, in the county of El Paso and state of Colorado, and at the time of the injuries complained of, was in the employ of the said defendant as brakeman, and was engaged at said Franceville Junction, in said county, in coupling freight-cars for the said defendant, as by the nature and terms of his employment he was required to do; and that it then and there became and was the duty of said defendant to procure good, safe, and secure apparatus, links, link-pins, and draw-bars to be used in coupling its said cars; that, by and through the carelessness, negligence, and default of the said defendant and its servants, it failed to furnish a sufficient number of good, safe, secure links and link-pins for coupling its cars aforesaid; and also it provided, used, and suffered to be used, unsafe, defective, and insufficient links and link-pins for coupling said cars as aforesaid, of which it had notice. *Fourth.* That by the want of due care and attention to its duty in that behalf towards said plaintiff on the 20th day of December, A. D. 1887, and while the said freight-cars and appliances aforesaid were in the use and service of the said defendant, and while the said plaintiff was engaged in coupling the same in his capacity as aforesaid for the defendant, a link was provided by said defendant for the purpose of coupling as aforesaid, and which was being used and

handled by plaintiff in his capacity as aforesaid. This link, by reason of its unsafeness, ineffectiveness, and insecurity, failed to act and operate in the coupling of said cars, and while the plaintiff, with all due care and diligence, was then and there using the same, for the purpose of coupling said cars for the defendant, and by reason of which, and by means whereof, then and there said cars came violently and forcibly into contact, while plaintiff in his capacity aforesaid was endeavoring to couple the same, by means whereof plaintiff's right hand was crushed and mangled, and he was otherwise greatly bruised, hurt, and wounded. By means of the premises plaintiff became sick and disordered, and suffered great and intense pain, and so remained for a long space of time; and suffered the loss of the index finger from his right hand by amputation, as a result of said crushing and mangling as aforesaid; and also lost the use of the middle finger of his right hand by the crushing and mangling of the flesh and bone of the same; and was then and there deprived of the use of said right hand, and is now deprived of the use of the same; and that, as he is informed and believes, he will never be able to use said right hand again, to the damage of the plaintiff in the sum of \$10,000. Wherefore plaintiff prays judgment for the sum of \$10,000." The answer of defendant admits the injury to said plaintiff as in the complaint set forth, but denies that the same is due to any default of the said defendant, or its servants or agents. All other allegations of the complaint are denied. A trial was had to a jury, resulting in a verdict and judgment for plaintiff, from which judgment this appeal is prosecuted.

*Wells, McNeal & Taylor and Teller & Oranhood*, for appellant. *J. B. Belford and T. C. Early*, for appellee.

HAYT, J., (after stating the facts as above.) In the court below appellee, as plaintiff, obtained judgment for the sum of \$800, for bodily injuries sustained by him while in the employ of appellant in the capacity of brakeman upon its railroad. It is shown by the record that at the time of the accident appellant was operating a line of railroad in this state between the cities of Denver and Pueblo; that appellee was in its employ as brakeman on one of its freight trains running between said points; that upon the morning of the day of the accident the train upon which appellee was employed left the city of Denver going south upon schedule time, that said train was not then properly supplied with links with which to make the couplings necessary to be made upon the contemplated run; that appellee endeavored to provide the train with the requisite number of links before starting from the city of Denver, but was prevented from so doing by reason of the negligence of appellant in failing to furnish such links. About 8 o'clock upon the evening of said day appellee, in his capacity as brakeman, was required to make a coupling at Franceville Junction, upon the line of said railroad. In making that coupling appellee sustained the injury for

which damages were recovered in the court below. The facts attending the accident are practically undisputed; the witnesses introduced by the plaintiff agreeing as to all material particulars, while the only attempt made to overthrow this testimony rests upon evidence of admissions claimed to have been made by the plaintiff to other employees of the company shortly after the accident. By such evidence contributory negligence on the part of appellee was attempted to be established. It is shown that the draw heads of the two cars which appellee was required to couple were of unequal heights above the tracks, making the coupling somewhat difficult. The night was dark, cold, and stormy; the supply of links furnished the train by the company was exhausted; none remained with which to make this coupling. In this extremity, and as the train was coming down the side track to the cars to be joined with it, appellee was searching about the tracks to find a link with which to make this necessary coupling. At this juncture the conductor in charge of the train ordered him to take a link laying upon the ground near the side track, and make the coupling with it. The accident occurred while appellee was endeavoring to execute this command. The link pointed out by the conductor not being a suitable one with which to make the coupling, it caused appellee's hand to be crushed between the cars. As described by the witnesses upon the stand, it was a bent link, as distinguished from a crooked link; a crooked link being one crooked in a particular way for the purpose of making couplings in cases where the draw-heads of the cars to be connected are of different elevations above the track, while a bent link is one that has become misshapen by use. In view of the evidence, the verdict of the jury in favor of appellee cannot be disturbed. He was acting at the time under the immediate direction of his superior, the conductor, who had charge of the train, and of the brakemen employed thereon, including appellee. Appellee did not discover the defect in the link in time to avoid the accident. He could not well do so in the darkness. He was required to act promptly in making the coupling, without time for investigation or opportunity for reflection. Under the law he was only required to exercise such care as might reasonably be expected from a person of ordinary care and prudence in the situation in which plaintiff was then placed. In view of the facts, it cannot be said, as a matter of law, that he did not exercise reasonable care. On the other hand, the company is properly chargeable with negligence in failing to provide the train with a sufficient number of links in the first instance, and again in directing appellee to use the defective link. The duty of the master to supply the servant with suitable machinery and appliances for the work to be performed is universally recognized. *Railroad Co. v. Discoll*, 12 Colo. 520, 21 Pac. Rep. 708; *Wells v. Coe*, 9 Colo. 159, 11 Pac. Rep. 50; *Hough v. Railway Co.*, 100 U. S. 213. Some of the witnesses for appellant testified that soon after the acci-

dent appellee stated that the accident was caused by his glove sticking to the link, the glove being wet at the time. Evidence was introduced, however, to show that the accident was not so caused, and that, if appellee made the statements attributed to him, he was in error in so doing. It was also in evidence that the glove was not wet, and that its use under the circumstances was reasonable and proper. All these matters, together with the law in relation to unavoidable accident and contributory negligence, were fully submitted to the jury under proper instructions. The damages are not excessive, and we see no reason for disturbing the verdict. *Gilmore v. Railroad Co.*, 18 Fed. Rep. 866; *Railroad Co. v. Doyle*, 49 Tex. 190. In its essential features the case is entirely dissimilar from *Wells v. Coe*, supra, relied upon by appellant. In that case *Coe*, the party injured, was "foreman and boss of the workmen." His authority at the mine was plenary, save, perhaps, at such times as *Wells* might happen to be present. He had charge of the workmen and control of the machinery. By his orders the means provided to prevent just such accidents as the one causing the injury complained of were dispensed with, thereby making the accident possible, and it was rightfully held, under these circumstances, that he could not recover. It is contended that all evidence of the insufficiency of the supply of links upon the train was inadmissible under the pleadings. An examination of the complaint and answer shows that this was one of the matters directly put in issue; consequently the evidence was properly admitted.

The judgment will be affirmed.

*RATCLIFFE et al. v. DAKAN et al.*

(*Supreme Court of Colorado*. March 6, 1891.)

COSTS—EQUITY SUITS—DISCRETION.

Where, in a suit to enjoin the infringement of water-rights, the questions of fact submitted to the jury are found in defendants' favor, and the chancellor finds that at no time prior to the trial did defendants interfere with or damage plaintiffs' rights, his judgment against plaintiffs for costs will not be disturbed.

Commissioners' decision. Appeal from district court, Douglas county.

*Wm. Dillon*, for appellants. *John L. Jerome*, for appellees.

**RICHMOND, C.** This was an action for an injunction to enforce certain rights to water for irrigation in water district No. 8, Douglas county, Colo. The plaintiffs claimed certain water-rights in respect to four ditches, setting forth the ownership by defendants of two ditches, and alleging the commission by defendants of various wrongful acts in violation of plaintiffs' prior rights to water. Prayer for injunction, and for general relief, and for costs. By the answer various defenses are set up which we deem it unnecessary to recite in the statement of the case. The question of whether or not the diversion of the water by defendants lessened the flow of water in the creek at the head or heads of plaintiffs' ditch or ditches was submitted to a jury, and upon the trial the jury an-

swered in the negative; thereafter the cause was set for final argument and decree. On February 21, 1887, final decree was made by consent, save as to the costs. The apportionment of costs was submitted to the court, and the plaintiffs were adjudged to pay the costs up to and including the trial, and each party was directed to pay their own costs made subsequent to the trial. That part of the decree was as follows: "And it is further adjudged and decreed that the defendants have and recover of and from the plaintiffs their costs up to and including the trial of this cause, to be taxed, and have execution therefor, and that as to the costs made subsequent to said trial each party to pay their own costs." To this appellants here and plaintiffs below excepted, and to reverse it have prosecuted this appeal. It is contended by appellants that this decree is appealable under the act of 1885, and the appellees do not controvert that position. Treating it, then, as a right of appellants to prosecute the appeal, we come to the consideration of the one and only question involved, and that is, did the court err in taxing the costs up to and including the trial, which resulted favorably to the defendants, to plaintiffs, and directing payment of their costs subsequent to the trial of each of the parties to this proceeding? Appellants have filed an extensive abstract of record, including the pleadings, all of the testimony, and the decrees of the court. In considering this question, we deem it essential to call attention to the first paragraph of the decree, which is in the following language: "Now come the plaintiffs, by William Dillon, Esq., their attorney, and the defendants, by John L. Jerome, Esq., their attorney, also come: and thereupon the motion of the defendants for final judgment in this cause, upon the trial heretofore had herein, and this cause having been tried before a jury at the December term of this court, A. D. 1886, and the issues submitted to said jury having been found in favor of the defendants, and the court having heard the arguments of counsel, and being now sufficiently advised in the premises, and the said parties hereto in open court consenting to the dates mentioned in the following order, the court doth find: That the defendants did not, and neither of them did, at any time prior to the bringing of this cause, interfere with the supply of water in the ditch known as 'Spring Creek Ditch No. 8' and the 'Ratcliffe Spring Creek Ditch No. 43,' used and enjoyed by the plaintiffs, and did not, prior to the trial of this cause, at any time, damage the plaintiffs, or either of them, with respect to their rights and privileges in said ditches." The findings appellants admit were by consent, although it was stipulated that nothing therein contained shall prejudice appellants on the question of costs. From the foregoing it will be seen that the issues submitted to the jury were found in favor of the defendants; that, in addition to this, the court found that the defendants at no time prior to the bringing of this cause had interfered with the supply of water in the ditch known as "Spring Creek

Ditch No. 8" or "Ratliffe's Ditch No. 43," used and enjoyed by the plaintiffs, and did not, prior to the trial of this cause, at any time damage the plaintiffs, or either of them, with respect to their rights and privileges in said ditches. Whether the trial court, in apportioning the costs, had a right, notwithstanding the stipulation of counsel, to consider the findings independently of the evidence, is quite immaterial. The evidence certainly justified the findings, and, in considering the judgment for costs, we must indulge in every deduction to support this part of the judgment that can reasonably be drawn from the evidence. True it is that if, from the abstract of record, we could be satisfied that the discretionary right of apportioning costs in chancery proceedings by the court had been abused, we would be warranted in reversing the decree to that extent. But a careful examination of the pleadings and the testimony justifies us in the assertion that the action of the court in thus apportioning the costs was not an abuse of its discretion. The general doctrine is that the matter of costs is so largely within the discretion of the chancellor that his action will not be disturbed unless error be very manifest. *Sanborn v. Kittredge*, 50 Amer. Dec. 58; *Shields v. Bogliolo*, 7 Mo. 134; *Portz v. Schantz*, 70 Wis. 497, 36 N. W. Rep. 249. We find nothing in the case that justifies us in disturbing the decree of the court in any particular, and therefore recommend that it be affirmed.

REED and BISSELL, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

#### MITCHELL v. REED *et al.*

(*Supreme Court of Colorado*. Feb. 20, 1891.)

##### CONVERSION—EVIDENCE—SUFFICIENCY.

Where in an action for the value of two transits it appears that defendant bought out a firm to whom plaintiffs had delivered two transits for sale, and that, just after the sale, defendant, acting on information afforded him by one of the clerks of the firm, wrote plaintiffs that he had the transits, but afterwards discovered that one of the transits belonged to another, to whom he surrendered it, and so told plaintiffs, the evidence is insufficient to support a judgment for plaintiffs for the value of that transit.

Commissioners' decision. Appeal from superior court of Denver.

Clarence A. Lott, for appellant. S. L. Carpenter, for appellees.

BISSELL, C. This action was originally commenced before a justice to recover the value of two Gurley mountain solar transits from the appellant, Mitchell. It was claimed that they came into his possession at the time he bought the stock of Alger & Co., to whom they had been antecedently delivered for sale by Reed Bros. It has been assigned as ground for reversal that the judgment of the superior court rendered upon the appeal to it is manifestly against the weight of evidence. This contention appears to be well based and properly laid. About certain of the facts essential to the plaintiffs' recovery

there is no dispute. The Reed Bros. owned two transits, which were sent to Alger & Co. for the purposes of sale. Subsequently the appellant, Mitchell, became the purchaser of Alger & Co.'s stock upon a lumped sale, without any inventory. The principal question in the court below, as well as in this, is, did Mitchell receive the two transits belonging to Reed Bros. at the time of the purchase from Alger & Co., and was he obliged to account to them for the value? Originally, as is evident, he was no party to the transaction. He had entered into no contract with Reed Bros., and incurred no liability with reference to the transits, either by virtue of an original stipulation with the bailors, nor by reason of anything that occurred as between him and Alger & Co. at the time of his purchase. Under these circumstances, his obligations to the Reed Bros. were exceedingly slight, and whatever he may have written, done, or said with reference to those two transits is to be construed in the light of these existing relations. The only evidence which was produced by Reed Bros. in support of their claim to recover the value was sundry letters which were written by Mitchell to them concerning the instruments within a very few days subsequent to his purchase. Mitchell seems very early to have discovered that his vendors, Alger & Co., had in their possession at the time of the sale to him sundry instruments, left with them for repairs or sale by various persons who claimed to own them. He seems to have attempted by inquiry to ascertain the facts concerning the ownership of all such instruments, and to have attempted their return to the parties who had the title. In pursuance of these plans he wrote the letters which were offered in evidence, which, in terms, conceded his possession of two instruments belonging to the plaintiffs, offered to dispose of them, and account for the proceeds. One of them was so sold by him, and the price remitted. As to the other, he contends that the letters were written under a mistake, and without full knowledge concerning the fact of the ownership of the instruments. His explanation upon this subject is full, and apparently satisfactory. The court below, however, seems to have proceeded upon the theory that, as the letters were written by Mitchell, and conceded his possession, he was as much bound by them as though he had been a party to the original contract, and therefore in a fashion he was estopped to deny the conclusiveness of their admission. No such effect should be given to those letters. The case demonstrated that the letters were written almost immediately upon the sale in June, 1884; that they were written without any absolute knowledge on the part of Mitchell with reference to the instruments, but were based upon information given to him by an employe of Alger & Co., and in the execution of an attempt upon his part to deliver the instruments to the persons to whom they belonged. Within a very short time of the writing of the letters, the actual owners of one of the instruments, the Denver & Rio Grande Railroad Company, made

claim upon him, and established their title, and he surrendered the instrument, which he had supposed belonged to Reed Bros. This undoubtedly he had a right to do, and the only question is, was it the instrument belonging to the Reeds? It satisfactorily appears from the evidence that it was not their property. At the time of the sale and purchase referred to it is shown that there were but three instruments in the stock purchased which would be included within the designation of mountain solar transits. One of them was a Buffenberger, which was subsequently delivered to one Martin; one was a light mountain Gurley, which was sold for the Reeds, who received the proceeds of the sale; and the other was a Gurley, which belonged to the Denver & Rio Grande Railroad Company. This accounts for all of the solar transits belonging to third persons which came into the possession of Mitchell by virtue of his purchase from Alger & Co. It is thus evident that his letters were the result of a mistake, and that he should not be held to the same strict responsibility for their contents as would be the rule had they been written by the persons with whom the original contract had been made. These conclusions are very largely supported by the course and conduct of the plaintiffs in the general history of the transaction. One of them made a personal claim upon Mitchell very shortly after the letters had been written, and very directly after they had been advised of the error into which he had fallen. Mr. Mitchell at the time explained the situation and circumstances of the transaction, showed the reason for his mistake, and the basis for his then and present contention. In all these things apparently the plaintiffs acquiesced, for they took no steps for the recovery of the instrument for nearly three years, and not until after a controversy between the appellant, Mitchell, and one of the principal witnesses for the appellees. These facts and circumstances tend very strongly to support the appellant's position.

Upon the whole record, it is the opinion of this court that the judgment was manifestly against the weight of the evidence, and finds very little support in it from testimony which is not satisfactorily contradicted and explained. Under these circumstances, however much this court may regret the necessity for a reversal, and whatever may be the pressure of the general rule restricting interference with judgments upon this ground, it is obvious that, in obedience to its convictions, the case must be reversed. The case should be reversed, and remanded for further proceedings.

**RICHMOND and REED, CC., concur.**

**PER CURIAM.** For the reasons stated in the foregoing opinion, the judgment is reversed, and the cause remanded for further proceedings.

**HALEY v. BREEZE, Treasurer.**

(*Supreme Court of Colorado. Feb. 27, 1891.*)

**PRACTICE—FILING PLEADING—DEFAULT.**

Under the Colo. Pr. Act of 1885, providing that the pleadings shall be filed within 10 days

after service of a copy of the answer, but not imposing any penalty for a failure to file them, a defendant who has served his answer in apt time should be permitted to defend, notwithstanding his failure to file the answer within 10 days after such service of it.

**Commissioners' decision. Appeal from district court, Routt county.**

*John A. Coulter and W. T. Hughes, for appellant. John M. Breeze, Daniel E. Parks, and H. B. Johnson, for appellee.*

**BISSELL, C.** This action was brought by Lewis H. Breeze, as treasurer of Routt county, on an injunction bond filed by Haley in a suit to restrain the county treasurer from collecting certain taxes. The suit was commenced under the practice act of 1885. The only error which will be considered will be that predicated on the ruling of the court which deprived the appellant, Haley, of his right to defend the suit. By the terms of the act of 1885, the summons must contain a substantial notification to the defendant of the names of the parties, of the court, and the purposes of the suit, and must require him to answer and serve a copy thereof, within a time specified, upon the attorney whose name is signed to it. It is conceded that the defendant served his answer upon the attorney in apt time, and thus formed an issue which he was denied the right to try. The defendant's answer was not filed in the clerk's office prior to the meeting of the court on the first day of the term ensuing the service. On that day the defendant tendered his answer to the clerk, who refused to file it. Some time prior to that date the plaintiff had filed a motion for a default, and asked for judgment because of this failure to file the answer. Before any action whatever had been taken by the court upon this motion, the defendant asked leave to file his answer, basing his motion upon the ground that the answer had been previously served in apt time, in accordance with the statute, and because the statute itself made no certain provision as to the time at which the answer should be filed in court. The court denied the application, entertained the motion for a default, and entered judgment against the defendant for nearly the entire amount for which the plaintiff had sued. The statute is in accord with the defendant's contention. It provides for the filing of the pleadings within 10 days after service of a copy of the answer, but does not impose a duty in this regard on the defendant, or enact a penalty for the disregard of the statute. The section which contains the 10-day clause likewise provides that the pleadings must be filed before default or judgment. The only inhibition, in the nature of a penalty, which attaches by the terms of the statute, is that relating to the entry of default or judgment. It is thus clear that the defendant loses no right by a failure to file his answer previously served in apt time, within the specified 10 days. While it was in the power of the court to order the answer filed at any prescribed time, it clearly was not within its power to enter judgment as upon a failure to answer, when no such penalty was imposed

by the statute, and the act had been substantially observed by the defendant. It is clear that Haley should have been permitted to defend. Counsel have pressed some questions concerning the proper measure of damages which are likely to be of importance on the trial. A decision would doubtless be an aid to the trial court. It would be given without hesitation, if the record contained the facts essential to a correct decision. In their absence, an intelligent judgment is impossible, and these matters are left wholly undetermined. For the reasons given, this judgment must be reversed, with directions to the court below to set aside the default and judgment, and to enter an order permitting the answer to be filed, when the cause will proceed according to the law in such cases.

RICHMOND and REED, CC., concur.

**PER CURIAM.** For the reasons stated in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to proceed in accordance with the suggestions made.

(88 Cal. 621)

FRAZER v. LYNCH *et al.* (No. 14,087.)

(Supreme Court of California. April 20, 1891.)

CONTEMPT—DISOBEDIENCE OF SUBPENA—PUNISHMENT.

1. Though Code Civil Proc. Cal. § 1991, provides that disobedience of a subpoena may be punished as a contempt, "and if the witness be a party his complaint or answer may be stricken out," it is error to strike out the answer for defendant's disobedience of a subpoena *duces tecum*, where his counsel admit the contents of the document sought to be produced, so as not to cripple plaintiff's case.

2. Where defendant is an illiterate person, and it is not clear that she knew the contents of the subpoena, and her counsel knew nothing of the matter, and had given her no advice as to her duty, the court should notify her of the effect of her disobedience, and give her an opportunity to produce the document before striking out her answer.

Department 2. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

*Reinoehl & Harrison*, for appellants. C. L. Jenks, D. W. Welty, and A. E. Nutt, for respondent.

DE HAVEN, J. This is an action of ejectment. The defendants joined in an answer, which put in issue all the allegations of the complaint as to the ownership and right to the possession of the demanded premises, the value of the rents, issues, and profits, and the amount of damages claimed by plaintiff. The plaintiff caused to be issued and served upon the defendant Catherine Lynch a subpoena *duces tecum*, requiring her to produce in court a United States patent, conveying a portion of the land in controversy to one Patrick Lynch, through whom plaintiff claims title. The said defendant did not produce the patent as commanded. The court below, of its own motion, examined the defendant upon oath as to her reason for not doing so. Her evidence is as follows: "Question. This paper was served on you, Mrs. Lynch, which reads as fol-

lows, among other things, [reading the commands of the subpoena, and then continuing:] This paper purports to have been served upon you,—you say your son read it to you? Answer. Yes, sir; that patent that I got. Q. Did you bring it? A. No, sir; I did not. Q. Why did you not bring it? A. I did not know that there was any case. Q. You did not understand that you were compelled to bring it by this subpoena? A. No, sir. Q. Tell me your reason for not bringing it, after your son read this subpoena? A. He read it to me after I got it from Washington; that is all. Q. Now, who read it to you?—you were served with a paper reading like this, were you not? A. Yes. Q. Who read that to you, or did you read it yourself? A. No, sir; I could not read myself. Q. Who read that to you? A. I do not believe any one read it to me. I was summoned on the road. There was a lady with me. She just looked at it, and I took it home, and left it on the shelf. Q. Your counsel told you, did they not, that it was necessary to bring this document into court? A. No, sir. Q. Your son told you, did he not? A. He did not tell me anything; he came home at six o'clock last night, sick. Q. Didn't your son tell you that your counsel said to you to bring that paper into court. A. I suppose he could have got it; he is very sick, and laying down sick in town here, and didn't get home until six o'clock. Mr. Harrison. We are ready to admit the contents of that document, so that it will not cripple the plaintiff's case. The Court. That paper was served upon that lady. She said at first that it was, and then afterwards that perhaps it was not, read to her. It is her duty, when a paper is served upon her, bearing the official imprint, as this document does,—if she cannot read it,—it is her duty to take it to some person and have it read. I certainly do not wish to be harsh with any person, but it seems to me that this is a flagrant obstruction of justice, and a disobedience of an order of the court, and, although I have listened with interest to the remarks that have been made by yourself and Mr. Reinoehl, I cannot quite come to the conclusion that this woman has done this through ignorance; it seems to me that there is some reason for it. The answer will be stricken from the files."

The question presented by this appeal is as to the correctness of this ruling, and it is clear to us that it cannot be sustained. Section 1991 of the Code of Civil Procedure provides that disobedience of a subpoena may be punished as a contempt of court; "and, if the witness be a party, his complaint or answer may be stricken out." This latter clause of the section is intended for the protection of the adverse party, whose substantial rights are or may be affected by such disobedience, as well as a punishment for the contempt itself; and it is evident from the nature of the power thus conferred on the court, that it should not be exercised, except with guarded discretion, and with a view to promote substantial justice in the case before it. It is apparent from the record before us that the defendant Mrs. Lynch is an illiterate



person, and it is not entirely clear that she knew the contents of the subpoena, and that what is claimed as an admission that it had been read to her did not really refer to the reading of the patent itself. It is evident that her counsel knew nothing of the matter, and had given her no advice in relation to her duty in regard to the subpoena. Under these circumstances the court should have distinctly notified her of the effect of a willful refusal to produce the paper, and have given her an opportunity to do so, before making the order under review. But, in addition to this, her counsel, before the making of this order striking the answer from the files, offered to admit everything that could be shown by the patent itself; thus obviating any necessity for its production, and fully saving every right of the plaintiff. This offer, thus made, is to be treated as that of the defendant herself, and was so far a substantial compliance with the commands of the subpoena as to make the subsequent order of the court clearly erroneous. This order is not, as claimed by respondent, a judgment for contempt, such as is provided for by section 1222 of the Code of Civil Procedure, and which, by the terms of that section, is final and conclusive; but was an error of law occurring during the trial of the action, and, being excepted to, may be corrected on this appeal. Judgment and order reversed.

We concur: BEATTY, C. J.; MCFARLAND J.

37 Cal. 371

SHANKLIN v. McNAMARA et al. (No. 13,562.)  
(Supreme Court of California. Jan. 4, 1891.)

PUBLIC LANDS—"SWAMP AND OVERFLOWED"—  
MEXICAN GRANTS—RES ADJUDICATA.

1. Where the register and receiver of the district land-office decides that certain land was not "swamp and overflowed" at the time of the enactment of Act Cong. Sept. 28, 1850, or that the patentees thereof are entitled to it on the ground that they were, before disposal of it by the state, *bona fide* purchasers within Act Cong. July 23, 1866, providing for the quieting of land titles in California, and confirming to purchasers in good faith lands included in rejected Mexican grants, the decision, if not appealed from, is conclusive against the state and its grantees.

2. The opinion of the register and receiver of the land-office as to whether land was swamp and overflowed, recited: "The evidence shows that all of said tract has for many years been used for ordinary purposes of agriculture in growing grain and grass for hay and pasturage. And the fact of its adaptability for the cultivation of these staple agricultural products would seem to determine the question as to the character of the land against the state. At any rate, these circumstances, coupled with the fact" that claimants were *bona fide* purchasers, etc., entitles them to the land. Held, that it was not decided that the land was not swamp and overflowed.

3. Act Cong. Sept. 28, 1850, granting to the different states all swamp and overflowed lands within their borders, did not grant lands the right to the possession of which was at the time vested in a grantee under a Mexican grant, though such land may have afterwards, on final survey, been excluded from the grant.

In bank. Appeal from superior court, Sutter county; PHILIP W. KEYSER, Judge.  
M. E. Sanborn and A. L. Hart, for appellants. J. H. Craddock, for respondent.

THORNTON, J. Ejectment. Judgment for plaintiff. Motion for a new trial by defendants denied, and appeal from the judgment and order denying the motion.

The plaintiff claims title to the land in controversy under a patent of the United States, issued to Willard Hodges, dated December 15, 1882, which was put in evidence, as was also a conveyance of the tract by Hodges to the plaintiff. The claim of Hodges is under the seventh section of the act of congress of July 23, 1866, entitled "An act to quiet land titles in California." 14 St. at Large, p. 220. This section provides that when persons in good faith, and for a valuable consideration, have purchased lands of Mexican grantees or assignees, which grants have subsequently been rejected, or when the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved, and continue in the actual possession of the same, according to the lines of their original purchase, and when no valid adverse right or title (except of the United States) exists, such purchasers may purchase the same, after having such lands surveyed under existing laws, at the minimum price established by law, upon first making proof of the facts as required herein, under regulations to be prescribed by the commissioner of the general land-office. Hodges and Upham made proof before the proper land-office of their right to purchase the land in suit under the section of the act of 1866 above referred to, bringing themselves within its provisions, and were allowed to purchase, and did purchase, on this proof and purchase, the patent of the United States above mentioned, under which plaintiff asserts title. This patent establishes *prima facie* the right of plaintiff to recover, and must be regarded as conclusive against the defendants, unless the latter can attack it, and successfully impeach its sufficiency to vest title in those claiming under it.

Defendants claim that the rights possessed by them entitle them to attack the patent. They say that as a matter of fact the land sued for was on the 28th day of September, 1850, swamp and overflowed land, and by virtue of the act of congress of that date entitled "An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits," the title to this tract passed from the United States to the state of California, and that it was out of the power of congress or of the United States government in any way or mode to divest this title so passed to the state by the act of 1850. It must be regarded as settled beyond controversy that the first section of the swamp-land act (Act Sept. 28, 1850) is a grant *in præsentem* to each state of the swamp and overflowed land within its limits. The supreme court of the United States, speaking through Justice FIELD, have said of this act in *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985: "The words of the first section of the act, 'shall be and are hereby granted,' import an immediate transfer of interest, not a promise of transfer in the future." This construction of the act has been sustained in several cases. See *Tubbs v. Wilhoit*, 78

Cal. 63, 14 Pac. Rep. 361, and cases there cited, and cases cited in *Wright v. Roseberry*, supra. The contention of the defendants is that they can impeach the patent of plaintiff by showing that the land in suit was, on the day of the passage of the swamp-land act of 1850, in fact swamp and overflowed land. To this contention plaintiff replies that defendants are estopped from making such proof by an authoritative decision of a competent tribunal to the contrary, binding on both plaintiff and defendants. When the defendants offered to defeat the effect of the patent to prove that the land was swamp and overflowed on the 28th day of September, 1850, the plaintiff met it with proof of what he claimed to be an authoritative decision and adjudication to the contrary, as above stated, and with the objection that by reason of such decision such evidence was incompetent and improper.

The material facts pertaining to this adjudication are as follows: In 1871 a contest arose, and was carried on in the United States land-office at Marysville, in the contested case of Willard Hodges and George B. Upham in regard to tract No. 12, township 12 N., range 8 E., to which John McNamara (one of the defendants in this case) and the state of California were parties. Tract 12 includes the land in suit in this case. Hodges and Upham claimed the whole of this tract 12. This contest involved the right to a portion of this tract 12 as between Hodges and Upham and John McNamara, and to a portion of the same tract as between Hodges and Upham and the state of California. There were other parties to the contest, but as their claims are not in any way involved in this action, they need not be further referred to. Citations were issued and served on all the parties. McNamara appeared by counsel and with his witnesses. The state of California did not appear, nor did any one appear for it. The register and receiver awarded the land in contest (in suit here) between the claimants Hodges and Upham and the state of California to the former. To John McNamara a portion of tract 12 was awarded, as against Hodges and Upham. This last-named portion awarded to McNamara is not included in the land sued for in this action. This decision, as between Hodges and Upham and the state of California, does not seem to have been carried by appeal to the commissioner of the general land-office at Washington. The decision of the register and receiver remains unchallenged by the state of California, or any one claiming under her. In a contest with another claimant as to lots 22 and 2 (involved herein) these lots were, on appeal, awarded by the secretary of the interior to Hodges and Upham. In awarding the lands in suit here to Hodges and Upham the register and receiver held that their right to purchase the lands was superior to that of the state. As the ruling was not appealed from, it would usually be regarded as concluding the state, and estopping her from any claim to the land in controversy.

But did the register and receiver hold that the land was not swamp and over-

flowed? On this point they say in their opinion: "Contestant, state of California, does not appear to contest the claim of Hodges and Upham, and no direct testimony was called out as to the alleged swamp and overflowed character of the land in dispute between these parties. The evidence, however, shows that all of said tract No. 12 has for many years been used for ordinary purposes of agriculture in growing grain and grass for hay and pasturage; and the fact of its adaptability for the cultivation of these staple agricultural products would seem to determine the question as to the character of the land as against the state. At any rate, these circumstances, coupled with the fact that prior to the act of July 23, 1866, and to the state's disposal of the land to purchasers in good faith, the claimants became purchasers in good faith of the grant title to the same, should, in our judgment, conclude the state in the premises." It is undoubtedly held in the opinion of the register and receiver that Hodges and Upham were entitled to the land involved in the contest with the state under the seventh section of the act of July 23, 1866. As far as regards the land in suit, the decision is binding on the state, in so far as the register and receiver have decided on the right of Hodges and Upham, (see *Hosmer v. Wallace*, 97 U. S. 580;) and also binding, in our judgment, on defendants, the McNamaras. In these contests before the officers of the land department as to the right to enter land the parties to whom it could be awarded on the contest are the proper and necessary parties. In the contest we are considering between Hodges and Upham and the state of California land could be awarded only to one of these parties. It would not and could not be awarded to a grantee of the state, as, in this case, to McNamara. The United States authorities in such contests only notice the rights of parties who have a right under the laws of the United States to enter and purchase the land. Any person claiming under the state must prosecute or defend their rights under the state as a party to the contest. McNamara, claiming under the state in this case, must have defended his right under the state as a claimant, and it was incumbent on him to do so. Therefore it follows that whatever was binding on the state, bound McNamara. If, as the result of the contest between Willard Hodges and the state, it had been adjudged that the land was not swamp and overflowed, that would have bound the state within the rule laid down in *Johnson v. Towsley*, 13 Wall. 72, approved and followed in *Hosmer v. Wallace*, 47 Cal. 471. See, also, *Samson v. Smiley*, 13 Wall. 91; *Warren v. Van Brunt*, 19 Wall. 653; *Shepley v. Cowan*, 91 U. S. 330; *Moore v. Robbins*, 96 U. S. 530; *Hosmer v. Wallace*, 97 U. S. 580; *Marquez v. Frisbie*, 101 U. S. 473. The determination of the facts in the same contest adjudging the right of Hodges and Upham as against the state to enter and purchase the land in suit is for the same reason binding on McNamara. The estoppel as to the state exists only as to the determination by the officers of matters of fact. Their deter-

mination, if free from fraud, and not the result of a fraudulent imposition upon them, is final and conclusive. It is still conclusive, though they may err in judgment as to the weight of testimony, or may decide directly against the evidence, subject to the limitation as to fraud and fraudulent imposition above stated. It may be remarked that this matter of fraud, or fraudulent imposition, could not be set up in an action at law, as this is. The patent on these grounds must be assailed by a proceeding in equity. Such is the law on this subject. See *Johnson v. Towseley*, supra, and *Moore v. Robbins*, supra. But if the officers of the land department award land to one person which has been granted to another, the courts of law can furnish a remedy. It is not within the power or jurisdiction of the land department to award that to one person which by an act of congress has been granted to another. The land department cannot grant land. It is incumbent on the land department, in executing the laws of congress in relation to the public lands, to award to a party claiming to enter and purchase land, such right as the laws of the United States have invested him with in regard to the land he claims; but if the laws have invested another with title by grant of the land to that other, a decision of the land department awarding it to another is a nullity. No title passes by such decision, though the officers of the land department have decided that he is entitled to it. To decide otherwise would be to hold that the land department can grant land contrary to an act of congress.

It is argued here on behalf of appellants that the officers of the land department have not decided as a matter of fact that the land in controversy was not swamp and overflowed. It seems to us that this contention, on a fair consideration and interpretation of the opinion of the register and receiver, is sound and maintainable, and that the decision of the register and receiver awards the land to Hodges and Upham on their claim, preferred under the seventh section of the act of July 23, 1866, and regardless of the fact whether the land in contest before them was swamp and overflowed or not. The language of their opinion on the point whether the land is swamp and overflowed or not is indefinite and ambiguous, and such that it cannot be said of it that it determines that the land is not swamp and overflowed. The opinion refers to the evidence, and says of it, "that it would seem to determine the question as to the character of the land as against the state." It does not say (as will be observed on a perusal of it) that the evidence shows the land to be dry land, and not swamp and overflowed, but that it would seem to do so. The opinion, in the next sentence, proceeds: "At any rate, these circumstances, coupled with the fact that prior to the act of July 23, 1866, and to the state's disposal of the land in good faith," etc., proceeding then to award the land to Hodges and Upham upon this claim under the seventh section of the act of congress just referred to. The judgment of the register and receiver is too indefinite in its

terms to be regarded as a decision that the land here was not swamp and overflowed. Under these circumstances, it is argued that the defendants have a right to show that the land is swamp and overflowed; that as such it vested in the state by the act of 28th September, 1850, known as the "Swamp-Land Act;" and that, having so vested, it could not be divested and the title conferred on another, by the subsequent act of July 23, 1866.

Did the swamp-land act of 1850 grant the swamp and overflowed land within the exterior bounds of a grant, which were excluded on the final survey, to the state of California? This is a question of interpretation of the provisions of the act of 1850, considered in the light of and influenced by the nature of the grants made by the Mexican authorities in California. Was it the intention of the law-makers to grant to the state lands of the nature and character above mentioned? The question is one relating to the intent of the law-making power. We are of opinion that there was no such intent to grant by the act referred to. The reasons for this opinion we will proceed to give. It is the settled law of this state that the grantee of a Mexican grant is entitled to the possession of all the land within the exterior limits of the tract designated in the map or *diseno*, (which generally attended the application of a grant,) though the quantity intended to be allotted to him on the final survey is a much less quantity than that designated in the map or *diseno*, and this right continues until the final survey has been made and approved, and perhaps until the patent is issued; or, to express the rule more briefly, where the grant is of a smaller quantity (say three leagues) within a larger area, (say of ten leagues,) from which the three leagues are to be taken, that the grantee is entitled to the possession of the whole until the quantity (three leagues) to be allotted to him is set off by the final survey, and that he (the grantee) is entitled to recover possession of the whole ten leagues by action appropriate to that end, until the specific quantity granted him is set off.

The above is the rule declared in *Ferris v. Coover*, 10 Cal. 621, followed in numerous cases to the same effect. *Cornwall v. Culver*, 16 Cal. 429; *Riley v. Hensch*, 18 Cal. 198; *Mahoney v. Van Winkle*, 21 Cal. 552. The same rule has been approved and declared to be the law by the supreme court of the United States in *Van Reynegan v. Bolton*, 95 U. S. 35, 36. We insert here that portion of the opinion (by FIELD, Justice) which relates to this point, as a clear exposition of the rule and the reasons on which it rests: "In the case at bar, the surveyor general for California disregarded the boundaries established upon the juridical possession delivered to the grantee. He proceeded upon the conclusion that the confirmees were restricted by the decree to one square league, to be measured out of the tract within those boundaries, which exceeded that amount by about fifteen hundred acres. Whether the terms of the decree justified his conclusion is a question upon which it is unnecessary for us to express an opinion. That

is a question which must, in the first instance, be determined by the land department in carrying the decree into execution by a survey and patent. It is sufficient for the present case that the survey made was contested by the confirmees, and the contest was undetermined when this action was tried. Until finally approved, the survey could not impair their right to the possession of the entire tract as delivered by the former government to the grantee under whom they claim. Until then it was inoperative for any purpose. Even if the limitation to one square league should ultimately be held correct, that square league might be located in a different portion of the tract by direction of the land department, to which the supervision and correction of surveys of private land claims are intrusted. The confirmees could not measure off the quantity for themselves, and thus legally segregate it from the balance of the tract. The right to make the segregation rested exclusively with the government, and could only be exercised by its officers. Until they acted and effected the segregation, the confirmees were interested in preserving the entire tract from waste and injury, and in improving it; for until then they could not know what part might be assigned to them. Until then no third person could interfere with their right to the possession of the whole. No third person could be permitted to determine, in advance of such segregation, that any particular locality would fall within the surplus, and thereby justify his intrusion upon it, and its detention from them. If one person could in this way appropriate a particular parcel to himself, all persons could do so; and thus the confirmees would soon be stripped of the land which was intended by the government as a donation to its grantee, whose interests they have acquired, for the benefit of parties who were never in its contemplation. If the law were otherwise than as stated, the confirmees would find their possessions limited, first in one direction, and then in another; each intruder asserting that the parcel occupied by him fell within the surplus, until in the end they would be excluded from the entire tract." This right of possession is property, and full protection of it was granted to the Mexican grantee by the treaty of Guadalupe Hidalgo, and by the constitution and laws of the United States. *Ferris v. Couver*, 10 Cal. 620, 621.

That the tract of land involved in this case was within the limits of the grant to Sutter was conclusively determined against defendants in the proceeding in the land-office considered in a former part of this opinion, where the land in suit was awarded to Hodges and Upham, under the seventh section of the act of congress of July 23, 1866. When the swamp-land act of the 28th of September, 1850, was passed, Sutter had a right to possession of the land sued for, and it is not to be supposed that the congress of the United States would grant land to one when another person had to it a right of possession for an indefinite period, granted to him by its laws at the time the

grant is said to have been made. It cannot be presumed that congress would have granted directly and unconditionally to a person a tract of land of which the United States did not have the absolute and uncontrolled title, so that its grantee might at once take possession. It could not be predicated of such a grant as the swamp-land act that congress intended to grant land to the state when at the time of the grant Sutter had title to possession of the land, and might become invested with the full legal title. He would have been so invested if, on the final survey of his grant, the land in suit had been included in such final survey. The principle here invoked and relied on was adopted by the United States supreme court in *Railroad Co. v. U. S.*, 92 U. S. 733, where it was held that a grant of land to the state of Kansas to aid in the construction of a railroad, embraced only the land whereto the complete title was in the United States at the date of the act, and was applicable only to public lands owned absolutely by the United States. This was held in regard to a grant of land to the state of Kansas, where at the time the grant was made the land in question was included in a reservation made to the Osage tribe of Indians. We think the rule of construction laid down in the case just cited shows that it was not the intention of congress to grant to the state of California by the act of September 28, 1850, lands the right to the possession of which was then vested in a Mexican grantee, and guaranteed to him by a treaty as well as by the constitution and laws of the United States. We see nothing in *Newhall v. Sanger*, 92 U. S. 761, or *U. S. v. McLaughlin*, 127 U. S. 428, 8 Sup. Ct. Rep. 1177, in conflict with anything ruled herein. We cannot see that those cases have any correct application to the case under consideration. From the foregoing it follows that the judgment and order are without error, and must be affirmed.

There is some very significant evidence in the record in relation to the land in suit, upon which we will make some observations in its relation to the legislation of congress in regard to swamp and overflowed lands. The fourth section of the act of July 23, 1866, is in these words: "Sec. 4. And be it further enacted, that in all cases where township surveys have been or shall hereafter be made under the authority of the United States, and the plats thereof approved, it shall be the duty of the commissioner of the general land-office to certify over to the state of California, as swamp and overflowed, all the lands represented as such upon such approved plats within one year from the passage of this act, or within one year from the return and approval of such township plats. The commissioner shall direct the United States surveyor general for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said state; and, where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward them to the general land-office

for approval: provided, that in segregating large bodies of land, notoriously and obviously swamp and overflowed, it shall not be necessary to subdivide the same, but to run the exterior lines of such body of land. In case such state surveys are found not to be in accordance with the system of United States surveys, and in such other townships as no survey has been made by the United States, the commissioner shall direct the surveyor general to make segregation surveys, upon application to said surveyor general by the governor of said state, within one year of such application, of all the swamp and overflowed land in such townships, and to report the same to the general land-office, representing and describing what land was swamp and overflowed under the grant, according to the best evidence he can obtain. If the authorities of said state shall claim as swamp and overflowed any land not represented as such upon the map or in the returns of the surveyors, the character of such land at the date of the grant, September twenty-eight, eighteen hundred and fifty, and the right to the same, shall be determined by testimony, to be taken before the surveyor general, who shall decide the same, subject to the approval of the commissioner of the general land-office." The record shows that the plaintiff offered in evidence the approved official township plat of township 12 N., range 3 E., M. D. M., filed in the United States land-office at Marysville, in this state, on August 2, 1869, and also the approved diagram of amendments to said plat from the office of the surveyor general of the United States for the state of California, dated 6th of September, 1869, filed in the United States land-office above mentioned, of the land district in which the land in controversy is situated, on September 9, 1869, showing the public lands and claims with specific boundaries within the rejected limits of the New Helvetia ranch. The above plat and diagram include the land involved herein, which is designated thereon as land claimed by purchasers of Mexican grants, or their assignees, and which have been excluded from the final survey of the Sutter grant. It will be observed that the land involved in this suit was not represented on the approved plat, or the approved diagram of amendments to it as swamp and overflowed, and it therefore did not become the duty of the commissioner of the general land-office, under the fourth section of the act of 1866, above quoted, to certify such land over to the state. Nor does it appear in the record that any township plat has been constructed which represents such land to be swamp and overflowed. Under the provisions of the fourth section it will be seen that the governor of the state was vested with authority to have the swamp and overflowed lands segregated by survey on application to the surveyor general; and it was further provided in the same section that if the authorities of the state shall claim as swamp and overflowed any land not represented as such upon the map or in the returns of the surveyors, the character of such land at the date of the grant,

(September 28, 1850,) and the right to the same, shall be determined by testimony, to be taken before the surveyor general, who shall decide the same, subject to the approval of the commissioner of the general land-office. In this case no steps have been taken by the governor or the state authorities to have the character of this land determined, to have it decided whether it was swamp and overflowed at the date of the grant. Nor does it appear that the defendants have ever taken any steps to have the governor or state authorities move in the matter. The patent under which the plaintiff makes title was issued on the 16th of December, 1882, on a claim commencing as far back as 1850. Defendants claim that their claim vested on a certificate of purchase issued on the 21st of July, 1866. The delay in this matter to have the character of the land determined as it could have been done under the section of the act of 1866 above quoted, though not conclusive, is strongly persuasive that the land was never of the character described by the swamp-land act of 1850 as swamp and overflowed. The court did not err in refusing to allow defendants to prove that the lands in suit belonged to the category of swamp and overflowed lands. We find no error in the record, and the judgment and order are affirmed.

We concur: WORKS, J.; SHARPSTEIN, J.; MCFARLAND, J.

PATERSON, J., (*concurring*.) I concur in the judgment. The swamp-land grant of 1850 is one *in præsenti*, and passed the title to the lands as of its date, but it could not attach to any specific tract until it was determined by the proper officer that the land was swamp in character. Under the act of 1850 it was the duty of the secretary of the interior to make out accurate lists and plats, and transmit the same to the governor of the state, and at the request of the latter, cause patents to issue therefor. No provision was made for a review of his action in ascertaining and designating the character of the lands. Under the act of July 23, 1866, which was passed to quiet land titles in California, the duty of identifying swamp lands by survey and segregation was put upon the surveyor general, subject to the approval of the land commissioner. It was provided that a hearing might be had by the state before the surveyor general for the purpose of showing that the township plats were incorrect. Provision was also made for the adjustment of the claims of *bona fide* purchasers from Mexican grantees, where the land purchased had been excluded from the survey of the grant on its final confirmation. These contests were heard before the register and receiver of the local land-office, under certain rules formulated by the commissioner. On August 2, 1869, the land in controversy was returned and designated upon the official plat as public land, claimed by purchasers of Mexican grantees, or their assigns. It was not returned as swamp land, and was not designated on the official plat with the usual government sec-

tions and subdivisions, but in accordance with existing lines of subdivisions, so as to include "permanent improvements," as provided by section 7 of the act of July 23, 1866. This plat, which in effect showed that the land was not regarded by the surveyor general as swamp and overflowed land, remained on file in the local land-office from August, 1869, to June, 1888, without challenge by any one—the state or its grantees—as to the character of the land. Hodges and Upham filed, in the local land-office, in September, 1869, a pre-emption claim for the land under section 7 of the act of 1866, claiming to have purchased it for a valuable consideration from the Mexican grantees, and placed valuable improvements thereon in part only. On this statement citations were issued by the officers of the land-office to the defendant, who had filed on a portion of the tract described in the Hodges claim, and to the state, to show cause against the application of Hodges and Upham to purchase. The state did not appear, but the defendant herein appeared, and contested the application. An appeal was taken to the commissioner of the general land-office, and from his decision to the secretary of the interior, who finally determined that the applicants were entitled to a patent. I think the proceedings had on application of plaintiff's grantors, who purchased the land under the provisions of the seventh section of the act of July 23, 1866, and the decision rendered by the department, are a complete bar to any claim of the state, and to the claim of the defendants. It is true, the proceedings against McNamara involved other lands than those in controversy here, but they also involved the right of said grantors to purchase the lands in controversy as against all parties to that action. At the time those proceedings were pending, McNamara held a certificate of purchase, under which he now claims title to the lands in suit. Although that certificate was issued in 1860, and the hearing before the land-office was not had until March, 1871, yet I think McNamara's right was concluded therein. The application of Hodges and Upham was based upon the allegation that they were *bona fide* purchasers for a valuable consideration from Mexican grantees of land which had been excluded from the final survey of the grant; that they had made improvements, and occupied the land according to the lines of their original purchase, and that there was no valid adverse right except that of the United States. In accordance with the rules of the department the said McNamara and all other persons interested were duly cited to appear and contest their right to purchase the land under the act of July 23, 1866. The defendant did appear and contest the claimant's right to a portion of the land, but made no contest as to that portion which is in controversy here, and for which he at that time held a certificate of purchase. The state had parted with her title to the defendant, and was interested in the contest. It was the duty of McNamara, as grantee of the state, to defend whatever claim he had under his certificate. It seems to me that, in the ab-

sence of fraud, the decision of the land department was binding on all the parties and all the world. *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985; *French v. Fyan*, 93 U. S. 169. The defendants did not offer to show that the land was swamp and overflowed at the time the grant took effect, to-wit, September 28, 1850. The evidence offered was all addressed to the question as to its character at the time of the trial. The court did not err, therefore, in excluding the evidence.

**CARROLL v. SEYMOUR.** (No. 14,221.)  
(*Supreme Court of California.* April 21, 1891.)

**EVIDENCE—SUFFICIENCY.**

Where the sole question is one of fact, and the evidence is sufficient to support the finding of the court, the judgment will be affirmed.

Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

*E. B. Stanton and Goodcell & Leonard*, for appellant. *Rolfe & Freeman*, for respondent.

**PER CURIAM.** There seems to have been but one material issue of fact made by the pleadings in this action, and that was as to the ownership of the land described in the complaint. On this issue the court found for the plaintiff. We think the evidence is sufficient to sustain this finding. We find no error in the record. Judgment and order affirmed.

(88 Cal. xxi)

**CARROLL v. SEYMOUR.** (No. 14,222.)  
(*Supreme Court of California.* April 21, 1891.)

Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

*E. B. Stanton and Goodcell & Leonard*, for appellant. *Rolfe & Freeman*, for respondent.

**PER CURIAM.** This case presents the same question as was involved in *Carroll v. Seymour*, *ubi supra*, (No. 14,221, just decided by this court,) and upon the authority of that case the judgment and order are affirmed.

(88 Cal. 599)

**SCOTT v. SELLS et al.** (No. 14,220.)  
(*Supreme Court of California.* April 17, 1891.)

**MORTGAGES—FORECLOSURE—DESCRIPTION OF PREMISES—JUDICIAL NOTICE.**

Where the description in a mortgage annexed to and made part of the complaint, in a suit to foreclose, shows that the mortgaged premises were, at the time the suit was commenced, in a legal subdivision, which the court judicially knows to have been within the boundaries of the county in which the suit was brought, it cannot be objected that the complaint does not show that the premises were so situated.

Department 2. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

*Wells & Hendershot and Chas. S. McKelvey*, for appellants. *Lee & Scott*, for respondent.

**BRATY, C. J.** This is an appeal from a decree foreclosing a mortgage. The complaint is in all respects sufficient, and, as the answer raised no material issue, the court properly gave judgment for the plaintiff on the pleadings. It is objected that the complaint does not show that

the mortgaged premises are in the county of Orange, where the action was commenced and the decree rendered. But the description in the mortgage, which is annexed to and made a part of the complaint, shows that the mortgaged premises are part of a legal subdivision which we know to have been within the boundaries of Orange county at the date of the commencement of the action, though at the date of the mortgage it was in Los Angeles county. Judgment affirmed.

We concur: DE HAVEN, J.; McFARLAND, J.

88 Cal. 413

GARNISS v. SUPERIOR COURT OF SAN FRANCISCO. (No. 14,160.)

(Supreme Court of California. March 21, 1891.)

JURISDICTION OF JUSTICE—ACTION AGAINST RECEIVER—ASSIGNMENT OF CLAIM.

1. An action against a receiver appointed to receive and hold the rents of land pending an appeal in ejectment, brought by one to whom the successful party assigns her right to such rents, is not an equitable action, but an action for money had and received, and a justice has jurisdiction thereof. The rents in his hands are no part of the judgment in ejectment.

2. The assignment is not made an assignment of part of a demand only, by the fact that the receiver holds the money subject to costs.

In bank. Application for bill of review. *Thornton & Merzbach*, for petitioner.

#### APPLICATION FOR WRIT OF REVIEW.

GAROUTTE, J. The facts set out in the petitioner's application are as follows: That one Horace W. Philbrook, upon the 15th day of April, 1890, commenced an action against the petitioner in the justice's court of the city and county of San Francisco upon a complaint stating, among other things: "That on the 24th day of January, 1889, in the superior court of the city and county of San Francisco, a civil action was commenced by Edward Harrison, administrator, et al., against Mary J. Lynch et al., for the purpose of recovering from said Mary J. Lynch a certain lot of land, and of barring the other defendants of all right, title, and interest therein. That on the 24th day of February, 1889, a judgment was rendered in said action against the said defendants. That on the 27th day of March, 1889, and prior to the commencement of the action of Philbrook v. Garniss, the superior court appointed James R. Garniss (defendant herein) receiver, to receive, hold, and preserve, during the pendency of an appeal from said judgment, the rents of said lot of land. That prior to January 1, 1890, said receiver, as such, received the sum of four hundred and eighty dollars as rent of the property. That on the 8th day of November, 1889, said superior court granted a new trial in said cause, and upon the 11th day of December, 1889, rendered judgment in said action in favor of Mary J. Lynch, declaring her to be the owner of said lot of land and the money in the hands of the receiver. That on the 28th day of February, 1890, said Mary J. Lynch assigned to this plaintiff (Philbrook) all moneys belonging to her in the hands of said receiver.

er. That on the 7th day of March, 1890, the court settled the receiver's accounts, and allowed him as credits as such officer all of said \$480, except the sum of \$274.50, and directed him to pay said sum to Mary J. Lynch. That on the 10th day of March, 1890, plaintiff notified the receiver of the assignment, and demanded the payment to him of the \$274.50, but he has refused to pay the same. Plaintiff prays for judgment," etc. Defendant answered this complaint with a general denial, and at the opening of the trial objected to the justice's court trying the action, upon the ground that it was an action in equity, and therefore the court had no jurisdiction. The objections were overruled, and upon trial the plaintiff obtained judgment as prayed for. The defendant appealed the case to the superior court, filed an amended answer, and at the commencement of the trial objected to the jurisdiction of the superior court to try the case, upon the ground that its jurisdiction in equity was original, and it had no appellate jurisdiction in such a case. The objections were overruled, and trial resulted in another judgment for plaintiff, as prayed for in the complaint. That on the trial of said case both the justice's court and the superior court exceeded their jurisdiction for the reasons abovestated, and petitioner has no remedy, except by this application.

It appears that the petitioner occupies the somewhat novel position of having appealed his case to the superior court upon questions of law and fact; then objecting to said court trying the case upon the ground of want of jurisdiction; and, upon that objection being overruled, taking the chance of an adverse verdict; and having lost that chance, then proceeding, by review, to this court to test the jurisdiction of the superior court. It seems the much better practice for petitioner would have been to directly attack the jurisdiction of the justice's court in some appropriate manner, rather than appeal the case to the superior court upon its merits. Indeed, if petitioner's contention is true, that the superior court had no jurisdiction to try the case upon appeal, because the justice's court had no jurisdiction to try the case at all, then it is difficult to see how the petitioner could secure a standing in the superior court upon appeal for any purpose: for after a case has been tried in the justice's court upon its merits, and an appeal is taken to the appellate court upon the law and the facts, or upon the law, (when a new trial is granted,) the cause is heard *de novo* in the superior court. Owing to the views we entertain upon the other branch of the case, it is not necessary to consider the question as to whether the conduct of the petitioner in appealing this cause to the superior court, upon the law and facts, creates such an estoppel against him as that he cannot be heard to object to the jurisdiction of that court to try the cause.

Petitioner contends that the complaint in the case of Philbrook v. Garniss shows an equitable cause of action of which the justice's court had no jurisdiction. Respondent insists that the complaint shows



a claim for money had and received by defendant to plaintiff's use. A receiver may be appointed in an action of ejectment, after judgment, during the pendency of the appeal; and, reading the application of the petitioner by the very dim light thrown upon the question by the meager facts stated as to the character of the action of *Harrison v. Lynch*, it appears to be a proceeding in ejectment. We then find the petitioner appointed receiver, after judgment for the plaintiff, and pending proceedings for appeal, for the express purpose of collecting and preserving the rents of the land. Thereafter, the motion for a new trial being granted by the lower court, and upon the succeeding trial judgment going for the defendant, the powers and duties of the receiver were clearly at an end. "Though a receiver may be, and generally is appointed upon the application of one of the parties interested in the property which he is to preserve, his holding is not merely for the benefit of such party, or of any other party. It is the holding of the court for the equal benefit of all persons who may be finally adjudged by the court to have rights in it. Where, however, the rights of the parties are established, he is considered as holding for the benefit of the parties entitled to the property." Beach, Rec. § 252. The contention of petitioner that these moneys in his hands were a part of the judgment in the case of *Harrison v. Lynch et al.* cannot be sustained. Indeed, the necessity of a specific decree by the court, declaring them the property of defendant Lynch, was not required, as she was necessarily entitled to them by reason of the judgment in her favor as to the possession of the realty. If plaintiff had finally recovered in the action, he could have had no judgment against defendant Lynch for these moneys, for she never had possession of them. They were in the custody of the court. The amount was certain, and had been preserved by the receiver *in specie*, for the only purpose that it might be delivered upon the order of the court to the party who should finally recover in the action. The order of the court decreeing that this money was the property of Mary J. Lynch was not a judgment for the rents and profits of the realty; it was no money judgment whatever; it was no judgment upon which an execution could have issued against anybody. It was not a judgment against the plaintiff, and it was not a judgment against the receiver, for he was not a party to the suit. This decree, then, establishing the *status* of the funds in the hands of the receiver, was not a part of the judgment within the pleadings or the proof in the case of *Harrison v. Lynch*. Neither was the assignment by Mary J. Lynch to Philbrook of the moneys in the hands of the receiver an assignment of a part of a demand. She assigned her entire demand, amounting to \$480. The mere fact that this money was held by the receiver, subject to a lien upon it for his fees and costs of receivership, and was thus charged with such costs, which he was entitled to deduct from the amount upon the settlement of his account, in no way affects the question of Mary J. Lynch's as-

signment of the entire demand. Her act in the matter was as entire, full, and complete as it was possible to make it, and it effected the exact result contended for by petitioner, for it obliterated the entire demand. What the assignee failed to obtain of the demand, Garniss, the debtor, secured for himself. Why should he be allowed to complain that this assignment was for a part of the demand, when at this very moment the balance of the demand is in his pocket, and his own property by a decree of the court. The rule that a court of law will not recognize an assignment of part only of an entire demand or judgment is based upon the reason that the liability of the debtor extends in favor of one person, and the law will not impose upon him the burden of being subjected to several suits or executions by different persons for fractional parts of the demand or judgment. In the case at bar, for the reasons already stated, this principle has no application. It seems clear that the petitioner held this money as money had and received for the benefit of Mary J. Lynch, and that the action of Philbrook v. Garniss was in *assumpsit*; an action at law, and not in equity; and was within the jurisdiction of the justice's court, and the appellate jurisdiction of the superior court. Let the application be denied. So ordered.

WE CONCUR: HARRISON, J.; PATERSON, J.; DE HAVEN, J.; MCFARLAND, J.; SHARPSTEIN, J.

(83 Cal. 473)

KLOSE v. HILLENBRAND *et al.* (No. 13,927.)  
(*Supreme Court of California*. March 28, 1891.)

DEEDS—CANCELLATION—FRAUD—EVIDENCE.

In a suit to set aside a deed as obtained by fraud it was shown that the grantor, an old man of weak mind, was falsely advised by his attending physician, the grantee's father-in-law, that he was about to die, and that, in order not to delay certain transactions in connection with the land, he had better convey his interest therein to the grantee; but the instrument was to contain a clause by which it should not go into effect, unless he died of that illness. The deed was drawn without any such clause, however, and the grantee got possession thereof without the consent of the grantor, had it placed on record, and thereafter claimed title under it. *Held*, that the evidence warranted a judgment setting aside the deed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

*Bishop & Watt*, (John H. Durst, of counsel,) for appellants. *Haskell & Meyer* and *Otto Tum Seden*, for respondent.

FOOTE, C. The plaintiff, Klose, had judgment in this action that a certain deed of conveyance to a one-half interest in certain real property situate in San Francisco from him to one William Hillenbrand, of date the 25th of April, 1888, was procured by fraud and artifice; that it was null and void, and conveyed no interest of Klose to the property therein described; and that ever since that date the plaintiff had been, and is now, the owner of, and entitled to the possession of, an

undivided one-half part or share of the lot of land described in the deed, with the improvements thereon. And further, that a conveyance from William Hillenbrand of the same property, by deed executed on the 21st of January, 1889, to his wife, Anna Hillenbrand, was executed in fraud of the rights of the plaintiff, and is null and void. It was further ordered and adjudged that the plaintiff be let in to the quiet possession, occupation, and enjoyment of the undivided one-half part or share of the lot of land and premises described in the judgment, and that the plaintiff recover his costs. From that judgment, and an order denying a new trial, this appeal is taken.

It appears from the evidence on behalf of the plaintiff that he was at the time he signed and acknowledged the deed to William Hillenbrand a person advanced in years, and of great weakness of mind, although not amounting to disqualification; that he made the deed without adequate consideration and without independent advice; that he was induced to make that instrument by an imposition practiced upon him on the part of Dr. Schmitz, the father of Anna Hillenbrand, who was the plaintiff's attending physician, in this: that Klose was informed by the doctor that he was dangerously sick, and that it would be better, in order not to retard the building of a house on the lot conveyed, which was then being erected by William Hillenbrand and Klose jointly, that he, Klose, should execute a deed to Hillenbrand of Klose's interest in the property, but that this instrument should have included in it a clause that it was not to go into effect unless Klose should die from his then illness, and should not be delivered or go into effect until after his death from such illness. But without any authority from Klose, after Schmitz obtained the deed in this way, Hillenbrand got possession of it, and placed it upon record. After Klose found this out he was uneasy, and asked to look at it, so that he could have it examined by a friend, presumably to see if his wishes had been carried out as promised. He was put off, however, from time to time, by the promises of Hillenbrand to deal fairly with him, and in good faith carry out the original design as understood by Klose, viz., that if he got well from the illness for which the father of Mrs. Hillenbrand was treating him the deed should be destroyed. But so far from drawing the deed as he agreed to, or delivering it as he promised, the physician of Klose violated both his agreements, with the knowledge and connivance of Hillenbrand and wife. The deceived and confiding old man brought this action after he found that, so far from keeping the promises made to him, these parties, bent on preserving their unjust advantage, had fully consummated it, as they supposed, by Hillenbrand conveying the property to his wife.

It is first contended for the appellants that the evidence is insufficient to support the findings. We think that which was introduced by the plaintiff is ample for that purpose.

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It is next contended that the complaint does not allege that the deed was to contain a clause that it was not to go into effect unless the plaintiff died from his then illness, but that the pleading only alleges that the clause was to be to the effect that the deed was not to go into effect until after the death of Klose, without reference to whether he died from his then illness or not. That, therefore, the evidence and findings are conflicting with the case made in the complaint. A careful examination of the pleading in question does not bear out this contention. It is manifest from the whole language employed, although the same is not couched in the clearest terms for that purpose, that the pleading as to that matter conforms to the findings and evidence. It is alleged in the complaint, and found to be a fact by the finding, "that said William Hillenbrand at once took possession of said deed from the hands of said Schmitz, [the doctor,] and caused the same to be recorded by said Schmitz in the office of the county recorder of the city and county of San Francisco, as though the same had been delivered to him by this plaintiff, when in truth and in fact the said deed has never been delivered to said Hillenbrand." The argument made in this connection by the appellants for a reversal of the judgment and order seems to be that this finding shows that the deed was delivered by Schmitz, and that he had the power confided to him to deliver it conditionally; that, although he used this power by violation of his promise to the plaintiff, yet it was a legal delivery, and hence the finding that there was no delivery conflicts with the fact which states that delivery was given by the possession taken by Hillenbrand from Schmitz. In other words, although Schmitz violated his promise not to deliver, yet this did not affect the delivery so far as Hillenbrand was concerned. We cannot conceive how such an act can accomplish the legal result claimed. *Brison v. Brison*, 75 Cal. 527, 17 Pac. Rep. 639; Civil Code, § 1572. The allegation of the pleading and the finding show no authorized delivery to Hillenbrand, but a possession and a recording of the deed fraudulently obtained and made. But if we were to concede the specific points made by the appellants involving the pleadings and findings as being well taken, the judgment and order should not be reversed, as the pleadings, findings, and evidence all show this much, at the very least, viz.: That Klose made a deed that he did not intend to make; that he was old, sick, and of impaired intellect; that the instrument was made without any adequate consideration, and without independent advice, but, to the contrary, by intended and deceptive advice; and that he would have moved to set it aside in reasonable time but for the promises made him by William Hillenbrand; and that, as soon as he unwillingly discovered that he had been deceived by those he had reason most to trust, he sought through the courts to obtain redress. Under this state of facts, as we understand the rule in such cases, laid down in *Richards v. Donner*, 72 Cal.

210, 211, 13 Pac. Rep. 584, it would seem that no prejudicial error has been committed, and that the judgment and order should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

88 Cal. 462

McKEEN v. NAUGHTON. (No. 13,630.)

(Supreme Court of California. March 27, 1891.)

APPEAL FROM THE JUSTICE OF THE PEACE—FAILURE TO FILE BOND—ESTOPPEL.

1. Under Code Civil Proc. Cal. §§ 974, 978, the undertaking on appeal from a justice of the peace must be filed within 30 days from the rendition of judgment in order to give jurisdiction, and, where it is not filed in time, the judgment, on appeal, of the municipal court of appeals of San Francisco, to which it was transferred from the county court, is void.

2. The fact that the appellant therein resisted a motion to dismiss will not estop him to set up the invalidity of the judgment in an action involving title to land acquired at a sale thereunder.

Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

James F. Smith and Smith & Maurasky, for appellant. J. C. Bates, (Myrick & Deering, of counsel,) for respondent.

DE HAVEN, J. Action to determine conflicting claims to certain real property. The appellant claims title to the land in controversy by virtue of a purchase thereof at a sale under an execution issued upon a judgment of the municipal court of appeals of San Francisco, in favor of one Harry Pateman against Robert McKeen and W. H. Norton, for the sum of \$277.70, including costs. The action of Pateman v. McKeen and Norton was commenced in the court of a justice of the peace for the city and county of San Francisco, and judgment therein rendered on May 8, 1879, in favor of the plaintiff therein, and against the defendants in that action. On June 6, 1879, the defendants therein served and filed a notice of appeal from said judgment to the county court of said city and county, but no undertaking thereon was filed until June 9, 1879. The case was tried in the municipal court of appeals on September 24, 1879, and on that day said court rendered the judgment under which the appellant claims. No order was made by the county court transferring the case to the municipal court of appeals until after the latter court had given its judgment. But on November 11, 1879, such order of transfer was made, and which also directed that the same be filed *nunc pro tunc* as of June 14, 1879. It is claimed by respondent that this judgment was void for want of jurisdiction, and that, therefore, no title passed under the execution sale mentioned, and this is the principal question for decision here. It is unnecessary to determine whether it was competent for the legislature, under the constitution then in force, to transfer to the municipal court of appeals a portion of the jurisdiction conferred by that constitution upon the county court, as it is clear that the mu-

nicipal court of appeals never acquired any jurisdiction of the case of Pateman v. McKeen and Norton for other reasons. There was no attempt to take an appeal to the municipal court of appeals, and the attempted appeal to the county court was ineffectual. If it be assumed that the undertaking given upon such attempted appeal was sufficient in amount, still the county court acquired no jurisdiction of the action, as the undertaking was not filed within 30 days after the rendition of the judgment in the justice's court. Code Civil Proc. §§ 974, 978; Coker v. Superior Court, 58 Cal. 177. In the case just cited this court said: "To effectuate an appeal from the judgment of a justice of the peace, three things are necessary, viz.: The filing of a notice of appeal with the justice, the service of a copy of the notice upon the adverse party, and the filing of a written undertaking; and all these things must be done within thirty days after the rendition of the judgment. Code Civil Proc. §§ 694, 978. All of these are jurisdictional prerequisites; none of them can be dispensed with, nor can any one of them be supplied, or, if fatally defective, be remedied, after the time limited in the statute; for, until all the prerequisites are completed, the appeal is not effectual for any purpose." This view of the law has been approved in the later cases of Hall v. Superior Court, 68 Cal. 25, 8 Pac. Rep. 509, and Dutertre v. Superior Court, 84 Cal. 536, 24 Pac. Rep. 284, and must be considered as the settled rule here. The act creating the municipal court of appeals did not attempt to confer upon it any other than appellate jurisdiction.—"the same power and jurisdiction in civil appeal cases as is possessed by the said county court." Act April 1, 1878, St. 1877-78, p. 947. And it would seem that, in order to call into exercise this appellate jurisdiction in a given case, there must have been an effectual appeal taken in such case, either directly to such court or to the county court; and if in the case of an attempted appeal to the county court the action should in any manner be transferred, either by force of the statute referred to, or by order of the county court, to the municipal court of appeals, that court would not thereby obtain any greater jurisdiction of the cause than was possessed by the county court. The appeal to the county court in the case of Pateman v. McKeen and Norton being ineffectual for any purpose, for the reasons hereinbefore stated, it necessarily follows that the judgment rendered on such appeal in the municipal court of appeals was without authority, and therefore void.

2. It appears that there was a motion made in the municipal court of appeals to dismiss the appeal in the case of Pateman v. McKeen and Norton, on the ground that no appeal had been taken as required by law. The motion was denied. The appellant insists that thereby the respondent here is estopped from asserting want of jurisdiction in that court to hear and give judgment in the case. If it be assumed that the respondent resisted that motion, still we do not think that such action would estop him to question in this action the jurisdiction of that court. The

matter of this alleged estoppel is not set out in the answer of the defendant, as it should be if relied upon as a defense. *Clarke v. Huber*, 25 Cal. 594; *Davis v. Davis*, 26 Cal. 39. But, passing over this defect in the answer, the fact that the appellants therein resisted the motion to dismiss the appeal in that action cannot work the estoppel claimed. Every fact in connection with the attempted taking of the appeal was within the knowledge of the respondent therein, and, being chargeable with a knowledge of the law, neither he nor the appellant here, who stands in his place, can be heard to say that he was deceived by any contention of the appellants in that action, as to the law governing appeals from justices' courts, and involved in the decision of that motion. "The representation, in order to work an estoppel, must generally be a statement of fact. It can rarely happen that the statement of a proposition of law will conclude the party making it from denying its correctness, except when it is understood to mean nothing but a simple statement of fact." *Bigelow, Estop.* p. 572. There is nothing in this case which takes it out of this general rule. Judgment and order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

38 Cal. 537

REMY v. OLDS et al. (No. 13,770.)

(Supreme Court of California. April 2, 1891.)

CONTRACTS—BREACH—JOINDER OF ACTIONS—PLEADING.

1. Under Code Civil Proc. Cal. § 427, subd. 1, there may be joined in a single action a claim for damages for defendant's breach of his obligations under a certain contract, and a *quantum meruit* for the performance by plaintiff of his obligations under the same contract.

2. Where the contract between plaintiff and defendant provides for the former's taking possession of land for three years, and the mutual performance of certain obligations during the whole term, and defendant, within less than a year, notifies plaintiff that he repudiates the contract, and turns him out of possession, plaintiff may sue at once for breach of contract without waiting for the time to perform the other undertakings.

3. Where plaintiff undertakes to irrigate the land thoroughly before April 1st, and defendant undertakes to construct an irrigating ditch, such ditch must be constructed before April 1st.

4. Though plaintiff undertakes to build a rabbit-tight fence to protect the vines he is to plant, performance is not due where defendant prevents his planting the vines.

5. After plaintiff has been turned out of possession he need not demand the deed for a portion of the land defendant contracted to make him before he brings an action for damages.

Commissioners' decision. In bank. Appeal from superior court, Merced county; C. H. MARKS, Judge.

*Breckinridge & Peck and Law & Law*, for appellant. *J. W. Knox, R. H. Ward, and Baldwin & Campbell*, for respondents.

FITZGERALD, C. This is an action for damages for breach of contract. Two alleged causes of action are separately stated in the amended complaint, in each of which the contract, which is in writing, is declared on *in hæc verba*, and contains in brief the following terms and condi-

tions: On the part of plaintiff: (1) During the fall of 1888 to thoroughly plow, level, and put in good condition, to irrigate and plant in vines and trees, all of lots 49 and 50. (2) Before April 1, 1889, to thoroughly irrigate, cultivate, and plant one-fourth each of said lots in first-class Malaga raisin grape-vines, and the remaining three-fourths of each of said lots in first-class Muscat raisin grape-vines, and to plant around each of said lots, in the manner therein provided, such trees as the defendants should furnish for that purpose. (3) For three full years from date of contract, to irrigate, cultivate, prune, and in every way properly care for, and each year during said term replant at his own cost all of the vines and trees planted or set out by him on lots 49 and 50 which should die or fail to thrive during that time. (4) To protect for said full term of three years said vines and trees by a good rabbit-tight fence around each of said lots, with the right granted to plaintiff to remove said fence at the end of said term if he shall so desire. (5) To deliver to defendants at the end of said term of three years all of said lots 49 and 50, fully set out and planted in vines and trees as herein agreed, all of said trees and vines to be in good thrifty condition. (6) To immediately construct, white-wash, or paint a dwelling-house upon lots 71 and 72, and keep the same in good condition during the entire term. On the part of defendants: (1) To allow plaintiff to enter upon at once, and to use and possess, for three years from date of contract, for the purposes heretofore mentioned, all of lots 49 and 50. (2) To allow plaintiff to have the use and possession of all of lots 71 and 72 during the whole of said term for such purposes as he shall desire. (3) To furnish to plaintiff one-half of one full water-right from the Crocker-Huffman Canal & Irrigation Company, and to construct a canal or ditch from the nearest branch of said Crocker-Huffman Canal, along Hattley avenue, to and along one side of said lots 49 and 72. (4) On October 3, 1891, provided plaintiff shall have complied with all the terms and conditions on his part, to execute to plaintiff a conveyance of all of lots 71 and 72. Time is made the essence of the contract; and plaintiff and defendants bind themselves each one to the other for the faithful performance of all the covenants of the contract in the penal sum of \$10,000 as liquidated damages to be paid by the failing party to the other. The complaint specifically alleges: (1) Performance or excuse of performance by plaintiff of each obligation resting upon him prior to the notice of repudiation by defendants. (2) Readiness and willingness to perform others. (3) Prevention of performance by defendants failing and refusing to dig the ditch and furnish the water. (4) That on June 10, 1889, while plaintiff was in possession of said land under said contract, and engaged in performing the covenants on his part to be performed, defendants notified plaintiff in writing that they, defendants, would not perform said contract on their part, and then and there prevented plaintiff from any further performance of the terms of said contract on

his part; and that said notice has never been retracted. That plaintiff, within a reasonable time after receipt of said notice, removed and vacated, and defendants entered upon and took possession of said lands in said contract mentioned. There is also a general allegation of performance of all the conditions precedent on plaintiff's part to be performed, except in so far as he was prevented by the acts or omissions of defendants. Defendants demurred generally to the whole complaint and separately upon the same grounds to each cause of action therein stated, which demurrer was sustained by the court below, and, upon plaintiff refusing to further amend, final judgment was rendered in favor of defendants. The case comes here by appeal upon the judgment roll alone.

The first objection taken by the demurrer—that several causes of action have been improperly united—is disposed of by the statement that the separate causes of action stated in the amended complaint arose out of the express or implied terms and conditions of the same contract. In other words, the first cause of action stated is for damages for breach of the actual terms of the contract, with each item of damage separately and specifically alleged, and all summed up into one general allegation of damages. The statement of the second cause of action is on a *quantum meruit*, and particularizes each item of work and labor performed and materials furnished, and the reasonable value thereof. Several causes of action may be united in the same complaint, where they all arise out of contracts expressed or implied. Code Civil Proc. § 427, subd. 1. Under the second objection—that the complaint does not state facts sufficient to constitute a cause of action—several questions are raised, and such of them as are necessary for us to consider will be taken up and briefly disposed of in the order in which they are presented.

1. "The action is prematurely brought." The complaint shows upon its face that the action was brought subsequent to the written notice of the repudiation of the contract by defendants, when the plaintiff was not in default, and after he had removed from and vacated, and defendants had entered upon and taken possession of, the premises heretofore mentioned. This constituted such a breach as authorized the plaintiff to immediately sue without waiting for the time to arrive for the performance of the other conditions. Section 1440, Civil Code; Hale v. Trout, 35 Cal. 229; Bunge v. Koop, 48 N. Y. 225; Crist v. Armour, 34 Barb. 378.

2. Nor is there anything in the point contended for, that defendants had until October, 1891, within which to dig the ditch and furnish the water. This provision of the contract is susceptible, as we think, of but one construction, and that is that the ditch should be dug, and the water furnished, when the time for irrigation by plaintiff arrived, and this is fixed by the terms of the contract at a period prior to April 1, 1889. Chipman v. Emeric, 5 Cal. 49, is not in point.

3. Nor is the point well taken that there is no allegation of performance or excuse

for non-performance of the covenant to protect the trees and vines by building around lots 49 and 50 a rabbit-tight fence. The contract plainly shows that the fence was intended solely for the protection of the vines and trees, and until there were vines and trees to protect there was no necessity for the fence. The complaint alleges that the vines died (the trees never having been furnished) for the want of the water which the defendants agreed, but failed, to furnish. Performance of this covenant was not due; therefore not necessary to be excused. But admitting that it was, the allegation, "was ready and willing to irrigate, prune, cultivate, and in every way care for said vines and trees, as promised in said agreement," is sufficiently broad to cover this obligation. Bunge v. Koop, 48 N. Y. 225; Crist v. Armour, 34 Barb. 378; Hale v. Trout, 35 Cal. 229.

The only other point which we propose to notice, that the suit cannot be maintained because there is no allegation of demand for a deed, is equally as untenable as the others. Such demand was unnecessary. Why should the plaintiff be required to do that which the defendants have expressly notified him in writing that they would not do? The law does not require the performance of a useless act, and, when it is made to appear by the defendants' own act that the demand would have been refused, then they cannot be heard to object that no demand was made. Parrott v. Byers, 40 Cal. 614; Wood v. McDonald, 66 Cal. 546, 6 Pac. Rep. 452. While we are of the opinion that the first cause of action, as stated in the amended complaint, is not entirely free from defects, some of which might have been reached by special demurrer, yet, on the whole, we are satisfied that it states facts sufficient to constitute a cause of action. In relation to the second cause of action, which is a statement on a *quantum meruit*, we have been unable to discover any defect whatever,—a position evidently concurred in by counsel for respondents, for they do not appear to have urged any very serious objection to it. If either cause of action state facts sufficient to constitute a cause of action, then the demurrer should have been overruled. We therefore advise that the judgment be reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

(38 Cal. 572)

SMITH *et al.* v. SMITH. (No. 13,857.)

(Supreme Court of California. April 2, 1891.)

VENUE—COUNTY OF DEFENDANT'S RESIDENCE.

Under Code Civil Proc. Cal. §§ 392, 393, providing that actions to recover real property, or for the determination of any right therein, may be brought in the county where the real estate is situated, but "in all other cases" the action must be brought in the county of defendant's

residence, a suit to compel the reconveyance of both real and personal property, and for an accounting of the rents and profits by defendant, and a personal judgment against him for the amount found to be due, must be brought in the county of defendant's residence, and not where the land is situated.

In bank. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

*Law & Law and Jas. H. Budd*, for appellant. *J. C. Campbell and P. W. Bennett*, for respondents.

HARRISON, J. This action was commenced in Tuolumne county against the defendant, who was then a resident of the county of Merced. After the service of the summons upon the defendant, and at the time of his demurring to the complaint, he filed an affidavit of merits, and demanded in writing that the place of trial of the action be changed from Tuolumne county to Merced county, upon the ground that Merced was the proper county for the trial of the action, and supported his motion by an affidavit that at the time of the commencement of the action he was, and had been for many years prior thereto, a resident of the county of Merced. The motion was denied, and the defendant has appealed from the order denying the same. It is alleged in the complaint that in July, 1876, one D. G. Smith, under whom the plaintiffs claim, was the owner and in possession of certain real estate in Tuolumne county, and certain personal property consisting of upwards of 26,000 sheep, together with horses, wagons, harnesses, and camp equipage, and was at the same time indebted to the defendant in the sum of \$31,000, and to other persons in the further sum of \$33,000; and that, "for the purpose of securing the payment of said indebtedness," it was agreed between said D. G. Smith and the defendant that said D. G. Smith "should deed by conveyance absolute on its face, but which in fact should be a mortgage, all his right, title, and interest in and to all of said real and personal property to the defendant, who was to carry on the business of said D. G. Smith, to-wit, that of sheep-raising, and pay from the proceeds of said business all the indebtedness of said D. G. Smith, and, when said indebtedness had been fully paid and discharged by the defendant, he was to reconvey all of said property, real and personal, and the increase thereof, to said D. G. Smith;" that "in furtherance of and in accordance with said agreement, and with the purpose and intent of complying with its terms and securing the payment of said indebtedness, said D. G. Smith executed and delivered to the defendant conveyances absolute on their face, but which were in fact mortgages, conveying all the aforesaid real and personal property to the defendant, and said property was then delivered to the defendant, and that the defendant has ever since been in possession thereof, and has had the use and received the proceeds and increase thereof, for the purpose of complying with the terms of said agreement." The complaint further alleges that "the defendant has received from said property, and from

the proceeds and increase thereof, large sums of money which greatly exceed all that was necessary to carry on said business and pay the expenses thereof, and also to pay all the indebtedness of said D. G. Smith;" that the defendant ever since said conveyance to him "has had and now retains the sole and exclusive use, possession, and benefit of all of said property, and of all the proceeds and increase thereof." Upon this complaint the plaintiffs pray for a judgment against the defendant that it be decreed that the absolute conveyances aforesaid were and are mortgages, and that the indebtedness which they were given to secure has been fully paid, and the defendant convey said real and personal estate, together with the proceeds and increase thereof, to the plaintiffs, and that the defendant account to the plaintiffs for all of said real estate, and the rents, issues, and profits thereof, and all of said personal property, and the proceeds and increase thereof, and that plaintiffs have judgment against him for such sum as shall be found to be due upon such accounting, after satisfying such mortgage indebtedness.

It does not appear from the complaint whether the conveyance of the real estate was distinct from that of the personal property, or whether the conveyance of the real estate in Tuolumne county was by a separate instrument from that which conveyed the real estate in Merced county, the averment being that said D. G. Smith did execute to the defendant conveyances "conveying all the said real and personal property." Whether we construe this averment as an allegation that each conveyance included both real and personal property, or that one conveyance embraced only real estate, while the personal property was conveyed by another, is immaterial for the purpose of determining this appeal. Section 892, Code Civil Proc., provides that "actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this Code: (1) For the recovery of real property, of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property." Section 395, Id., provides that "in all other cases the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action."

The general spirit and policy of the statute is to give to the defendant the right of having all personal actions against him tried in the county of his residence. Provision is made for the trial of actions affecting real estate in the county where the land is situated, and for the trial of certain other designated actions in the county where the cause of action arose, but the general rule for the place of trial is prescribed in section 395 by the declaration that "in all other cases" the action must be tried in the county in which the defendant resides at the commencement of the action. This section is general and comprehensive in its terms, and embraces

all other cases than those which are specified in the three preceding sections. It is intended to protect the defendant against the expense and inconvenience of being compelled to go to a distant county to defend himself against an action that might be commenced against him there, and is in accordance with the principles that obtain wherever the common law prevails, that the plaintiff, who would seek redress from a defendant, must seek it in the county where he resides. When, however, the subject-matter of the action is local, and the judgment which is sought is to operate directly upon that subject-matter, it is provided that the action shall be tried in the county where the subject-matter of the action is situated. This being an exception to the general rule, the conditions under which the exception is claimed must be clearly and distinctly shown. The plaintiff cannot, by uniting in his complaint matters which form the subject of a personal action with matters which form the subject of a local action, compel the defendant to have both those matters tried in a county other than that in which he resides. It is only when real estate alone is the subject-matter of the action that the provisions of section 392 can be invoked against a defendant who resides in a county different from that in which the land is situated. If, in his complaint, the plaintiff join with such a cause of action another which is not embraced in its provisions, or if he also seeks a remedy against the defendant upon matters which are not embraced within the provisions of this section, his action becomes one of those "other cases" provided for in section 395, which the defendant is entitled to have tried in the county of his residence.

It is evident, upon the examination of the complaint herein, that the primary object of the action is to obtain from the defendant an accounting of his transactions in carrying on the business of sheep-raising under the agreement of July, 1876, with a personal judgment against him for the excess that upon such accounting may be found to have been received by him above the amount required to discharge the indebtedness of his grantor, and that he reconvey the property to the plaintiffs. The basis of the plaintiffs' cause of action against the defendant is contained in their allegation that "he has received from said property and from the proceeds and increase thereof large sums of money, which said sums greatly exceed all that was necessary to carry on the said business and pay the expenses thereof, and also to pay all the indebtedness of said D. G. Smith, covenanted to be paid in said agreement." The "proceeds and increase" of the personal property are treated in the complaint as distinct from the "rents, issues, and profits" of the real estate. It is under this allegation that the plaintiffs demand an accounting from the defendant, and ask that they may "have judgment against him for such sum as shall be found to be due upon such accounting." An action for an accounting is a proceeding in equity, and is essentially a personal action. The defendant has the right under section 395, Code Civil Proc., to have such action tried

in the county of his residence. The plaintiff cannot deprive him of this right by uniting in his complaint with such action a demand for an accounting for certain rents, issues, and profits alleged to have been received by the defendant from certain real estate situated in another county, and that he be adjudged to reconvey said real estate. Unless the cause of action set forth in the complaint falls wholly within the provisions of section 392, or of one of the two next succeeding sections, the provisions of section 395 prevail. In *Ashurst v. Gibson*, 57 Ala. 584, this principle was discussed. The statutes of that state provided that the complainant might file his bill for the foreclosure of a mortgage of real property in the county in which the real estate, or a material portion thereof, was situated. In that case a bill to foreclose a mortgage of real and personal property was filed in a county other than that in which the defendants resided. The court say: "The locality of the real estate and of residence alike confer jurisdiction, and the complainant may, at his pleasure, elect the one or the other jurisdiction. The right of election is limited to suits the subject-matter of which is real estate, and does not embrace other suits having a different subject-matter. \* \* \* Land must be the subject-matter, and the exclusive subject-matter, of suit, or the jurisdiction conferred by the act does not attach. Remedies must be pursued in the district of the residence of a material defendant, if land and personal property are the subject-matter of suit. Jurisdiction of the one cannot draw to the court jurisdiction of the other. A mortgage may embrace a very inconsiderable quantity of land of insignificant value, and personal property of very large value. It could not properly be said a suit for foreclosure or for redemption had for its subject-matter land. Its subject-matter is land and personal property, and in such a case it would contravene the spirit and policy of our legislation to subject parties to suit in the county in which the land is situated without the county of their residence." This case was cited with approval in the case of *Le Breton v. Superior Court*, 66 Cal. 27, 4 Pac. Rep. 777, where it was held that an action against a trustee for an accounting on both real and personal property was properly brought in the county where the defendant resided. It was held in *Baker v. Insurance Co.*, 73 Cal. 182, 14 Pac. Rep. 686, that an action for the purpose of procuring a reconveyance of land that had been conveyed by absolute deed as security for a debt, upon the averment that the debt had been paid, should be tried in the county where the land was situated. In that case the only issue presented was as to the right of a reconveyance after the payment of the debt, the court saying: "The land is the subject-matter concerning which the contest is waged, and it is situate in San Joaquin county." We do not intend to question the correctness of that decision, but we are not inclined to extend its doctrine so as to include an action for an accounting and a personal judgment thereon, brought against a defendant in a county other



than that of his residence, simply because a portion of the property for which he has to account is land situate in that county. The order of the superior court denying the motion is therefore reversed, and it is directed to make an order changing the place of trial from Tuolumne county to Merced county.

We concur: PATERSON, J.; SHARPSTEIN, J.; DE HAVEN, J.; MCFARLAND, J.; GAROUTTE, J.

88 Cal. 514

FALK v. REIS, Treasurer. (No. 14,008.)

(Supreme Court of California. March 13, 1891.)

ELECTIONS—REGISTRATION—APPOINTMENT OF OFFICERS.

1. Act Cal. March 18, 1878, (St. 1877-78, p. 299,) requires (section 6) the board of election commissioners of the city and county of San Francisco to pass on cases of alleged illegal registration on the precinct registers, brought before it by the registrar of voters, and (section 29) on the action of the registrar in cancelling names upon, or adding names to, the register, and is authorized to "appoint clerks or other assistants to the registrar," to enable him to ascertain the correctness of the registers. Section 12 authorizes the board to select all election officers "provided for by law." *Held*, that the board cannot appoint persons to advise or assist the board, in the selection and appointment of officers of election, or, independently of the registrar, to scrutinize the roll and detect fraud in registration.

2. Nor is such authority given the board by section 33, providing that all provisions for carrying out the registration and election laws shall be made by the board.

In bank. Application for *mandamus*.

*Oliver P. Evans*, for plaintiff. *George Flournoy*, for respondent.

DE HAVEN, J. Application for a writ of mandate, commanding the defendant, as treasurer of the city and county of San Francisco, to pay to plaintiff certain audited demands held by him against said city and county. It appears from the petition that on September 6, 1886, the board of election commissioners for said city and county resolved "that an agent be, and he is hereby, employed and commissioned by the board of election commissioners of the city and county of San Francisco, with such clerical assistance as may be necessary, not to exceed fifteen clerks to be appointed by this board, to take all necessary, active, and efficient measures to scrutinize the rolls and to prevent frauds in the present registration for the coming general election, and for the purpose of enabling this board to discharge its duties in connection with the appointment of precinct boards of registration satisfactorily. Said agent shall detail a sufficient number of clerks to assist the commission in the discharge of its duty in selecting said precinct boards, and that in this behalf the registrar is requested to furnish him and his assistants such information and facilities as will enable them properly to discharge their duties." On September 15, 1886, the said board by resolution employed the plaintiff, his assignor, Smith, and 14 others, "for the purpose of scrutinizing the roll and detecting fraud in the present registration, and also to assist and advise the present board

of election commissioners in the selection and appointment of precinct boards of registration and officers in the general election." The defendant has demurred to the petition, and in passing upon this it is necessary to determine whether the board of election commissioners of the city and county of San Francisco were authorized by the act of March 18, 1878, (St. 1877-78, p. 299,) to appoint or employ petitioner and his assignor, Smith, to discharge the duties named in the resolutions already referred to. It is sufficient for the question in hand to say that by section 6 of this act the said board is required to pass upon such cases of alleged illegal registration upon precinct registers as may be brought before it by the registrar of voters, and by section 29 the said board must pass upon the action of the registrar in either cancelling names upon or adding other names to the precinct registers received by him from the board of precinct registration. And under this section it may also appoint clerks or other assistants to the registrar, to enable him to ascertain the correctness of such precinct registers. *Schmitt v. Dunn*, 55 Cal. 651. The said board is also empowered by section 12 of the act under consideration to "select all election officers provided for by law for said city and county, \* \* \* and if the list furnished them by the registrar does not contain a sufficiency of names of respectable and fit persons for election officers, they must take measures to secure the names of proper persons." The resolutions under which the petitioner and his assignor were appointed show that such appointments were not made to assist the registrar in the discharge of any of the duties imposed upon that officer by section 29, already referred to, nor is it claimed in the petition that any such assistance was in fact rendered by either of them; therefore their appointment cannot be considered as specially authorized by that section.

Section 33, which provides that "all provisions for carrying out the registration and election laws in said city and county of San Francisco shall be made by the board of election commissioners, and demands on the treasury authorized or allowed by them for such purposes shall have the same force and effect as if authorized and allowed by the board of supervisors," does not, so far as concerns the question with which we are now dealing, add anything to the powers given said commissioners by the preceding sections to which we have referred. From this general reference to the powers conferred upon the board of election commissioners, by the act of March 18, 1878, we think it very clear that no express authority is conferred by that act on said board to appoint an agent for the purpose named in the resolution first quoted, or to appoint any person or persons to advise or assist said board in the selection and appointment of any officers of election, or, independently of the registrar, to scrutinize the rolls and detect fraud in the registration. And we think it equally clear that no such authority is given to said board by implication, as being incident to

or appropriate, to be exercised in connection with any of the express powers conferred upon such board. Undoubtedly the purpose of the statute under consideration is, as stated by the attorney for petitioner and expressed in its title, "to regulate the registration of voters and to secure the purity of elections in the city and county of San Francisco;" but, for the purpose of effecting this, the act itself makes minute provisions for the appointment of all officers contemplated by it as necessary for its enforcement, and for the employment of all clerks and other assistants to the officers named in it, and assigns to each officer his appropriate duties. By this assignment the registrar of voters has devolved upon him the duty to "constantly inform himself, by examination and inquiry, as to the condition of the precinct registers, and the legality of the names therein, or demanding to be placed thereon, and shall see that none but legal voters are registered," and, to enable him to discharge this duty he is allowed a clerk "and such other clerical assistance as shall be found necessary, \* \* \* to be allowed and authorized by the board of election commissioners of said city and county." Section 3, Act March 18, 1878. But these clerks are to be appointed by the registrar, and not by the board of election commissioners. *Schmitt v. Dunn*, supra. If, in the performance of his duty of making constant examination and inquiry into the proceedings touching registration, the registrar shall "have reason to believe" that in any particular case a person has been improperly registered, he is required to cite such person before the board of election commissioners, and it then becomes the duty of such board to pass upon the case thus presented, and substantially the same duty is devolved upon the board in approving or disapproving the act of the registrar in cancelling names upon or making additions to the precinct registers returned to him. It would seem that the law, in assigning the duties mentioned to the registrar, does not contemplate that the board of election commissioners should also be charged with the same duty of making a general and vigilant inquiry in relation to the matter of registration. Nor is it at all necessary that the board should have the authority to appoint persons to discharge the very duty which is plainly enjoined upon the registrar, in order that such board may obtain information to enable it to properly dispose of cases brought before it by the registrar for decision. The law evidently intends that, in a case thus brought to its attention, the board shall act upon such appropriate evidence as may upon the hearing be submitted to it by the registrar and the other party to the proceeding. It is also clear to us that the board had no implied authority to appoint the assignor of petitioner and the other persons named in the resolution or September 15, 1886, to assist the board in the selection and appointment of precinct boards of registration and other officers for the general election. The duty of appointing such election officers is, by the act under

consideration, devolved upon the board of election commissioners, and the board was not authorized, as an incident to this, to employ any person to advise it in relation to the proper performance of this duty. What measures the board would be authorized to take to secure the names of proper persons to serve in such positions, if the registrar should neglect to furnish the list of names of persons possessing the necessary qualifications, as provided by section 11 of the act here construed, we need not consider, as it is not alleged that any such failure necessitated the action of the board now under review. In *Falk v. Strother*, 84 Cal. 545, 22 Pac. Rep. 676, and 24 Pac. Rep. 110, nothing was decided contrary to the conclusions announced here, the court, in that case expressly saying: "Whether or not the payment of the demand could be prevented or enforced at any other stage of its history is a question which does not arise here." Demurrer to the petition sustained, and judgment for the defendant, denying the application for the writ of mandate asked for in petition.

We concur. BEATTY, C. J.; SHARPSTEIN, J.; HARRISON, J.; GAROUTTE, J.; MCFARLAND, J.

38 Cal. 434

HALL et al. v. WALLACE. (No. 13,034.)

(*Supreme Court of California*. March 25, 1891.)

STATUTE OF FRAUDS — PAROL SALE OF LANDS BY AGENT WITHOUT WRITTEN AUTHORITY—TENANCY AT WILL.

1. A verbal contract by an agent for the sale of lands whenever the owner shall perfect his title thereto is invalid under the statute of frauds. Civil Code Cal. § 1624.

2. A contract for the sale of lands, made by an agent having no authority in writing, is invalid under the statute of frauds. Id. § 1624, subd. 5.

3. The entry on land under a verbal contract to purchase makes the person in possession a tenant at will.

Department 2. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

Phillip Teare, for appellant. Wm. & Geo. Leviston, for respondents.

SHARPSTEIN, J. This is an appeal from a judgment and order denying defendant's motion for a new trial in an action of unlawful detainer. The plaintiffs allege that on or about the 1st day of May, 1886, they, by a verbal agreement and lease, leased and demised to the defendant certain premises now in his possession, to have and to hold at the will of the plaintiffs. That plaintiffs on the 7th day of January, 1888, terminated said lease by giving defendant a notice in writing to remove from the said premises within a period of one month from the said date; and on the 28th day of March, 1888, three days' notice in writing was given by plaintiffs to defendant, requiring and demanding of him possession of said premises, but defendant neglected and refused for the space of three days after said demand was served on him, and ever since has neglected and refused, to surrender possession of said premises; wherefore plaintiffs pray

restitution thereof, etc. Each and every material allegation of the complaint is specifically denied by the defendant. And defendant, further answering, alleges that he entered into possession of said premises, and made valuable improvements thereon, under a verbal agreement with one Watson, an agent of plaintiff Carpenter, to purchase the same whenever said Carpenter had perfected his title thereto. Defendant further alleges that he has always been ready and willing, and is now ready and willing, to pay for said land the price which he agreed to pay therefor. Upon these issues the parties went to trial before a jury, which returned a verdict for the plaintiff for the restitution of the premises without damages, upon which a judgment was entered that the plaintiffs recover from the defendant the restitution of the possession of said premises. The contention of appellant is that he "did not occupy the premises as a tenant at will or for a term, but on a definite verbal agreement to purchase the land improved by him." A verbal contract for the sale of real property, or for an interest therein, is invalid; and, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent be in writing, subscribed by the party sought to be charged. Civil Code, § 1624, subd. 5. Here there was no written agreement to sell by the owner of the property, or authority in writing to an agent to sell. The alleged agreement is doubly invalid,—(1) it was not in writing, (2) it was not made by an agent having authority in writing to make it. We think the entry and holding of the defendant under a void agreement constituted him a tenant at will. That being so, the record presents no error committed by the court which could affect the substantial rights of the parties. Judgment and order affirmed.

WE CONCUR: DE HAVEN, J.; MCFARLAND, J.

(83 Cal. 468)

*In re NOAH'S ESTATE.* (No. 12,999.)

(*Supreme Court of California.* March 27, 1891.)

EXECUTORS—DISCHARGE—WIDOW'S ALLOWANCE.

Where a wife, because of separation from her husband, and not of the value of his estate, has been adjudged not entitled to an allowance for her support, she cannot sue to set aside a decree of final distribution discharging the executors, on the ground that property belonging to the estate was fraudulently excluded from the inventory and appraisal, since she is not affected by the decree.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

H. E. Highton, for appellant. Pillsbury & Blanding, for respondent.

BELCHER, C. Most of the questions involved in this case were considered and passed upon in the case of the same title, reported in 73 Cal. 583, 15 Pac. Rep. 287. It is now further shown that one of the executors of Joel Noah's will, William H. Morris, died on the 1st of October, 1887;

that the two surviving executors proceeded to settle up the estate; that on the 29th of November, 1887, they presented and filed their final account, with a petition praying that the account be settled and the estate in their hands be distributed; that upon the 12th of December following, after due and regular notice, the matter came on to be heard, and, no objections being made thereto, a decree in due form was made and entered, settling and allowing the accounts of the executors, and distributing all of the estate remaining in their hands; and that afterwards, on the 14th of May, 1888, a decree in proper form was made and entered, discharging the executors from all liability to be incurred thereafter by them. The appellant, as widow of Joel Noah, deceased, commenced this proceeding by filing in the superior court, on the 12th of June, 1888, her petition praying that the decrees, settling the final account of the executors and distributing the estate, be vacated and set aside, and that she as such widow be allowed out of the estate of deceased, for her support and maintenance, the sum of \$100 per month, to take effect from his death, on the 28th of August, 1883. The petition sets out all the proceedings in the former case, and then, to show that the petitioner is now entitled to the relief prayed for, proceeds to state "that the inventory and appraisal of the property of said deceased, returned and filed herein on the 13th day of November, 1883, by the executors of said estate as aforesaid, was false and untrue, in this: That said inventory and appraisal did not include and set forth the following described property belonging to said deceased, to-wit, cash in the hands of the said William M. Morris, one of the executors, to the amount of \$8,550; United States bonds in the hands of said William M. Morris, belonging to said deceased, to the amount of \$10,000; cash on deposit in the London & San Francisco Bank, Limited, belonging to said deceased, to the amount of \$20,000, which was drawn out of said bank by said Morris, after the death of said deceased, on a power of attorney, which was rendered void by the death of said deceased;" "that, when the said inventory and appraisal was returned to and filed in this court, the said William M. Morris, one of said executors, knew that the money and property described in the last preceding paragraph belonged to said deceased, and knew that the same should have been described, set forth, and included in said inventory, but the said William M. Morris, knowingly, deceitfully, and fraudulently, and for the purpose of deceiving and defrauding your petitioner and the court, did not disclose his possession thereof, and omitted to include the sums, or any part thereof, in said inventory in order to impose upon the court, and in order that the action and decision of this court might be influenced and prejudiced against your petitioner, and in order that the court might be made to believe that the estate of said deceased was smaller than it really was; and the said William M. Morris then and there, and thereafter, connived and conspired with

the devisees under the will of said deceased to deceive and impose upon this court, by agreeing upon a secret and clandestine distribution of said money and property in the hands and under the control of the said Morris, as aforesaid, and the same was, in pursuance of said fraudulent, collusive, and clandestine agreement, thereafter distributed by said Morris to said devisees, without the knowledge or consent of this court." The petition also states that the petitioner did not learn of these facts until on or about the 5th day of May, 1886, and, that, notwithstanding she exercised all the diligence in her power in searching for and collecting testimony to establish them, she did not succeed, and could not have succeeded in doing so, until immediately before the 12th of December, 1887, and that it was impossible for her to cause to be prepared and filed a new petition, asking for an allowance, before the decree of distribution was made and entered. The executors demurred to the petition on the ground that it did not state facts sufficient to entitle the petitioner to the relief prayed for, or to any relief; and when the petition came on to be heard the executors, by their counsel, moved the court for a dismissal thereof, upon the ground that a decree of distribution had been duly given, made, and filed; that the executors had been discharged from all their liabilities as such executors; that the court had no jurisdiction to hear the petition; and also because the whole matter was *res adjudicata*. The court granted the motion and entered an order dismissing the petition. From that order this appeal is prosecuted. In *Willis v. Farley*, 24 Cal. 491, it appeared that an action was commenced to foreclose a mortgage against the property of an estate, and process was served on one Shirley as administrator, after the estate had been distributed and the administrator discharged. It was said: "When that action was commenced and the decree was entered there was no such administrator, and hence the whole proceeding was of no binding validity,—it was to all intents and purposes a nullity; for, by the discharge of the administrators, they were as completely separated from the business of the estate as if they had been dead; and J. M. Shirley had no right to appear in or be a party to any suit as the representative of the estate which had passed from his hands, and respecting which his authority had long before then wholly ceased."

It is claimed for appellant that that case is unlike this, and not in point, because here there was a direct application to have the discharge set aside on the ground that part of the estate had been concealed and kept back. But, under the circumstances shown, we fail to see how this fact can in any way aid the appellant. On the former appeal it was held that, under the statute, only those who were the immediate family of the deceased, and were by law entitled up to his death to look to him for support and protection, could claim any allowance for support out of the estate. And the court, after reviewing the authorities, said, (73

Cal. 589, 15 Pac. Rep. 290:) "It is enough to say that—since the appellant voluntarily made an agreement with her husband for separation, such as our law authorizes, received and enjoyed the benefits of the money paid for her support during the separation, and voluntarily continued to live apart from him without any attempt to set aside the agreement, or assume again the matrimonial connection, or even to demand further means for her separate support—the court below was justified in holding that the petitioner did not constitute the immediate family of the deceased, to whom was to be continued, during the settlement of the estate, the 'reasonable support' which the husband in ordinary cases is presumed to furnish his wife." As is readily seen, the decision did not depend upon the amount or value of the estate, but rested solely upon the fact that the petitioner, under the statute, was not entitled to the relief demanded. Now conceding, as claimed, that it was the duty of the court below, when informed under oath, even by a stranger, that a large part of the estate had been concealed and withheld from administration, to arrest all proceedings, until the truth or falsity of the assertion should be ascertained, and, if found to be true, to vacate its order of distribution and discharge, still appellant's rights were in no way affected by the action of the court, and she was not thereby "aggrieved." It results, we think, that the appellant's petition was properly dismissed, and we advise that the order be affirmed.

We concur: VANCLIFF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

38 Cal. 483

PEOPLE v. O'BRIEN. (No. 20,767.)

(Supreme Court of California. March 30, 1891.)

ROBBERY — JURY — TRIAL — RECORD ON APPEAL — INSTRUCTIONS.

1. Pen. Code Cal. § 1207, makes the judgment roll which will constitute the record of an action consist of the indictment or information, and a copy of the minutes of the plea or demurrer, "a copy of the minutes of the trial," instructions, and a copy of the judgment. Held, that the return of the sheriff on the *venire* is not part of the record.

2. The fact that the sheriff's return on the *venire* shows two names of jurors summoned as "Garwin" and "Zena," and that two jurors who were sworn and served were "Ganivan" and "Zina," is no ground for reversing a judgment, where it is in no other way made to appear that all the jurors who sat at the trial were not summoned.

3. Failure of the court to inform defendant, as provided by Pen. Code Cal. § 1066, that if he desires to challenge any particular juror he must do so before the juror is sworn, is not ground for reversing the judgment, if it appears that defendant and his counsel were fully aware of his rights. Following *People v. Mortier*, 58 Cal. 262.

4. Defendant's affidavit that his trial was continued in his absence, and that he was not present at the trial of his co-defendant, shows no ground for reversal of judgment, under Pen. Code Cal. § 1181, providing that defendant is entitled to a new trial, "when the trial has been had in his absence, if the indictment is for a felony."

A On indictment for robbery, a charge to find defendant "guilty or not guilty" is not erroneous, as withdrawing from the jury the right to determine defendant guilty of petit larceny only, if the evidence shows that, if guilty at all, he is guilty of robbery.

Department 2. Appeal from superior court, city and county of San Francisco, F. W. VAN REYNEGOM, Judge.

Carroll Cook, for appellant. W. H. H. Hart, Atty. Gen., for the People.

SHARPSTEIN, J. The point presented by the brief of appellant's counsel is "that the defendant was tried by at least one, if not two, jurors who were never summoned as jurors in the case." The two jurors who are alleged to have sat upon the jury without being summoned were G. H. Ganivan and Theodore Zina. Among the names of those duly summoned, the two which most nearly resemble the two above mentioned were "G. H. Garwin" and "Theodore Zena." How a person whose name was not upon the list of those summoned by the sheriff could be called, accepted, sworn, and permitted to sit as a juror in the trial of a case is not explained. Nor is it shown that the person who sat as a juror was not the person summoned, or that the apparent difference in the names was not caused by a clerical or typographical error. We think the return of the sheriff upon the *venire* constitutes no part of the record, and if not it is not properly before us. The judgment roll, which will constitute a record of the action, consists of "(1) the indictment or information, and a copy of the minutes of the plea or demurrer; (2) a copy of the minutes of the trial; (3) the charges given or refused, and the indorsements thereon; and (4) a copy of the judgment." Pen. Code, § 1207.

No one will contend, we think, that the return of the sheriff upon a *venire* could be included in either of these enumerations, unless it be within the second, as a part of "the minutes of the trial." And, as the minutes of the trial are a memorandum of what takes place in court, they would not properly include the acts of the sheriff in the service of process. What he did would appear in his return upon the process, which would constitute no part of the minutes of the court. There is no definition of the minutes of a court that would include a sheriff's return upon the process placed in his hands for service. But, if it did constitute a part of the record, we are not prepared to hold that it would constitute a sufficient ground for reversing the judgment. It is not a ground for granting a new trial or arresting a judgment. *People v. Fair*, 43 Cal. 137. Here a mere dissimilarity of names is alone relied on. In no other way is it made to appear that all the jurors who sat at the trial were not actually summoned. The point raised here may rest wholly upon a clerical or typographical error, which could not have affected or prejudiced in any manner the rights of appellant. Upon such a showing we could not, according to established principles, reverse the judgment.

The point presented by appellant's brief

is that "it appears by the record that at the time the judgment was pronounced the defendant was not informed by the court of the nature of the charge against him, or of his plea, or of the verdict of the jury." The recitals in the judgment show that the defendant was informed of all these things, and it nowhere appears in the record that he was not. This point appears to be based upon a misconception of the record. The Code provides that, "before a juror is called, the defendant must be informed by the court, or under its direction, that if he intends to challenge an individual juror he must do so when the juror appears, and before he is sworn." Pen. Code, § 1066. In the bill of exceptions we find the following: "The court, without instructing the defendant as to his right to challenge the jurors, proceeded to and did impanel a jury, said defendant, O'Brien, not offering to challenge and not challenging any of said jurors." It appears by the minutes of the court, which constitute a part of the record, that 12 persons, whose names are given, were drawn, sworn, and examined, and that six of them, whose names are given, were "peremptorily challenged by defendant," and three of them, whose names are given, by the people. This seems to conflict with the statement, in the bill of exceptions, that the defendant did not challenge any of said jurors. We shall accept the statement in the minutes as true, and dispose of the point as a similar one was disposed of in *People v. Mortier*, 58 Cal. 262, in which the court said: "The next point in the case is that the failure of the court to instruct the prisoner upon his rights as to challenging jurors was error. It is true that section 1066 of the Penal Code does provide that 'before a juror is called the defendant must be informed by the court, or under its direction, that if he intends to challenge an individual juror he must do so when the juror appears and before he is sworn.' The object of this provision of the law is to protect the rights of the defendant in the matter of challenging jurors. He should be informed of the fact that, if he desires to challenge any particular juror, he must exercise that right before the juror is sworn; but it appears from the record in this case that the defendant's rights in this respect were fully understood by him and his counsel, and the privilege of challenging jurors was exercised to a large extent in the case. It is true that the court omitted a duty imposed by law, but it clearly appears that the defendant was not in any manner prejudiced by the error complained of, and, such being the case, the omission of the court in the matter referred to constitutes no sufficient ground for reversing the judgment. 'After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties.'" Pen. Code, § 1258.

One of the specified grounds of the motion for a new trial is the following: "That defendant was not present at every stage of the proceedings in said action." A defendant against whom a verdict has been

rendered is entitled to a new trial "when the trial has been had in his absence, if the indictment is for felony." *Id.* § 1181. The defendant does not state in his affidavit that his trial was had in his absence, but states that he was not present at the trial of his co-defendant, Sullivan, and that his (O'Brien's) trial was continued when he was not present in court. The affidavit fails to show that the trial (his own trial) was had in his absence, and therefore fails to show any ground for a new trial, as the Code clearly excludes all other grounds than those enumerated in said section. *People v. Fair*, 43 Cal. 137.

The court in its charge defined "robbery" as it is defined in the Penal Code, and then explained the fear, by means of which, if property is taken through its influence, will constitute the taking robbery. The contention of appellant's counsel is that there is no evidence of the existence of any such fear at the time of the alleged taking of the property in this case, and therefore that the verdict is contrary to the charge of the court and against law. We think there is some evidence tending to show that the taking of the property in this case was accomplished by means of both force and fear. As we view it, there is nothing in the definition of robbery as given by the court in its charge that was calculated to confuse the jury, and we think it is easy to determine from the charge the correct definition of the crime with which the defendant was charged. There is no misdirection in the charge, and we think the court charged the jury upon all matters of law necessary for their information.

The court in its charge instructed the jury that their verdict would be "guilty or not guilty." Appellant's counsel insists that it was error to so instruct the jury, because, he says: "The crimes of grand and petit larceny are both included in the offense charged against the defendant, and it was the province of the jury to determine from the evidence whether the elements which would constitute it the crime of robbery existed or not." The evidence all tended to prove that the defendant, if guilty of any crime, was guilty of robbery. *People v. Madden*, 76 Cal. 521, 18 Pac. Rep. 402. We are satisfied that the evidence is sufficient to justify the verdict, and that the court below did not err in denying the motion for a new trial on the ground that it was not. Judgment and order affirmed.

We concur: DE HAVEN, J.; McFARLAND, J.

33 Cal. 568

MILLER v. MAYO. (No. 13,978.)

(Supreme Court of California. April 1, 1891.)

PUBLIC IMPROVEMENTS—ASSESSMENTS—LIENS.

1. Where Act Cal. March 18, 1885, authorizing the improvement of a street, provides that the expense incurred "shall be assessed upon the lots fronting thereon \* \* \* in proportion to the frontage," a complaint in an action to foreclose a lien for such assessments, which alleges that assessment was made "on property benefited by such street improvement," is bad on demurrer.

2. Such act further provided "that the street superintendent shall thereupon cause to be con-

spicuously posted along the line of said contemplated improvement, at not more than three hundred feet in distance apart, but not less than three in all, or, when the work to be done is the improvement of an entire crossing, in front of each quarter block liable to be assessed, notices" of the contemplated improvement. Held, that where the improvement contemplated is the grading of the street for several blocks, posting notices at intervals of 300 feet is sufficient, though the improvement includes several crossings.

3. The property owner cannot object to the assessment by reason of the street superintendent's omission to approve the contractor's bond.

in bank. Appeal from superior court, Sacramento county; J. W. ARMSTRONG, Judge.

Clinton L. White, for appellant. Frank D. Ryan, for respondent.

PER CURIAM. This action was brought to foreclose a lien for a street assessment upon real property of the defendant. A demurrer was filed to the complaint, which was overruled, and answer filed. Trial was had, resulting in a judgment for the plaintiff as prayed for. From that and an order denying a new trial the appeal is taken.

1. The demurrer to the complaint should have been sustained. Section 7 of the act of March 18, 1885, under which the work was authorized, provides that "the expenses incurred for any work authorized by section 2 of this act \* \* \* shall be assessed upon the lots and lands fronting thereon, \* \* \* each lot or portion of a lot being separately assessed in proportion to the frontage." The complaint herein alleges "that, immediately after the completion of said street work, said street commissioner proceeded to and did make an assessment upon the property benefited by said street improvement." This was not a compliance with the statute, and, although it may be a fact that the lots and lands fronting upon the improvement were the only property which was benefited thereby, yet, for the purpose of alleging a cause of action, the complaint should have alleged that the assessment was made in the terms prescribed by the statute.

2. The board of trustees declared their intention to order Twelfth street, from J street to L street, to be improved by grading and graveling. This included the crossing of K and Twelfth streets. It is alleged in the complaint that, after the resolution of intention had been passed by the board of trustees, the street commissioner "caused to be conspicuously posted along said contemplated work more than three notices of said resolution, at less than three hundred feet in distance apart." The defendant, in his demurrer, objects to the sufficiency of the complaint in this respect. We think, however, that the complaint alleges a sufficient compliance with the statute. Section 3 of the act aforesaid provides that, after the resolution of intention has been passed, "the street superintendent shall thereupon cause to be conspicuously posted along the line of said contemplated work or improvement, at not more than three hundred feet in distance apart, but not less than three in all, or, when the work to be done is the improvement of an entire crossing, in front

of each quarter block liable to be assessed, notices of the passage of said resolution." The appellant contends that, inasmuch as the work provided for included the crossing, it was necessary for the street superintendent to post the notices of the resolution not only at intervals of less than 300 feet along the line of the work, but also in front of each quarter block liable to be assessed. The statute, however, does not require such posting. The proviso in section 3, above quoted, "or, when the work to be done is the improvement of an entire crossing, in front of each quarter block liable to be assessed," is in the disjunctive, and is to be construed as being a separate direction from that with which it is connected. If the work ordered to be done "is the improvement of an entire crossing," then the notices of the resolution must be posted "in front of each quarter block liable to be assessed," but for any other work the direction is that the notices shall be posted "along the line of said contemplated work or improvement." In the present case "the line of the contemplated work or improvement" was Twelfth street from J to L, and the allegation in the complaint that the notices were posted along that line is a sufficient compliance with the requirements of the statute.

3. The testimony offered at the trial sufficiently proved that the official grade of Twelfth between J and L had been established by proper authority.

4. The allegation in the complaint that the bond given by the plaintiff at the time of executing the contract had been approved by the board of trustees, instead of by the superintendent of streets, is immaterial in this action. A failure to execute a bond that should be satisfactory to the superintendent of streets might be a sufficient reason for the superintendent to refuse to enter into the contract with the contractor, but, after the work has been completed to the satisfaction of the superintendent of streets, the property owner cannot object to the correctness of the assessment by reason of the omission on the part of the superintendent to approve the bond of the contractor. The judgment and order denying a new trial are reversed, and the court below is directed to sustain the demurrer to the complaint, with leave to the plaintiff to amend if he shall be so advised.

33 Cal. 510

LASSEN COUNTY v. SHINN *et al.* (No. 13,819.)  
(*Supreme Court of California.* March 31, 1891.)

COUNTY BOARD—EMPLOYMENT OF ATTORNEY.

The board of county commissioners have authority to employ counsel, other than the district attorney, to collect the money due to the county by the state for the support of indigent persons, and the choice of such counsel is a matter within their discretion, and cannot be reviewed.

Commissioners' decision. In bank. Appeal from superior court, Lassen county; M. MARSTELLER, Judge.

F. A. Kelley, for appellant. *Shinn & Masten*, for respondents.

BELCHER, C. This action was instituted by the district attorney of the plaintiff,

to recover from the defendants the sum of \$416.25, money alleged to have been paid to them out of the plaintiff's treasury, without any authority of law, and 20 per cent. damages for the use thereof, as provided in section 8 of the county government act. St. 1883, p. 300. The court below gave judgment for the defendants on demurrer to the complaint, and the plaintiff appeals. The facts alleged in the complaint are in substance as follows: That the defendants were attorneys at law, residing in the county of Lassen and doing business therein as partners; that on the 6th day of July, 1889, the plaintiff's board of supervisors made and caused to be entered on its minutes an order which read as follows: "It is ordered that Shinn and Masten be, and they are hereby, authorized to collect all moneys now due to Lassen county from the state of California on account of keeping indigent persons, and that the auditor draw his warrant in favor of Shinn and Masten for fifty per cent. of all moneys collected by them;" that the order was made against the express wishes, advice, and consent of the district attorney, and that the latter asked the board for a reasonable length of time to examine into the question whether there was any money due the county from the state for the support of indigent persons, but the board unlawfully and wrongfully refused his request; that in pursuance of the order the defendants proceeded to collect from the state the moneys due the county for the support of indigent persons, and obtained therefor comptroller's warrants for the sum of \$632.50, which they delivered to the county treasurer; and that, in payment for their services, the county auditor then drew his warrant on the county treasurer for the sum of \$416.25, which sum was paid to them in full. And as ground for equitable relief, it is alleged that, at the time the order above referred to was made, the defendant Masten appeared before the board of supervisors, and stated to them that he did not know, but thought there might possibly be some money due the county from the state, for the support of indigent persons by the county; but as it was very uncertain whether anything could be collected, and there were considerable risks in such undertaking, if the board would enter into an agreement to allow and pay defendants 50 per cent. of all moneys collected, they would undertake the collection and get all they could; that these statements were falsely and fraudulently made, with intent to deceive and mislead the board, and did deceive and mislead and induce the board to make the order, when it would not otherwise have done so; that before that time the supreme court of the state had decided in the case of Yolo Co. v. Dunn that all of the counties were entitled to receive aid from the state for the support of aged persons in indigent circumstances, and that the defendants knew of that decision, and of the mode of procedure to obtain the money, but that the district attorney did not know of the decision till some time afterwards. In our opinion, the ruling of the court upon the demurrer was proper.



It is settled law that, where a county has legal business to be transacted, its board of supervisors may employ counsel, other than the district attorney, to transact the business, if in the judgment of the board the public interest will thereby be subserved. This is rested upon the ground that the district attorney may be incompetent, or sick, or absent from the county, or engaged in other business, so that he cannot attend to it, or the business to be transacted may be outside of the county. *Smith v. Mayor*, 13 Cal. 533; *Hornblower v. Duden*, 35 Cal. 670. Here the county had a claim against the state for its *pro rata* share of the money appropriated by the state for the support of aged persons in indigent circumstances. But the claim could only be enforced and the money obtained by preparing proper proofs and presenting them to the state board of examiners, and, after the claim should be audited and allowed, obtaining the comptroller's warrant for the same. This was business which might well have been supposed to require the services of a competent attorney; and to transact it the board of supervisors seems to have been authorized to employ counsel other than the district attorney, and to pay them such reasonable fee as might be agreed upon. Whether the board exercised good judgment in employing the defendants, and agreeing to pay them as it did, is a matter which cannot be considered here. Of course, supervisors have no right to waste or give away moneys belonging to the county, or to expend them otherwise than in the interest of the public. In a case like this, however, their judgment and discretion are not open to review by the courts. *Hornblower v. Duden*, supra. The matters set up in the complaint for the purpose of obtaining equitable relief add nothing material to that instrument. The Yolo County Case, referred to, was decided by this court on the 27th of September, 1888, (77 Cal. 133, 19 Pac. Rep. 262.) The defendants, doubtless, knew of that decision before the 6th of July, 1889, and it would seem that the district attorney ought to have known of it. The statements alleged to have been made by Masten to the supervisors were that "he did not know, but thought there might probably be some money due the county from the state for the support of indigent persons by the county." This might be true, notwithstanding he at the time knew of the decision in the case referred to; and in it and what follows we see nothing which necessarily deceived or misled the board. The case of *Scollay v. County of Butte*, 67 Cal. 249, 7 Pac. Rep. 661, cited and relied upon by the appellant, is not in conflict with what has been said. On the contrary, it approves and reaffirms the rule declared in *Smith v. Mayor*, and in *Hornblower v. Duden*, supra. It follows that the judgment appealed from should be affirmed, and we so advise.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

HEINLEN v. PHILLIPS. (No. 13,925.) 88 Cal. 557

(Supreme Court of California. April 1, 1891.)

JURISDICTION OF SUPREME COURT — CERTIORARI — POWERS OF JUSTICE OF THE PEACE.

1. Code Civil Proc. Cal. § 52, subd. 2, limiting the appellate jurisdiction of the supreme court in certain cases to controversies involving not less than \$300, does not apply to an appeal from an order of the superior court granting a writ of *certiorari* to ascertain whether a justice's court had power to make an order annulling a judgment therein. Overruling *Bienefeld v. Milling Co.*, 82 Cal. 425, 22 Pac. Rep. 1113.

2. A justice of the peace has no power to annul a judgment rendered in his court after a regular trial. Following *Weimmer v. Sutherland*, 74 Cal. 341, 15 Pac. Rep. 849.

3. Code Civil Proc. Cal. § 892, relative to justices' courts, provides that "when the trial is by the court judgment must be rendered at the close of the trial," but attaches no penalty or consequence to a violation thereof. *Held*, that such provision is merely directory, and that a judgment rendered by a justice six weeks after trial is valid.

McFARLAND, J., dissenting.

In bank. Appeal from superior court, Tulare county; W. W. Cross, Judge.

G. A. Heinlen, for appellant. R. Irwin and B. C. Mickle, for respondent.

SHARPSTEIN, J. This is an appeal from an order of the superior court, made on *certiorari*, annulling an order of a justice of the peace by which a judgment previously rendered was set aside. The cause appears to have been submitted in the superior court upon the return made to the writ. At any rate there is nothing in the record before us to show that the return was controverted, and for the purpose of the present appeal it must be taken to be true. The material facts shown by the petition and the return are as follows: John Heinlen, the appellant here, brought an action in the justice's court of J. B. RUNYON, of Mussel Slough township, Tulare county, against the respondent, P. C. Phillips, to recover the sum of \$150 for services rendered. An answer was put in, and a trial was had before another justice who was called in by Justice RUNYON to sit in his place. Both the parties were represented at such trial, and witnesses were sworn and examined. The case was submitted on December 16th, and on the 29th of the following January judgment was rendered for the plaintiff for \$60 and costs. On the 20th of the following March the plaintiff moved the court to set aside this judgment. The motion was heard by Justice RUNYON, and was granted. The defendant then moved to have the order granting such motion set aside, but, failing in this, obtained a writ of *certiorari* from the superior court, which, after a hearing, annulled the order vacating the judgment. The appeals from this order of the superior court.

1. A motion is made to dismiss the appeal, upon the ground that, since the amount involved is less than \$300, this court is without jurisdiction. And the case of *Bienefeld v. Milling Co.*, 82 Cal. 425, 22 Pac. Rep. 1113, decided by department 2 of this court, sustains the position. But that case is in conflict with the prior decisions which, in the pressure of busi-

ness, were overlooked, and we think it is best to return to the settled rule. The point was decided in *Winter v. Fitzpatrick*, 35 Cal. 269, which overruled a prior case. The opinion was delivered by SANDERSON, J., who said: "The jurisdiction of this court in proceedings of this character does not depend upon the amount in controversy. Our review does not embrace the merits of the action. We look into the case no further than may be necessary to ascertain whether it is a case in which the inferior tribunal, board, or officer from which it comes had jurisdiction, and, if not, whether there is any other plain, speedy, or adequate remedy. For that purpose we may or may not have occasion to look to the amount in controversy, but not for the purpose of adjudicating the amount, or any question involving the right of either party to a judgment upon the merits." This case was approved and followed in *Morley v. Elkins*, 37 Cal. 456, and *Palache v. Hunt*, 64 Cal. 474, 2 Pac. Rep. 245. This would seem to be sufficient to establish the rule; and, as the department did not have before it the case mentioned, we think that *Bienenfeld v. Milling Co.* must be overruled. The motion to dismiss is therefore denied.

2. Upon the merits we think that the judgment should be affirmed. The judgment rendered in the first instance was not by default, but after a regular trial; and it has been held that in such case the justice has no power to set it aside. *Weimmer v. Sutherland*, 74 Cal. 341, 15 Pac. Rep. 849. It is argued, however, that the first judgment in the justice's court was void because it was not rendered until six weeks after the case had been submitted. The provision of the Code of Civil Procedure is as follows, (sec. 892:) "When the trial is by the court, judgment must be rendered at the close of the trial." It is to be observed that no penalty is prescribed, or consequence attached, to a violation of this section; and we think that if the legislature had intended that the delay of a day by the justice (for that would be a violation of the provision) should subject the parties to the expense of a retrial it would have said so in express terms. A similar but much stronger provision was enacted in relation to the district courts; but it was held to be merely directory. *McQuillan v. Donahue*, 49 Cal. 157. It is true that the superior court is a court of general jurisdiction, while the justice's court is one of limited jurisdiction. But the decision did not proceed upon the power of the court, but upon the intention of the legislature. The judgment is affirmed.

We concur: BEATTY, C. J.; HARRISON, J.; DE HAVEN, J.; PATERSON, J.; GAROUTTE, J.

I dissent: MCFARLAND, J.

(33 Cal. 560)

HAYS v. GLOSTER et al. (No. 13,790.)

(Supreme Court of California. April 1, 1891.)

CONSTRUCTION—TRUSTS—PAROL EVIDENCE—FRAUD.

In an action to have a trust as to certain real and personal property declared and enforced,

plaintiff alleged that, being so far deranged that he was entirely incompetent to transact any business, he was induced to convey the property to defendant by his false and fraudulent representations that he would take care of and manage it, pay off plaintiff's debts, and then retransfer the property to plaintiff; that there was no other consideration; that defendant knew the representations to be false and untrue, and made the same with intent to deceive and defraud plaintiff. Held, that the facts alleged show a trust arising from fraud under Civil Code Cal. § 292, providing that trusts may be created by writing or "by operation of law," and parol evidence was admissible to prove the allegations tending to establish the fraudulent acts.

In bank. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

Spencer & Raker and C. A. Raker, for appellant. Goodwin & Jenks and Ewing & Claffin, for respondents.

MCFARLAND, J. This action was brought for the purpose of having a trust as to certain real and personal property declared and enforced, and for an accounting, reconveyance, etc. An answer was filed, in which the material averments of the complaint were denied. There was no demurrer to the complaint,—probably because it did not appear that the alleged promises and undertakings of defendant D. M. Gloster, upon which the cause of action is based, were not in writing. But at the trial nearly all the evidence offered by plaintiff was excluded upon the grounds that the alleged trust was void under the statute of frauds unless in writing; that a written instrument cannot be contradicted or changed by parol evidence; and, generally, that the alleged trust could not be proven by parol testimony. A jury had been called to try some of the issues; but as plaintiff, under the rulings of the court, failed to get in any material evidence, the jury was discharged, and the court gave judgment for defendants, from which, and from an order denying a new trial, plaintiff appeals. So that the question presented is practically this: Would the complaint have stated a cause of action if it had appeared on its face that the things averred as the basis of the alleged trust were not evidenced by writings? It is averred in the complaint (substantially) that on November 23, 1883, plaintiff was, and for a long time previous thereto had been, the owner in fee and in possession of certain described land, which, with the improvements thereon, was of the value of \$10,000; and also a large amount of personal property on said land, consisting of horses, mules, cattle, hogs, wagons, plows, mowers, threshing-machine, and other farming implements, grain, hay, bacon, lard, household furniture, and other personal property, of the value of \$10,000; that at said time plaintiff was in very poor health and in a feeble condition physically and mentally, and that his mind was, and for some time prior thereto had been, so far deranged that he was entirely incompetent to transact any business; and that the defendant D. M. Gloster well knew of plaintiff's said weakness and incompetency. It is further averred that at and before said November 23, 1883, said defendant made frequent visits to plaintiff

at his home on said land, and frequently and falsely represented to plaintiff that he was plaintiff's special and warm friend; that plaintiff was being robbed and wronged by others, and that defendant was very anxious to befriend, protect, and aid plaintiff, and to take care of him in his feeble condition; that defendant falsely represented to plaintiff that he was worth \$1,000,000, and could easily advance money to pay any debts then owing by plaintiff, and would do so if plaintiff would turn over his property to defendant, and requested and persuaded plaintiff to transfer all said real and personal property to defendant, and to let him into possession thereof jointly with plaintiff; that defendant promised and agreed "that if plaintiff would so transfer and let him, said defendant, into the possession of said property, he, the defendant, would protect and take good care of and preserve the said property, and would manage the same for plaintiff, and in plaintiff's interest, and out of the proceeds of said property he would pay plaintiff's debts; and that he would provide plaintiff a pleasant and comfortable home upon said property, and would take good care of the plaintiff in his then feeble condition, and would advance any money necessary for such purposes; and that when he had paid plaintiff's debts, and had so managed his business affairs as to relieve him from his then present embarrassments, he would retransfer all of said property to plaintiff." It is further averred that, induced solely by said false promises, representations, and pretenses, "and without any other or further consideration whatever therefor," plaintiff, on said 23d day of November, 1883, executed and delivered to said defendant D. M. Gloster a deed of conveyance of said real property and a bill of sale of all said personal property, and allowed defendant to take control of the same, and that defendant thereupon entered upon said land and took entire charge of all of said real and personal property; that from said date to the fall of 1887 defendant and plaintiff jointly occupied the dwelling-house upon said land; and that during said time neither said defendant nor his family made any effort to make plaintiff comfortable, or to restore his health, but, on the contrary, neglected and ill-treated him, and very poorly provided him with clothes and food, so that his health was thereby injured, and his chances for recovery greatly lessened. It is further averred that defendant afterwards fraudulently, and in violation of said trust and confidence, conveyed without consideration a part of said land to his daughter, Mary E. Gloster, and another part to Henry O'Toole, both of whom are made parties defendant; that said defendant D. M. Gloster has sold the principal part of said personal property, and converted the proceeds thereof to his own use, and has apportioned to his own use the rents and profits of all said real and personal property, and has never paid any of plaintiff's debts; and that he now repudiates said trust and all said promises, and claims to be the owner of all said property not yet sold free of all trust, and is now holding the same ad-

versely to plaintiff. It is further averred as follows: "That all the statements and promises and representations made by the defendant D. M. Gloster to plaintiff as set out in the complaint were false and fraudulent, and said defendant D. M. Gloster knew said representations to be false and untrue, and the same were made by said defendant to plaintiff with intent to deceive and defraud said plaintiff, and thereby to obtain possession of plaintiff's property for the sole purpose of defrauding plaintiff thereof," etc. There is an averment that plaintiff did not discover the fraud until within three years before the commencement of the action; and there are also many other averments, in detail, of matters not necessary to be here mentioned.

We think that the matters set forth in the complaint, if true, constitute a cause of action, assuming that the alleged undertakings of defendant D. M. Gloster were not in writing. The case is not one to which the rules that a trust in real property must be in writing, and that a writing cannot be varied by parol evidence, apply. Trusts may be created by writing or "by operation of law," (Civil Code, § 852;) and trusts which arise from fraud, either actual or constructive, are not within that part of the statute which requires a trust to be declared by a written instrument. The averment in the complaint last above quoted is, we think, a sufficient statement that the promises alleged to have been made by defendant D. M. Gloster were made without any intention of performance, and therefore there was actual fraud within the meaning of the phrase "a promise made without any intention of performing it," as used in section 1572 of the Civil Code. But, if that were not so, we think that the other facts stated show a case of trust arising out of fraud within the authorities of *Broder v. Conklin*, 77 Cal. 330, 19 Pac. Rep. 513; *Brison v. Brison*, 75 Cal. 525, 17 Pac. Rep. 689; *Murray v. Dake*, 46 Cal. 645; *Sandloss v. Jones*, 35 Cal. 481; and *Newman v. Smith*, 77 Cal. 22, 18 Pac. Rep. 791. See, also, *Humphrey v. West*, 40 Mich. 597; *Tracey v. Sacket*, 1 Ohio St. 55; *Reid v. Burns*, 13 Ohio St. 49. In some of the cases above cited there was a peculiar confidential relation, as that of husband and wife, parent and child, or attorney and client; but that was not the fact in all the cases. The case at bar is very similar to those of *Humphrey v. West*, *Sandloss v. Jones*, and *Broder v. Conklin*, supra.

The alleged mental weakness of plaintiff is a matter to be seriously examined. Upon this subject the supreme court of Ohio, after a review and citation of authorities, say as follows: "Those who from imbecility of mind are incapable of guarding themselves against fraud and imposition are under the special protection of the law. The rule to be collected from all the authorities, I take to be this: Where there is imbecility or weakness of mind arising from old age, sickness, intemperance, or other cause, and plain inadequacy of consideration, or where there is weakness of mind, and circumstances of undue influence and advantage, in either

case a contract may be set aside in equity."

As first above stated, the questions involved in this case arose on rulings of the court sustaining objections of defendants to evidence offered by plaintiff. The statement on motion for a new trial consists mainly of questions asked by plaintiff of witnesses, objections by defendants, rulings sustaining the objections, and exceptions by plaintiff, and of offers by plaintiff to prove certain facts, and objections to such offers sustained. It would be useless labor to notice all of such rulings in detail. They all seem to have gone upon the theory that plaintiff was bound by the terms of the deed and bill of sale, and could not prove the averments of the complaint by parol evidence. One or two examples of the rulings will be sufficient. While plaintiff was on the witness stand he was asked by his counsel,—referring to the time the deed was made: "What was the matter with your physical organization, whether you were sick, weak, or disabled?" The question was objected to by the defense as "irrelevant and immaterial," and the objection was sustained. Counsel for plaintiff then said: "We offer to prove that plaintiff at the time of the transfer set out in the complaint was of weak and unsound mind, and incompetent to transact business, on the 23d day of November, 1883. We offer to prove that defendant must have known of such mental weakness and sickness, and that he took advantage of such weakness and sickness to persuade plaintiff to such contract set out in the complaint. (Objected to as irrelevant and immaterial. Objection sustained. Plaintiff excepts.)" This ruling was erroneous. Again: "Question. What induced you to make that transfer of property? (Objected to as incompetent, immaterial, and irrelevant; it appearing that the transfer was in writing, and expresses the inducement, and it is the best evidence what the inducement was.) The Court. That brings up the same question. The objection is sustained. (Plaintiff excepts.)" This ruling was erroneous. Again: "Question. State what consideration, if any, you received for turning over that property to defendant Gloster? (Objection as irrelevant, immaterial, and incompetent. It is evidenced by the bill of sale itself. It is entirely irrelevant and immaterial whether there was any other consideration outside of the writing; the writing speaks for itself. It is the same thing you have been to work on twenty-four hours. Objection sustained. Plaintiff excepts.)" These examples show the general nature of the 25 specifications of error contained in the statement. Plaintiff sought in various ways—by questions put to witnesses and by offers of proof—to introduce evidence tending to prove the averments of his complaint; but he was prevented by the rulings of the court from doing so. His offers were not objected to because they were in the form of "offers to prove;" but because the things offered to be proven were inadmissible. It is possible that some of the evidence offered to be introduced was objectionable under the general rules of evidence; but the main basis of

the rulings was that parol evidence was not admissible to establish the averments of the complaint. Therefore it is sufficient for the guidance of the court below on another trial to say generally that plaintiff is entitled to prove (if he can) the material averments of his complaint, his mental condition at the time of the transfer, the advantage taken of his mental weakness by defendant, and undue influence by the latter, the real consideration of the transfer, the condition of the property and the circumstances of the transaction, the alleged fraudulent acts of the defendant before, at the time of, and after the transfer, and all facts which reasonably tend to establish the alleged fraudulent acts; and these things may be proven by parol testimony, subject, of course, to the general rules of evidence. For the reasons above given the judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; DE HAVEN, J., HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.

88 Cal. 553

RODGERS v. WITTENMYER. (No. 13,416.)

(Supreme Court of California. April 2, 1901.)

MORTGAGES—PAYMENT—PLEADING—EVIDENCE—DURESS.

1. A complaint alleged that, plaintiff and defendant differing as to the amount due upon a mortgage, defendant agreed that if plaintiff would pay the amount claimed by defendant to be due, and it afterwards transpired that the amount so paid was in excess of the amount due, defendant would repay to plaintiff such excess; and, further, that the amount so paid was more than was due, but that such excess had not been repaid. Held sufficient to constitute a cause of action.

2. Such complaint is not ambiguous or uncertain.

3. The following testimony given by plaintiff was insufficient to prove the agreement to repay: "The day the money was paid, \* \* \* of course I was prepared to pay under protest. I went to [defendant] when I saw the mistake. \* \* \* She agreed to come up here and see about it. \* \* \* I notified her of the mistake, and she told me she would come up here and see" her agent, "and, if I was right, it would be right."

4. Where, in order to put an end to foreclosure proceedings, a mortgagor agrees to pay the amount due, together with interest, attorney's fees, and costs, but, a dispute arising as to the total amount due, he pays, under protest, more than he believes to be due, such payment is not under compulsion.

Department 2. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

W. S. Tinning, for appellant. Smith & Murasky and F. Van Norman, for respondent.

SHARPSTEIN, J. This action was brought to recover \$427.50, alleged to have been paid in excess of the sum due from plaintiff to defendant upon a certain mortgage held by defendant upon the land of plaintiff. The jury rendered a verdict in favor of plaintiff for \$300, and defendant has appealed from the judgment and an order denying his motion for a new trial. The allegations of the complaint are that the defendant had a mortgage upon land of the plaintiff to secure the payment of \$6,-

000, and interest thereon, and about February 21, 1887, defendant commenced an action to foreclose said mortgage; that in May, 1887, while said action was still pending, plaintiff being desirous of terminating said action and saving further costs to himself therein, and of liquidating and discharging his indebtedness to the defendant under said mortgage and said action, offered to pay to the defendant the mortgage money, interest, costs, and counsel fees due and payable thereunder; that all that was then lawfully due to the defendant by reason of the premises was the sum of \$4,000 principal, and the sum of \$2,127.50 interest, \$150 counsel fees, and \$25 costs, making in all \$6,302.50, which defendant offered to pay, but defendant demanded \$6,730; plaintiff protested against paying more than the said sum of \$6,302.50, but said defendant refused to take less than said sum of \$6,730, and agreed that she would recoup to plaintiff the difference between said sums, to-wit, the sum of \$427.50, if it afterwards transpired that a mistake had been made in the calculation of principal and interest and costs aforesaid, that plaintiff thereupon paid to defendant said sum of \$6,730, under protest as to said sum of \$427.50. The plaintiff alleges that defendant did make a mistake of \$427.50 in said calculation, and, although often requested by plaintiff to pay him said sum of \$427.50, defendant has not paid the sum or any part thereof to plaintiff, wherefore he demands judgment for that sum. Defendant demurred to the complaint on the ground (1) that it does not state facts sufficient to constitute a cause of action; (2) that it is ambiguous and unintelligible. The demurrer was overruled, and appellant claims that the court erred in overruling it.

The complaint, as we construe it, alleges in substance that, the plaintiff and defendant differing as to the amount due upon the mortgage, defendant agreed that if plaintiff would pay the amount claimed by defendant to be due, and it afterwards transpired that the amount so paid was in excess of the amount due, defendant would repay to plaintiff such excess. That was sufficient to constitute a cause of action, and we fail to discover any ambiguity or uncertainty in it. We think the demurrer was properly overruled. The defendant in her answer denies that she ever at any time agreed that she would recoup or repay to plaintiff any part of said sum of \$6,730, or any sum of money in any event or for any cause; denies that said sum of \$427.50, or any sum paid by plaintiff to defendant, was excess or in excess of the amount due defendant under said mortgage. Several other of plaintiff's allegations are denied in the answer. Among the particulars specified by appellant in which the verdict is not justified by the evidence is the following: "The evidence failing to show any agreement on the part of the defendant to recoup or repay to the plaintiff any sum of money, or any part of the amount claimed in the complaint in any event, the verdict should have been for the defendant." The evidence of the plaintiff in support of his allegation that the defendant

agreed that she would recoup to plaintiff the difference between the sum of \$6,302.50 and \$6,730, to-wit, the sum of \$427.50, if it afterwards transpired that a mistake had been made by defendant in her calculation of principal and interest and costs, is extremely meager. It is as follows: "The day the money was paid by Dr. Strentzel, of course I was prepared to pay under protest. I went to Mrs. Riley when I saw the mistake,—to her house; me and my son. She lived on Minnie street, and she agreed to come up here and see about it. This was in '87. I notified Mrs. Riley of the mistake, and she told me she would come up here and see Mr. Wittenmyer,—he attended to her business,—and if I was right it would be right." We think this evidence fails to prove any agreement of defendant to recoup or repay to plaintiff any sum of money whatever, in any event. Precisely what it does mean we will not undertake to explain. But it is insufficient to constitute an agreement of the kind alleged in the complaint, and that is all that we are called on to decide. It is only fair to respondent's counsel to state that his main contention is that the payment of the sum in excess of the sum which he admits was due, was under compulsion. That contention, in our opinion, is unsupported either by the allegations of the complaint or the evidence on the trial. We think the exceptions to the charge of the court were none of them well taken, and we do not discover any other errors than that the evidence is insufficient to justify the verdict, for which a new trial should be had. For that error defendant's motion for a new trial should have been granted. Judgment and order reversed.

We concur: MCFARLAND, J.; DE HAVEN, J.

88 Cal. 530

DONLON V. JEWETT. (No. 14,334.)

(Supreme Court of California. April 1, 1891.)

COUNTIES—CLASSIFICATION—SALARIES OF COUNTY OFFICERS.

St. Cal. 1883, p. 299, § 162, divides counties into 48 classes; the thirty-ninth being counties having a population of 5,600 and under 6,000; the fortieth, those having 5,300 and under 5,600; the forty-first, those having 5,000, and under 5,300. By section 163 the salaries of the various officers of the several classes was fixed. By Act March 13, 1885, said section 163 was amended and divided into new sections numbered consecutively from 163 to 210. The salaries of the officers of said three classes were fixed, respectively, by sections 201, 202, and 203. St. 1889, p. 232, amends said original section 162 so as to define class 39 as counties having a population of 5,640 and under 6,000. It added a class,—39½,—defined as counties having a population of 5,000 and under 5,640. In all other respects, including the clauses defining classes 40 and 41, section 163 was re-enacted in precisely its original terms. A new section, numbered 201½, was inserted between sections 201 and 202, by which the salaries of officers of class 39½ were prescribed. *Held*, that the legislature did not intend to abolish classes 40 and 41, but merely to create a new class, which they intended to describe as embracing counties with a population of 5,600 and under 5,640.

In bank. Application for *mandamus*. Aylett R. Cotton, for petitioner. Black-

*stock & Shepherd and H. L. Poplin, Dist. Atty., for respondent. M. E. Sanborn, amicus curiae.*

BEATTY, C. J. The petitioner is assessor, and the respondent auditor, of Ventura county, and it is the duty of the latter, prescribed by law, to draw his warrant at the end of each month for a monthly installment of the salary of the former. At the end of the month of January, petitioner demanded a warrant for his January salary, claiming that Ventura was a county of the thirty-ninth and one-half class, and that his annual salary as assessor of a county of that class was \$3,200. But the respondent, being in doubt whether Ventura was, according to a correct construction of the statute, a county of the thirty-ninth and one-half class or of the forty-first class, in which the assessor's salary is less than \$3,200, refused to draw his warrant on that basis. Thereupon this original proceeding was commenced here for a writ of mandate to compel the auditor to perform his supposed duty.

There is an entire agreement between the parties as to all matters of fact, and the only question in the case is one of statutory construction. Section 5 of article 11 of the constitution enjoins upon the legislature the duty of providing for a uniform system of county government, but for the purpose of regulating the compensation of county officers permits a classification of counties according to population. In pursuance of this provision an act was passed March 14, 1883, entitled "An act to establish a uniform system of county and township governments," (St. 1883, p. 299, by which (section 162) the counties of the state were divided into 48 classes, according to their population as established by the federal census of 1880, the thirty-ninth, fortieth, and forty-first classes being defined as follows: "Counties having a population of five thousand six hundred, and under six thousand, shall belong to and be known as of the thirty-ninth class; counties having a population of five thousand three hundred, and under five thousand six hundred, shall belong to and be known as counties of the fortieth class; counties having a population of five thousand, and under five thousand three hundred, shall belong to and be known as counties of the forty-first class." Ventura, having a census population of 5,073, fell into the forty-first class.

By section 163 of the same act the salaries of the several county officers of the respective classes of the counties were fixed. By an amendatory act passed March 18, 1885, this section 163 was amended, and divided into new sections, numbered consecutively from 163 to 210. In this amendatory act the salaries of officers of the thirty-ninth class were regulated by section 201, those of officers of the fortieth class by section 202, and those of officers of the forty-first class by section 203. Another amendatory act was passed in 1887, (St. 1887, p. 178,) and finally, on March 16, 1889, the act was passed (St. 1889, p. 232) which gives rise to the present controversy. By this last amendatory act sec-

tion 162 of the original act was so amended as to change the definition of the thirty-ninth class, and add a new class, numbered 39½. A new section, numbered 201½, was also inserted between sections 201 and 202, by which the salaries of officers of the thirty-ninth and one-half class of counties were regulated. By this amendment the definition of counties of the thirty-ninth class was changed so as to read as follows: "Counties having a population of five thousand six hundred and forty, and under six thousand, shall belong to and be known as counties of the thirty-ninth class." And the following definition was made of counties of the thirty-ninth and one-half class: "Counties having a population of five thousand, and under five thousand six hundred and forty, shall belong to and be known as counties of the thirty-ninth and one-half class." In all other respects, including the clauses defining the fortieth and forty-first classes, section 162 was re-enacted in precisely its original terms. The effect of this legislation was to produce a conflict in the terms of the statute, rendering it necessary to resort to construction in order to ascertain the intention of the legislature. The thirty-ninth and one-half class, by its definition, embraces all counties having a population of 5,000 and under 5,640,—that is to say, all counties formerly embraced in classes 40 and 41, and any county formerly embraced in class 39 with a population of 5,600, and under 5,640. By reason of the amendment to the definition of class 39, it is brought into perfect conformity with the definition of the new class, but the literal re-enactment of the clauses defining classes 40 and 41 creates the conflict; for, as above shown, they consist of counties having a population, respectively, of 5,300, and under 5,600, and of 5,000 and under 5,300; both of which classes are embraced in the definition of class 39½. Such being the terms of the statute, and the circumstances of its enactment in its present form, the petitioner contends that we must hold the intention of the legislature to have been to repeal the clauses defining classes 40 and 41, and to substitute for those classes, and a part of class 39, the newly-defined class, 39½. On the part of respondent it is contended that the intention was to preserve classes 40 and 41, and to make the new class consist of those counties only—formerly embraced in class 39—containing a population of 5,600, and under 5,640. It is certain that the legislature intended one thing or the other, but either construction of the statute convicts it of a blunder, and the question to be solved is whether the mistake consisted in the inadvertent use of the number 5,000 instead of 5,600 in defining class 39½, or in the re-enactment of the clauses defining classes 40 and 41.

The principle of construction relied on by petitioner in support of his contention is that in cases of repugnancy a later statute controls an earlier one; from which he argues that the clause defining 39½ being new, and those defining 40 and 41 being a mere republication of the terms of the original act, the former must govern. But in view of the constitutional provis-

ion prescribing the method of revising and amending statutes and sections of statutes, can we, for the purpose of construing an amendatory act, consider its new features as being later in point of time than those parts of the original which are merely republished? The constitution, art. 4, § 24, provides that "no law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended." The effect, and the only effect, of this requirement, is to compel the republication of so much, and so much only, of the old law as the legislature intends to continue in force along with the amendment, and it would seem that one object of the provision must have been to prevent conflict and repugnancy between the new and the old portions of the statute by requiring the incorporation of all amendments in the revised text of the statute or section amended; for, necessarily, the legislature by this method is compelled not only to scrutinize the amendment itself, but all other parts of the statute which are at the same time presented to view in their connected sequence; and we are not entitled to assume that the intention to enact the new portion was any more clear and distinct than the intention to modify its operation by the effect of such portions of the original act as have been thus deliberately preserved. The duty of a court is, therefore, to endeavor to construe the revised or amended act in the same manner it would construe a new and original piece of legislation,—viewing all its parts, giving to every part, if possible, some effect consistent with the whole, and as little as possible repugnant to other parts, "*ut res magis valeat, quam pereat*." If, however, it is found that there is an irreconcilable conflict between the amendment, and some portion of the old statute that has been preserved and republished in the revision, so that no effect can be given to one without destroying the operation of the other, and there is nothing else to indicate the probable intention of the legislature it might be necessary to hold that full effect is to be given to the amendment and the re-enactment of the conflicting portion of the original act treated as a mistake. It may be conceded that the cases cited by petitioner sustain his contention to this extent, but certainly they go no further, and in this case we think it not only unnecessary, but for many reasons inadmissible, to solve the difficulty in the mode suggested. If it had been the intention of the legislature to abolish the fortieth and forty-first classes, and to consolidate them, along with a part of the thirty-ninth, into a new class, the short and simple and obvious means of accomplishing such intention was to amend the clause defining class 39, as was done; to amend the clause defining class 40 so as to make it embrace all counties containing a population of 5,000 and less than 5,640, and to drop the clause defining class 41. In addition to this, it would only have been necessary to amend section 202, regulating the compensation of officers of class 40,

with or without a repeal of section 203, which, even though not repealed, would have been left with nothing to operate upon. There was no need to resort to the use of a fractional number, (39 $\frac{1}{4}$ ), to designate a new class if 40 and 41 were to be abolished, for in that case there were whole numbers enough and to spare, for the purpose of such designation. And so was it equally unnecessary to resort to the fractional number 201 $\frac{1}{4}$  to designate the section regulating the compensation of officers of the new class of counties. This is, to our minds, very conclusive proof that the legislature did not intend to abolish classes 40 and 41, but only to create a new class between 39 and 40, comprising one or more counties formerly included in class 39. Instead of being guilty of the elaborate and superfluous series of blunders imputed to it on the theory of petitioner, the legislature made the simple and comparatively natural mistake of using a wrong number in a single clause of the act,—the number 5,000, instead of the number 5,600, in the clause defining the new class, 39 $\frac{1}{4}$ . This view affords a simpler and more probable explanation of the discrepancies in the statute than any other, and has the merit of satisfying the cardinal rule of construction which requires that some effect shall be given, if possible, to every clause of the contract, or substantive provision of a statute, consistent with its entire scope and object. And this view is corroborated by the fact that section 202, regulating the compensation of officers of the fortieth class, was not merely re-enacted, but was amended by the act we have been considering, so as to increase the salary of superintendent of schools from \$700 to \$1,500. If there was no intention to preserve the fortieth class, why this amendment?

Our conclusion is that Ventura remains a county of the forty-first class, and that the petitioner can claim only the salary provided for assessors in that class of counties. Writ denied.

We concur: PATERSON, J.; HARRISON, J.; MCFARLAND, J.; GAROUTTE, J.; DE HAVEN, J.

83 Cal. 579  
*Ex parte* ERDMANN. (No. 20,818.)

(*Supreme Court of California*. April 2, 1891.)  
CRIMINAL LAW—IMPRISONMENT TO ENFORCE FINE.

Since Pen. Code Cal. § 1205, providing for imprisonment in the county jail to enforce a fine, at the rate of one dollar a day, has been amended to provide that such imprisonment must not exceed the time for which defendant might be sentenced to imprisonment for the offense of which he has been convicted, defendant, convicted of simple assault and fined \$500, cannot be imprisoned more than three months, which is the term of imprisonment fixed for the offense. Pen. Code Cal. § 241.

1. bank. Application for *habeas corpus*.

*L. E. Phillips*, for petitioner. *J. A. Hosmer*, for the People.

PER CURIAM. On February 14, 1890, the petitioner was convicted of a simple assault in police court No. 2 of San Francis-



co, and sentenced under section 1205, Pen. Code, to pay a fine of \$500, and in default of payment to be imprisoned in the county jail at the rate of one dollar for each day until the fine should be satisfied. The maximum of imprisonment for said offense is "not exceeding three months," (Pen. Code, 241,) although a fine of \$500 may also be imposed. Under the sentence of fine imposed by the court, petitioner has already been in jail considerably over a year; and he contends that, for the purpose of enforcing the fine, he cannot legally be imprisoned longer than the maximum term of three months. The question has been presented to us heretofore, when there was some difference of opinion in regard to it. As the legislature, at its recent session, amended said section 1205 so as to expressly provide that imprisonment to enforce a fine must "not exceed, in any case, beyond the time for which the defendant might be sentenced to imprisonment for the offense of which he had been convicted," we think that former doubts on the subject should, in justice, be resolved in favor of the petitioner. It is ordered that petitioner, Frank Erdmann, be discharged from custody.

88 Cal. 478

*In re BAUQUIER'S ESTATE.* (No. 13,979.)

(Supreme Court of California. March 28, 1891.)

ADMINISTRATORS—APPOINTMENT—DISQUALIFICATION.

The fact that a brother is prejudiced against his sister does not disqualify him to act as administrator of his father's estate.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

*Johnson, Johnson & Johnson*, for appellant. *Robert Devlin, A. L. Hart, and J. C. Tubbs*, for respondent.

TEMPLE, C. Joseph Bauquier died, leaving an estate estimated at about \$20,000. In his will he named his daughter, Mrs. Rode, executrix. Letters having been refused her, Frank Bauquier, a son of the deceased, the public administrator, and one Smith, severally applied for letters. At the hearing a contest was inaugurated between Bauquier and the public administrator. The court denied the application of Bauquier and Smith, and appointed the public administrator, and thereupon Bauquier took this appeal. An appeal had been previously taken by Mrs. Rode from the order denying her application to be appointed executrix. Since the submission of this case here, that order has been reversed, and thereby the right of Mrs. Rode to be appointed executrix apparently settled. The matters involved in this appeal, therefore, have become practically of little consequence. We think, however, it must be held in this case that it was error to hold that the fact that Frank Bauquier was prejudiced against his sister disqualified him to act as administrator. Therefore the order denying his application and appointing the public administrator should be reversed.

We concur: VANCEJEF, C.; FOOTE, C.  
Cal. Rep. 26-28 P.—8

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed.

88 Cal. 616

*In re CARMODY'S ESTATE.* (No. 13,822.)  
(Supreme Court of California. April 18, 1891.)

ADMINISTRATOR—APPOINTMENT—WANT OF INTEGRITY.

1. Under Code Civil Proc. Cal. § 1865, providing that the relatives of a decedent can administer only when they are entitled to succeed to the personal estate or some part of it, and section 1886, subd. 5, providing that the whole estate shall go to the surviving husband or wife if decedent leave neither issue, father, mother, brother, nor sister, letters of administration should not be granted to a wife's nephew when she leaves a husband surviving, but no issue, father, etc.

2. A husband, who is the sole distributee of his wife, under Civil Code Cal. § 1886, is not disqualified to act as her administrator because he claims the whole estate as a gift from his wife, under section 1869, providing that no person shall be competent to serve as administrator who shall be adjudged incompetent for want of integrity.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

*Grove L. Johnson and Albert M. Johnson*, (Thornton & Mersbach, of counsel,) for appellant. *Chas. F. Hanlon*, for respondent.

BELCHER, C. Fannie Carmody died intestate in the county of Sacramento on the 4th day of September, 1889. She left surviving her John Carmody, her husband, and five children of a deceased sister, of whom Niel Grant was one, but no issue, father, mother, brother, or sister. On the 24th of October, 1889, Niel Grant filed in the superior court of the county a petition asking that letters of administration on the estate of decedent be issued to him. In his petition he stated, among other things: "That said deceased left estate in the said county of Sacramento, consisting of real and personal property. That the value and character of said property, so far as known to your applicant, are as follows, to-wit: \$800, or thereabouts, in Sacramento Savings Bank; real estate in California, value unknown; furniture and personal effects, value unknown." Two days later the surviving husband filed his petition for letters of administration on the estate. He stated in the petition, among other things: "That she [decedent] left estate in said county, which consists of an interest [it is claimed] in certain moneys in the Sacramento Bank, on deposit therein; that the value of said estate is unknown to said petitioner, and the same consists wholly of personal property." When the petitions came on to be heard, Carmody was called as a witness, and testified to certain facts which tended to show that during her last illness his wife made or attempted to make to him a gift of the money she had on deposit in the Sacramento Bank. He was then, on cross-examination, asked and answered certain questions as follows: "Question. Mr. Carmody, do you want to be administrator of Fannie Carmody's estate? Answer. Well, of course. I did not think

when she made this assignment—she said there would be no need of an administrator. Those were the words she spoke. Q. Do you want to be administrator of your wife's estate? A. Yes, sir; of course. Q. Well, what estate did she leave? A. I do not know as she left any." Counsel for Grant then offered and read in evidence a complaint, filed by Carmody, on October 9, 1889, in an action instituted by him against the Sacramento Bank to recover the moneys deposited therein by Fannie Carmody. The complaint contained, among others, the following averments: "That on the 22d day of August, 1889, the said Fannie Carmody sold, transferred, conveyed, and delivered unto this plaintiff, by and with the consent of this defendant, the said bank-book, together with all the moneys as aforesaid deposited by her in said bank, and the plaintiff has ever since been and now is the owner and holder of said bank-book and of the moneys so deposited by her in said bank. That since the transfer as aforesaid, one Niel Grant, who asserts that he is a nephew of said Fannie Carmody, has notified said defendant not to pay said moneys to the plaintiff, and has demanded that the said bank pay the same to him, said Niel Grant, and has claimed and still claims to be the owner of said money so deposited, by reason of which claim, notice, and demand of said Niel Grant the said defendant is in doubt as to its rights in the premises, and as to whether or not the plaintiff is the true owner and holder of said book and moneys, and declines to pay the same to him unless it shall be determined by the judgment of this court that the plaintiff is such owner and holder," etc. The above was all the testimony introduced, and, as will be seen, there was nothing to show that there was any property of the estate, other than the bank deposits, or that there were any creditors of the estate. The court made the following finding: "That the petitioner, John Carmody, is incompetent to serve as administrator, and that he denies said deceased left any property or estate whatever; and the said John Carmody claims all the estate of said deceased; and the court finds that the said application of said John Carmody is made not in good faith, but for the purpose of obtaining possession of the estate of deceased for his own, and to deprive the heirs and creditors of said estate from any participation therein; and that said John Carmody is wanting in integrity in that regard." An order was accordingly entered, denying the petition of Carmody, and directing that letters of administration on the estate be issued to Niel Grant. From that order Carmody appeals.

The provisions of the statute, bearing upon the question, are as follows: "Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof; and they are, respectively, entitled thereto in the following order: (1) The surviving husband or wife, or some competent person whom he

or she may request to have appointed; (2) the children; (3) the father or mother; (4) the brothers; (5) the sisters; (6) the grandchildren; (7) the next of kin entitled to share in the distribution of the estate." Code Civil Proc. § 1365. No person is competent or entitled to serve as administrator or administratrix who is "(4) adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity." Code Civil Proc. § 1369. "If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate goes to the surviving husband or wife." Civil Code, § 1386, subd. 5. It is clear from these provisions that Niel Grant was not entitled to succeed to any portion of the estate, and was therefore not entitled to letters; and it is equally clear that the surviving husband was entitled to the whole estate. In re Ingram, 78 Cal. 586, 21 Pac. Rep. 435. The finding that the surviving husband was incompetent to serve as administrator for want of integrity was evidently based upon the fact that he claimed the whole estate as his own, and the question is, was the finding justified? We do not think it was. There was nothing in the fact named which showed a want of integrity or disqualification. See *Estate of Bauquier*, ante, 178, (decided March 18, 1891.) We advise that the order appealed from be reversed.

We concur: FITZGERALD, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed.

38 Cal. 597

HINKEL v. DONOHUE *et al.* (No. 13,318.)  
(Supreme Court of California. April 16, 1891.)

#### NOTICE OF APPEAL—PARTIES—DISMISSAL.

Where an action of ejectment against several defendants is dismissed by plaintiff before defendants are served, or answer, and afterwards two of the named defendants file a cross-complaint seeking affirmative relief, which is dismissed on plaintiff's motion, it is not necessary for the defendants who joined in the cross-complaint to serve the other defendants with notice of appeal from the order dismissing it, as such other defendants are not adverse parties within the meaning of Code Civil Proc. Cal. § 940.

In bank. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Michael Mullany, (W. C. Burnett, of counsel,) for appellants. O'Brien, Morrison & Daingerfield, for respondent.

McFARLAND, J. This is a motion to dismiss an appeal upon the ground that the necessary parties were not all served with notice of appeal. The action is, in form, ejectment, and several persons are named in the complaint as defendants. Before either of the defendants had been served with or had appeared, plaintiff's attorney filed with the clerk of the court a dismissal of the action. Afterwards two of the named defendants—Patrick Donohue and Mary Donohue—filed an answer, and also

a cross-complaint, asking affirmative relief. Thereafter, on motion of plaintiff, the court made an order dismissing the action, with costs to defendants. From this order or judgment the said defendants Patrick and Mary Donohue appeal. They did not serve the other defendants with their notice of appeal; and for this reason respondent contends that the appeal should be dismissed. We do not think that the other defendants were adverse parties, within the meaning of section 940 of the Code of Civil Procedure. They would be entirely unaffected by any judgment that might be rendered on appeal. The plaintiff in this action had a clear right to dismiss as to any of the defendants who had not been served, or who had not appeared and set up an adverse claim. None of the authorities cited by respondent cover the case at bar. If, on this appeal, the judgment of dismissal should be reversed as to the defendants who appeal, "it would still stand unreversed as to" either of the other defendants, "and therefore they would not be affected by a reversal." *Randall v. Hunter*, 69 Cal. 80, 10 Pac. Rep. 130. See, also, *Williams v. Mining Ass'n*, 66 Cal. 193, 5 Pac. Rep. 85. We think, therefore, that this present motion to dismiss the appeal should be denied. But, of course, nothing is determined here that will affect the questions which will arise at the hearing of the appeal. The motion to dismiss the appeal is denied.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.; HARRISON, J.; DE HAVEN, J.; GAROUTTE, J.

88 Cal. 581

HORTON v. GALLARDO. (No. 13,963.)

(*Supreme Court of California*. April 3, 1891.)

WRITS—SERVICE OF SUMMONS—AFFIDAVIT.

An affidavit of service of summons, which does not show that the person serving it was over 18 years old when he served it, is insufficient to prove service.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

*Willis & Appel*, for appellant. *J. M. Damron*, for respondent.

VANCLIEF, C. This is an appeal by the defendant from a judgment against him by default, and his counsel makes the point here that the summons in the action was not served on him. The only evidence contained in the record from which the court could have found service of summons upon the defendant is the following affidavit, indorsed on the summons: "Office of the Sheriff of Los Angeles Co. I hereby swear that I received the within summons on the 26th day of February, A. D. 1890, and personally served the same on the 27th day of February, A. D. 1890, by delivering a copy and having this read to the defendant in person, being Y. Gallardo, the defendant named in said summons, by delivering to him, the said defendant, personally, in the city and county of Los Angeles, Cal., a copy of said summons, and a certified copy of the complaint in the action named in said summons, attached to

said copy of summons. Dated this 28th day of February, A. D. 1890. J. S. CHADWICK." As this affidavit does not state or show that Chadwick was over the age of 18 years at the time of the alleged service of summons by him, it is insufficient to prove such service. *Maynard v. MacCrellish*, 57 Cal. 355; *Howard v. Galloway*, 60 Cal. 11; *Weil v. Bent*, Id. 603; *Doerfler v. Schmidt*, 64 Cal. 265. I think the judgment should be reversed and the cause remanded.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded.

88 Cal. 491

BOARD OF HARBOR COMMISSIONERS OF PORT OF EUREKA v. EXCELSIOR REDWOOD CO. (No. 13,293.)

(*Supreme Court of California*. March 30, 1891.)

CONSTITUTIONAL LAW—LEGISLATIVE ACTS—DELEGATION OF POWER.

Under Pol. Code Cal. §§ 2568, 2569, subd. 6, empowering the board of harbor commissioners of the port of Eureka to make rules and regulations for the protection of navigation in Humboldt bay, and to impose penalties, not exceeding \$500 for any one violation, for the violation of such rules, the harbor commissioners cannot impose a penalty, as its imposition is a legislative act, and the legislature cannot delegate such power to any other body.

Department 1. Appeal from superior court, Humboldt county; JOHN ELLSWORTH, Judge.

*J. H. G. Weaver and J. N. Gillett*, for appellant. *S. M. Buck*, for respondent.

GAROUTTE, J. This is an action to recover a penalty of \$500, imposed by the plaintiff upon the defendant for the violation of certain rules and regulations made by plaintiff. Section 2568, Pol. Code, provides that "the board of harbor commissioners of the port of Eureka are authorized and empowered to make such rules and regulations and take such action as may be necessary for the protection of navigation in Humboldt bay." Section 2569, subd. 6, provides: "Impose penalties for violation of such rules and regulations not exceeding for any one violation the sum of five hundred dollars, to be recovered by action." Section 5 of the rules and regulations made by plaintiff in pursuance of the above sections of the Code imposes a penalty in the sum of \$500 for the violation of certain of these rules. We do not believe the plaintiff has the power to impose a penalty as provided in the rule just mentioned. The imposition of a penalty is in the nature of a quasi criminal proceeding, as it only follows from the violation of some law. In *U. S. v. Montell*, Taney, 52, referring to the character and object of penalties, we find this language: "It is not damages, therefore, that are intended to be secured, but punishment intended to be inflicted upon those who are justly and properly responsible for any improper use of the vessel's register." \* \* \* In other words, it is a fixed penalty imposed by law as a

punishment for breach of duty enjoined by law, and must be treated as such," etc. The board of harbor commissioners is a creature of the statute, and purely an executive body, and the fixing and imposing of penalties are matters of which the legislature alone has cognizance. An act providing that, if a person does or does not do a certain thing, he shall pay a penalty of \$500, is legislation; and it is a cardinal principle of representative government that the legislature cannot delegate the power to make laws to any other authority or body. *Cooley, Const. Lim.* 116, 139. Conceding that the legislature could delegate to the plaintiff the authority to make rules and regulations with reference to the navigation of Humboldt bay, the penalty for the violation of such rules and regulations is a matter purely in the hands of the legislature. The act of the legislature in fixing the maximum of such penalty is of no avail; the vice of the whole matter is in not itself fixing the penalty, and in delegating such legislative power to the plaintiff. Justice AGNEW, in *Locke's Appeal*, 72 Pa. St. 491, says: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things, upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government." And it would seem that the establishment of rules as to the navigation of Humboldt bay would be simply acts of executive administration which the legislature could delegate to the plaintiff as an executive body under the foregoing authority; but, when the executive body has made such rules and regulations, it has exhausted all the authority which the legislature had power to confer upon it. In the case at bar the legislature attempted to go further than in the case of *Ex parte Cox*, 63 Cal. 21. Under an act of the legislature approved March 4, 1881, the viticultural health officer, with the approval of the board of viticultural commissioners, was empowered to declare and enforce rules in the nature of quarantine to prohibit the importation of diseased vines, etc.; and further provided that any willful violation of these rules should constitute a misdemeanor. The petitioner, Cox, was discharged upon *habeas corpus* by this court, he having been convicted of violating certain of these rules and regulations. The court said: "For the purpose of local legislation, legislative functions may be conferred upon and exercised by municipal corporations; but the act before us is in no sense a conferring of powers for municipal purposes. The legislature had not authority to confer upon the officer or board the power of declaring what acts should constitute a misdemeanor." In that case the legislature delegated the power to the board to make the rules, but expressly provided in the act itself the punishment for the violation of such rules. But in the case at bar the legislature not only delegated the power to the plaintiff to make the rules and regulations, but went far beyond that, and attempted to delegate the power to the plaintiff to punish for the violation of such

rules and regulations. This could not be done. Let the judgment be affirmed.

We concur: HARRISON, J.; PATERSON, J.

#### CITY OF PORTLAND v. KING.

(*Supreme Court of Oregon.* March 31, 1891.)

#### MUNICIPAL IMPROVEMENTS—TAKING COUNTY ROAD FOR STREET.

As a proceeding by a city to appropriate for a street a county road, and condemn defendant's reversionary interest, the admission of oral evidence of the proceedings of the county court, testimony as to the practicability of the route for city purposes, conjointly with opinions as to the value of the reversionary interest, permitting deeds of property adjoining the road to be read from the record entries, and instructions to the jury that the city having made street cuttings across it, so that travel is unsafe, is not an abandonment of the road, are not prejudicial to the substantial rights of defendant.

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

Action by the city of Portland against A. N. King to take land for a street. Judgment for plaintiff, and defendant appeals and assigns as error: (1) The admission of oral evidence as to the orders made by the county court in granting an injunction in lieu of the record of its transactions. (2) Allowing respondent's witnesses to testify to the practicability of the route for city travel, and to testify as to the value of appellant's reversionary interest in the road. (3) Reading deeds to property adjoining the road from the entries on the county records. (4) Instructions to the jury that the city having gone upon a county road, and made cuts across it, so that travel was unsafe, is not an abandonment of the road, and no divestment of the right to use it in the public authorities.

*J. C. Moreland and Killen, Starr & Thomas*, for appellant. *W. H. Adams*, City Atty., and *Raleigh Stott*, for respondent.

PER CURIAM. This is a proceeding by the city of Portland to appropriate for a street that portion of the Cornell county road from B to J street in the city, and to condemn appellant's reversionary interest, if any, therein. A trial before a jury in the court below resulted in a verdict and judgment in favor of appellant for the sum of \$2,500, from which he appeals, assigning as error the rulings of the court in the admission of testimony and instructions to the jury. The form of the proceeding has obviated the only difficult question that could arise in the case, and it may be conceded that the errors assigned are well taken, yet they could not possibly have been prejudicial to any substantial rights of the appellant, and we have no alternative but to affirm the judgment.

(3 Ariz. 235)

#### OURY et al. v. GOODWIN.

(*Supreme Court of Arizona.* Jan. 24, 1891.)

#### EMINENT DOMAIN—EXERCISE IN TERRITORIES—PUBLIC USE—IRRIGATION.

1. The territory of Arizona, though not possessing sovereignty, is clothed with authority to

provide for the exercise of the power of eminent domain by the clause in the organic act which says: "The legislative power of this territory extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States."

2. To determine what is a public use authorizing the exercise of this power, cases and principles, rather than definitions, must be consulted.

3. It is well established by the weight of authority that in determining what is a public use, as contradistinguished from a private use, the peculiar physical conditions and necessities of the country are to be considered, and in some cases to determine whether the taking is for a public or private use.

4. That in the territory of Arizona the physical conditions are such, and the necessity for the use of water for irrigation so great and indispensable, as to authorize an act of the territorial legislature providing for the condemnation of right of way for ditches or canals by the agent of the territory for the use of 18 or less farmers (or ranchers) in a farming neighborhood.

5. That the taking in this case was for a public use, because in pursuance of a law general in its character and terms, and providing for the irrigation of vast areas of land that would otherwise be wholly worthless and uninhabitable.

(Syllabus by the Court.)

Appeal from district court, Maricopa county.

A. Buck, for appellants. W. J. Kingsbury, for appellee.

GOODING, C. J. This is an action under title 22, "Eminent Domain," Rev. St. Ariz., act approved March 9, 1887, to condemn real estate of appellant for the purpose of a canal or ditch for irrigating purposes. The appellant contends—*First*, that the legislature had no power to pass the act; *second*, that the court, and not the legislature, must be the final judge of what is a public use, as distinguished from a private use; *third*, that the use in this case is private, and not public.

These are questions of the utmost importance in this territory, and have been presented and argued with ability commensurate with their importance. Was the act, "Eminent Domain," beyond the power and authority of the legislature, and therefore void? The organic law of Arizona provides: "The legislative power of this territory extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. But no laws shall be passed interfering with the primary disposal of the soil." \* \* \* "The exercise of the power of eminent domain is certainly a rightful subject of legislation." The various and imperative demands for the exercise of this power are so obvious as to preclude the idea that congress did not intend to confer it by the language used in the organic act. Public buildings, public roads, railroads, canals, water-works, sewers, gas, electric lights, and all the modern improvements of a public character are dependent on the exercise of this power. Not only is the exercise of the power of eminent domain a "rightful subject of legislation," but this power is implied from the negative. "But no law shall be passed interfering with the primary disposal of the soil." The primary disposal, it is needless to say, is the disposal of it by the government when it parts with its title.

The legislature has the power to determine and fix by what tenures lands in the territory shall be held, and under what forms titles shall pass, and who shall be the heirs at the death of the proprietor, and pass other like laws. The purpose of the organic act was to transfer from congress to the territorial legislature the power that congress had to pass laws for the people of the territory upon "all rightful subjects of legislation." The territorial legislature is substituted for congress, and clothed with the power of congress, except that it may not pass laws interfering with the primary disposal of the soil, nor tax the property of the United States, nor tax the lands or other property of non-residents higher than the lands or property of residents. That congress had the power to pass an act providing for the exercise of the power of eminent domain in the territory no one will question. That it has delegated this power to the territorial legislature we think is quite clear. Cooley, Const. Lim. 650, says: "In the new territories, however, where the government of the United States exercises sovereign authority, it possesses, as incident thereto, the right of eminent domain, which it may exercise directly or through the territorial governments."

Was the property taken for a private or public use? The court below found that the property in question was sought to be condemned for a "use authorized by law," and was necessary for said use. The "statement of facts" is the evidence taken on the trial. It appears that the ditch in question is connected with the Tempe canal, and what is known as the "Southern Branch." Mr. Goodwin says: "Our branch is not an organization of its own. It is a part of the southern branch, in which Mr. Oury owns stock; it is a part of the same canal." He further states that: "The *exanjero* of the southern branch has charge of our canal; our canal is just a part of the southern branch." "The directors of the southern branch have control of our ditch as well as the southern branch; the whole business is under one set of directors." He further states that there are about 8,000 acres of land under the ditch, desert land, worthless without irrigation. He further mentions the names of 18 persons who own stock, and states that none of these shareholders own more shares than is necessary to irrigate their land, and that it was the intention to give each shareholder sufficient to irrigate his own land. That others besides these shareholders owned land within the boundaries marked and as covered by the canal. The ditch is owned by a joint-stock association, not a corporation. That about 1,000 inches of water was used through the canal, and the shareholders owned about 2,000 acres. The 1,000 inches of water run through the ditch was owned by the shareholders in the Tempe canal, and in the southern branch both. That 100 inches would be used to 160 acres, sometimes more. These facts, not contradicted, bear on the question of the use being a public use, or a purely private use. The other facts we deem it unnecessary to set forth, as the

controversy arises on the facts above set out. The amended complaint alleges, among other things, that the "plaintiff is a resident of the territory of Arizona, county of Maricopa, and an agent of the said territory for the purpose hereafter mentioned, by virtue of title 22 of the Revised Statutes of said territory, and as such agent brings this suit against the defendants for the purposes mentioned aforesaid;" and in paragraph 4, in substance, "that plaintiff, J. C. Goodwin, Robert G. Goodwin, James McClintock, Robert J. Martin, James Gilliland, T. G. Cartledge, Fisher G. Bally, Douglas Lemon, Adams, and numerous other persons, farmers residing in the Missouri Flat neighborhood, county and territory aforesaid, are the owners of about 8,000 acres of arable and irrigable lands in said neighborhood, wholly valueless without irrigation," etc.; and prays "to condemn the land for the purposes mentioned in the complaint." The damages, as found by the court, amount to \$124.50.

Do the facts of the case disclose that the use was a "use authorized by law,"—in other words, a public use, in the view of the law? There is no definition of a public use that has yet been formulated to which we can go as a certain criterion. To know what is a public use which authorizes the exercise of the power of eminent domain, we must have recourse to cases rather than definitions,—to uses that have been held to be public. There are certain uses about which there is no controversy. Property taken for state-houses, for court-houses, for school-houses, for public roads, and the like, which pass under the immediate control of the public authorities, are cases of clear and direct public uses. Property taken for railroads, canals, and the like have also been conceded to be taken for public uses. In this class of cases the property is not in the possession of or controlled by the officers or agents of the public. Private individuals own and control the property. The title to the property is not in the public, nor is the possession or control, as in the case of court-houses, school-houses, etc. The public use consists in the right of the people to transit and transportation at reasonable rates. The public receives a benefit and advantage in this: that a new and better means of travel and transportation is afforded. In other words, in this class of cases it is conceded that the property of the individual owner is properly and lawfully taken, because the general public receives a convenience and advantage, and a right to participate in the use. But there is another class of cases on an entirely different basis. In a number of the states where the physical conditions of the country offer inducements for the construction and erection of mills for grinding grain or sawing lumber, laws have been passed authorizing individuals and private companies to condemn mill-sites. These laws have been sustained in the states where they have been enacted, though questioned, criticised, and often the authority denied, outside of the jurisdictions where the benefits are enjoyed. Upon what principle or reasoning can

these laws be sustained? The public do not participate in the title to the property condemned; nor in the possession or control; nor in the use direct, as in the case of railroads, canals, etc. The courts which have upheld these laws as constitutional rank among the first in the country. We refer to the following cases on this point, and other points in this case: *Beekman v. Railroad Co.*, 22 Amer. Dec. 705; *Holyoke Co. v. Lyman*, 15 Wall. 507; *Tide Water Co. v. Coster*, 18 N. J. Eq. 518; *In re Application for Drainage of Lands*, 35 N. J. Law, 497; *Hartwell v. Armstrong*, 19 Barb. 166; *Shaw v. Railroad Co.*, 16 Gray, 415; *Norfleet v. Cromwell*, 70 N. C. 634; *Lowell v. Boston*, 111 Mass. 454; *Talbot v. Hudson*, 16 Gray, 417; *Mill Corp. v. Newman*, 12 Pick. 467; *Jordan v. Woodward*, 40 Me. 317; *Manufacturing Co. v. Fernald*, 47 N. H. 444; *Ash v. Cummings*, 50 N. H. 591; *Hazen v. Essex Co.*, 12 Cush. 477; *Harding v. Goodlett*, 3 Yerg. 41; *Hankins v. Lawrence*, 8 Blackf. 266; *Olmstead v. Camp*, 33 Conn. 532; *Venard v. Cross*, 8 Kan. 248; *Thien v. Voegtlander*, 3 Wis. 461; *Higginson v. Inhabitants of Nahant*, 11 Allen, 530; *Commissioners v. Armstrong*, 45 N. Y. 234; *County Ct. of St. Louis Co. v. Griswold*, 58 Mo. 175.

In *Holyoke Co. v. Lyman*, 15 Wall. 507, CLIFFORD, J., says: "Authority to erect dams across such streams for mill purposes results from the ownership of the bed and the banks of the stream; or the right to construct the same may be acquired by legislative grant, in cases where the legislature is of the opinion that the benefits to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain; and, to authorize such an interference with private rights for that purpose, lands belonging to individuals have often been condemned for such purpose, in the exercise of the right of eminent domain, in cases where, from the nature of the country, mill-sites sufficient in number could not otherwise be obtained; and that right is even more frequently exercised to enable mill-site owners to flow the water back beyond their own limits in order to create sufficient power or head and fall to operate their mills." *Mill Corp. v. Newman*, 23 Amer. Dec. 627, says: "But it is said the analogy fails when applied to laying bare the flats in order to get the water-power for mills, because the public have no right in respect to the manufactories, as they have to travel on the turnpike roads. But the public may be well said to be paid or compensated in the one as well as in the other case, and are benefited by the one improvement as well as by the other." Take the grist-mill established in this city as an example. Is it no benefit to have the corn ground near to the inhabitants, rather than at a distance? But you cannot compel the miller to grind your corn for the toll, as you may the proprietors of the turnpike to let you travel over the road for a toll. \* \* \* For more than a century the mill-owners had the right to raise a head or pond of water by flowing the lands of others, paying the damage. In many such cases valuable meadows have been inundated, and thus private

property has been taken without the consent of the owners, excepting only as they may be supposed to have consented to the laws made by the legislature. But for these 'Mill Acts,' as they are called, the mill-owner might have been liable for the damages as at common law, or the owner of the land might have removed the dam as a private nuisance. But under and in virtue of these acts the dam is protected. The owner of the land is thereby deprived of the entire dominion of his soil, because the public good required the sacrifice of his lands for a reasonable price. Now, we have nothing to do with the expediency of these various mill acts, but it is entirely apparent that the legislature have considered it for the public good to encourage the erection of mills, and have subjected the property of citizens to the control of mill-owners, they paying the damage. The principle is that the lands of individuals are holden subject to the requisitions of the public exigencies, a reasonable compensation being paid for the damage. It is not taking the property of one man and giving it to another. At most, it is a forced sale, to satisfy the pressing want of the public. Now, this is as it should be. The will or caprice of an individual would often defeat the most useful and extensive enterprises if it were otherwise." It is not claimed in the case just cited that the right of the general public to participate is the basis of the right to condemn. The resulting benefits are held sufficient, and are relied upon as justifying the exercise of this power.

In *Scudder v. Falls Co.*, to be found in 23 Amer. Dec. 770, the court discusses what is a public use, and on what power of eminent domain is based. The case is stated in these words: "Whereas, the object of the present franchise is to create a water-power and erect thereon extensive manufacturing establishments. These will be under the control of individuals. The company will either build or lease. They may build for themselves or lease to whom they please, and they are under no obligation to let the public participate in the immediate profits of their undertaking. If to establish this as a public benefit, it is indispensably necessary that the public should have the privilege of participating in it directly and immediately, then the proposition is not made out, and the defendants have no authority. But is not this view too narrow? Can public improvements be limited within such a compass? May we not, in considering what shall be deemed a public use and benefit, look at the objects, the purposes, and the results of the undertaking?" In this case, decided as early as 1832, it was held that the use was public, and not private, because of the incidental benefits to the public. There was to be no participation by the public, only the incidental benefits. The court further says: "Nor is it [eminent domain] limited to private corporations whose sole object, or even whose primary object it is to promote the public good. Such corporations are not to be found. Private interest or emolument is the *primum mobile* in all. The public interest is secondary and consequential."

And again: "The ever-varying condition of society is constantly presenting new objects of public importance and utility, and what shall be considered a public use or benefit may depend somewhat on the situation and wants of the community for the time being." 22 Amer. Dec. 700. After referring to a number of cases wherein it has been held that "Mill Acts" are constitutional if the public have the right to participate, the court goes on to say: "But in many of the states the validity of statutes authorizing the condemnation of sites and the flowage of land, for the establishment and maintenance of mills and other manufactories, has been upheld on the broad ground, that, without regard to any actual right of the public in the use of them, they are of such public utility as to be in the nature of public improvements." *Olmstead v. Camp*, 33 Conn. 532; *Todd v. Austin*, 34 Conn. 78; *Occum Co. v. Manufacturing Co.*, 35 Conn. 496; *Grammell v. Potter*, 6 Iowa. 548; *Venard v. Cross*, 8 Kan. 248; *Harding v. Funk*, Id. 315; *Cogswell v. Essex Mill Corp.*, 6 Pick. 94; *Fiske v. Farmingham Co.*, 12 Pick. 68; *Mill Corp. v. Newman*, Id. 467; *Hazen v. Essex Co.*, 12 Cnsh. 475; *Miller v. Troost*, 14 Minn. 365, (Gil. 282;) *Manufacturing Co. v. Fernald*, 47 N. H. 444; *Newcomb v. Smith*, 1 Chand. (Wis.) 71; *Fisher v. Horicon*, 10 Wis. 351; *Holyoke Co. v. Lyman*, 15 Wall. 507, per CLIFFORD, J.

In 47 N. H. 456, this question is put: "Or, to put the question in a general form, is it of such general public advantage that the streams and waters of this state should be brought into practical use for manufacturing purposes that a private right standing in the way of the enterprise, designed to accomplish extended and connected improvements in the water of a large stream, \* \* \* is taken for a public use when taken to advance such an enterprise and remove an obstacle to its success? The act authorizing the property taken was sustained by the court. In the case of *Tide-Water Co. v. Coster*, 18 N. J. Eq. 521, it is held that the right of eminent domain could be employed for the purpose of reclaiming large tracts of tide-water land, and based its decision on the ground that 'it is the resulting general utility which gives such an enterprise a kind of public aspect, and invests them with privileges which do not belong to mere private interests.' The case of *Head v. Manufacturing Co.*, decided by the supreme court of the United States at the October term, 1884, (113 U. S. 16, 5 Sup. Ct. Rep. 441,) is instructive on the subject of the 'Mill Acts' of many states, and does not deny their constitutionality, even in the instances where there is no pretense of a right on the part of the public to participate, except in the resulting benefits. The general mill act of New Hampshire authorized 'any person or any corporation' to erect a dam flowing the lands of others, paying the owners of land flowed damages to be assessed 'by a committee or a jury.' In that case, as in this, it was claimed that it was taking private property for private use, contrary to the constitution. The taking was held to be lawful, on the right of the legislature to make



laws affecting such cases. When property in which several persons have a common interest cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control or interest in the property is thereby modified."

But we desire to quote from this decision of the highest court in the land, and of so recent delivery, for the purpose of showing the strength of the authorities on the propositions involved in this case. First, the act which is sustained gives the right to "any person or any corporation" to flow the lands of others; that is, as held in many cases, to take them. Further it says: "General mill acts exist in a great majority of the states of the Union. Such acts, authorizing land to be taken or flowed *in invitum* for the erection and maintenance of mills, existed in Virginia, Maryland, Delaware, and North Carolina, as well as in Massachusetts, New Hampshire, and Rhode Island, before the Declaration of Independence, and exists to this day in each of these states except Maryland. \* \* \* They were enacted in Maine, Kentucky, Missouri, and Arkansas soon after their admission into the Union. They were passed in Indiana, Illinois, Michigan, Wisconsin, Iowa, Nebraska, Minnesota, Mississippi, Alabama, and Florida while they were yet territories, and re-enacted after they became states. They were also enacted in Pennsylvania in 1803, in Connecticut in 1864, and more recently in Vermont, Kansas, Oregon, West Virginia, and Georgia, but were afterwards repealed in Georgia. In most of these states their validity has been assumed without dispute; and they were never adjudged to be invalid anywhere until since 1870, and then in three states only, and for the incompatibility with their respective constitutions. "The principle objects, no doubt, of the earlier acts were grist-mills; and it has been generally admitted, even by those courts which have entertained the most restricted view of the legislative power, that a grist-mill which grinds for all comers, at tolls fixed by law, is for a public use. But the statutes of many states are not so limited either in terms or in the usage under them. In Massachusetts for more than half a century the mill acts have been extended to mills for any manufacturing purpose. And throughout New England, Pennsylvania, Virginia, North Carolina, Kentucky, and many of the western states, the statutes are equally comprehensive." I have quoted thus fully because the expression is that of the supreme court of the United States, and as recent as 1884; and because it shows that these acts are not sustained as constitutional because of the right having been exercised before the adoption of the constitutions, though many cases place the right or power on that ground; and, further, because in my opinion the mill acts of the numerous states have far less foundation in public necessity or public utility than the water acts of Arizona, and because the similarity

of the acts is apparent. Under the mill acts any person or corporation may take private property for their use, the benefits being the general and resulting benefits to the public. Under the water acts any person or corporation may take right of way for water. The mill acts are held valid where there is no participation by the public. Is it then necessary that there should be participation direct under the water acts, to obviate the objection of its otherwise being a private, and not a public, use? In some of the drainage acts of the various states and territories there is no participation. I am not unmindful of the fact that some cases place the lawfulness of both the mill acts and the drainage acts under the power of the legislature, expressed by the court in the case from which we have just quoted, viz., the right to compel owners of private and separate property to join with other owners of private and separate adjoining property to improve the same *in invitum*, as by a common ditch, party-walls, etc. In the case of the exercise of the power of eminent domain, the individual has a portion of his property taken for which ample compensation is made. In the case of a resort to the other power, as in the drainage acts or some of them, the part not taken may be sold at a sacrifice to pay assessment for the benefits. But there are many cases where the power must rest on the right of eminent domain, as where one man's land is flowed for the benefit of another man's mill; where a right of way is taken over one man's land for a ditch to drain the swamp lands of one or more of his neighbors. In all these cases the private property of the individual is taken, and it is of little concern to him under what particular power. If under the power of condemnation, he gets compensation for what is taken. If under the power to assess for improvement, a forced sale of all may result in a sacrifice of all. If the constitution cannot protect in the latter case, ought it to be invoked in the former to the detriment of the community, and against a general beneficial public policy, growing out of peculiar and extraordinary physical conditions of the country? The counterpart in principle to the proposition involved in this case is to be found in the drainage laws of various states, especially on the sea-coast. There it is to get water off the soil; here it is to get it on to and in the soil. What difference can there be in principle? Some of the cases base the lawfulness of the drainage acts on the plea (may we not say in many cases, pretext) of promoting the public health. Many other cases base the right on the broad ground of public benefit and utility. 22 Amer. Dec. 705. RODMAN, J., said, in sustaining the act to condemn: "If 'public utility' is synonymous with 'public use,' the case is still clearer. In many cases, therefore, it has been held that acts for the drainage of lands by the power of eminent domain, where the chief object was to improve the land and render it fit for human habitation and cultivation, were constitutional and valid." *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518; In re Application for Drainage, 35 N. J. Law,

497; *Hartwell v. Armstrong*, 19 Barb. 166; *Talbot v. Hudson*, 16 Gray, 417; *Norfleet v. Cromwell*, 70 N. C. 634. In the last case *RODMAN, J.*, said: "It is well known that in the Atlantic section of this state there are hundreds of thousands of acres of what is called 'swamp land,' which from the flatness of their surface, and the filling up of the natural courses of drainage, if any ever existed, cannot be relieved of the water which ordinarily covers them, and made fit for human habitation and cultivation, except by cutting artificial canals from them into some convenient creek or river, which must necessarily pass through the intervening lands of the riparian proprietors. If these canals can be cut only by the permission of the owners of the banks of the necessary outlets, this vast area of fertile land must remain for ages an uncultivated and unpopulated wilderness, and it will be entirely valueless to those who bought it from the state on the faith of its laws. An act which aims to remedy so great an evil, affecting so many persons now living, and so many more in the future, must be deemed one of general and public utility. \* \* \* Roads and aqueducts are classed together in the Institutes as servitudes of the same public character. In the swamps, which the act in question chiefly affects, the canals are more important than the roads, as they must always precede them."

In these cases water must be taken off the lands to fit them for habitation and cultivation. In Arizona water must be taken on the lands to fit them for habitation and cultivation. *Lux v. Hagglin*, 69 Cal. 304, 10 Pac. Rep. 674, says: "And while the court will hold the use private when it appears that the government or public cannot have any interest in it, the legislature, in determining the expediency of declaring a public use, may no doubt take into consideration all the advantages to follow from such action; as the advancement of agriculture, the encouragement of mining and the arts, and the general, though indirect, benefits derived by the people at large from the dedication. It may be that, under the physical condition existing in some portions of the state, irrigation is not theoretically a 'natural want,' in the sense that living creatures cannot live without it. But its importance as a means of producing food from the soil makes it less necessary, in a scarcely appreciable degree, than the use of water by drinking it. The government would seem to have not only a distant and consequential, but a direct, interest in the use. Therefore a public use." Here the use of water for agriculture is held to be a public use. The same authority says: "We are only called on to say that sections of the Code which provide for taking water from riparian proprietors (on due compensation to supply farming neighborhoods) are constitutional and valid." In *Barber v. Connolly*, 113 U. S. 81, 5 Sup. Ct. Rep. 357, (1884,) Justice FIELD says: "But neither the amendment, [14th amendment to the constitution.] \* \* \* nor any other amendment, was designed to interfere with the power of the state,

sometimes called its 'police power,' to prescribe regulations, to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains." "Special burdens are often necessary for general benefit, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects." This was said in passing on and construing the constitutional provision, providing that no one shall be "deprived of life, liberty, or property without due process of law." "Due process of law" was held to mean affecting all alike who were of the same class or similarly situated. Take the case of ditching or draining companies in interior states where there are swamp lands. The owners of the swamp lands are allowed to form ditching companies, and drain their lands and the lands of their neighbors, and assess their neighbors *in invitum* for the expenses incurred, and in some instances, as I have before said, selling at a sacrifice, the lands of their neighbors to meet the assessments. The ditches limited in some cases to little farming neighborhoods, comprising fewer in number than 13. No doubt these laws were first enacted on the theory of the general health, and may have been continued on that pretense long after everybody understood that the increased productiveness of the soil and the enhanced value of the lands constituted the *primum mobile* of the stockholders in the companies. These laws have been upheld in states where the judiciary might say it was a startling proposition to assert that one man might invoke the state's power of eminent domain to convey water over another man's land, paying him ample compensation therefor. In the one case a mere right of way, a slender strip of land, is taken,—is appropriated,—and compensation made therefor; in the other, a ditch or drain is made *in invitum*, and the benefits assessed by others, and must be paid or a forced sale result. Why should the first proposition be startling and the second accepted and approved?

In the state of Nevada it has been held that the law authorizing the condemnation of land to give access to mines, and to enable miners to carry on the business of mining, is constitutional. *Mining Co. v. Seawell*, 11 Nev. 402. In *Mining Co. v. Corcoran*, 15 Nev. 147, it was held constitutional to authorize the condemnation of lands for the purpose of operating a mine. In Colorado, statutes have been passed authorizing the appropriation of water by individuals for irrigating, and also the right to condemn land for right of way for irrigation. *Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. Rep. 142; *Schilling v. Rominger*, 4 Colo. 100. I refer to these Nevada and Colorado cases as authority direct on the question involved in this case.

An examination of these cases, the mill-

site, the mining cases, the water cases, discloses the fact that the legislatures of various states have clothed private corporations and individuals with the power of eminent domain to make available the extraordinary natural resources within their borders. In a great number of these instances there is no participation by the general public, and the public use consists in the purely incidental benefits. The peculiar physical conditions, and the great benefit that would result to the general public, seemed to justify a public policy authorizing the taking of private property to promote the general welfare in such cases. In most states, and under ordinary conditions, laws like the mill-site acts, the dam acts, and the acts allowing land to be condemned to facilitate mining, and for irrigation, would not be passed, and might not be thought of sufficient public necessity and importance to be upheld if passed. The conflict in the authorities may be accounted for in the different conditions that exist in different states. The authorities are numerous that sites for manufacturing may not be condemned, though manufacturing is of great public utility, and promote the general welfare in a pre-eminent degree. But the reason given is that a sufficient number of sites can be had by purchase, and without the necessity of condemnation. But a different ruling prevails where manufacturing is done by water-power, and mill-sites are few, as we have seen in the cases before referred to.

All condemnation acts are predicated on the proposition that private ownership must yield to public necessity. "Public necessity" often means, as illustrated in the above instances, public convenience and advantage. We have many other instances of what "public necessity" means. Though telephones are of very recent invention, and reach the very limited few, their use is held to be a public necessity; in other words, public convenience and advantage,—sufficiently so, at least, to justify the exercise of the sovereign power of eminent domain. Natural gas, though limited to localities small in area, is held also to be a public necessity, and therefore to justify the exercise of this extraordinary power. Laws relating to the telephone and natural gas are good illustrations of the adaption of the law to the existing conditions, and the necessity for the enforcement of the doctrine that private property must yield, on compensation being made, to the public welfare. But recently both the telephone and natural gas were unknown, now both are necessary to the public use; that is, we submit to the public convenience and advantage. "Government must adapt itself to the existing condition and wants of society, or its efficiency is destroyed." *Swan v. Williams*, 2 Mich. 438. "This right of resumption [condemnation] may be exercised not only when the safety, but also when the interest, or even the expediency, of the state is concerned." *Beekman v. Railroad Co.*, 3 Paige, 73. Property may be taken under power of eminent domain, where the use is merely amusement or recreation, as for public drives or parks. *Higginson v. Inhabitants of Nahant*, 11 Allen, 530; *In re*

*Mount Washington Road Co.*, 35 N. H. 134; *In re Bushwick Ave.*, 48 Barb. 9; *County Court v. Griswold*, 58 Mo. 175; *Commissioners v. Armstrong*, 45 N. Y. 234.

Speaking of the power of the state to exercise the right of eminent domain in behalf of railroads, Judge COOLEY says: "In such cases the property is not so much appropriated to the public use as taken to subserve some general and important public policy." *Ryerson v. Brown*, 35 Mich. 339. Chancellor Kent has written: "If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose." 2 Kent, Comm. 340. I give due weight to the remark of Judge COOLEY that "it would not be entirely safe" to apply with "much liberty" the words "in any way;" and the further remark of Judge COOLEY that private property may not be taken "for objects which may merely tend to give an aspect of beauty," etc. I have looked into the various instances of the exercise of the right and power of eminent domain in the cases before cited, to ascertain whether it is necessary that the property appropriated should be actually appropriated to a direct public use, or to some use in which the general public might participate, as in the cases of railroads and canals, or whether the requirements of the constitution might not be met, if the use was in pursuance of some general and important public policy. In other words, may a state or territory, in view of its natural advantages and resources and necessities, legislate in such a way, exercising the power of eminent domain, that these advantages and resources may receive the fullest development for the general welfare, the laws being general in their operation? This territory is vast in extent, and rich in undeveloped natural resources. Mountains and deserts are not an inviting prospect, when viewed by a stranger in transit. But the mountains abound in the precious metals, gold and silver, "the jewels of sovereignty;" and the deserts may be made to "bloom and blossom as the rose." The one great want is water. With this resource of nature made available, the mountains and the deserts may be made to yield fabulous wealth, and Arizona become the home of a vast, prosperous, and happy people. But with water in this territory "cribbed, cornered, and confined" it will continue and remain the mysterious land of arid desert plains, and barren hill-sides, and bleak mountain peaks. The legislature of the territory, seeing what was apparent to all, adopted at an early day a policy,— "a general and important public policy." That policy was to protect against private ownership and monopoly the one thing indispensable to the growth, development, and prosperity of the territory,—the element that would serve to uncover the gold and silver hidden in the hills and mountains, and transform the desert into a gar-

den. Section 22 of the bill of rights provides: "All streams, lakes, and ponds of water capable of being used for the purposes of navigation or irrigation are hereby declared to be public property, and no individual or corporation shall have the right to appropriate them exclusively to their own private use, except under such equitable regulations and restrictions as the legislature shall provide for that purpose." Section 3198, Rev. St., provides: "The common-law doctrine of riparian rights shall not obtain or be of any force or effect in this territory." Then provision is made for public and private *acequias*. Section 3201, Rev. St. Ariz.: "All the inhabitants of this territory, who own or possess arable or irrigable lands, shall have the right to construct public or private *acequias*, and obtain the necessary water for the same from any convenient river, creek, or stream of running water." Section 3202 provides: "Whenever such public or private *acequias* shall necessarily run through the lands of any private individuals not benefited by said *acequias*, the damage resulting to such private individuals on the application of the party interested shall be assessed by the probate judge of the proper county in a summary manner." These provisions were enacted early in the history of the territory, and probably existed as they are now when the territory was a part of old Mexico. The intention was to make the use of water, as much as as practicable, within the reach of all, and to guard it against monopoly by private ownership on the one hand, and against being hemmed in by the ownership of the adjacent land, liable to be acquired and held by speculators, on the other hand. The wisdom of this policy, under the physical conditions existing in the territory, must be apparent to every one. What better illustration could we have than the present case? Eight thousand acres of desert land can be brought under cultivation if the right of way can be obtained over intervening land; the value of the land taken is \$124.50, which the owner of the land receives. What was the policy? Private ownership and monopoly of the streams, lakes, and ponds was prohibited. They were reserved for and dedicated to the people. To make the water of these streams, lakes, and ponds available, the right of way must be provided for ditches and canals over the lands of those who might become the owners of the soil on the borders of the streams or the margins of the lakes and ponds. Without this provision it is easy to see how a few individuals might throw themselves across the pathway of progress and development, by acquiring the lands on the margins of the streams and around the lakes and ponds. The water intended for the free and general use would be surrounded, hemmed in, and without a right of way available under the law the vast tracts of land lying on the outside must forever remain desert, or pay the tribute of extortionate and unconscionable demands. To prevent this, the laws above mentioned were enacted at the very beginning, and before titles were acquired. The laws of the territory,

on the subject of water and water-rights, are not peculiar to this territory. Similar laws exist in Nevada, Montana, Colorado, Idaho, Dakota, and New Mexico. The legislatures of all these states and territories have by their enactments declared their belief in the constitutionality of these laws, and in none of them have the courts held otherwise. It is in the first instance for the legislature to declare what are public uses to which private property may be appropriated. If a law declaring such uses, and making provision for such appropriations, is not in contravention of some constitutional provision, it is the duty of the courts to recognize and enforce it. If there is a doubt as to its constitutionality; if not clearly unconstitutional, being the act of the law-making power and a co-ordinate branch of the government,—it is well settled that it is the duty of the courts to treat and enforce it as a valid law. If the law is unwise in its provisions, or oppressive in its operation, the power that created it must be looked to to repeal or modify it. In this case the proceeding is in the name of the territory of Arizona, by James C. Goodwin as its agent. It conforms to the requirements of the statutes, and is not in contravention of the constitution of the United States, or the organic act of the territory, or any act of congress. The judgment below is therefore affirmed.

SLOAN and KIBBEY, JJ., concur.

STATE *ex rel.* JOURNAL PUB. CO. v. KENNEY, Auditor.

(*Supreme Court of Montana.* March 28, 1891.)

STATE AUDITOR—DUTY TO ISSUE WARRANTS—APPROPRIATIONS.

1. Taxes levied for a fiscal year must be treated as revenue for that year, though they may not be collected and reach the treasury before the commencement of the following fiscal year, and are to be considered in determining whether the appropriations by the legislature provide for expenditures which exceed "the total tax provided by law," which is prohibited by Const. Mont. art. 12, § 12.

2. Where the legislature has made an appropriation for a claim against the state, and it has been examined, approved, and transmitted to the auditor by the state board of examiners, and the taxes levied for the year are less than the total appropriations, it is the duty of the auditor to issue his warrant on the treasurer for the claim. He cannot refuse on the ground that there is no money in the treasury for its immediate payment.

*Petition for mandamus.*

*McCutcheon & McIntire*, for petitioner.  
*Henri J. Haskell*, Atty. Gen., for respondent.

BLAKE, C. J. The affidavit of the relator states the following facts: The Journal Publishing Company is a corporation, and entered March 11, 1889, into a contract with the territory of Montana to do all the printing thereof, pursuant to law. The state, under this contract, is indebted to the relator in the sum of \$7,909.93, for printing for the territory and state. The accounts therefor were presented by the relator to the state board of examiners, and audited, approved, and allowed in

said sum, and was by it certified and presented to the second legislative assembly. Said legislative assembly, by an act entitled "An act to provide for the payment of all claims against the state approved by the state board of examiners, and reported to the legislative assembly," approved March 7, 1891, appropriated out of the funds of the state the sum of \$7,909.93 to pay this claim. A demand for the relator was made March 14, 1891, of the respondent, that as state auditor he should draw his warrant on the state treasurer for the amount of said claim. The respondent refused to draw any warrant therefor. The return does not deny any of the foregoing allegations, but contains the following averments: The assessed value of all the property within the state for the last fiscal year was \$112,000,000. The revenue of the state thus far for the fiscal year ending November 30, 1891, amounts to \$363,332.80. The revenue of the state from a license and property tax for the remainder of this fiscal year will not exceed \$70,000. The fiscal year of 1891 commenced December 1, 1890, and ends November 30, 1891. The taxes levied for this fiscal year, and not paid in by the county treasurers, and received by the state treasurer until the commencement of the fiscal year 1892, are carried upon the books of his office for the purpose of paying off all indebtedness for which appropriations have been made by the legislative assembly for the expenditures incurred in the fiscal year ending November 30, 1892; and the sums received after December 1, 1891, by the state treasurer, are credited upon his books as funds of the fiscal year 1892, and not for the year 1891. Between February 18, 1891, and March 7, 1891, the legislative assembly passed many appropriation bills, which obtained the approval of the governor in the order which is specified. The answer sets forth particularly the laws which are referred to, the dates of their approval, and the amount appropriated thereby, which exceeds \$640,000 for the fiscal year ending November 30, 1891. The appropriation bills which became laws before the act, supra, which includes the claim of the relator, appropriated for the fiscal year ending November 30, 1891, out of any moneys in the state treasury not otherwise appropriated, the sum of \$558,412.36. The state treasurer has set apart for the purposes which are mentioned in the statutes, respectively, of the moneys so received, the entire sum in the treasury. And the answer further alleges: "That at the present time there is not any money in the state treasury that is available or applicable to the payment of the claim of this relator, nor subject to any warrant that might be drawn in favor of this relator for said claim. That since the 28th day of February, 1891, this resistant has drawn certain warrants upon the state treasury, and which have been paid in accordance with the provisions of the general laws, and in pursuance of the appropriations made in the acts last mentioned, in the total sum of \$95,207.30. That there now is a balance in the state treasury of \$268,125, so set apart as aforesaid. That this resist-

ant has refused to draw his warrant in favor of the relator for the claim so presented, upon the ground that the last legislative assembly of the state of Montana have authorized expenditures and made appropriations for the fiscal year 1891, prior to the passage of [the act, supra.] heretofore referred to, which exceed the total tax then and now provided by law, and applicable to such appropriation and expenditure, and which exceed, in the aggregate of such total tax, the sum of \$100,000." The relator filed a demurrer to the answer, upon the ground that the facts therein stated did not constitute a defense. The act supra, which is referred to in the affidavit of the relator, contains the following provisions: "Section 1. That the sum of \$44,648.19 be, and the same is hereby, appropriated out of any moneys in the treasury, not otherwise appropriated, for the payment of claims against the state, approved by the state board of examiners, reported to the second legislative assembly. Sec. 2. That, in payment of said claims, the auditor is hereby directed to draw his warrant upon the state treasury in favor of the following persons, and for the following amounts." In this list the relator is named, and the amount is the same as that which is specified in the affidavit. The statute provides that "the 1st day of December in each and every year shall be the end of the fiscal year for territorial [state] purposes." Comp. St. div. 5, § 140. It is disclosed by the answer and admitted by the relator that the second legislative assembly appropriated for the fiscal year of 1891 the sum of \$640,000, and that a large part thereof, the sum of \$558,412.36, was embraced in laws which were approved prior to the act supra, under which the relator asserts his rights in this proceeding. The revenue, which has been received during this fiscal year, and which, it is estimated, will be received during the remainder thereof, amounts to the sum of \$433,332.80. The deficit seems to be the sum of \$217,000 or thereabouts. The respondent for this reason refuses to draw his warrant in behalf of the relator, and maintains that said legislative assembly has appropriated an amount in excess of the money in the treasury of the state, or which could be made available therefor during the fiscal year of 1891. The following section of the constitution is cited to uphold his action: "No appropriation shall be made or any expenditures authorized by the legislative assembly whereby the expenditures of the state during any fiscal year shall exceed the total tax then provided for by law, and applicable to such appropriation or expenditure, unless the legislative assembly making such appropriation shall provide for levying a sufficient tax, not exceeding the rate allowed in section nine (9) of this article, to pay such appropriations or expenditures within such fiscal year. \* \* \* No appropriation of public moneys shall be made for a longer term than two years." Article 12, § 12. The opinion of the justices of the supreme court of the state of Colorado in *Re Appropriation by General Assembly*, 13 Colo. 316, 22 Pac. Rep. 464, considers similar constitutional provis-

lions, and says: "It will be observed that appropriations and expenditures for ordinary purposes are legitimate so long as they do not exceed the total tax already provided by law, and applicable for their payment, or which may, within constitutional limits, be so provided for their payment within the proper fiscal year. \* \* \* What we have said of the legislative department in respect to making appropriations or authorizing expenditures in excess of constitutional authority applies with equal force to the executive department in recognizing or dealing with legislation affecting the public revenue. If legislative acts, making appropriations in excess of constitutional limits, have unfortunately received the governor's signature instead of his veto, he should nevertheless withhold his approval from any and all vouchers relating to such unconstitutional appropriations. So, also, the auditor should refuse to draw any warrant therefor, and the treasurer should decline to make payment thereon. In reference to matters arising under enactments clearly unconstitutional, the unauthorized act of one government official is no justification or excuse for a similar act by another." It is obvious that the responsibility of the legislative assembly is of the utmost gravity. The ninth section, *supra*, declares that the rate of taxation of real and personal property for state purposes in any one year shall not exceed 2½ mills on each dollar of valuation, whenever such property shall amount to one hundred million dollars. Article 12, § 9. By virtue of the power herein conferred, an act was passed by this legislative assembly, and approved March 4, 1891, which levied for the fiscal years of 1891 and 1892, respectively, the highest rate of taxation which was allowed, to-wit, 2½ mills on each dollar of such valuation. "Any legitimate expenditure of the state," said the court in *People v. Scott*, 9 Colo. 422, 12 Pac. Rep. 608, "necessary to be provided for by state tax, is a state purpose, and the tax to be provided is a tax for a state purpose." We assume, what is not controverted in this hearing, that the acts of the second legislative assembly, *supra*, which are enumerated in the answer, and embody appropriations, are within this definition of the constitutional expression, "state purposes."

In performing the grave task of observing this restriction of the constitution, some difficult problems require solution. We again quote from the opinion, in re Appropriation by General Assembly, *supra*, which sheds considerable light upon this inquiry, and says: "We are asked what legal criterion is fixed by which it can be known, at the date of an act appropriating or authorizing the expenditure of money, whether such appropriation or expenditure will be in excess of the prescribed constitutional limits. We answer that there is no absolute criterion which can be relied upon in every instance and under all circumstances. The general assembly must, of necessity, exercise their own judgment in the first instance." It is also stated that the legislators must obtain all the information respecting the

public revenue and probable expenses of the government which can be derived from the reports of officers and the testimony of other persons concerning these matters. It may therefore be reasonably presumed that the second legislative assembly of the state acted upon the knowledge within its command, that the valuation of the taxable property for the fiscal year 1890 was \$112,000,000, and that this rate of taxation would yield a revenue of \$280,000 per annum for the fiscal years 1891 and 1892. The aggregate of this sum and the above amount of \$433,332.80 is \$713,332.80.

The act concerning revenue, approved March 6, 1891, provides that the county clerk shall, on or before the first Monday of October, "deliver a copy of the corrected assessment book, to be styled, 'Duplicate Assessment Book,' to the county treasurer." Section 90. "Within ten days after the receipt of the 'Duplicate Assessment Book' the county treasurer must mail to each tax-payer the following notice: (1) Amount of taxes; (2) that taxes will be delinquent after the first day of September, and that, unless paid prior thereto, ten per cent. will be added to the amount thereof; (3) the time and place at which payment of taxes may be made." Section 96. "The treasurer of each county in this state shall be, by virtue of his office, collector of taxes therein." Section 145. "After December 1st of each year, all unpaid taxes are delinquent." Section 100. "On the first Monday in March, June, September, and second Monday in December, the county treasurer must settle with the county commissioners for all moneys collected for the state or county." Section 99. "Each county treasurer shall, at the expiration of every three months, render an account of and cause to be paid over to the state treasurer the amount of all moneys collected for state purposes, and shall complete the collection of all lists delivered to him; and at the expiration of each fiscal year, and at the expiration of his term of office, shall make final settlement with the county commissioners of his county, and shall report to the treasurer immediately thereafter a correct statement of the amount found due the state, and the county treasurer shall remit to him such amount." Section 183. It is apparent from these provisions of the statute that the taxes for state purposes become due and payable in the month of October, and that the county treasurers are the agents of the state in the collection thereof. They are required to settle their accounts at certain periods, and remit to the state treasurer the amount of the taxes which have been ascertained to be due. In complying with the requirements of the law, it is not possible for them to pay into the treasury of the state, before the end of the fiscal year, the amount of the taxes which have been levied and collected for that term. It is a safe assertion that a small part of such taxes, if any, will be received by the state treasurer during the fiscal year. It is the contention of the respondent that, under these conditions, the funds which will be realized from the levy of the taxes

which have been authorized by the second legislative assembly for the year 1891 cannot be treated as revenue for that period; and that the same should be credited to the proper accounts of the fiscal year 1892, because they will be actually placed in the state treasury after the commencement of the last-named year. We dissent from this proposition. The section *supra* of the constitution does not use the terms "revenue" or "funds," but declares that "the expenditures of the state during any fiscal year shall not exceed the total tax then provided for by law." The mere circumstance that a brief delay occurs in the transfer of the money, which is the property of the state, to the official custodian thereof, does not touch the question. In *Evans v. McCarthy*, 42 Kan. 428, 22 Pac. Rep. 631, Mr. Justice VALENTINE for the court said: "But taxes, under a levy made by or for the state, certainly become proceeds for such levy long before they reach the state treasurer's office. They are proceeds of such levy as soon as they are paid into the offices of the various county treasurers of the state, and do not remain something else than proceeds until they reach the state treasurer's office. When they are received by the county treasurers they then become public funds, and belong to the state, and cannot then or afterwards be used for any other purpose than the purpose for which they were appropriated." The treasury of the state, in the eyes of the law, will be the recipient of the proceeds of said levy for the fiscal year 1891, to-wit, the sum of \$280,000, before the end thereof. We conclude that this amount which has been estimated to be the revenue from the direct tax for the fiscal year 1891 should be held available to meet in the future, when collected, some of the appropriations which were made for the same time; and that the act, *supra*, for the relief of the relator and other parties, does not violate any clause of the organic law of the state.

The respondent insists that he cannot be required to draw his warrant for the relator unless there are funds in the treasury for its immediate payment. Our attention has not been directed to the words of any statute or the constitution which sustain this view, and the authorities express an opinion to the contrary. The same cases cover this and another proposition which has been examined. In *State v. Hoffman*, 35 Ohio St. 435, Mr. Justice WHITE, as the organ of the court, said: "There is no validity in the claim set up by the defendant that there is no money in the treasury of the city with which to pay the warrant, should one be issued. The duty enjoined on the defendant, as auditor of the city, to issue the warrant, is not made dependent on whether there is money in the treasury to pay the warrant. On ascertaining the amount that ought to be paid by the city, in the mode prescribed, he is directed to issue his warrant upon the city treasurer for the amount so ascertained, to be paid out of the general fund of the city, and the same is declared to be a sufficient voucher. The duty of paying the warrant is devolved on the treasurer, and whether he has

funds or not with which to take up the warrant is no concern of the auditor in discharging the duties imposed upon him by the statute." In *People v. Brooks*, 16 Cal. 11, Mr. Chief Justice FIELD, for the court, said: "To an appropriation, within the meaning of the constitution, nothing more is requisite than a designation of the amount, and the fund out of which it shall be paid. It is not essential to its validity that funds to meet the same should be at the time in the treasury. As a matter of fact, there have seldom been in the treasury the necessary funds to meet the several amounts appropriated under the general appropriation acts of each year. The appropriation is made in anticipation of the receipt of the yearly revenues. It constitutes, indeed, the authority of the comptroller to draw his warrants, and of the treasurer, when in funds, to pay the same, and that is all." See, also, *Evans v. McCarthy*, *supra*; *State v. Parkinson*, 5 Nev. 15; *Swann v. Buck*, 40 Miss. 268; *Springfield v. Edwards*, 84 Ill. 626; *Law v. People*, 87 Ill. 385. The act prescribing the duties of the state board of examiners provides that any person who has a claim against the state, and for which an appropriation has been made, shall present the same for its action. This statute derives its power from the constitution. Article 7, § 20. The seventh section of the act provides further: "If the board approve such claim, they shall indorse thereon, over their signatures, 'Approved for the sum of ——— dollars,' and transmit the same to the office of the state auditor, and the auditor shall draw his warrant for the amount so approved in favor of the claimant, \* \* \* in the order in which the same was approved." But the respondent must investigate and decide in all cases according to the rules of interpretation which have been laid down in this opinion, whether the appropriations for the fiscal year have exceeded the limitations which have been prescribed by the constitution, and act accordingly. The relator has complied with the laws which have been enacted in pursuance of the constitution; the legislative assembly has made a lawful appropriation for the payment of his claim; and the state board of examiners has approved and transmitted the same to the respondent. It is therefore the legal duty of the state auditor to draw his warrant in favor of the relator for the amount of this claim. The demurrer must be sustained, and, as the respondent declines to file any other answer, it is ordered and adjudged that the peremptory writ of mandate issue according to the prayer of the affidavit.

HARWOOD and DE WITT, JJ., concur.

STATE *ex rel.* BUCK v. HICHMAN, Treasurer.  
(*Supreme Court of Montana*. April 13, 1891.)

DISTRICT JUDGES—COMPENSATION—APPROPRIATIONS.

Const. Mont. art. 8, § 14, declares that the legislative assembly may increase or decrease the number of judges in any judicial district. Act Mont. Feb. 27, 1891, provides that the district



judges, whose offices may be established by the legislature, shall receive the same compensation as is now, or may hereafter be, provided by law for judges of the district courts. Const. Mont. art. 8, § 29, provides that district judges shall be paid quarterly a certain salary, and section 34 provides that all judges who have been elected or appointed are governed by the same provisions of the constitution. *Held*, that the constitution appropriates money for the salary of a judge appointed to fill an office subsequently created, and he is entitled to be paid, in preference to appropriations made for other purposes before his appointment.

Application for *mandamus*.

*B. P. Carpenter*, for relator. *H. J. Haskell*, Atty. Gen., for respondent.

BLAKE, C. J. The relator prays that a peremptory writ of mandate be issued out of this court, commanding the state treasurer to pay a certain warrant which had been drawn by the state auditor under the following circumstances: The relator was appointed February 28, 1891, a judge of the district court for the first judicial district, and has discharged the duties of the office since that time. The salaries of the district judges of the state are payable quarterly, and one of such quarters ended March 31, 1891, at which time there was due to the relator the sum of \$301.39. The state auditor then issued his warrant to the relator, drawn upon the respondent, for the said sum, in payment of said salary. The state treasurer refuses to pay this warrant, and in his answer sets forth these facts, which are conceded. The legislative assembly prior to the 5th day of March, 1891, at the second session thereof, appropriated by several statutes for state purposes the sum of \$464,084. The moneys in the treasury of the state, being the sum of \$148,400, have been set apart in accordance with certain appropriation laws, which are specified. The legislative assembly, by an act which was approved March 5, 1891, appropriated the sum of \$20,000 to pay the salaries of the relator and other district judges who had been appointed in pursuance of statutes passed during said second session. At the date of the passage of the acts creating the office to which the relator was appointed, and providing for the payment of his salary, there was not, and has not been, any moneys in the treasury of the state applicable thereto. The respondent has paid the sum of \$234,000 on account of the appropriations which are specified, and there remains unpaid the sum of \$230,084. The constitution declares that "the legislative assembly may increase or decrease the number of judges in any judicial district." Article 8, § 14. By an act approved February 28, 1891, an additional judge was authorized for the district court of the first judicial district of the state, and the relator was appointed to the office. It was enacted February 27, 1891, that the district judges whose offices may be established by the legislative assembly, "shall receive the same compensation as is now or may hereafter be provided by law for judges of the district courts." There is no legislation of this character, but the salary has been fixed by the constitution in this section: "The

judges of the district court shall each be paid quarterly, by the state a salary, which shall not be increased or diminished during the terms for which they shall have been respectively elected. Until otherwise provided by law, \* \* \* the salary of the judges of the district courts shall be three thousand five hundred dollars per annum each." Id. § 29. It is further declared that "vacancies in the office of \* \* \* judge of the district court \* \* \* shall be filled by appointment by the governor of the state." Id. § 34. All judges of the district courts, who have been elected or appointed, are governed by the same provisions of the constitution. In the absence of any statute, they are entitled to receive from the state the salary which has been defined in the constitution section supra. We reaffirm the doctrine of *State v. Hickman*, 9 Mont. 370, 23 Pac. Rep. 740, that the language which has been quoted is an appropriation made by law.

The respondent admits the soundness of these legal propositions, but maintains that he cannot pay the warrant delivered to the relator by reason of other appropriations which were made before the act, supra, approved March 5, 1891. It is not claimed that there is any statute that controls this matter. The supreme court of the state of Colorado, in *Re Appropriations by General Assembly*, 13 Colo. 316, 22 Pac. Rep. 464, said: "In view of the examination we have given the subject, we are of the opinion that acts of the general assembly making the necessary appropriations to defray the expenses of the executive, legislative, and judicial departments of the state government for each fiscal year, including interest on any valid public debt, are entitled to preference over all other appropriations from the general public revenue of the state, without reference to the date of their passage, and irrespective of emergency clauses." This view was entertained under conditions like those which confront us, with this essential difference: The constitution of that state does not regulate the amount of the salaries of the officers of the executive and judicial departments. The chief reason of the rule thus announced is the necessity of preserving the state, which is paramount to all other considerations. We recognize the force of this argument, but prefer to put this decision upon another ground. The appropriations which are embodied in the constitution have priority over any act of the second legislative assembly which relates to the disbursement of the moneys in the treasury. The rights of the parties are not affected by this act, supra, approved March 5, 1891, and the claim of the relator is supported by the fundamental law of the state. The appropriations which have been made for purposes for which the amounts are not expressed in direct terms by the constitution are necessarily subsequent in the order of payment to the salary of the relator. We are therefore of the opinion that the respondent has in his hands moneys which should be applied upon the warrant of the relator. It is ordered and adjudged that the peremp-

tory writ of mandate be issued to the respondent according to the prayer of the relator.

**HARWOOD and DE WITT, JJ., concur.**

(10 Mont. 496)

**STATE ex rel. BLACKFORD v. KENNEY, Auditor.**

(*Supreme Court of Montana.* April 12, 1891.)

**CODE COMMISSION—SALARY OF CLERK—WARRANT OF STATE AUDITOR—FAILURE TO MAKE APPROPRIATIONS.**

Const. Mont. art. 12, § 10, provides that no money shall be drawn from the state treasury except upon specific appropriations made by law. *Held* that, in the absence of an appropriation the state auditor properly refused to issue his warrant on the treasurer for salary due the clerk employed by the code commissioners, under 16th Sess. Acts Mont. p. 117, § 4, authorizing such commissioners to employ a clerk, and directing his salary to be paid monthly by the auditor on vouchers to be approved by the chairman of the commission.

**Application for mandamus.**

Const. Mont. art. 12, § 10, provides that no money shall be drawn from the state treasury except upon specific appropriations made by law.

*Wm. Blackford and Steve Carpenter*, for relator. *Henri J. Haskell*, Atty. Gen., for respondent.

**BLAKE, C. J.** The relator has applied to this court for a peremptory writ of mandate to be directed to the state auditor, and commanding him to draw a warrant upon the state treasurer in favor of the relator for the sum of \$150. It is shown by the affidavit and admitted by the respondent, that the relator was employed May 31, 1890, as the clerk of the code commission of the state, and has acted as such since that time; that he has not received his salary for the month of March, 1891; and that, upon a demand therefor, the respondent refuses to draw his warrant in any sum for the relator. The act under which the code commission was appointed contains this provision: "The said commissioners \* \* \* are empowered and authorized to employ one competent clerk, who shall receive for his \* \* \* services \$150 per month. \* \* \* The salary of the clerk of such commission shall be paid monthly by the auditor upon vouchers to be approved by the chairman of the commission." St. 16th Sess. p. 117, § 4. No appropriation has been made for the payment of his salary for the period above mentioned, and the claim of the relator is founded upon the act supra. The case of *State v. Kenney*, 9 Mont. 389, 24 Pac. Rep. 96, is applicable to these facts, and the application for a peremptory writ of mandate must be denied.

**HARWOOD and DE WITT, JJ., concur.**

(10 Mont. 500)

**CARRON v. WOOD et al.**

(*Supreme Court of Montana.* April 12, 1891.)

**IRRIGATION—SUIT FOR DIVERSION OF WATER—MEASUREMENT—INSTRUCTIONS—APPEAL—PRACTICE.**

1. On appeal from an order overruling a motion for a new trial, made upon a statement of the case, under Code Civil Proc. Mont. § 298,

providing that the statement shall specify the particular errors relied on, and, if no specifications are made, the statement shall be disregarded on hearing of the motion, the supreme court can only consider the specifications of error found in the record.

2. In an action for damages for diverting waters claimed by virtue of prior appropriation and use for purposes of irrigation, an instruction that the extent of the appropriation of water is determined by the capacity of plaintiff's "head-gate and ditches, and the quantity of water required" by him, to be measured as the statutes (Comp. St. Mont. p. 997, § 1262) provide, is not erroneous in making the test the head-gate, instead of what the ditch will carry.

3. The court instructed the jury that in determining the amount of water plaintiff was entitled to they should find the same in inches, measured in the manner provided by law for the measurement of water; and set out the law in detail in the charge. *Held*, that there was no error in striking out of the charge before giving it a clause that, in order to find the amount of water plaintiff was entitled to, the evidence and the jury's finding must conform to the measurements provided by the law, and, if the evidence did not, it was only speculative and uncertain, since such clause was mere repetition, and was on the weight of the evidence.

4. Defendants are liable for actual injury to plaintiff by their diversion of the water previously appropriated by him, though they may not have used the water continuously, and may have used it only for a short time.

**Appeal from district court, Missoula county.**

Code Civil Proc. Mont. § 298, provides the method of settling the statement if the motion for a new trial is to be made upon a statement of the case, and provides that when the notice for the motion designates as the ground of the motion the insufficiency of the evidence to justify the verdict, the statement shall specify the particulars in which such evidence is alleged to be insufficient; and when the notice designates as the ground of the motion errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion.

*S. G. Murray and Robinson & Stapleton*, for appellants. *Geo. W. Reeves, Thos. C. Marshall, and Woody & Webster*, for respondent.

**HARWOOD, J.** The appeal herein is from an order overruling defendants' motion for a new trial. The cause of action alleged by plaintiff is to the effect that defendants, during the year 1889, wrongfully diverted and deprived plaintiff of the use of 550 inches of the waters of Burnt Fork creek, claimed by plaintiff, by virtue of prior appropriation and use, for the purpose of irrigating plaintiff's tract of 320 acres of land situate in Missoula county. The relief demanded by plaintiff is: (1) The recovery of \$2,000 damage alleged to have been sustained by reason of such wrongful and continued diversion of said water during the year 1889; (2) that defendants be perpetually enjoined from further interference with plaintiff's alleged water-right. A jury trial was had, which resulted in a verdict in plaintiff's favor, to the effect that he was entitled to 550 inches of the waters of Burnt Fork creek, as against all

of the defendants; and that plaintiff had suffered damage in the sum of \$1,535.88 by reason of defendants wrongfully depriving plaintiff of the use of said waters during the year 1889; which damage was apportioned against 12 defendants in divers sums, found by the jury, and set forth in the verdict. The grounds upon which a new trial is sought, as recited in the notice of intention to move therefor, are: "(1) Errors of law committed and occurring at the trial of said cause, duly excepted to; (2) insufficiency of evidence to justify the verdict of the jury; (3) that the verdict is contrary to law, (4) excessive damages." Motion for new trial was made upon a statement of the case, and upon the hearing thereof was overruled. Thereupon defendants appealed from the order overruling the motion.

The points presented by appellants' brief for consideration here are far more numerous than the exceptions saved and the specification of error comprised in the record. We must confine our review to the record in this respect. Code Civil Proc. § 298. The first assignment of error met with in the record relates to certain instructions given by the court to the jury. It is contended by appellant's counsel that the court erred in giving a certain instruction as to points to be considered by the jury in ascertaining the quantity of water plaintiff was entitled to. The instruction cited and complained of reads as follows: "The extent of the appropriation of water is determined by the capacity of his head-gate and ditches and the quantity of water required by the appropriator for the uses for which it may be appropriated. In this action plaintiff seeks to establish his claim to the waters of Burnt Fork creek to the extent of 550 inches, measured as the statutes of Montana require, and which is hereafter given."<sup>1</sup> Appellants' counsel contend that "the test is not the head-gate, but what the ditch will carry." We perceive no force in this contention. The head-gate is in one sense a part of the ditch, and at the same time is so devised as to conduct the water through such an aperture as to indicate the dimensions of the volume. The court said to the jury in the instruction that the "capacity of the head-gate and ditches" must be considered in determining the quantity of water to which the appropriator was entitled. The sense in which the observation is made is obvious, and is free from error.

Appellants further complain of the modification of a certain instruction in the following respect: The court gave the jury an instruction as follows: "That in determining the amount of the water plaintiff is entitled to you are instructed to find the same in inches, measured in the manner provided by the laws of Montana for the measurement of water, and which is as follows." This instruction continues to give in detail and by illustration the unit of measurement of water appropriated, as provided by statute. Comp. St. p. 997, § 1262. So far no complaint is made against this instruction. But it appears that, as

originally drawn, it contained a clause as follows: "In order for you to find the amount of water plaintiff is entitled to, the evidence and your finding must conform to the above manner of measurements, and, if the evidence does not, it is only speculative and uncertain." This clause was stricken out, and the instruction, as thus modified, was given. The striking of said clause out is assigned by appellants as error. In the same instruction the court had told the jury that in finding the quantity of water to which the plaintiff was entitled the same must be estimated according to the unit of measurement prescribed by statute. Language to the same effect had been used in the other instruction, quoted above. So that the portion of the clause stricken out which related to the unit of measurement by which the jury should estimate the quantity of water plaintiff was entitled to was only a repetition of what had already been given. The other part of the clause stricken out relates to the weight which the jury should give to evidence. We think that was properly stricken out. The jury were the judges of the weight to be given to evidence. The capacity of plaintiff's ditches and the dimensions of the head-gates were questions of controversy upon the trial. Some witnesses, after testifying as to their experience in measuring water for irrigating purposes, and their knowledge of the ditches in question, said they could state the capacity of said ditches from their knowledge of the same and their experience in measuring water, and such testimony was allowed. Other witnesses testified to having measured the head-gates and examined the ditches for the purpose of estimating the capacity thereof, and stated to the jury the dimensions. The jury was then instructed as to the statutory unit of measurement which the jury should apply in estimating the plaintiff's water-right. The jury were the judges as to the weight of the testimony, and we think the clause in said instruction was properly stricken out, for the reason that all that it properly expressed had already been given; and that it contained expressions as to the weight due to evidence in the estimation of the jury, which was improper.

Appellants assign two other points, wherein they allege the court erred in refusing to give certain instructions asked for on their behalf, relating to the measure and manner of estimating damages resulting from diverting and depriving plaintiff of the water to which he claimed title. By a careful review of the instructions given, we find that the court embodied in the instructions given substantially all of the unobjectionable portions of the instructions mentioned which appellants proffered, and which were by the court refused.

Passing from assignments of error in relation to the giving and refusing to give instructions to the jury, we find that all other specifications set forth in the record relate to "particulars in which the evidence is insufficient to justify the verdict." Section 298, Code Civil Proc. These latter specifications assert in effect the proposi-

<sup>1</sup> Comp. St. Mont. p. 997, § 1262.

tions, which will be treated in the order stated, as follows:

1. That the evidence introduced on the part of plaintiff as to the capacity of his ditches was too uncertain to justify the finding of the jury in that respect; and that the evidence introduced on the part of the defendants as to the capacity of plaintiff's ditches "was certain and definite." A study of the evidence presented by the record shows that witnesses for the respective parties had made examinations and measurements of the plaintiff's ditches and head-gates, and stated to the jury the dimensions and capacity thereof. As often occurs in controversies, there is considerable difference in the statement of witnesses for the respective parties as to the capacity of plaintiff's ditches. It was the province of the jury to pass upon the credibility of witnesses and the weight of testimony and make a finding. It has often been announced by this court that where there is evidence to support the verdict the same will not be disturbed because there is conflicting testimony upon the subject. *Lincoln v. Rodgers*, 1 Mont. 217; *Toombs v. Hornbuckle*, Id. 286; *Ming v. Truett*, Id. 322; *Travis v. McCormick*, Id. 347; *Territory v. Reuss*, 5 Mont. 606, 5 Pac. Rep. 885; *Ramsey v. Cattle Co.*, 6 Mont. 498, 13 Pac. Rep. 247.

2. That the evidence is insufficient to sustain the verdict, because uncontradicted testimony on behalf of defendants showed that defendants did not continually use the water in controversy; but used the same only at certain specified periods of time, "and that defendant Julian used the same only three days altogether." As to defendant Julian, the record shows that only nominal damages were assessed against him. The admission as to his having used said water three days, if the same belonged to plaintiff, is sufficient, without question, to sustain the nominal damage assessed. But it is not to be inferred from the above observation that we hold that such interference with the plaintiff's right to the use of water, without his consent, for that period of time, might not sustain a greater amount of damage than that assessed against defendant Julian. We do not understand that the period of time during which one's right is invaded and he is deprived of the exercise thereof is the only criterion by which the damage is to be estimated. The effect which necessarily resulted from the act is to be considered, and it would without doubt be correct to measure the damage according to the real injury wrought, rather than the time occupied by the wrongful act. These observations apply to the other defendants, as well as to Julian. The period of time during which defendants deprived plaintiff of the use of said water may have been all that was necessary to effect the loss that he complained of, and, if such effect was consummated by the wrongful act or resulted as a consequence thereof, the defendants would be bound to answer in damages therefor, notwithstanding there was some intermission of the wrongful conduct.

3. That the verdict awarding the plaintiff damage is not sustained by the evi-

dence, for the reason that the evidence as to the amount of damage sustained by plaintiff, by reason of being deprived of the use of said water, was too indefinite and uncertain to justify the verdict of the jury in that respect. In this connection appellants specify that the proper measure of damage was the net profit which plaintiff would have realized from the production of his land had the same been irrigated, after deducting the expense necessarily involved in raising and marketing the same; "and there was no evidence before the jury as to the cost of seed, planting and hauling said crop to market, which items should have been deducted from the value of the crop." The record, as we read it, shows a state of facts contrary to appellants' assertions in the specification last mentioned. It appears from the record that plaintiff had appropriated his land for certain purposes by sowing and planting. Evidence was introduced on behalf of plaintiff tending to prove that, had defendants not interfered, and diverted said water belonging to plaintiff, he would have had enough to properly irrigate and bring to maturity the crops which he had planted, with a result as to harvest that season averaging with other crops of the same species on like quality of land, and under other like conditions, as would have existed as to plaintiff, had not defendants interfered and deprived plaintiff of said water. Evidence was introduced not only as to the value of all such crops as plaintiff had devoted his land to, but also as to the expense of planting, raising, harvesting, and marketing such crops. It appears that the case was reopened for the purpose of introducing evidence of such expenses. This testimony tends to prove the very items which appellants assert should have been in evidence before the jury. The court instructed the jury that in estimating damages they should "deduct the amount of expense necessary to mature, harvest, and prepare for market, and put on the market," such crops. This was in harmony with the proposition which appellants insist upon. It is unnecessary here to decide the question as to whether proof in detail of all such items should be required in such a case. If witnesses testify as to what amount of damage resulted from the destruction of a certain thing, measuring the damage in money, the witnesses are subject to all proper inquiries as to how they arrive at the value stated, as to whether or not expenses involved in connection with the subject have been considered in arriving at the value or damage stated, and all other pertinent inquiries would be proper; and, if a witness states a fact which is the result of considering several conditions to arrive at a truthful statement, is it not to be presumed that such conditions have been considered by the witness? At any rate, as before observed, the witness may be questioned as to whether or not he has considered in detail the conditions or circumstances which affect the fact stated. *Ellis v. Tone*, 58 Cal. 289. Counsel for appellants, in their brief, present a number of questions, which cannot be considered because no specifica-

tion of errors in such matters is found in the record. Code Civil Proc. § 298. We have carefully considered all questions presented by counsel founded on the errors in law and particulars of insufficiency of evidence, set forth in the record, and find no error therein. The verdict of the jury appears to be fully sustained by the evidence. The order overruling defendants' motion for new trial is affirmed, with costs.

BLAKE, C. J., and DE WITT, J., concur.

(46 Kan. 175)

RORK v. BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY *et al.*

(*Supreme Court of Kansas*. April 11, 1891.)

ERRONEOUS TAX CERTIFICATES—REFUNDING—RUNNING OF STATUTE OF LIMITATIONS.

1. Where a person holding a tax-sale certificate presents the same in proper time to the board of county commissioners of the county where it is issued, and asks for the refunding (payment back of the taxes, interest, etc.) of such certificate, and the certificate is so erroneous or irregular that the land or lot therein described ought not to be conveyed, the board should discover the errors or irregularities, and order the county clerk not to convey the land or lot. Paragraph 6999, Gen. St. 1889.

2. Paragraph 6999, Gen. St. 1889, does not affect materially any of the substantial rights of persons holding tax certificates issued prior to its adoption. The amendment simply gives new direction for the return of the money to the holder of erroneous or irregular tax-sale certificates.

3. A person cannot prevent the operation of the statute of limitations by delay in taking preliminary action incumbent upon him. *Railroad Co. v. Burlingame Tp.*, 36 Kan. 628, 14 Pac. Rep. 271.

4. Where the owner of tax certificates, which are so erroneous or irregular upon their face as to be absolutely void, or where the tax proceedings in the public offices of the county show clearly that the tax certificates, on account of fatal errors or irregularities in the tax proceedings, are wholly void, the purchaser thereof, in order to refund the same, (obtain a return of his taxes, interest, etc.,) must present them to the board of county commissioners within three years after the date of their issue.

(*Syllabus by the Court.*)

Error from district court, Douglas county; N. T. STEPHENS, Judge.

On October 6, 1879, William E. Rork filed with the board of county commissioners of Douglas county his bill for the refunding of certain tax-sale certificates. On July 1, 1880, he filed an amended bill of particulars covering 30 items of claim. On November 3, 1880, the matter came up for hearing before the board of county commissioners, and the same was denied and rejected. Thereupon Rork appealed to the district court of Douglas county, and on December 1, 1880, filed his appeal-bond. The condition of his appeal-bond was as follows: "That whereas, William E. Rork, minorson and heir at law of Carrie L. Rork, deceased, by his next friend, W. S. Warner, has appealed from the decision of the board of county commissioners of the county of Douglas, made by said board on the 3d day of November, 1880, in the matter of certain items of his claim filed in the clerk's office of said county on October 6, 1879, specifically set out in his

application, filed in said office on July 1, 1880, to the district court of said county: Now, if the above William E. Rork aforesaid, by his next friend aforesaid, shall prosecute faithfully his appeal, and pay all costs that may be adjudged against him, then the above obligation shall be void, else to remain in full force and virtue." At the April term of the district court for 1881, upon the application of Rork, G. W. Spaulding, administrator of the estate of Carrie L. Rork, deceased, was made a party defendant. On the 24th day of March, 1882, Rork filed an amended petition in which he alleged, among other things, "that he is the sole heir at law of Carrie L. Rork, deceased, and that Carrie L. Rork was in her life-time the owner of certain tax-sale certificates issued by the county treasurer of Douglas county to her and to her assignors, as purchasers of certain real estate, at tax-sales for delinquent taxes, as hereinafter particularly enumerated and set forth; and for his several causes of action he says, [here are set forth the various defects in said 30 tax-sale certificates.] And the said plaintiff alleges that the said G. W. Spaulding is the administrator of the estate of the said Carrie L. Rork, deceased, duly appointed by the county court of Outagamie county, in the state of Wisconsin, and qualified according to law; and the said G. W. Spaulding, as such administrator, has or claims some interest in the several tax-sale certificates, and the said plaintiff asks that he shall show his interest in or claim to the same, or any part thereof. Wherefore your petitioner prays this honorable court to order the county clerk of said county not to convey the several tracts and parcels of land hereinbefore described, (because of the alleged errors and irregularities set out,) under and by virtue of any of the sales, respectively, hereinbefore set out; and for such other and further order and relief in the premises as may be necessary to enable your petitioner to have refunded to him, by the county treasurer of said county of Douglas, the several amounts and sums of money hereinbefore mentioned, with interest as provided by law in such cases. And your petitioner will ever pray." On September 13, 1882, the board of county commissioners filed an answer to the amended petition, containing a general denial. On September 13, 1882, G. W. Spaulding, administrator of the estate of Carrie L. Rork, deceased, filed an answer in the nature of a disclaimer. Trial had at the October term of the court for 1882 before the court, a jury being waived. Evidence was offered tending to show that (1) the tax-sales were illegal and void, for there was included in each of the certificates a charge for advertising in excess of the fee paid by the county therefor,—this ground applied to all of the 30 causes of action; that (2) certain of the parcels of land had been previously sold to the county, for unpaid taxes and charges assessed thereto, and had not been redeemed from such prior tax-sales, nor sold by the county, nor had the tax-sale certificates issuable to the county been assigned prior to the time the refunding was applied for,—this ground applied

to the causes of action from 1 to 15, inclusive; and that (8) certain of the parcels of land were not described on the tax-roll, nor on the tax-sale record, nor in the tax-sale certificates, with sufficient particularity to define what was sold, or intended to be sold, at the tax-sales under which the refunding was applied for,—this ground applied to the causes of action from 16 to 30, inclusive. After the evidence had all been produced, the cause was continued for argument from time to time until the April term of the court for 1884. On the 18th day of July, 1884, the court made a general finding in favor of the board of county commissioners, and entered judgment that plaintiff pay all the costs, taxed at \$19.90. Subsequently the plaintiff filed a motion for a new trial, which was overruled. The plaintiff excepted, and brings the case here.

*O. A. Bassett*, for plaintiff in error. *J. W. Green* and *John Q. A. Norton*, for defendants in error.

**HORTON, C. J.,** (after stating the facts as above.) It is contended upon the part of the defendants—*First*, that the petition of plaintiff filed in the court below does not state a cause of action in his favor against the board of county commissioners of Douglas county; *second*, that, if plaintiff ever had a cause of action against the board of county commissioners, it is barred by the statute of limitations. The amended petition of plaintiff contains 30 causes of action. They are all of the same general tenor. They allege—*First*, ownership of certificates; *second*, a sale of lands by the county treasurer of Douglas county, and issue of tax-sale certificates to purchaser; *third*, the illegality of the tax-sale certificates, and the facts showing why the tax-sales were illegal, to-wit, imperfect descriptions of land, illegal charges for advertising the land, and certificates outstanding in the county at the time of the sales. The petition closes as follows: "Wherefore your petitioner prays this honorable court to order the county clerk of said county not to convey the several tracts and parcels of land hereinbefore described, (because of the alleged errors and irregularities set out,) under and by virtue of any of the sales respectively hereinbefore set out, and for such other and further order and relief in the premises as may be necessary to enable your petitioner to have refunded to him, by the county treasurer of said county of Douglas, the several amounts and sums of money hereinbefore mentioned, with interest as provided by law in such cases." The tax-sale certificates described in the petition were signed and issued by the county treasurer of Douglas county in 1870, 1871, 1872, 1873, and 1874. The statutes relating to the refunding the amount paid upon tax-sale certificates, when errors or irregularities are discovered, so that the land sold at the tax-sales ought not to be conveyed, are as follows: Section 120, c. 107, p. 1058; Gen. St. 1868; section 145, c. 34, p. 96, Sess. Laws 1876; section 145, c. 107, p. 2137, Gen. St. 1889. A careful comparison of these statutes will aid in determining the questions involved. St. 1868, p. 1058: "Sec.

120. \* \* \* And if, after any certificate shall be granted upon such sale, the county clerk shall discover that, for any error or irregularity, such land ought not to be conveyed, he shall not convey the same; and the county treasurer shall, on the return of the tax certificate, refund the amount paid therefor on such sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, out of the county treasury, with interest on the whole amount at the rate of 10 per cent. per annum." Laws 1876, p. 96: "Sec. 145.

\* \* \* And if, after any certificate shall have been granted upon any sale, the county clerk shall discover that, for any error or irregularity, such land ought not to be conveyed, he shall not convey the same. And the county treasurer shall, on the return of the tax certificate with the refusal of the county clerk indorsed thereon, refund the amount paid therefor on each sale, and all subsequent taxes and charges paid thereon by the purchaser, or his assigns, out of the county treasury, with interest on the whole amount at the rate of ten per cent. per annum." Gen. St. 1889, p. 2137, par. 6999: "Sec. 145. \* \* \* And if, after any certificate shall have been granted upon any sale, the board of county commissioners shall discover that, for any error or irregularity, such lands or lots ought not to be conveyed, they may order the county clerk not to convey the same; and the county treasurer shall, on the return of the tax certificate, with a certified copy of such order of the board of county commissioners, refund the amount paid therefor on such sale, and such of the subsequent taxes and charges paid thereon by the purchaser, or his assigns, as may be so ordered by the board of county commissioners, out of the county treasury, with interest on the amount so ordered refunded at the rate of ten per cent. per annum. \* \* \*

It is claimed upon the part of the defendants that the petition of plaintiff is insufficient, because the tax certificates can only be refunded under the provisions of the statute in force at the time of the tax-sales. This is the statute of 1868. This claim is answered adversely by the decisions of *Commissioners v. Goddard*, 22 Kan. 389, and *Commissioners v. Faulkner*, 27 Kan. 164. The amendments to the statute of 1868, by the statutes of 1876 and 1889, do not "affect any right which accrued under any prior statute, but simply give new direction for the return of the money." We think, if fatal errors or irregularities actually exist, so that the land or lot described in a tax-sale certificate ought not to be conveyed, and the certificate is presented in proper time, that it is the duty of the board of county commissioners to discover them, when their attention is especially called thereto, and that they have not the option to purposely refuse to discover such fatal errors or irregularities. *Commissioners v. Goddard*, supra.

The contention that the claim or claims of the plaintiff were barred by the statute of limitations is of much force. If not barred by the two-years statute of limitations, (paragraph 1676, Gen. St. 1889,)

then they were barred by the three-years statute of limitations. Section 18, subd. 2, Civil Code; *Richards v. Board*, 28 Kan. 326. The record shows that this action was commenced on October 6, 1879, and all of the tax-sale certificates were issued more than five years prior to that date. In *Commissioners v. Goddard*, supra, it is said that "a purchaser at a tax-sale is a mere volunteer in the payment of the tax. Buying, as he does, property from a person who is not the owner, such party comes strictly and rigidly within the rule of *caveat emptor*. He has the same means of knowing whether the proceedings relating to the assessment of the taxes, the tax-sale, and the issuance of the certificate are valid or not, as the county has, and he is bound to inquire whether the officers have authority to make the sale. As all the proceedings are matters of record, it is not only prudent for such a purchaser to examine into the matter for his own safety; but, if he fails to inform himself of the authority of the officers, he does so at his own risk, excepting that he may have his money refunded where the statute expressly makes such provision, if he pursues the remedy pointed out. The officers of a county can only act in accordance with positive law, and neither the board of commissioners nor the county treasurer can refund any moneys upon the failure of tax-titles, except as some statute requires it." In *Sullivan v. Davis*, 29 Kan. 28, it is said: "Except as limited and qualified by express statutory provisions, the rule of *caveat emptor* applies to all purchases at tax-sales, and if the public has nothing to sell the purchaser gets nothing; so, also, the risk of all mistakes is with the tax purchaser." It was decided in *Railroad Co. v. Burlingame Tp.*, 36 Kan. 628, 14 Pac. Rep. 271, "that a person cannot prevent the operation of the statute of limitation by delay in taking action incumbent upon him." It was also said in that case that "to permit a long and indefinite postponement would tend to defeat the purpose of the statutes of limitation, which are statutes of repose, founded on sound policy, and which should be so construed as to advance the policy they were designed to promote." If the plaintiff could delay the presentation of his certificates to the board of county commissioners for five years, then he could delay for ten, fifteen, or any indefinite period of time. He should have presented his tax certificates to the board of county commissioners "for refunding" (for the return of his taxes, interest, etc.) before the expiration of three years after their issue. This he failed to do, and he also failed to allege any reason or excuse for his delay. In the case of *Commissioners v. Young*, 18 Kan. 440, the "error or irregularity" actually "discovered" by the county clerk was probably and presumably one of fact. It consisted in supposing that the land did not belong to the United States, and that it was taxable, while in fact the land did belong to the United States, and was not taxable. Such an "error or irregularity" is a mistake of fact. In that case, unlike this, the errors or irregularities in the tax certificates were not matters of

record in the offices of the county clerk or county treasurer, and in that case, until the owner of the tax certificate had ascertained that the land belonged to the United States when it was taxed, he did not know, and could not have known, of any error or irregularity to be discovered. In this case the fatal defects in the tax certificates were known, or ought to have been known, by the owner of the same for more than five years before he took any preliminary or other steps to obtain a return of his taxes, interest, etc. In *Richards v. Board*, supra, it was necessary for the party to determine whether the Indian title to the lands had been extinguished,—a matter which he could not ascertain from the public records of the county, or from any records within his control. The liability of the county to refund the taxes is a statutory liability, and in order that it shall be liable the plaintiff was bound to take some action within a reasonable time, and he should have acted more promptly. Before the county could be made liable, the certificates must have been presented, and some act on its part committed, or some failure to perform some act imposed by law. But the plaintiff failed to act promptly or in any reasonable time. *Railroad Co. v. Burlingame Tp.*, supra; section 18, subd. 2, Civil Code; section 138, Comp. Laws 1879; paragraph 6991, Gen. St. 1889. The judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 714)

INTERSTATE CONSOLIDATED RAPID TRANSIT RY. CO. v. SIMPSON et al.

(Supreme Court of Kansas. April 11, 1891.)

EMINENT DOMAIN—COMPENSATION—BENEFITS.

1. Where a right of way for a railroad is condemned through a tract of land, the owner's damages cannot be diminished by any benefits likely to accrue from the construction of the railroad to that portion of the tract not taken. *Railroad Co. v. Ross*, 40 Kan. 598, 20 Pac. Rep. 197.

2. Errors that are not prejudicial will not warrant the court in disturbing the verdict.

(Syllabus by the Court.)

Error from district court, Wyandotte county; O. L. MILLER, Judge.

*Warner, Deun & Hagerman* and *I. J. Ketcham*, for plaintiff in error. *Alden & McGrew* and *Stevens & Stevens*, for defendant in error.

JOHNSTON, J. This was an appeal from an award made by commissioners appointed at the instance of the railway company to condemn lands of the defendants in error taken as a right of way for a railroad. In the district court the amount of the award was increased, and the railway company complain of the rulings and result of that trial. There are numerous errors assigned, but we find nothing substantial in any of them. It is insisted at length that the court erred in excluding from the consideration of the jury all benefits accruing to the land-owners by reason of the establishment of the road. It is conceded that, under the constitutional provision ordaining that full compensation shall be made to the land-



owner without regard to benefits, neither general nor special benefits can be deducted from the value of the land actually taken. But it is contended that this restriction does not extend to the residue of the land; and as to that the special benefits resulting from the construction of the road may be set off against the damages, and that the measure of damages done to the remainder of the land is its value after deducting benefits. This particular question has recently received the consideration of the court, and it determined that no benefit resulting from the construction of the road could be considered or deducted from the damages sustained by the land-owner. *Railroad Co. v. Ross*, 40 Kan. 598, 20 Pac. Rep. 197.

Complaint is made of several rulings of the court in sustaining objections to questions asked upon cross-examination. It came out during the trial that the defendants in error had offered to give a strip of land through their property for the purposes of a public street, upon certain conditions, and inquiries were made of several witnesses in regard to the conditions of the proposal, and the reason for its non-acceptance. In most cases the objections to the questions were properly sustained, because they were not proper on cross-examination. It is difficult to see the importance or materiality of such testimony, as it appears that the land was not given for a street, but still remained the property of the defendants in error when the condemnation proceedings were had; and, if there was any materiality in the testimony, it was subsequently fully developed by W. A. Simpson, who testified in behalf of the defendants in error as to the proposal, with all its conditions. The court also excluded testimony in regard to the action of some of the defendants in error in having the property stricken from the tax-roll upon the theory that it was a public street. As the land was not a public street, but belonged to the defendants in error, their action in that regard would not prevent them from recovering the value of their land appropriated by the railroad, and any damage done to the same. The court made no mistake in excluding the testimony. Some of the questions asked upon cross-examination, in regard to statements made to officers of the railroad company respecting the street, might properly have been answered, but they are not sufficiently material to warrant us in disturbing the judgment. The judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 716)

KANSAS (ENT. R. CO. v. BOARD OF COUNTY COM'RS OF JACKSON COUNTY.)<sup>1</sup>

(Supreme Court of Kansas. April 11, 1891.)

ESTABLISHMENT OF HIGHWAY—CROSSING RAILROAD TRACK—DAMAGES.

Where a public highway is located and established across a railroad company's right of way, the railroad company is entitled to just compensation for all its necessary expenditures in constructing cattle-guards, and such other things as are required by the statutes to be con-

structed by the railroad company by reason of the highway. *JOHNSTON, J.*, dissenting.

(Syllabus by the Court.)

Error from district court, Jackson county, *ROBERT CROZIER, Judge.*

*A. L. Williams, Charles Monroe, and R. W. Blair*, for plaintiff in error. *Rafter & Robinson*, for defendant in error.

*VALENTINE, J.* The present case, as made in the district court and brought to this court, is a model of brevity, containing only two pages as copied by a typewriter, and yet it contains all that is necessary to present the questions sought to be presented by the parties. It appears that the Kansas Central Railroad Company, which is the plaintiff in error and was the plaintiff below, is a railroad corporation of this state; that a public county road was legally laid out and established across its right of way; that at the time this was done the railroad was operated by the Union Pacific Railway Company, another duly-organized railroad corporation of this state, as lessee; that no notice was ever given to the plaintiff with respect to any of the proceedings for the establishment or creation of this highway prior to its creation, though a proper notice was given to the Union Pacific Railway Company with respect thereto. Within 12 months after the location of this highway the plaintiff filed with the board of county commissioners of Jackson county, which is the defendant in error, and was the defendant below, its application for damages claimed to have been sustained by reason of the location and opening of the aforesaid road, which application was in due form, and for an amount exceeding \$150. The application was refused, and the plaintiff in due time appealed to the district court, where the case was tried before the court without a jury. "Upon the trial it was agreed by the parties that it would cost the plaintiff the sum of \$150 to put in, at said crossing, the cattle-guards, fences, crossing planks, crossing signs, and whistle posts, as required by the laws of Kansas to be put in by the railroad company at every highway crossing of a railroad in the state of Kansas; and that, if the plaintiff was entitled to recover damages, judgment should be for \$150. It was admitted by the parties on the trial that the plaintiff is a railway corporation, duly created and existing under the laws of the state of Kansas, and had lawfully condemned the right of way for and built and completed its railway at the place where this highway crosses its track prior to the location of such highway; that plaintiff's railway is operated by the Union Pacific Railway Company, a corporation duly organized, which is the lessee of the Kansas Central Railroad Company. It was also proved on the trial that no notice of the meeting of the viewers to lay out said road was ever served upon the plaintiff, or any of its agents, and that no copy of such notice was on file in the office of the clerk of Jackson county. All the facts hereinbefore stated were agreed upon by the parties at the trial." Upon these facts the court below found generally in favor of

<sup>1</sup>Petition for rehearing pending.

the defendant, and against the plaintiff, and rendered judgment accordingly; and the plaintiff, as plaintiff in error, brought the case to this court for review.

We think the court below erred in its findings and judgment. A railroad company's right of way is property; an estate in land; the dominant estate securing to the railroad company the exclusive right to the occupancy, use, and control of the property as against all persons except the owner of the fee; and the paramount right to such occupancy, use, and control, even as against him. *Railway Co. v. Allen*, 22 Kan. 285. In all cases where a railroad company procures its right of way under the authority of the state, in the exercise of its sovereign power of eminent domain, by what are usually termed "condemnation proceedings," the railroad company pays to the owner of the land the full value of all the land actually taken, and full and complete compensation for all the losses or damages which might result to the remainder of the owner's land, and both such value and compensation are paid by the railroad company irrespective of any benefit, or supposed benefit, which might result to the owner of the land from the construction or the operation of the railroad. *Railroad Co. v. Ross*, 40 Kan. 598, 20 Pac. Rep. 194; *Interstate Con. R.T. Ry. Co. v. Simpson*, ante, 393, (just decided.) And the railroad company in paying this value and for these damages always pays largely more in the aggregate than the land actually taken is worth,—sometimes 10 or 20 times more than it is worth. And while the railroad company procures its right of way through the intervention of the state in the exercise of its sovereign power of eminent domain, and procures the same ostensibly for public purposes—and land can never be taken under such power for any other than a public purpose,—yet the railroad company alone pays for such right of way, and sometimes, as before stated, pays an amount aggregating 10 or 20 times more than the land actually taken is worth. And, although the property is taken ostensibly for a public purpose, yet all the authorities agree that the railroad company, by procuring its right of way and paying for it, procures an actual, individual, private right,—an easement,—and an estate paramount to the rights or interests of all others except the right of the state to again subject the land to be taken under the power of eminent domain. The railroad company in such a case is the dominant owner, and the owner of the fee is only a servient owner. It therefore necessarily follows that any person who should interfere with the railroad company's occupancy, use, or control of its right of way, except with the authority of the railroad company, or in subserviency to its rights, or under the sovereign power of eminent domain, would be a trespasser liable to the railroad company for all damages that might result from the trespass. And it would also seem to follow that where the interference is under the sovereign power of eminent domain, and the railroad company sustains substantial loss from such interference, the railroad

company would be entitled to just compensation for all such loss. Certainly, whenever the railroad company's right to the exclusive occupancy, use, and control of its right of way is interfered with permanently under the power of eminent domain, something is taken from the railroad company. Of course, it is not the fee in the land that is taken, for the railroad company does not own the fee, nor is the fee under our present laws ever taken from any one under the power of eminent domain. What is taken in such a case is a portion of the railroad company's exclusive right to the occupancy, use, and control of its right of way, a part of its easement, and making it a tenant in common with some other person, corporation, or the public. This is certainly a taking of something from the railroad company which is valuable. It is a taking of a portion of the railroad company's estate for which it has paid full and ample compensation, and for the taking of which it is entitled to compensation. Where a railroad company is compelled by condemnation proceedings to surrender the use of a portion of its right of way in part to another railroad company, all the authorities agree that something is taken from the railroad company, and that just compensation should be awarded to it. And nearly all the authorities agree that where the railroad company is compelled to surrender the use of a portion of its right of way in part to the public for a public highway, something is again taken from it for which it is also entitled to fair and just compensation. It is true that where a highway is established by proper authority across a railroad company's right of way without at all interfering with the company's use of its right of way, and without requiring the company to be at the expense of constructing crossings or cattle-guards, or erecting fences or signs or whistle posts, or being at any other expense or suffering any substantial loss, no compensation can be allowed; but, where any real or substantial loss is suffered or damage sustained, the railroad company may have adequate compensation. In *Mills*, Em. Dom. § 33, the following language is used: "Sec. 33. The laying of a highway across a railroad track is considered an additional burden in those states where the law imposes upon the railroad company the additional expense of erecting and maintaining signs at the crossings, or erecting and maintaining cattle-guards, and of flooring the crossings and keeping the planks in repair. These expenses, being directly imposed, must be paid for. In New York and Pennsylvania the laying of highways across the tracks of railroads may be done without compensation, and the railroad company may be compelled to make the necessary excavations, embankments, and bridges to safely accommodate the highway. This authority would not include the opening of roads through grounds used for necessary buildings, yards, etc., although it was suggested in Pennsylvania that a street might be opened through depot grounds, and that the wisdom of such action could not be

questioned by courts." In *Lewis, Em. Dom.* § 491, the following language is used: "In New York a statute has been held valid which authorizes the laying out of highways over the tracks of a railroad without compensation, and although it compelled the railroad company to make the necessary excavations or embankments to take the highway across. This is put upon the reserved power to repeal, alter, or amend the incorporation acts. The act in question only provided for crossing the 'track' of any railroad, and it was not held to apply to grounds taken for a station house, etc., or to tracks used simply for storing cars. Substantially the same ruling has been made in Maine, though the right to repeal, alter, or amend the charter was not reserved. In other states it is held that, in such cases, the railroad company is entitled to compensation for taking its land for a highway subject to its right to use the same for railroad purposes, and to such a sum as will enable it to make and maintain the crossing, with suitable signs, cattle-guards, planking, etc. Nothing can be allowed on account of the possibility of the company being compelled to pay damages for accidents at the crossing, and evidence of what the company has paid for accidents at other crossings is incompetent. Nor can anything be allowed for the expense of ringing a bell at the crossing, nor in view of the contingency of its having to build a bridge." In *Redf. R. R.* (6th Ed.) \*40, No. 13, the following language is used: "A railway corporation is entitled to damages for land taken by laying a public highway across its line, and for the expense of maintaining signs and cattle-guards at the crossing, and of flooring the same, and keeping it in repair; but not for any increased liability to accidents, for increased expense of ringing the bell, or its liability to be ordered by the county commissioners to build a bridge for the highway over the track. And in assessing damages, in such a case, no supposed benefits from an increase of travel on the railway can be set off against the company." In *Pierce, R. R.* p. 193, the following language is used: "The laying out of a highway across land of a railroad company which is used for a station, or for other purposes than a right of way, is a taking of its property entitling it to compensation. So, also, it is entitled to compensation where the highway appropriates lengthwise a part of its right of way. The laying out of a highway across the company's track, without further interference with it, is, however, not a taking of its property. The state, in authorizing the crossing, simply regulates and adjusts private rights with reference to public interests, and exercises its reserved police power. The crossing should be laid in a manner to cause as little injury as possible to the previous use, and the railroad company is entitled to compensation where the crossing is so constructed as to result in serious inconvenience." In 6 *Amer. & Eng. Enc. Law*, pp. 554, 555, the following language is used: "When a highway is laid out by the proper authority across a railroad company's right of way,

this is not such a taking of property as entitles the company to damages; but where the company is required to erect sign-posts and maintain the crossing, there is in such case a taking for which compensation must be made. Where a railroad company constructs its track across a turnpike, compensation must be made to the turnpike company. The owner of property which abuts upon a highway cannot recover damages for the mere crossing of the highway by the tracks of the railroad; but, if his property is injured by change of grade made for the purpose of laying said track, he can recover. Where one railroad company is authorized to run its tracks over the land of another, this is a taking for which compensation must be made." Also, as in favor of the doctrine that railroad companies may recover compensation in such cases, see the following cases: *Railroad Co. v. Plymouth Co.*, 14 Gray, 155; *Crossley v. O'Brien*, 24 Ind. 325; *Railroad Co. v. City of Detroit*, 49 Mich. 47, 12 N. W. Rep. 904; *Grand Rapids v. Grand Rapids & I. R. Co.*, 58 Mich. 641, 26 N. W. Rep. 159; *Railway Co. v. Hough*, 61, Mich. 507, 28 N. W. Rep. 532; *Railroad Co. v. Deering*, 78 Me. 61, 2 Atl. Rep. 670; *Kansas City v. Kansas City Belt R. Co.*, (decided by the supreme court of Missouri, December 1, 1890,) 14 S. W. Rep. 808. The following cases possibly hold a different view: *Railway Co. v. Sharpe*, 38 Ohio St. 150; *Railroad Co. v. President*, 5 Lans. 461. In the case of *Railway Co. v. Hough*, supra, it was decided as follows: "Where a highway is laid out across a railroad, the railroad company is entitled to include in its damages to be paid by the township the expense of cattle-guards, fencing, and other outlays to complete the approaches, besides the cost of maintaining them; and a statute which imposes this expense upon the railroad company is in conflict with the constitutional provision forbidding the taking of private property without just compensation."

The principal objections urged against the right of the railroad company to receive compensation for its losses, in cases where a public highway is laid out across its track, are the following: *First.* It is claimed that the railroad company obtains its right of way through the intervention of the state, and by the exercise of the state's sovereign power of eminent domain, and therefore it must be presumed that the state reserves to itself the right, or, in other words, creates the right, to take a portion of such right of way at any time afterwards for any other public purpose, without any compensation to the railroad company. *Second.* It is also claimed that no substantial damages are suffered by the railroad company except by its expenditures in the construction of cattle-guards, fences, signs, etc.; and that the duty of constructing these things are imposed upon the railroad company under the police power of the state, and therefore that the railroad company cannot receive any compensation for their construction.

It is true the railroad company obtains its right of way under the authority of the state, and by virtue of the exercise of the

sovereign power of eminent domain; but the railroad company pays for all the property which it procures, and the state pays nothing. Indeed, as a general rule, the railroad company pays vastly more than all the property which it actually receives is worth, paying not only the actual value of the land taken, but also all the damages supposed to result to that not taken; and all this without deducting anything for benefits received; and no one else pays anything. Of course, the state continues to hold the power to take the property again for some other public purpose, as for a right of way for another railroad company or for a public highway; for this power, that is, the power of eminent domain, is inherent in the state, inalienable, permanently existing, inexhaustible, and extends to all property, and the state could not deprive itself of such power by anything it might do. But there is nothing in law or in reason that would even intimate that the state would desire to retake the property for another public purpose without fair compensation to the railroad company, even if it could do so. When the state takes a portion of a railroad company's right of way for the right of way for another railroad company or for a highway, it takes it just as it takes any other private property, and the railroad company which suffers the loss should receive just compensation.

Whether the duty imposed upon the railroad company of constructing cattle-guards, fences, signs, etc., can be or is imposed upon it under the police power of the state, makes no difference in this case. If the highway should not be established across the railroad company's right of way, then it would not be necessary for any of these things to exist; but, if a highway is so established, then the duty under the statutes immediately springs into existence, requiring the railroad to so construct these things. The establishment of the highway is therefore the cause of all these additional burdens being imposed upon the railroad company. And must the railroad company bear these burdens and suffer these losses without compensation? Why should it be treated differently from others who have interests in real estate? All others having interests in real estate are entitled to compensation for losses resulting from the location of a public highway interfering with their free and rightful use of such interests. *Commissioners v. Labore*, 37 Kan. 480, 484, <sup>1</sup> et seq. And why should not a railroad company be entitled to compensation for losses in like cases? With reference to all the public highways existing at the time when the right of way for any railroad is procured, and which might affect the location of the railroad, the railroad company has notice, and therefore has notice with reference to what cattle-guards, etc., it must construct when it constructs its railroad; and it constructs its railroad with the understanding that it must make all the necessary expenditures for the construction of such cattle-guards, etc. But with respect to highways not already established

when the right of way is procured, there can be no such understanding. We think a railroad company may recover, in a case like the present, for all expenditures it is required to make under the statutes by reason of the location of a highway across its right of way. With regard to notice, the notice to the Union Pacific Railway Company was no notice to the plaintiff. The judgment of the court below will be reversed, and cause remanded for further proceedings.

HORTON, C. J., concurs. JOHNSTON, J., dissents.

(46 Kan. 104)

BOARD OF COUNTY COM'RS OF GREENWOOD COUNTY V. KANSAS CITY, E. & S. RY. CO.

(*Supreme Court of Kansas*. April 11, 1891.)

LOCATION OF HIGHWAY—CROSSING RAILROAD TRACK—DAMAGES.

1. Where a public highway is located and established across a railroad company's right of way, the railroad company is entitled to just compensation for all its necessary expenditures in constructing cattle-guards, and such other things as are required by the statutes to be constructed by the railroad company by reason of the highway.

2. The case of *Kansas Cent. R. Co. v. Board of County Com'rs*, 45 Kan. —, ante, 894, cited and followed.

JOHNSTON, J., dissenting.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Greenwood county; A. L. L. HAMILTON, Judge.

A. M. Hunter and H. G. Jones, for plaintiff in error. Geo. R. Peck, A. A. Hurd, and C. N. Sterry, for defendant in error.

SIMPSON, C. This case was tried in the court below on the following agreed statement of facts: "That the plaintiff is now, and for more than two years last past has been, a railroad incorporation duly incorporated under the laws of the state of Kansas. That during all of said time it has been the owner of a right of way for its railroad across a part of section 31, township 25, range 11 east, in Greenwood county, state of Kansas. That its ownership of the aforesaid right of way, was created by due and legal condemnation proceedings had by it to condemn a right of way through Greenwood county, Kan., for its railroad, in accordance with the provisions of the laws of the state of Kansas, and that its only interest in the land is that acquired by such condemnation. That during the time aforesaid it has had and maintained a railroad over said right of way, which has been in and still is in operation, and that during said time it has been in the actual possession of said right of way. That in September, 1885, a road or highway, known as the 'Wackett Road,' was duly surveyed and viewed across said right of way and railroad in accordance with the provisions of law, and under due and proper proceedings and orders had and made by and before the board of county commissioners of Greenwood county, Kan. That no notice of any kind or description of the meeting of said viewers, or of the view and survey of said road, was ever served upon the plain-

<sup>1</sup> 15 Pac. Rep. 577.

tiff, or any of its agents, and that the plaintiff had no knowledge of the meeting of said viewers. That no person representing the plaintiff was present at the meeting of said viewers, at the time they viewed and surveyed said road, and no claim for damages was presented to them on behalf of plaintiff. That at the October, 1885, session of the board of county commissioners, the said road was duly and legally laid out and established by due orders, of all of which plaintiff had no knowledge; and that thereupon the said board duly and legally ordered said road to be opened. That the first knowledge plaintiff ever had of the establishing of said road, or of any proceedings for the establishment of the same, was when it was ordered by the township trustee and road overseer to open the same across its right of way, and to build and establish a crossing for the same over its railroad, after the same had been ordered opened. That, in pursuance to such notice by the township trustee and road overseer, the plaintiff built a crossing for said road, over and across its track and right of way, at the necessary expense of \$134, as follows:

For one new cattle-guard.....	\$ 65 00
For moving old cattle-guard.....	30 00
For moving fences to connect cattle-guards with fences.....	19 00
For two drain-boxes.....	20 00
	<b>\$134 00</b>

—That the viewers in viewing said road did not allow plaintiff any damages, and that within a year after the viewing of said road, and its establishment, the plaintiff caused a claim for its damages, as herein above stated, to be duly presented to the board of county commissioners of Greenwood county, Kan., at a regular session, for allowance. That the said board at such session refused to allow said claim in part or in whole, and rejected the same. That thereupon the plaintiff duly appealed from said action to the district court of Greenwood county, Kan., which said appeal constitutes this case. That, if the plaintiff is in law entitled to recover upon the facts stated, it is entitled to recover said sum of \$134. The trial court rendered the following judgment: "And now, on this 5th day of March of the January term of this court, in 1888, the above cause having been submitted to the court on agreed statement of facts here on file, and written briefs filed by counsel on each side, and duly considered by the court, the court finds for the plaintiff; and it is hereby ordered and adjudged by the court that the plaintiff recover of the defendant in the sum of \$134, and the costs of this suit, taxed at \$——, to which defendant duly excepted." All exceptions and a motion for a new trial were overruled, and the cause brought here for review.

The two questions discussed on each side are: *First*. Is a county liable in damages to a railroad company for laying out a public highway across its right of way, when that is an easement only? *Second*. Are the damages claimed too remote? This court has just decided, in a similar case,—that of *Kansas Cent. R. Co. v.*

*Board of County Com'rs*, ante, 394,—that, "where a public highway is located and established across a railroad company's right of way, the railroad company is entitled to just compensation for all its necessary expenditures in constructing cattle-guards, and such other things as are required by the statutes to be constructed by the railroad company by reason of the highway." An examination of the facts in each case will show that the only material difference in the proceedings in both cases is that in the one no notice was given to the railroad company either of the petition for or the order of the board locating the highway, and the first knowledge the railroad company had of the proceedings to establish the highway was when the township trustee ordered the railroad company to open the same across its track or right of way. In the other case the railroad was being operated by a lessee, and notice was given to the lessee, but not to the company that owned the railroad. With this difference, the cases are identical, and present the same questions. Guided by the case cited, it is recommended that the judgment of the district court of Greenwood county, in favor of the railroad company, be affirmed.

PER CURIAM. It is so ordered.

HORTON, C. J., and VALENTINE, J., concur. JOHNSTON, J., dissents.

(46 Kan. 183)

#### ROOT v. TOPEKA WATER SUPPLY CO.

(Supreme Court of Kansas. May 10, 1890.)

#### ACTION ON CONTRACT—SUFFICIENCY OF EVIDENCE.

Where a plaintiff proves a *prima facie* case, and there is no evidence on the part of the defendant rebutting said *prima facie* case, a judgment in favor of the defendant is erroneous, as being against the evidence.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

H. C. Root and Wm. P. Douthitt, for plaintiff in error. Case & Moss and Hazen & Isenhardt, for defendant in error.

STRANG, C. September 20, 1877, Hugo Felitz was the owner of lot 5, section 30, township 11, range 16, Shawnee county, Kan. October 5, 1881, he and his wife, Catherine Felitz, deeded an undivided one-half interest in said property to the Topeka Water Supply Company. January 26, 1882, said Hugo Felitz and wife deeded the remaining undivided half interest in said lot to the Topeka Water Supply Company. February 22, 1886, Hugo Felitz and wife entered into an agreement with H. C. Root and J. W. Campbell, whereby they agreed that, if said Root and Campbell would commence a suit to set aside the deeds made by Felitz and wife to the defendant, and prosecute said suit to a successful conclusion, as consideration for their services therein they would convey to said Root and Campbell an undivided half interest in lot 5, above described. Said contract was acknowledged by Felitz and wife, and immediately placed of record. March 1, 1886,

Root and Campbell commenced a suit in the superior court of Shawnee county, in the name of Catherine Feltz, to set aside the deed from her husband and herself to the defendant. The petition in said case alleged, among other things—*First*, that the land conveyed by Hugo and Catherine Feltz to the defendant by said deeds was the homestead of said Feltz and wife; *second*, that Catherine Feltz had been adjudged insane, and was insane when she executed and acknowledged the deeds made by herself and husband to the defendant company; *third*, that said deeds were obtained from herself and husband by fraud practiced by the defendant; *fourth*, that said Catherine Feltz became well and restored to her reason in 1885. January 20, 1886, the defendant company demurred to the petition of the plaintiff in said superior court, but said demurrer was never heard. August 26, 1886, Catherine Feltz, without the knowledge or consent of her attorneys, Root and Campbell, filed in said court an order dismissing said suit. September 9, 1886, the court, pursuant to said order, dismissed said case at the cost of the plaintiff therein, Catherine Feltz. December 8, 1886, J. W. Campbell and wife conveyed to H. C. Root all their interest in said lot 5. Catherine Feltz never in any way compensated Root and Campbell for their services rendered under said contract with her and her husband. April 28, 1887, H. C. Root demanded of the defendant company a deed for the undivided one-half of said lot under his contract with Catherine Feltz, and the company refused to make said deed. April 29, 1887, H. C. Root commenced his action to compel the defendant, as the grantee of Catherine and Hugo Feltz, taking subject to his interest in said land, to carry out the agreement of Catherine and Hugo Feltz made with him. In this petition, among other things, he alleges that, pursuant to the agreement between Hugo and Catherine Feltz with himself and Campbell, he instituted proceedings in the superior court to set aside the deeds made by Catherine and Hugo Feltz to the defendant, and prosecuted said suit until it was dismissed; that said suit was dismissed by agreement; that the agreement upon which it was dismissed was that the defendant therein should pay the plaintiff in said case \$390, and give her and her husband a life-lease of the land in controversy, and the plaintiff and her husband were to make a new and valid deed to said premises to the defendant, and dismiss the suit. The defendant herein demurred to the petition of the plaintiff below, which demurrer was overruled, and defendant answered, to which the plaintiff replied. The case was tried by the court without a jury, and judgment rendered in favor of the defendant. Plaintiff filed a motion for a new trial. Motion overruled, exception allowed, and the plaintiff comes here alleging that the court erred in overruling the motion for a new trial, and in rendering judgment for the defendant, when under the evidence and the law it should have been rendered for the plaintiff.

This case turns upon the character of the judgment of the superior court in dis-

missing the case therein, in which Catherine Feltz was plaintiff, and the Topeka Water Supply Company was defendant, and the effect of said judgment of dismissal upon the parties thereto and their privies. The plaintiff alleges that said judgment of dismissal was, under the circumstances under which he alleges it was made, an adjudication of the matters in controversy in favor of the plaintiff therein, Catherine Feltz,—she receiving all the fruits of a victory, and the defendant yielding the same; and that therefore he has a right to have specific performance of the contract of Hugo and Catherine Feltz with himself and Campbell enforced in this suit. Mr. Root furnishes an elaborate brief upon the character and effect of said judgment of dismissal, with a forcible argument, supported by numerous citations of authorities, while the defendant in its brief cites no authorities, and simply treats the authorities invoked by the plaintiff as not applicable to the case. It seems to us the defendant overlooked almost entirely the possible effect of the judgment of dismissal in the superior court, supplemented, as it was, by parol evidence showing, or tending to show, what the agreement between the parties to said suit was in connection with said dismissal. The plaintiff insists that said judgment of dismissal was a "dismissal agreed," and that such a judgment is *res judicata*, and the authorities cited go a long way in that direction. If such judgment is *res judicata*, what was settled thereby? It is claimed by the plaintiff that the material allegations in the petition of the plaintiff in that case were settled; that it was settled that the land in dispute, lot 5, was the homestead of the plaintiff therein and her husband when they executed the deeds conveying said lots to the Topeka Water Supply Company; that said judgment settled the fact, as alleged in said petition, that Catherine Feltz was insane when she executed the said deeds conveying lot 5 to the Topeka Water Supply Company; and that the said Catherine Feltz was afterwards, to-wit, in 1885, restored to her reason. The record of the case in the superior court was admitted in evidence by the trial court, and thus became a part of the evidence to be passed upon in said court. Taking such record as it stood, unaffected by the parol testimony admitted in the case for the purpose of showing an agreement between the parties thereto, and we can readily understand how the trial court could have rendered judgment for the defendant, even conceding the dismissal was a judgment, and as such *res judicata*, and a bar, to the extent to which it went; for then such record would show a simple, voluntary dismissal of her case by the plaintiff. It then would be *res judicata* as to her rights therein, and a bar to any future claim by her to said property growing out of any right she at that time possessed, and probably a bar to the plaintiff herein, who claims under her and her husband. But when the dismissal, as shown by the record introduced, is affected by the parol testimony modifying said dismissal, and changing it from a simple voluntary dis-

missal by the plaintiff of her cause of action, at her own costs, to a "dismissal agreed," which is an adjudication of the matters in dispute between the parties by themselves, and such adjudication as so shown establishes the fact, even *prima facie*, that by such adjudication the defendant practically admitted the contention of the plaintiff and treated with her upon that basis, and no evidence was offered by the defendant to rebut the showing of the plaintiff in that regard, we fail to see upon what theory the trial court rendered the judgment it did. The plaintiff alleges that the judgment as rendered is against the evidence and the law. It seems to us, the plaintiff having made at least a *prima facie* showing, by the introduction of the record of the case in the superior court, and the parol testimony affecting and modifying it, that the judgment of dismissal in said court was a judgment of "dismissal agreed," and, there being no evidence to rebut such showing, that the claim of the plaintiff is well founded, that the judgment of the court below is against the evidence.

There are other questions in this case, but we do not care to discuss them. In sending this case back for a new trial, we prefer to let it go back affected by as few restrictions as possible; leaving the case open for a full and complete trial of all the questions raised in the case, and only suggest that it be tried by counsel with more care than before, and that in so important a case as the record here presents, with so many important questions involved, there should be findings of fact upon all the important questions raised by the pleadings.

Counsel for defendant argue in their brief that there is no evidence that the land in question was the homestead of Hugo and Catherine Felitz when they executed the deeds to the defendant company. We think they have overlooked the evidence in the case on that question. It is true there is not a great amount of evidence upon the question, but there is direct and positive evidence supporting the homestead allegation, and it is hardly rebutted by the uncertain and incomplete evidence that the premises are within the city limits, and contain more than is allowed by our homestead provision in a city. All the deeds describe the premises as lot 5, section 30, township 11, range 16, in Shawnee county, Kan., and there is no evidence that squarely places it inside the city limits. We are speaking of the evidence on this subject outside of the record of the trial in the superior court. Possibly that record itself settles the question, but as the case goes back, we do not care to pass upon that question. Counsel for defendant in their brief say there is no evidence of the insanity of Catherine Felitz. There is none except that which comes through the said record of the superior court; but possibly that is enough. It depends upon the effect given to the judgment of dismissal in the superior court, upon which hangs this entire case as the record is now made up. The defendant company did not offer the deed obtained by it from Hugo and Catherine Felitz, August 26,

1886, in evidence, and says in its brief that it did not in any way rely upon the title thus obtained. But that deed is in evidence in the case, and the evidence, as it now stands, shows that the defendant not only procured said deed for some purpose, but that it gave a valuable consideration therefor; and there is no explanation by the defendant as to the purpose in obtaining said deed, the real consideration therefor, nor as to whether said deed had any relation to the dismissal of the suit in the superior court by Mrs. Felitz. We recommend that the judgment of the district court be reversed, and the case remanded for a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 189)

#### ROOT V. TOPEKA WATER SUPPLY CO.

(*Supreme Court of Kansas. April 11, 1891.*)

##### CANCELLATION OF DEED—RES ADJUDICATA.

In an action by a vendor against a vendee to set aside a deed, a third party who, subsequent to the delivery of the deed sought to be set aside, but before the suit is brought therefor, obtains by written contract with the vendor an interest in the land described in said deed, which interest is contingent upon the success of the plaintiff's action to set aside the deed, but who is not a party to the suit, is not privy to the judgment therein obtained. Modifying ante, 398.

(*Syllabus by Strang, C.*)

Commissioners' decision. On rehearing.

*H. C. Root*, for plaintiff in error. *J. H. Moss, J. D. McFarland, and Hazen & Isenhardt*, for defendant in error.

STRANG, C. This case was submitted to this court on briefs and oral argument, some time ago, and reversed. It is now here on a motion for a rehearing. When the case was before this court first, the question as to whether the plaintiff in error was privy to the judgment in the superior court of Shawnee county, in the case of Catherine Felitz v. The Topeka Water Supply Co., was not seriously argued, and did not receive the attention it was entitled to. The argument on the motion for rehearing made that the principal question in the case; and considered in connection with the determination of the case in the superior court, and the use made of the record in that case, and the trial of this case in the court below, we think it a very grave question. A careful examination of the question satisfies us that the contention of the defendant in error on this point is correct. The plaintiff in error is not privy to the judgment of the superior court in the case of Catherine Felitz against the Topeka Water Supply Company. *Freem. Judgm.* § 162; *Hunt v. Haven*, 52 N. H. 170; *Dickinson v. Lovell*, 35 N. H. 16; *Flanders v. Davis*, 19 N. H. 139, 149; *Starkie, Ev.* (9th Ed.) \*328. The plaintiff in error had only a contingent, equitable interest in the land in controversy in said suit in the superior court. If that case had gone on to trial and judgment, and had been decided in favor of the Topeka Water Supply Company, Root would have taken nothing under his contract. If it had been decided in favor of



Mrs. Felitz, that would have vested the title in her, and then the water company would have been ousted, and Root could have demanded specific performance of Catherine and Hugo Felitz. But the case did not go to trial and judgment in the superior court. The plaintiff in error contends it was settled out of court, and was dismissed in pursuance of said settlement, and a new conveyance taken by the water company from Hugo and Catherine Felitz.

The plaintiff in error claims that the relation between himself and the water company, growing out of the settlement and dismissal of the case in the superior court, is that the water company was the purchaser under this last deed of the land in controversy from Hugo and Catherine Felitz, with notice of his rights under the contract of Catherine and Hugo Felitz with the plaintiff in error and J. W. Campbell. Now, while Root is not privy to the said judgment in the superior court, yet he had an undoubted right in pursuance of his theory of the settlement and dismissal of said cause in the superior court, in an independent action for specific performance against the water supply company, as purchaser, with notice of his rights in the land in question, to introduce in evidence the record of the superior court, to show that he had complied with the contract with Hugo and Catherine Felitz; and we think he had a right to further use said record as evidence, in connection with the parol testimony supplemental thereto, and proof of the taking of a new deed by the company from Hugo and Catherine Felitz, to show a settlement of that case between the parties, whereby the company became, at that time, the purchaser of the land in question. Having introduced the contract under which he claimed, the record of the court, and parol testimony supplemental thereto, to show a compliance on his part with the terms of the contract between himself and partner with Hugo and Catherine Felitz, the new deed taken by the company from Hugo and Catherine Felitz as a part of the alleged settlement, the lease executed by the company back to Hugo and Catherine Felitz, proof of the value of said lease, and the payment of \$390 in cash by the company to Hugo and Catherine Felitz at the time of said alleged settlement, it seems to us that the plaintiff in error showed such a *prima facie* case as, unexplained by any evidence on behalf of the defendant in error, entitled him to have it submitted to the jury. The defendant in error, in connection with its motion for rehearing, suggests that the opinion heretofore filed in this case holds that the judgment of the superior court is *res adjudicata* of the allegations of the petition in the case in that court to the effect that the land in question was a homestead; that Catherine Felitz was insane when she executed the deeds of 1881 and 1882 to the water company; and that her reason was restored to her before she signed the contract under which plaintiff in error claims, in February, 1886. This court did not intend to settle any question in the opinion heretofore filed, except that the plaintiff in the court below had made such a *prima*

*facie* case as entitled him to a hearing before the jury. But, as we now hold that the plaintiff in error is not privy to the judgment in the superior court between Catherine Felitz and the water company, the defendant in error will not be embarrassed by anything growing out of any privy of relation on the part of Root with said judgment, and the plaintiff in error will be put on notice that in a new trial he must prove the allegations of his petition by such evidence as will satisfy the court and jury. It is recommended that the motion for rehearing be denied.

PER CURIAM. It is so ordered; VALENTINE, J., and JOHNSTON, J., concurring.

HORTON, C. J. I have serious doubts about the decision in this case, but, as a new trial is to be had permitting the parties to litigate *pro* and *con* every question involved in the pleadings without any prior order or judgment being conclusive or *res adjudicata*, I cannot perceive that the result reached can be prejudicial or harmful in any way.

(45 Kan. 732)

DOUGLASS v. HANNON *et al.*

(Supreme Court of Kansas. April 11, 1891.)

REVIEW ON APPEAL—PRESUMPTIONS—QUESTIONS NOT RAISED BELOW.

It appearing from the record that the trial court found that John Hannon was the owner of the real estate in controversy, and as the evidence upon this point is not all preserved, we cannot say that the decision is contrary to the evidence. If Hannon has the title, the question of possession seems to be immaterial. Unless the contrary affirmatively appears, it will be presumed that the proceedings in the trial court submitted for review are regular. *State v. English*, 84 Kan. 629, 6 Pac. Rep. 701; *State v. Herold*, 9 Kan. 194.

(Syllabus by the Court.)

Error from district court, Leavenworth county; ROBERT CROZIER, Judge.

John C. Douglass, for plaintiff in error.  
Thomas P. Fenlon, for defendant in error.

PER CURIAM. No attempt was made before the court below to have the taxes assessed as a lien upon the real estate described in the tax-deed, and therefore this matter cannot be now considered. We do not pass upon the question as to the right of the plaintiff to obtain another tax-deed, because this question is not properly in the case. The judgment of the district court will be affirmed.

(47 Kan. 107)

ATCHISON, T. & S. F. R. CO. v. PLASKETT.

(Supreme Court of Kansas. April 11, 1891.)

ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Where a railroad company stops its train not to exceed a minute as it approaches a railroad crossing within the limits of an incorporated city, and while its cars are standing over a street crossing a child seven years of age, on his way home from school, attempts to take hold of the brake-ladder on a freight-car in the train, for the purpose of climbing over the car, and the train starts just as he makes the effort to get on to the car and jerks him off, so that he falls under the wheels, and is run over and injured, and

<sup>1</sup>Petition for rehearing pending.

the trainmen have no knowledge of the attempt upon the part of the boy to board the train, *held*, that the company is not guilty of such negligence towards the boy as to render it liable for damages on account of such injury.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, McPherson county; FRANK DOSTER, Judge.

*Geo. R. Peck, A. A. Hurd, and Robert Dunlap*, for plaintiff in error. *Lucien Earle and C. M. Bruce*, for defendant in error.

GREEN, C. This was an action brought by Chester R. Plaskett, by his next friend and father, G. R. Plaskett, against the Atchison, Topeka & Santa Fe Railroad Company, for damages alleged to have been caused by the negligence of the defendant. The action was tried before the court and jury in McPherson county, and resulted in a verdict and judgment for \$6,000 for the plaintiff. A number of errors are assigned, for which a reversal is asked. The undisputed facts in this case are that on the 5th day of December, 1887, a freight train, consisting of 27 or 28 cars, passed through McPherson between 3 and 4 o'clock in the afternoon, going east. The railroad track, in the limits of the city, is located about the middle of Simpson street, which runs east and west. Among the streets running north and south, and in the order named extending east, are Main, Ash, Elm, and Oak. As the train crossed the last-named street it whistled and stopped for the Rock Island crossing. The plaintiff, who was at that time seven years and two months old, was returning from school along Oak street, to his home, situated on the north side of the track from the school-house, which was located one block from the intersection of Simpson and Oak streets. The child was accompanied by some eight or ten boys and girls about his own age, going north along Oak street, on the sidewalk. As they reached the crossing they found the street obstructed by this freight train, and, according to the evidence of the plaintiff, it had been standing there about a minute, when he went up to the train, and one of his schoolmates said to him, "Let us climb over across and go home," and when that was said he started to climb over, and the train moved; that he caught hold of the rod or ladder by which the brakemen climb to the top of the cars before the train started; that the boy with him helped him to get onto the cars; and, after he got hold, the train moved. The movement of the train jerked him under the cars, and the wheels passed over his right leg, making amputation necessary below the knee. There was no flagman or gates at this crossing, which was one of the principal crossings of the city, which contained at that time a population of some 5,000. The special findings of the jury are as follows: "(1) Did the plaintiff, Chester Plaskett, take hold of defendant's train? Answer. Yes. (2) If yes, was the said train in motion and moving and being moved at the time plaintiff took hold of it? A. No. (3) Did the plaintiff

attempt to get on the defendant's train while the same was in motion? A. No. (4) Did the plaintiff know that there was danger in attempting to get on the defendant's train under the circumstances? A. No. (5) If your answer to the last question be 'no,' state fully the reason that he did not know of said danger. A. He was too young to know danger. (6) Was the defendant guilty of willful and gross negligence towards the plaintiff under the circumstances? A. They were guilty of gross negligence, not willful. (7) If yes, state fully in what such willful and gross negligence consists. A. In the trainmen knowing this place was frequented by school children, and not being on the lookout. (8) Was the defendant guilty of ordinary negligence under the circumstances? A. Yes. (9) If your answer to the last question be 'yes,' state particularly in what said negligence consisted. A. The trainmen not being at their proper places. (10) How many school children necessarily used the sidewalk and crossing where the accident occurred? A. From 40 to 60. (11) If you find for the plaintiff, how much damages do you allow him for physical pain and mental suffering? A. One thousand dollars. (12) How much do you allow—how much damages do you allow—plaintiff as the natural and probable result of the injury? A. Five thousand dollars. (13) How much do you allow plaintiff as exemplary damages? A. 00. (14) Did the acts of the plaintiff contribute to the injury? A. Yes."

The first, and perhaps the only, question for our determination in this case is whether the railroad company was guilty of any negligence, or violated any duty which it owed to this child, as it run its train through the city of McPherson. It is unnecessary for us to discuss the different degrees of negligence, for the reason that most courts of last resort, notably the supreme court of the United States, fail to recognize any negligence unless it be culpable. The findings of the jury upon which negligence is predicated in this case consisted in the fact that the trainmen knew that the crossing where the accident occurred was frequented by children going to and from school; that they were not on the lookout for persons crossing the track, or in proper position upon the train to prevent persons from climbing on the cars. These were the only findings imputing negligence to the defendant below. It was a proper precautionary measure for the company to stop its train at the crossing of another railroad, and one which the law recognizes. The evidence indicated that the train was running at a slow rate of speed through the city, and came to a full stop as it approached the Rock Island crossing and immediately started again. The engineer, fireman, and forward brakeman were on the engine, and looked to see that the track was clear. They did not see the plaintiff attempt to board the train. Can it be successfully claimed that the defendant owed a duty to this child to have men posted at proper intervals on top of the train to keep vigilant watch, and see that he did not attempt to climb upon its

cars? While greater care is demanded in the operation of trains in populous cities than in sparsely settled districts through which a railroad may run, we do not think the law imposes any such a duty upon a railroad, even in cities. It would be difficult to conceive how a train could be successfully guarded so as to prevent persons from climbing onto the cars at crossings, or moving at a low rate of speed through towns and villages. But it is claimed that the railroad company did owe to this child the duty of active vigilance, to see that he was not injured; that the condition of things at the crossing in question, the population of the city, and the almost constant travel over the railroad track,—being but a block from the school-house, where seven or eight hundred children were in attendance; and the safety of these children demanded the utmost care and the greatest precaution upon the part of the company. It is doubtless true that this crossing was used a great deal by children going to and from school, and it therefore became necessary to exercise a great degree of care to prevent accidents; but the regulation of this and the other crossings rested primarily with the city authorities, and the failure to properly guard these crossings can hardly be charged as negligence upon the part of the defendant when no ordinance of the city required it. To uphold the verdict and judgment in this case, there must be some negligence chargeable to the railroad company. The tender years of the child may indeed excuse him from concurring negligence in this case, but his inability to contribute to the cause of the injury on account of his youthfulness cannot supply that negligence which the law says must exist before he would be entitled to recover damages. In a case not unlike this in many respects, this court has said: "In all courts culpable negligence consists in the failure to exercise the amount of care required, whether that amount be slight, ordinary, or great, and whether the corresponding degree of negligence be called gross, ordinary, or slight, or merely negligence. In the present case we take it that all the parties having any connection with said accident were required to exercise that degree of care and diligence which an ordinarily prudent person would exercise under like circumstances. This is ordinary care, and the failure to exercise it would be ordinary negligence, or culpable negligence, or, as some courts would say, merely negligent; and, if all the parties in this case exercised ordinary care, then no one was guilty of culpable negligence. Now, all negligence, to be culpable, necessarily implies the failure to properly perform some duty. Now, what duty did the railroad company owe to Charles W. Henigh which it did not properly perform? No relation existed between them. He was not a passenger, nor an employee, and had no business with the railroad company of any kind or character. He had no right to climb upon said car as he did, nor to touch it, nor even to go upon the company's premises. Technically, he was a mere trespasser, and the company owed to him no duty except such as it owes to trespassers in general, or ex-

cept such as it owes to all mankind. We have heretofore held that all persons must use their property and conduct their affairs with reference to the rights of all other persons, and with reference to all known or anticipated surroundings, and that even trespassers have a right to expect that such will be done. *Railway Co. v. Fitzsimmons*, 22 Kan. 686, 690, et seq.; *Railway Co. v. Brady*, 17 Kan. 330, 334, et seq. And we will still adhere to this doctrine. But no person is bound to anticipate something which is not likely to occur, or to so conduct his affairs as to prevent accidents which are not likely to happen. This has reference where no specific duty exists, but only such general duties as all mankind owe to each other." *Railroad Co. v. Henigh*, 23 Kan. 347. See, also, the case of *Railroad Co. v. Fihn*, 24 Kan. 627. The principle decided in these two cases settles the question of the liability of the railroad company in this case. We do not think any wrong was shown upon the part of the defendant in error. We recommend a reversal of the judgment of the court below.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 112)

ATCHISON, T. & S. F. R. CO. v. PLASKETT.

(*Supreme Court of Kansas*. April 11, 1891.)

Error from district court, McPherson county; FRANK DOSTER, Judge.

Geo. R. Peck, A. A. Hurd and Robert Dunlap, for plaintiff in error. Lucien Earle and C. M. Bruce, for defendant in error.

PER CURIAM. This case was submitted with the case of *Railroad Co. v. Plaskett*, ante, 401. All of the questions involved in this case were also involved in that, and the judgment of the court below is reversed upon the authority of that case.

(46 Kan. 120)

PARSONS & P. R. CO. v. MONTGOMERY.

(*Supreme Court of Kansas*. April 11, 1891.)

EMINENT DOMAIN—COMPENSATION—REDUCTION OF VERDICT.

1. When a trial court, in an action to recover damages for the condemnation of a right of way taken for public use, arbitrarily reduces the amount of the verdict rendered by a jury from \$3,337.08 to \$2,589, and the record assigns no reason for such a reduction, and the record shows the jury adopted the highest and most extreme estimate of value, depreciation, and damage in the verdict returned, such judgment will be reversed, and a new trial granted.

2. While there may be cases where the trial court may properly reduce the amount of a verdict on account of some particular fact, or on some element of damage, or for some error in the computation, or when the reduction is occasioned by some other sufficient reason, the judgment may be upheld; yet the general rule is, when the damages returned by a jury are so excessive as to show the verdict was rendered under the influence of passion or prejudice, it will be set aside, and the questions in issue submitted to the judgment of another jury.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Montgomery county; GEORGE CHANDLER, Judge.

Kimball & Osgood, for plaintiff in error. Joseph Chandler, for defendant in error.

<sup>1</sup> Petition for rehearing pending.

SIMPSON, C. This was an appeal to the district court of Montgomery county from the award of commissioners, who assessed damages for the right of way of the railroad company through the land of the appellant. The case was tried by a jury at the March term, 1888, and is brought here by the railroad company to reverse certain rulings made at the trial. The appellant claimed for the particular land taken; for damages to the entire tract; for the increased inconvenience in farming; for increased labor and expense in fencing and maintaining fences; for interference with the natural drainage; for causing an overflow of water on certain portions of the farm; for increased care, trouble, and expense in handling stock; for expenses incurred in constructing and maintaining proper crossings; for increased labor in handling crops growing thereon; for increased cost in cultivating land adjoining right of way; for damage to dwelling-house and outbuildings; for running immediately in front thereof and making a deep cut; for destruction of hedge and apple trees, and for depreciation in market value by increased exposure to fire from the operation of the road. Before the trial the railroad company tendered the sum of \$1,185 and costs, which was refused. The jury returned a verdict in favor of the appellant for \$3,327.08.

The jury returned answers to special interrogatories as follows: "Question. 1. How many acres of land does plaintiff own in section 30? Answer. One hundred and fifty-three acres. Q. 2. Does this acreage include one-half of the river? A. Yes. Q. 3. What was the fair market value per acre of this tract of land immediately before the right of way for the defendant was condemned across it? A. Fifty dollars per acre. Q. 4. For what particular purpose, if any, was this tract intended and used by plaintiff? A. Agricultural and stock-raising. Q. 5. How many acres of this tract were appropriated by defendant for its right of way, and what was its value? A. Seven and one-tenth acres, at \$50 per acre." "Q. 7. Immediately after the railroad was laid out, and the right of way appropriated therefor across this tract of land in section 30, what was the fair market value per acre of the residue? A. Forty dollars per acre. Q. 8. What was the fair market value of the residue of this tract in section 30, in the aggregate, immediately after the condemnation and appropriation of their right of way? A. Five thousand eight hundred and thirty-six dollars. Q. 9. If you find any damage to this tract beyond the value of the land taken, state particularly the items of such damage and the amount of each item. A. Inconvenience and loss of time in cultivating and harvesting crops, \$400. Q. 10. Do you find any damage to this tract in section 30 outside of the value of the land taken because of the inconvenience in handling stock; and, if yes, then how much, and is this amount included in your award? A. Yes. Amount, \$200, which amount enters into our award. Q. 11. Do you award any damage to this tract for additional fences required to be built; and, if so, for what fences, and how much

do you allow for that? A. No. Q. 12. Do you allow any damage to this tract of land in section 30, by reason of the railroad embankment obstructing the flow of water, thereby overflowing plaintiff's land outside of the right of way, and, if so, how much? A. No. Q. 13. If you find any damage resulting from such obstruction and consequent overflow, could it not be avoided by proper and sufficient openings through defendant's embankments? A. —. Q. 14. Do you find any damage to this tract in section 30 by reason of inconvenience and loss of time in plowing, planting, cultivating, and harvesting upon the triangular pieces of ground on either side of the railroad; and, if so, how much do you find, and does that amount enter into and form a part of your award? A. Yes. Amount, \$400. Item first, question 9. This amount enters into our award. Q. 15. What was the fair market value per acre of the 20-acre tract in section 36, immediately prior to the condemnation proceedings before referred to? A. Sixty dollars per acre. Q. 16. How much of this tract was appropriated by the defendant railroad for its right of way, and what was its fair market value at the time of such appropriation? A. One and sixty-three hundredths acres, at \$60 per acre,—\$97.80. Q. 17. How much of this tract is south and east of the right of way of the railroad, and what was its fair market value immediately after the condemnation proceedings and appropriation of the right of way? A. One and one-half acres. No value. Q. 18. What was the fair market value per acre of that portion of the 20 acres lying north and west of defendant's right of way immediately after the condemnation and appropriation of the strip to railroad purposes? A. Twenty-five dollars per acre. Q. 19. If you find that portion of the 20-acre tract described in the last question to have depreciated in value by reason of the appropriation of this right of way and construction of defendant's road, does any portion of that depreciation result from damage to the natural building spot, and, if yes, how much does this amount enter into and form a part of your award? A. Yes; \$35 per acre on 17 acres; amount, \$595. Q. 20. How much land does plaintiff own in section 25, south of the river, and east of the Southern Kansas Railroad? A. About 35 acres. Q. 21. What was the fair market value of this land per acre immediately before the right of way for defendant's railroad was condemned and appropriated through the tracts in sections 30 and 36? A. Fifty dollars per acre. Q. 22. What is the distance between defendant's railroad and the tract described at the nearest point? A. Two hundred and seventy-five feet. Q. 23. Do you find that the land owned by plaintiff in section 25 is or was in any way depreciated in value or damaged by reason of the condemnation and appropriation of the right of way for and construction of defendant's railroad through the lands of plaintiff in sections 30 and 36? A. No. Q. 24. If you should answer the last question in the negative, the following question need not be answered: What is the amount of such

damage? State particularly the items thereof, and the amount of each of these.

A. —. Q. 25. Do you allow any damages to any of the land described for smoke, dirt, noise, or jarring of ground, caused by passing trains; and, if so, does this amount so allowed enter into your award? A. No. Q. 26. In estimating the value of the land taken, do you include in its the value of any fencing which was then on the land taken for defendant's right of way? A. No. Q. 27. Do you allow damages to any of the land described by reason of increased danger of fire caused by the negligent escape of sparks and cinders from the locomotives of defendant in the operation of its road, and, if yes, does the amount allowed enter into your award? A. No. Q. 28. Which way does plaintiff's house front, and is there any public highway on that side of the 20-acre tract? A. South, and no highway. Q. 29. Do you allow anything for increased danger to stock, caused by the negligence of defendant's employees in the operation of its road; and, if yes, does that amount enter into your award? (Refused, and excepted to by defendant.) A. —. Q. 30. Do you allow anything for increased hazard to animals, teams, or stock caused by being frightened by defendant's trains of cars; and, if yes, do you include that in your award? A. —. (Refused and excepted to by defendant.) Q. 31. Was it a part of the plan of construction of the defendant's road across that tract in section 30 to put in an under-pass for stock, about 800 feet west of the river bridge? A. No; it not being shown on profile or map. Q. 32. Were the commissioners for the defendant's right of way informed of this plan by the engineer having in hand the construction of said road, and did they take it into consideration in their assessment of damages thereto? A. —. (Refused and excepted to by the defendant.) Q. 33. Are those plans being carried out in the construction of defendant's road across said tract in section 30? A. No evidence that it is. Q. 34. Do you take that into your consideration in your award, and assess your damage to that land on the theory that such pass is now or is to be made? A. No."

The following is a part of the final judgment of the court: "And the court finds from said general award of the jury, and their answers to the special questions, that the amount of plaintiff's damages for the actual value of the strip of land appropriated by the defendant, 100 feet wide, through plaintiff's premises, namely, all of the south-east quarter ( $\frac{1}{4}$ ) of section twenty-five, (25,) south of the Verdigris river, and east of the Southern Kansas Railroad, and the north half ( $\frac{1}{2}$ ) of the north-east quarter ( $\frac{1}{4}$ ) of the north-east quarter of section thirty-six, (36;) all in township thirty-four (34) south, of range sixteen (16) east. Also all of lots ten (10) and eleven (11) and that portion of lot twelve (12) west of, and all of lots eight (8) and nine (9) south of the Verdigris river,—all in section thirty, (30,) in township thirty-four (34) south, range seventeen (17) east, in Montgomery county, Kansas; and for the consequential

diminution in value of the remaining portion of plaintiff's said land in said sections thirty (30) and thirty-six (36) aforesaid, and for the value of buildings and other improvements on said last-named tracts of land, and for all other damages sustained by the plaintiff by reason of defendant's appropriation of its said right of way through, upon, and across said last-named tracts, and the interest thereon from the date of the appropriation of said strip of land to be said sum to which the court reduced the award of the jury as aforesaid. It is therefore by the court considered, ordered, and adjudged that the said award of damages and assessment of the condemnation commissioners, from which the plaintiff appealed in this case, made to the plaintiff and against the defendant for its right of way of 100 feet wide through plaintiff's said premises, be revised, enlarged, corrected, and increased to said sum of \$2,589, and that the general award of the jury herein be modified, reduced, and decreased to said amount, which amount shall draw interest from the date of the award of the jury at the rate of 7 per cent. per annum, which said amount, with interest as aforesaid, shall stand in the place and in lieu of the award of the said commissioners appealed from as aforesaid by plaintiff, and in the place of the award of the jury as aforesaid, and shall be paid by the defendant, its successors or assigns, to the plaintiff, the owner of said above-described premises, before the defendant shall appropriate said strip as aforesaid, and before it shall have the possession thereof; and plaintiff shall have and recover of and from the defendant herein the costs of this action as a personal judgment against the defendant, taxed at \$238.05, for which execution is awarded." The trial court denied a new trial, but reduced the verdict, against the consent of the land-owner, to \$2,589, and rendered judgment for that amount.

The land through which the railroad secured the right of way consisted of a large tract of rich bottom soil. The particular part injured by the location of the road and the construction of the track was south of the Verdigris river and east of the track of the Southern Kansas Railroad. The farm was used for stock and agricultural purposes. The evidence fairly shows that it was the best farm for general agricultural purposes in that neighborhood. The only questions that we can consider and that are fairly raised by the motion for a new trial and the record are: *First*, that the award is not sustained by sufficient evidence; *second*, that said award is in conflict with and against the special findings of the jury; *third*, that said award is excessive, and the damages appear to have been given under the influence of passion and prejudice; *fourth*, errors of law occurring during the trial and excepted to at the time.

1. Considering these assignments of error in their order, it may be said of the first that there is some evidence to sustain the award.

2. There are some things in the record that tend to show that the jury were actuated by passion and prejudice. We are

not unmindful of the fact that the general disposition of jurors in this class of cases is to award liberal compensation to land-owners for the land taken from their farms for railroad purposes, and, so long as that liberality does not run to excess, or is not caused by passion or prejudice, we will not interfere. But in this case there is hardly an item of depreciation, or an element of damage, but has been assessed by the jury at the very highest estimate placed upon it by the most extreme witness. A general average of the opinion of the various witnesses is the better rule, and generally results in substantial justice, and is a clear indication of the absence of passion or prejudice. Apart from the evident disposition of the jury to adopt the highest and most extreme estimate of value, depreciation, and damage, the action of the trial court reducing the award as returned by the jury from \$3,327.08 to \$2,589 is to be regarded as very suggestive of the fact that the jury was influenced by passion and actuated by prejudice in returning an excessive verdict. We have searched the record in vain to discover, if possible, the reason that induced or the motive that controlled the trial judge in the reduction of the verdict. It may have seemed to him, as it does to us, that, taking into consideration all the facts established by the evidence, the mere size of the verdict created a conviction that it was too large. If this is so, he ought to have set aside the verdict, and granted a new trial, rather than have attempted to substitute his judgment for that of the jury. The railroad company is entitled to have a fair estimate of damages made by an impartial jury, and we have grave doubts as to whether there has been a due observance of its legal rights in this respect. While it appears to us that the award of the jury is excessive, it is not the function of the court to say how much. The amount ought to be determined by a fair and impartial jury, without prejudice or passion. All we can do in such a case is to see that the jury, in making an award in a case like this, are not influenced by sympathy, feeling, or prejudice, and do not go beyond what is a fair compensation. Railroad Co. v. Brown, 26 Kan. 443. Going back again to the reduction of the verdict by the trial court, it does not affirmatively appear from the record that the sum of \$738.08, that was deducted from the verdict of the jury, was on account of the jury taking into consideration some element of damage not existing in the case, or on account of some error in computation, or some other error occurring at the trial. According to the special findings of the jury, the value of the land taken and the damage to the remainder of the tract aggregated \$2,596.80, and this sum comes very close to the verdict as modified by the trial court; but we cannot presume that all the other elements of damage—some of which were sustained by evidence at the trial—would be arbitrarily excluded. Hence the conviction grows stronger that the trial judge reduced the verdict because he thought that it was so excessive that it must have been given under the influence of passion and

prejudice. It may be that cases will arise where the verdict and special findings will show some particular fact or some element of damage which would authorize the trial judge to reduce the amount thereof, and that in such a case the judgment rendered upon the reduced verdict would be allowed to stand; but the general rule is, when the damages are so excessive as to show that the verdict is rendered under the influence of passion or prejudice, it should be set aside, and the questions in dispute submitted to the judgment of another jury. The reason for this is that the parties are entitled to the judgment of a fair and impartial jury, and the judgment of the trial court ought not to be substituted for that of a jury; for, if such a rule would be recognized and maintained, the trial by jury in such cases would be practically denied. See the cases of *Railway Co. v. Hand*, 7 Kan. 380; *Railroad Co. v. Cone*, 37 Kan. 567, 15 Pac. Rep. 499; *Steinbuechel v. Wright*, 43 Kan. 307, 23 Pac. Rep. 560; *Cassin v. Delany*, 38 N. Y. 178. Another very good reason for granting a new trial in such a case is that, when the verdict of a jury is tainted by passion or prejudice, the court cannot separate that part of the verdict that is so tainted from the other part, even in a case where the record shows that the prevailing party ought to recover. In this case it appears to us that the plaintiff below was entitled to a verdict for a sum in excess of that allowed by the award appealed from; but when we agree with the trial court that it ought to be reduced, that in fact the verdict was for too much, the only remedy that ought to be applied to this particular case is to grant a new trial. It is a case that comes peculiarly within the province of a jury to determine, and, as a matter of legal right, either party is entitled to a jury trial, and ought not to be compelled to abide by the judgment of a trial court. For these reasons we are compelled to reverse the judgment. The other errors assigned are serious, but, as the case must be reversed, it is not necessary to pass upon them, as they may not arise on another trial. It is recommended that the judgment be reversed, and a new trial ordered.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 166)

JARVIS CONKLIN MORTGAGE TRUST CO. v. SUTTON *et al.*

(Supreme Court of Kansas. April 11, 1891.)

MECHANICS' LIENS—PLEADING—PETITION—EVIDENCE—TITLE OF DEFENDANT IN LAND.

1. Where, in a case for the foreclosure of a lien for material furnished, there is no allegation on the body of the petition that the contract to furnish materials was with the owner, but the petition refers to the lien statement as attached thereto, and as a part thereof, and said lien statement clearly shows the contract to furnish material was with the owner, *held*, that the petition sufficiently shows that the contract was with the owner.

2. A petition in such a case, which states that the plaintiff furnished lumber and materials to the amount of \$537.93, sufficiently states the value

of such lumber and materials without any further allegation of value.

3. Evidence examined, and held sufficient to sustain the finding of the court that the contract for furnishing material was with the owners of the land upon which the building was erected.

4. To obtain a lien for material furnished, under paragraph 4733, Gen. St. 1889, it is not necessary to show that the party to whom the material was furnished had a complete title when the contract for the material was made. It is sufficient if at that time he has equitable title.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court. Rice county; ANSEL R. CLARK, Judge.

A. M. Lasley, A. L. Perry, and Albert Perry, for plaintiff in error. C. F. Foley, for defendants in error.

STRANG, C. This was an action to foreclose certain mechanics' and material-men's liens. The Jarvis Conklin Mortgage Trust Company filed a cross-petition, setting up a cause of action on a note and mortgage against the defendants Byers and Tuttle, owners of the property described in the petition of the plaintiffs below, and claiming a lien upon the premises prior to the other liens sought to be foreclosed. The issue was thus joined between the parties claiming liens upon the property as material-men and mechanics on one side, and the holder of the mortgage lien on the other, to determine whose liens were first. The case was tried by the court, which found in favor of Sutton & Murphy against the owners of the premises for the amount of the material furnished by them; and for the defendant Tarr against them for the amount of his claim as a mechanic; and also in favor of the Jarvis Conklin Mortgage Trust Company against the same defendants for the amount of their claim. The court ordered a foreclosure and sale of the premises described in the petition and cross-petition. The court further found that the liens of Sutton & Murphy and J. W. Tarr were of equal rank, and superior to the mortgage lien of the Mortgage Trust Company, and ordered the proceeds of the sale to be applied first to the payment of the costs of the case; second, to the payment of the judgments of Sutton & Murphy and Tarr; and the balance, if any, applied to the payment of the judgment of the Mortgage Trust Company; and the overplus, if any, to be turned over to Byers and Tuttle, the owners of the premises. The Jarvis Conklin Mortgage Trust Company objected to the decree of the court, and excepted. They filed a motion for a new trial, which was overruled, upon which they bring the case here, and allege for errors, first, that the court erred in overruling the objection to the reception of evidence under the petition in the case upon the ground that it did not state facts sufficient to constitute a cause of action. The particular defect pointed out in the petition is an alleged failure to state therein that the contract for furnishing the material was made with the owners of the premises upon which the building was to be erected. There is no statement to that effect in the body of the petition; but the lien statement of the plaintiff is attached to its petition as a

part thereof, and therein it is alleged that the contract was with Byers and Tuttle, and that they are the owners of the premises. We think this is sufficient as against a demurrer or general objection to evidence under the petition. There was no motion to make the petition more definite. The next complaint is that the petition does not allege that the materials furnished were of any value. The petition says the plaintiff furnished material amounting to \$537.93, but does not add any further allegation of value. We think the statement that the plaintiff furnished material to the amount of \$537.93 is a sufficient statement of value. The plaintiff says the court below ought to have granted a new trial because there was no sufficient evidence to sustain the judgment. If there was any proper evidence upon all the questions at issue, the judgment, under the rule of this court, should be affirmed. The particular failure of proof here alleged is that there was no evidence that the contract for the material furnished was with the owner or owners of the lots upon which the building was erected. The evidence shows that the contract was with J. F. Byers, and that the material was "charged to Byers, or to Byers and Tuttle." Byers and Tuttle were partners at the time the material was purchased, and it was purchased for the partnership. The partnership erected the building. The evidence upon the question of ownership was somewhat uncertain. But there was some evidence tending to prove that the contract was with the owners of the premises on which the building was erected; and, the district judge having found that it was sufficient, this court will not disturb such finding. It is also said that Byers and Tuttle were not the owners of the lots on which the building was erected at the time the material was contracted for. This contention is technically true. But Byers and Tuttle had examined and priced these lots, together with others belonging to the same party, before making the contract for the material in controversy. They intended buying some of the lots looked at and priced upon which to place the building subsequently erected by them. They had not notified the owner of the lots that they would take these particular lots, at the time when they contracted for the material, but they must have decided in their own minds, because Byers told Sutton where to deliver the lumber. The material-men commenced the delivery of the lumber on these lots a few days after they contracted to deliver it. Some of the evidence shows that the building was begun on said lots as early as the 21st of January, 1887, only a few days after the contract for material was entered into. Byers and Tuttle followed up their election to take the particular lots in controversy by completing their title thereto, and obtained a deed February 23, 1887. Paragraph 4733 of the General Statutes of 1889 provides that "any person who shall, under contract with the owner of any tract or piece of land, or with the trustee, agent, husband, or wife of such owner, furnish material for the erection, alteration, or repair



of any building, improvement, or structure thereon, \* \* \* shall have a lien upon the whole of said piece or tract of land, the building and appurtenances, in the manner herein provided for the amount due to him for such material." To obtain a lien under this paragraph we do not think it necessary that the person to whom the material is furnished should have a perfect title to the land upon which the building or improvements are to be erected at the time of making the contract for the material. It is sufficient if at that time he has equitable title. *Byers and Tuttle* perfected their title on February 23, 1887. The material was delivered in January, February, and March of that year. The parties who contracted for the material became the owners of the lots, and used the material in a building upon these lots; therefore the material-men have their lien as claimed. *Seitz v. Railway Co.*, 16 Kan. 140; *Phil. Mech. Liens*, (2d Ed.) § 81. This case is different from *Lumher Co. v. Schweiter*, (Kan.) 25 Pac. Rep. 592, recently decided, because there the purchasers of the material had no legal or equitable estate in the lots upon which the house was erected. We do not, therefore, think the objection that *Byers and Tuttle* were not the owners of the land upon which the building was erected, and upon which the lien for the material was claimed, is good, especially as the mortgage lien did not attach thereto until several days after the title was complete in *Byers and Tuttle*, and after, as we believe under the law, the right of the material-men had attached thereto. We have examined the judgment of the court; and, while it is not as full and formal as it might, and perhaps should have been, we do not think there is any prejudicial error therein. We recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 202.)

**EXCELSIOR MANUF'G CO. v. BOYLE et al.**

(*Supreme Court of Kansas*. April 11, 1891.)

**LEVY OF EXECUTION—PRIORITY OF LIEN—RETURN OF SHERIFF—AMENDMENTS.**

1. In a proceeding to determine and adjust the priorities of certain liens existing against the real property of a debtor, it was found that an execution had been taken out on the judgment first rendered within one year after its rendition, and levied upon land subject to a mortgage; but it was erroneously appraised by excluding the amount of the mortgage debt, and the execution creditor directed the sheriff not to advertise and sell under the illegal appraisal. The levy was made upon the whole estate, and not upon a mere equitable interest. Within the succeeding year other judgments were obtained, and the proceeding to subject the mortgaged land of the debtor to the payment of the liens, and to determine the respective priorities of the same, was begun and tried. *Held*, that the existence of a mortgage upon the land, or the illegal appraisal of the same, or the direction of the execution creditor to the sheriff not to advertise and sell under such appraisal, did not invalidate the levy, but the levy as made preserved the preference and priority of the lien of the judgment first rendered.

2. During the trial it was ascertained that

the sheriff had neglected to sign his return made upon the execution, and the court allowed him to amend by signing his name thereto. *Held* not error.

8. In the answer of the judgment creditor who obtained the judgment first rendered, the fact that a levy had been made was not stated, and during the trial the court permitted him to amend and plead and prove the levy that was made. *Held*, that the court did not abuse its discretion in allowing the amendment, and the fact that the amendment was not formally written out after it was allowed is not sufficient ground for a reversal.

(*Syllabus by the Court.*)

Error from district court, Butler county; A. L. REDDEN, Judge.

F. L. Jones, for plaintiff in error. *Clogston, Hamilton, Fuller & Cobbison*, for defendants in error.

JOHNSTON, J. This is a proceeding to review an order of the district court distributing among the creditors of E. C. Boyle & Co. the proceeds arising from a judicial sale of the debtors' property. In 1885, E. C. Boyle & Co. were engaged in the hardware trade at Augusta, Kan., and were largely indebted to numerous creditors, among whom were Deere, Mansur & Co. and the Excelsior Manufacturing Company. On November 16, 1885, Deere, Mansur & Co. obtained several judgments against E. C. Boyle, which in the aggregate amounted to over \$1,200. Abstracts of the judgments were filed in the office of the clerk of the district court, and on November 3, 1886, and before any judgments were rendered in favor of the other creditors of E. C. Boyle, Deere, Mansur & Co. caused executions to be issued upon their several judgments, and in their behalf it is claimed that these executions were levied upon the real estate of E. C. Boyle & Co. on November 6, 1886. On December 20, 1886, two others of the creditors of Boyle recovered judgments against him, and during the January term, 1887, of the district court, the Excelsior Manufacturing Company and the remaining creditors recovered judgments against Boyle in the district court. Boyle was then the owner of real estate in the town of Augusta, upon which the executions of Deere, Mansur & Co. were claimed to have been levied, and against which there was a mortgage in favor of the Farmers' State Bank. On April 8, 1887, the Farmers' State Bank brought an action in the district court to subject certain real estate of E. C. Boyle to the satisfaction of their judgment, and to adjust and establish the priority of liens of the mortgagees and judgment creditors, and all the creditors claiming an interest in the real estate were made parties defendant. On July 15, 1887, a trial of this action was had, and the court found the dates of the rendering of the several judgments against E. C. Boyle, and also found that the mortgage lien of the Farmers' State Bank was a first and paramount lien on the real estate in question, and decreed a foreclosure and sale of the property, and that the proceeds of sale should be applied—*First*, to the payment of costs; *second*, to the satisfaction of the mortgage; and that the balance should be brought into court to

await its further orders. The court did not at that time undertake to establish the priorities of the liens of the judgment creditors. In pursuance to the decree, the property was sold for \$1,800. From this sum the mortgage lien of the Farmers' State Bank was paid, with costs, which left a balance in the hands of the sheriff of \$651.20. On December 21, 1887, application was made to the court for a distribution of the surplus proceeds among the judgment creditors, according to their respective priorities. Upon the hearing of this application it was conceded by all that Deere, Mansur & Co. obtained a first judgment against E. C. Boyle, which was dated November 16, 1885, and that an execution was issued thereon November 3, 1886. They then offered in evidence their several executions issued on the date last named, and upon which they claimed that a levy had been made upon the real estate of Boyle. An objection was made to the reception of a certain execution, and the return of the sheriff, because it appeared that the return had not been signed by any one. Deere, Mansur & Co. then asked leave of the court to permit the sheriff to amend his return on the execution by signing the same, which the court allowed. A further objection was made because the answer filed by Deere, Mansur & Co. in the action did not show that a levy had been made, and also that the real estate was not subject to levy and sale upon execution, for the reason that the statutes provided another and different remedy. The court permitted the answer to be amended, but the amendment was never actually made. After hearing all the testimony, the court made an order of distribution, providing: *First*, for paying the costs of the action; *second*, for the satisfaction of the judgment of Deere, Mansur & Co., upon which execution was issued and levied upon the property sold; and, *third*, that the remainder should be applied to the satisfaction of the judgment of the Excelsior Manufacturing Company.

Did the court err in allowing the sheriff to amend his return and in permitting Deere, Mansur & Co. to amend their answer? The courts are vested with a large discretion in allowing amendments to process and pleadings, and unless there has been a clear abuse of discretion the ruling of the court will not be disturbed. The failure of the sheriff to sign his return to the execution is an amendable defect. The levy had been actually made, and it was proper to permit an amendment in conformity with the facts. There was no attempt to supplement or affect the levy, but the amendment related only to the evidence of the levy that was actually made; "and, generally, amendments are permissible when they simply run to perfecting the proof of a service which was in fact made." *Wilkins v. Tourtellott*, 28 Kan. 834; *Kirkwood v. Reedy*, 10 Kan. 453. Neither do we think that the court abused its discretion in permitting the answer to be amended. The trial had not yet been completed, nor had the priorities of the several judgment creditors been determined. It was an equitable action,

for the purpose of establishing priorities of the several liens existing against the Boyle property, and this question depended upon the time of the rendition of the judgments as well as upon whether they had been duly kept alive by the issuance and levy of executions. The Deere, Mansur & Co. judgment had been rendered long prior to any of the others, and it is admitted that an execution had been levied before the expiration of one year next after the rendition of their judgment. In their answer they had omitted to allege the levy, and the amendment showing this circumstance did not change the defense, nor can it be said that it was not in furtherance of justice. If additional time had been necessary in order that the plaintiff might contest the truth of the allegation, it might have been obtained upon application to the court; but no delay was asked, and we think no injustice was done in permitting the defendants to plead and prove the fact showing that their lien was prior and paramount to that of the plaintiff.

Some objection is made because the amendment to the answer was not written or actually made. Permission to amend was granted by the court, proof was offered, and the parties proceeded with the trial as if the answer had actually been amended. Under these circumstances, we will treat the answer as having been amended to conform to the facts shown. "A defect in the pleadings or proceedings which ought to have been corrected below by amendment will be disregarded here or considered as amended." *Wilkins v. Tourtellott*, 29 Kan. 514; *Organ Co. v. Lasley*, 40 Kan. 521, 20 Pac. Rep. 228.

The final contention is that execution was levied upon a mere equity of E. C. Boyle, which could not be sold by means of an ordinary execution. It is said that they should have employed the proceedings as directed by section 481 of the Civil Code; that the levy was made prior to 1887, when section 448 of the Civil Code was amended so that the mere interest of the mortgagor might be separately appraised and sold; and hence the officer could not sell the mere equitable interest, and the levy, as made, was ineffectual. The record, however, does not sustain the contention of the plaintiff below as to the facts. The return of the officer is that the levy was made upon the land itself,—upon the whole estate, and not upon a mere equity. It recites that the sheriff "did forthwith levy said writ upon the following described real estate of said debtor, situated in Butler county, in state of Kansas, to-wit, lots 9 and 11, in block 16, in the original town of Augusta, Butler county, Kansas." Prior to the amendment of section 448 of the Code, made in 1887, the sheriff could not take into account the fact that the land upon which he levied an execution was subject to a mortgage or other lien, as there was then no authority to have it appraised and sold subject to such liens. The fact that the land was mortgaged, however, did not prevent a levy upon the whole estate; and, if it was appraised and sold without reference to the incumbrances, the purchaser would ac-

quire the title, subject, of course, to any lien or incumbrance that might exist against it. *De Jarnette v. Verner*, 40 Kan. 224, 19 Pac. Rep. 666. Under the levy that was made in this case, the property was erroneously appraised, subject to the mortgage that has been mentioned; and hence no valid sale could be made under the appraisal. But the error of the appraisers did not invalidate the levy, nor did the fact that the attorneys of the execution creditor directed the sheriff not to advertise and sell the land under the illegal appraisal destroy the levy, or postpone the lien of the judgment to that of the plaintiff in error. The execution, as we have seen, was taken out before the expiration of one year next after the rendition of the judgment, and levy was made upon the land itself, and not upon a mere equity, and thus the preference and priority of the lien was preserved. *Smith v. Kimball*, 36 Kan. 490, 13 Pac. Rep. 801. We find no error in the rulings of the district court, and therefore its judgment will be affirmed. All the justices concurring.

(45 Kan. 751)

PHENIX INS. CO. OF BROOKLYN V. WEEKS.

(Supreme Court of Kansas. April 11, 1891.)

ARGUMENTS OF COUNSEL—INSURANCE—PROOFS OF LOSS—WAIVER—APPLICATION—SUFFICIENCY.

1. A statement made by counsel for the plaintiff in stating the plaintiff's case to the jury considered, and *held*, that no material error was committed.

2. Where a fire insurance policy was issued by an insurance company, and afterwards the insured property was destroyed by fire, and the company then denied all liability on the ground that the policy was void, *held*, that by this denial the company in effect waived all its rights under certain stipulations in the policy requiring proofs of loss to be made, and giving the company 60 days thereafter within which to pay the loss; and a suit brought on the policy within less than the 60 days is not prematurely brought.

3. Where a local agent of a fire insurance company furnishes a blank application to a party seeking insurance, and the agent himself, who has full and complete knowledge of all the facts, fills up the blanks and informs the applicant that the same is done correctly, and the applicant believes him and signs the application, and afterwards a policy is issued thereon, and afterwards a fire occurs, destroying all the insured property, *held*, that the company cannot then claim that the insurance policy is void because of inaccurate or incomplete statements in the application.

4. Where the prayer of a petition asks for interest from a certain date the plaintiff cannot recover interest from a prior date.

(Syllabus by the Court.)

Error from district court, Edwards county; J. C. STRANG, Judge.

This was an action brought in the district court of Edwards county on February 5, 1887, by James P. Weeks against the Phenix Insurance Company of Brooklyn, N. Y., upon a fire insurance policy issued by the defendant to the plaintiff on December 24, 1885, to recover for an alleged loss by fire of the insured property. The case was tried before the court and a jury on November 4, 1887, and the jury rendered the following verdict, and in answer to the following interrogatories made the following special findings of fact, to-wit: Verdict: "We, the jury, impaneled and sworn in the above-entitled cause,

do upon our oaths find for the plaintiff, and assess his damages at \$2,660.42." Findings of fact: "Question 1. Is it not a fact that L. W. Higgins was local agent of the defendant at Kinsley, Kansas, at the time the policy sued on was issued? Answer. Yes. Q. 2. Is it not a fact that L. W. Higgins, as local agent of defendant at Kinsley, wrote the answers in the application for such policy, which plaintiff signed? A. Yes. Q. 3. Is it not a fact that L. W. Higgins, as such agent, at the time of the making of the application and issuing of the policy, had full knowledge of the fact that a part of the machinery in the building was for the purpose of grinding feed? A. Yes. Q. 4. If the jury answer the last question in the affirmative, they may state if it is not a fact that L. W. Higgins, as such agent, knew at the time he issued the policy sued on that the plaintiff intended to grind feed with the rollers in elevator A. A. Yes. Q. 5. Is it not a fact that the plaintiff informed L. W. Higgins fully and truthfully of all the facts in relation to there being a watchman at the mill prior to the writing down of the answers in the application concerning a watch and watchman? A. Yes? Q. 6. Is it not a fact that L. W. Higgins, as such local agent, with a full knowledge of all the facts as stated to him by plaintiff, in relation to watch and watchman, informed plaintiff that the answers which he (Higgins) wrote down to the questions in the application concerning a watch and watchman, were the proper answers to be made? A. Yes. Q. 7. Is it not a fact that when L. W. Higgins issued to plaintiff the policy sued on in this action, that he, as such agent, had full, complete, and exact knowledge of all the facts and circumstances connected with the question as to whether there was any watchman kept at the elevator, or not? A. Yes. Q. 8. Did the plaintiff make any false representations to L. W. Higgins concerning the risk prior to the issuance of the policy? A. The plaintiff read and signed the application attached to the answer, but prior to reading and signing it, he stated to the agent fully and truthfully all the facts and circumstances involved in any answer contained in said application, and the agent then wrote the answers which appear in said application. Q. 9. (erased.) Q. 10. Is it not a fact that defendant company, prior to the expiration of thirty days from the date of the fire, notified plaintiff that it would not pay him for any loss under the policy sued on? A. Yes."

Upon this verdict and these findings the court below, on November 5, 1887, rendered judgment in favor of the plaintiff and against the defendant for the sum of \$2,660.42, and costs of suit; and the defendant, as plaintiff in error, brings the case to this court for review.

H. M. Jackson, for plaintiff in error. C. M. Sterry, for defendant in error.

VALENTINE, J., (after stating the facts as above.) 1. The first claim of error made by the plaintiff in error is with reference to the original statement of the case of the plaintiff below, made by his counsel after the jury had been impaneled, and prior to

the introduction of any evidence. Section 275 of the Civil Code provides, among other things, as follows: "Sec. 275. When the jury has been sworn, the trial shall proceed in the following order, unless the court for special reasons otherwise directs:

(1) The party on whom rests the burden of the issues may briefly state his case, and the evidence by which he expects to sustain it." Counsel for plaintiff below, in his said statement, used the following, among other, language: "That, as I was stating to you, the reason that we make this proof to you is to show to you that an insurance company cannot issue a policy, take a man's money, and give him something in return which is absolutely worthless the moment it is issued,—not worth the paper it is printed on." Possibly a portion of this statement borders too closely upon an argument to come strictly within the provisions of the foregoing section of the Civil Code; but certainly no material error was committed. The insurance company did take the man's money, and did issue to him an insurance policy, and when the fire occurred it then claimed that the policy was and had always been absolutely worthless and void.

2. It is claimed that the action was commenced prematurely. By the terms of the policy sued on the loss was to be paid "sixty days after the proofs of the same required by the company shall have been made by the assured and received at the office in Chicago." The fire occurred December 4, 1886. Proofs of the loss were not made for more than 30 days afterwards, and this action was commenced on February 5, 1887, within less than 30 days after the proofs of the loss. Now, if the company had admitted its liability for the loss, or for any possible portion thereof, or probably if it had not denied its liability wholly and absolutely, its claim in this respect would be good; but after the fire occurred it then, and persistently afterwards, denied its liability utterly and absolutely, and denied it upon the ground that the policy itself was utterly null and void, and absolutely worthless. As before stated, the fire occurred December 4, 1886, destroying substantially all the insured property, which was worth vastly more than the amount of the insurance; and the company immediately had notice thereof. The local agent of the company, L. W. Higgins, had notice as soon as the fire occurred. The general agent at Chicago, Thomas B. Burch, and the adjuster, M. M. Hamlin, had notice very soon afterwards. Hamlin visited the locality where the fire occurred on December 15, 1886, and made some inspection and examination with reference thereto. On December 24, 1886, both Hamlin and Burch wrote letters to Higgins, denying the liability of the company, and in effect stating that the company would not pay anything on account of the loss. Hamlin's letter reads as follows: "Phenix Insurance Company, M. M. Hamlin, adjuster, Omaha, Neb. Omaha, Neb., December 24, 1886. L. W. Higgins, Esq., Kinsley, Kansas—Dear Sir: I am just in receipt of a letter from our Chicago office, same being in reply to my letter written from Kins-

ley; and if Mr. Weeks thinks now there is any boy's play about this matter, you can say to him, we deny liability. Our Chicago office is firm, decided, and in earnest, and we can afford to spend as much as Weeks boasts that he can, and then come out ahead. Personally, I regret the unfortunate combination, and regret that it should in any manner interfere with your business; but otherwise we are ready for conflict. Let it come. Yours, etc., M. M. HAMLIN." Burch's letter is too long to be given here. These letters were handed by Higgins to the plaintiff, Weeks, about December 27 or 28, 1886, and Higgins then informed Weeks that the company denied all liability, and would not pay anything on account of the loss. Proofs of loss were afterwards made, but not within 30 days after the fire. We think that the aforesaid denial of liability on the part of the insurance company for the alleged reason that the insurance policy was itself absolutely void was, in effect, a waiver of all its rights to require proofs of loss, and to have the time for it to make payment of that portion of the amount of the loss for which it was liable extended 60 days after such proofs of loss were made. Cobb v. Insurance Co., 11 Kan. 98, 97 et seq., and cases there cited. For this reason we do not think that the action was commenced prematurely.

3. We do not think that the claims of error numbered 3, 4, and 5, in the brief of counsel for plaintiff in error, require any comment. None of them are tenable under the facts of this case. We shall therefore pass to the claim of error numbered 6, which is that the court below erred in refusing to give certain instructions to the jury. By this claim the plaintiff in error attempts to raise the question of the validity of the insurance policy. It claims that the insurance policy was at the beginning, and always has been, void because of the untruthfulness of the answers made by the plaintiff in his application for the insurance. It is claimed that the plaintiff insured his property as an elevator, when in truth and in fact it was a mill; and that he represented that he kept a watchman on the premises during nights, and that the watchman had no other duties to perform, when in truth and in fact he kept no watchman at all. With respect to the elevator, the question and answer, or rather the statements, in the application are as follows: "Name of elevator: Elevator A." With respect to the watchman, the questions, answers, and statements are as follows: "Watchman: Is a watchman kept on the premises during the night? Yes. Is any other duty required of the watchman? No." The facts affecting these questions are substantially as follows: The building was an elevator, containing steam-fixtures and machinery to operate the same, a corn-sheller, and some other articles named in the application; and also some machinery for grinding corn and other grain, which was not mentioned in the application. As to the watchman, the plaintiff, with eight or ten other business men of the city of Kinsley, employed a private watchman to watch their property during nights, including

the property in question, and this watchman had no other duties to perform. The local agent had complete knowledge of all these matters, both with respect to the elevator and all its machinery and contents, and how it was used, and with respect to the watchman. Just before the application was made out and signed, the local agent went through all parts of the elevator building, and examined the same with all its contents, and he then filled up the application, he writing all the written statements therein, and all the answers to the questions therein contained, and then stating to the plaintiff that the questions were all properly answered, and the plaintiff believed they were, and then signed the same. The plaintiff did not make a single untruthful statement to the local agent. The evidence shows all these things, and the special findings of the jury show the most of them. We would further state in this connection that the application was originally a printed application furnished by the insurance company, with blanks therein, to be filled up before signing, and then signed by the applicant; and it contained not only the aforesaid questions for the applicant to answer, but it also contained the following, among other, statements: The party subscribing the application "hereby covenants and agrees to and with said company that the foregoing answers are true," etc., "and such answers or statements are to be always construed and accepted as forming and constituting a continuing warrant;" and the policy which was afterwards issued contains a statement that the application should "be considered a part of this contract and warranty by the assured." It was admitted by the defendant's answer, and also shown by the evidence "that L. W. Higgins was and is a duly-authorized agent appointed by the defendant at Kinsley, Edwards county, Kansas," but the exact scope of Higgins' agency is not shown. The policy also contained a provision that "the insurance may also be determined at any time, at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy. The answers and statements contained in the application were substantially true, although perhaps not as complete and exact as they should have been, but the company's agent at Kinsley knew all these things, and the company is bound to know what he knew; and yet the company took the applicant's money, issued to him the policy, and never canceled the same, although it had the power to do so at any time if it so chose. The company chose to let the insurance stand until the fire occurred, and then for the first time it claimed that the insurance was void. This does not seem like acting in good faith. Under the facts of this case we do not think that the policy is void. And in support of this view we would refer to the following cases decided by this court: *Sullivan v. Insurance Co.*, 34 Kan. 170, 8 Pac. Rep. 112; *Insurance Co. v. Pearce*, 39 Kan. 396, 18 Pac. Rep. 291; *Insurance Co. v. Barnes*, 41 Kan. 161, 21 Pac. Rep. 165; *Protective Union v. Gardner*, 41

Kan. 397, 21 Pac. Rep. 233; *Insurance Co. v. Hogue*, 41 Kan. 524, 21 Pac. Rep. 641; *Insurance Co. v. Gibbons*, 43 Kan. 19, 22 Pac. Rep. 1010; *Insurance Co. v. Gray*, 43 Kan. 497, 23 Pac. Rep. 637.

4. As a seventh and last complaint the plaintiff in error claims as follows: "The verdict and judgment were excessive, and contrary to law. The petition claimed \$2,500, with seven per cent. interest from February 4, 1887. Interest from February 4, 1887, to November 5, 1887, \$181.72; principal, \$2,500.00; total, \$2,681.72." We think this claim of the plaintiff in error is correct. The jury calculated interest from the time of the fire, to-wit, December 4, 1886, while under the petition of the plaintiff below they should have calculated interest only from February 4, 1887, as the petition did not ask for any interest prior to that time. Civil Code, § 87, subd. 3; *Green v. Dunn*, 5 Kan. 254, 261, 262; *City of Burrton v. Bank*, 28 Kan. 390, 393. The judgment was rendered November 5, 1887, for \$2,680.42. This, we think, is the only substantial error committed in the case. The judgment of the court below will be modified by reducing it from \$2,680.42 to \$2,681.72. All the justices concurring.

(46 Kan. 145)

#### PARSONS WATER CO. v. HILL.<sup>1</sup>

(*Supreme Court of Kansas*. April 11, 1891.)

APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW  
—CONTINUANCE — PLEADING — AMENDMENT—  
WEIGHT OF EVIDENCE.

1. Where on the trial of a cause the plaintiff is permitted to amend his petition setting up a new cause of action, and the defendant does not object to it on that ground in the trial court, he cannot in this court assign the allowance of such amendment as error, and have the matter reviewed here, though he did object to the allowance of such amendment on other grounds.

2. Under the circumstances of this case, it was not an abuse of discretion on the part of the court to refuse a continuance of the case because of the amendment allowed to the petition.

3. Where an action is brought upon two promissory notes, and during the trial it is dismissed as to one of them without prejudice, and afterwards the plaintiff amends his petition, and claims the same amount as balance due on a settlement, and the pleadings show the settlement occurred more than three years before the petition was amended, it is error to overrule a demurrer to said petition which alleges that the cause of action is barred by the statute of limitations.

4. Evidence examined and held sufficient to support the verdict and judgment as to the first cause of action.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Neosho county; L. STILLWELL, Judge.

*Kimball & Osgood*, for plaintiff in error. *Sluss & Stanley* and *W. H. Criley*, for defendant in error.

STRANG, C. In 1883 the defendant in error contracted in writing with the plaintiff corporation to build water-works in the city of Parsons, Kan., and was to receive as compensation therefor \$100,000 worth of paid-up capital stock of said company, par value, and \$50,000 worth, par value, of the mortgage bonds of said company, which stock and bonds were to be all the stock and all the bonds to be is-

<sup>1</sup>Petition for rehearing pending.

sued by said corporation. During the construction of said works the defendant in error did some extra work for the plaintiff in error, and, when the works were completed, or about completed, he presented to the directors of said corporation a bill for \$1,717.35 for said extra work. The company thought the bill too much, and finally the parties agreed upon a settlement, the company promising to pay Hill the sum of \$1,100 by giving him a note for said sum, due six months from the 1st day of the month of January, 1884. The water-works were turned over by Hill to the company. Soon afterwards Hill called on Mr. Kimball, the president of the corporation, reminded him that he had settled with the company, and that the company was to give him its note for \$1,100. Kimball made and signed notes for the company for \$400 and \$700, respectively, and delivered them to Hill. Said notes were to be attested by the secretary of the company, Mr. McKim, but the \$700 note was to be held for some work to be completed by Hill before it was to be attested by McKim. Hill presented the \$400 note to McKim, who attested it. Afterwards he presented the \$700 note to McKim for attestation. When McKim got possession of the note he took it to Mr. Kimball, and showed it to him, who thereupon wrote across the face of the note, "Not good until countersigned by McKim," and then directed McKim not to countersign it. McKim returned the note to Hill, having refused to countersign it. Afterwards, on November 18, 1886, Hill brought suit against said corporation on said notes, declaring upon the \$400 note for his first cause of action, and upon the \$700 note for his second cause of action. The company answered by general denial; and also alleged that Hill had never completed the water-works, and had so defectively constructed them, so far as he had progressed with the work, that the company had been compelled to spend large sums of money—specifying the same—to complete said water-works, and make them comply with the specifications which were a part of the contract for the construction of the works, and demanded judgment against Hill for a large sum. Hill replied, denying generally the allegations of the answer, and specially alleged the completion of the works according to the terms of the contract, inspection and acceptance of the works by the company, and the undertaking of the company to pay him \$1,100, and that the notes sued on were executed to cover said \$1,100. On the trial of the case, when the \$700 note was offered in evidence, the company objected to its reception as evidence, for the reason that the paper offered in evidence as the note of the corporation had never been executed by said corporation. The objection was sustained, and thereupon the plaintiff dismissed his second cause of action,—the one founded upon said \$700 note,—without prejudice, and the case proceeded until the defendant below had introduced his evidence, and the plaintiff below had offered his rebuttal evidence, and was about to rest his case, when the said plaintiff, before resting his case, asked

leave to amend his petition so as to conform his allegations to the facts proved, which leave was granted, and the petition was so amended as to state a cause of action for the \$700 as due on settlement between the parties January 13, 1884. The defendant below objected to the amendment, and when it was allowed asked a continuance upon the ground that the company was not ready to try the case on the amended petition; but no showing was made, and the court refused to continue the case. The company then demurred to the second count in the petition, for the reason that it did not state facts sufficient to constitute a cause of action, and, if any cause of action was stated, that it was barred by the statute of limitations. The demurrer was overruled. The defendant then answered this amended petition, substantially repeating its answer to the original petition. The defendant then introduced evidence as to said cause of action, and rested, and the plaintiff rebutted. The jury rendered a general verdict for the plaintiff below in the sum of \$1,071.71. Motion for a new trial was overruled.

The first matter to which the attention of the court is directed is the alleged error arising from the action of the court in permitting the plaintiff below to amend his petition during the trial. The plaintiff in error claims that the amendment introduced a new cause of action, and the amendment was therefore erroneous. The defendant below objected to the allowance of the amended petition, but the objection was in the nature of a demurrer, and stated that the second count of the petition as amended did not state a cause of action, and, if it did, the cause of action so stated was barred by the statute of limitations. There was no objection upon the ground that the amendment introduced a new cause of action into the case, and therefore that matter cannot be reviewed here. The next complaint is based upon the refusal of the court to continue the case at the request of the defendant corporation on the statement of its attorney that it was not ready to proceed with the trial on the amended petition. The plaintiff below introduced no new evidence in chief after amending his petition. The defendant below introduced evidence under the amended petition directed to the second cause of action, and the plaintiff presented a little rebuttal evidence thereto, and rested. The original suit involved a cause of action for the same \$700 declared on in the amended petition. It is true it was originally declared on in the form of a promissory note, while in the amended petition the note was abandoned, and the amount was claimed as a balance due on settlement; but the alleged note declared on in the original petition represented the same \$700 due on the settlement declared on in the amended petition. The defendant below had notice from the commencement of the suit that the plaintiff below claimed the \$700 the same as he did the \$400. The case of the plaintiff below was tried in chief with the claim for the \$700 in the case, and the record shows that the evidence all the way through the

case related as much to the \$700 claimed in both the original and amended petitions as it did to the \$400 claim in the original petition. It cannot be said, then, that the defendant below was in any sense surprised by the amendment. Under such circumstances, and with no showing for a continuance by the defendant company, we cannot say that the court abused its discretion by refusing to continue the case.

The next allegation of error presented by the plaintiff is the action of the court overruling the defendant's demurrer to the amended petition in the court below. The demurrer alleged that the cause of action stated in the second count of the petition as amended was barred by the statute of limitations. The settlement between Hill and the water-works company, out of which the claim arises, was had on the 13th day of January, 1884. The amended petition in the case was filed July 21, 1887. It will be seen that, if the three-years statute applies, it had run before the amendment was made, and the cause of action therein stated was barred, unless something had occurred to place the matter within the statute. Does the three-years statute apply? The plaintiff's claim is for a balance due on settlement. The cause of action is not founded on a written agreement. It is an open account,—balance due on settlement. The three-years statute applies to such claims. The defendant in error argues that when the amendment was made it related back to the commencement of the suit, and by operation of law was thus brought within the statute. We do not think the statute can thus be avoided. If it can, there is nothing but the statute in relation to amendments to prevent any cause of action barred by the statute of limitations from being brought within the limit of the statute by amendment whenever another cause of action is pending between the same parties which was commenced before the statute had run against the new cause of action. Suppose the plaintiff below, on the same day that he dismissed his second cause of action, had instituted a new suit therefor,—which he could have done, and probably should have been required to do,—there would then be no question but that, if the statute had run at the commencement of said suit, it would be too late, and the cause of action would be barred. So, where a plaintiff during the trial of his case ascertains that he cannot recover on one of the causes of action in his petition, and thereupon dismisses his case as to said cause of action, but afterwards is permitted to renew the same in another form, we think such renewal of his cause of action, so far as the statute of limitations is concerned, is the commencement of a new action, and, if the statute has run against said cause of action when said amendment and renewal are allowed, the cause of action therein set up is barred. The defendant in error also claims that the cause of action set up in the amended petition is founded upon the contract between the parties for the erection by him of the water-works. Here is where the

difficulty in this matter, so far as the defendant in error is concerned, is found. The plaintiff below might have brought his action, so far as this cause of action is concerned, and, indeed, so far as both are concerned, upon the contract, setting up the contract, and then alleging the settlement under it, in which case the five-years statute would have applied, and no part of the case would be barred. But the plaintiff below simply brought his action upon two promissory notes. There was nothing in the petition referring to anything as a foundation for the cause of action therein stated except the notes sued on. During the trial the plaintiff therein dismissed his second cause of action without prejudice, and subsequently renewed it in a different form, and basing it upon a balance due on settlement. In any view that we are able to take of this case the statute has run against the cause of action set up in the amended petition. We have examined the authorities cited by counsel for the defendant in error, but fail to find anything therein to support the position assumed by counsel.

The fourth and fifth complaints were settled by the verdict of the jury. Each depended upon the evidence, which was conflicting upon all questions involved in these complaints. The verdict of the jury, therefore, is conclusive thereon.

The last error assigned is founded upon an alleged erroneous instruction given by the court to the jury. We do not think it possible, under the circumstances of this case, for the jury to have been misled by the technical error on the part of the court in using the word "defendant" instead of the word "plaintiff," in its instructions to the jury, when speaking of laying the mains. The fact that the plaintiff, instead of the defendant, laid the mains was too well understood by the jury for them to be misled by a slip of the tongue in referring to the parties or a party to the suit.

The plaintiff claims that the court, in its instruction referring to the amount of mains required by the ordinance to be laid in the city, left out the words "in said city," so that it did not appear from the instruction that the six miles of mains required by the ordinance to be laid must be laid in the city. While the court left out the words "in the city," yet the court used the following language: "And if you believe from the evidence that the defendant [plaintiff] laid six miles of pipe at places designated," etc. With the ordinance which required the six miles of pipe to be laid in the city in evidence, this language of the court was equivalent to saying: "If you find six miles of pipe was laid in the city, then, so far as this feature of the contract is concerned, you would be justified in finding the plaintiff had complied with the same." At any rate we do not think there is any material error in the instruction complained of. It is recommended that the case be reversed as to the second cause of action, and affirmed as to the \$400 and interest on same.

PER CURIAM. It is so ordered; all the justices concurring.



(46 Kan. 70)

HAYNER *et al.* v. TROT *et al.*

(*Supreme Court of Kansas. April 11, 1891.*)

CLAIMS AGAINST DECEDENT'S ESTATE—PLEADING.

1. Where a claim presented to a probate court for allowance alleges that the debtor therein named owes the party presenting the claim the sum of \$377.62, for commissions paid on the sale of machines, for which notes were taken that are uncollectible, and copies of said notes are attached, showing the amount of the same, and the amount of the commissions paid thereon is also shown, and said claim is verified, and has attached thereto contracts which provide that, when commissions have been paid on notes that are uncollectible, they shall be refunded, *held*, that such claim is good against a demurrer, and that the action of the court in sustaining a demurrer thereto was erroneous.

2. Under our statute, which provides that claims presented to the probate court for allowance shall be heard summarily, and without the form of pleading, it is not a proper practice to interpose a demurrer to a claim therein.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Geary county. M B. NICHOLSON, Judge.

Thomas Dever, for plaintiffs in error. J. R. McClure, for defendants in error.

STRANG, C. The plaintiffs filed a claim in the probate court of Davis, now Geary, county against the defendants for \$377.62. The defendants demurred to the statement of the claim as filed, which demurrer was sustained. The plaintiffs excepted to the action of the court in sustaining said demurrer, and took the matter to the district court on error. The district court affirmed the action of the probate court, and the plaintiffs come on up to this court with a transcript, asking that the whole matter be reviewed and corrected here.

There are two questions involved in this matter. The first is whether the statement of the claim filed by the plaintiffs in error in the probate court was sufficient to require the said court to consider it. While the claim as presented to the probate court is not well stated, and in fact is defectively stated, we do not think it is so defectively stated as not to amount to a statement of a claim at all; and, if it amounted to a claim at all in favor of the plaintiffs and against the defendants, it was good against a demurrer. We therefore think the district court erred in affirming the action of the probate court in sustaining the demurrer to said claim.

The second question involved in the case is one of practice. The plaintiffs in error contend that, under our statutes requiring matters of this kind to be heard summarily and without pleading, there is no such practice as interposing a demurrer to a claim filed in the probate court. Gen. St. 1889, par. 2878, reads as follows: "The probate court shall hear and determine all demands in a summary way, without the form of pleading, and shall take the evidence of competent witnesses, or other legal evidence." The statute contemplates that the court will hear the evidence in support of the claim without any pleading. With this provision of law in our statute-book we do not think it a proper practice to file a demurrer to a claim presented in the probate court. The statute

seems to contemplate the presentation of claims in this court by the owners thereof without the aid of an attorney at law, and that the court shall investigate the claims in a summary way, without any pleadings that require the skill of an attorney at law in their preparation. Once recognize the practice of filing pleadings in this court, and the contemplated simplicity of hearings therein will be lost in the maze of technicalities. We think it is better to proceed in the manner pointed out in the statute. It is recommended that the judgment of the district court be reversed.

PER CURIAM. It is so ordered: HORTON, C. J., and VALENTINE, J., concur.

JOHNSTON, J. I concur in the conclusion that the statement of claim filed by plaintiffs was sufficient to invoke the consideration of the court, and to overcome the demurrer that was filed against it, and for that reason I concur in the judgment of reversal. I see no objection, however, to the interposition of a demurrer, or motion,—the name is immaterial,—challenging the sufficiency of the claim which is filed. The statute requires that any person presenting a demand against an estate must set forth in writing, not only the amount of his claim, but the nature of the same; and, if it is founded on a written statement or account, a copy of the same must be filed with the demand; and the court cannot then allow the demand, unless the claimant make an oath or file an affidavit with the claim, stating to the best of his knowledge and belief that he has given credit to the estate for all payments and offsets to which it is entitled, and that the balance claimed is justly due. Gen. St. 1889, pars. 2868, 2872. Although a formal pleading is not required, these provisions of the statute must be complied with in order to invoke the jurisdiction of the court, and the investigation and allowance of the demand. When the claim presented does not come up to these essential requirements, the court may, in my opinion, upon motion or demurrer, determine the insufficiency of the statement of demand, and dismiss the proceeding, unless the proper amendment is made. When the nature of the claim is stated as the statute requires, and it manifestly appears that it is not a valid claim against the estate, or that it is one that is not allowable by the probate court, what is the necessity or propriety of proceeding further? I see no impropriety in challenging the sufficiency of the statement of demand at the outset by a demurrer or motion, before witnesses are subpoenaed and needless costs are incurred.

(46 Kan. 213)

CITY OF WELLINGTON v. TOWNSHIP OF WELLINGTON *et al.*

(*Supreme Court of Kansas. April 11, 1891.*)

DIVISION OF TOWNSHIPS—ASSETS—CONDITIONS IN DEED—TOWN HALL—CITY FORMED FROM TOWNSHIP—RIGHTS IN TOWN PROPERTY.

1. When small portions of an original township are from time to time detached to aid in the formation of new townships, the portions of the

original township thus detached, in the absence of legislative provisions to that effect, retain no interest in or claim to the public property of the original township not situate in any of the portions detached.

2. A deed conveying town lots to a municipal township, its successor or successors, for the consideration of "one dollar and the enhanced value of lots that are owned by the grantor that lie in the vicinity of the herein granted lots," for the express purpose of erecting a township hall, vests the absolute title to the lots in the township, but places a limitation on the manner of the use of said lots.

3. When, under such a conveyance, the township raises money by taxation, and erects a town-hall on the lots, and the hall is used solely and distinctly for public purposes connected with the administrative powers of the municipality, it is public property, subject to legislative control, and not the private property of the corporation under a proprietary power.

4. When a city of the second class is created out of territory wholly within the limits of a municipal township, the title to two town lots in said city, which were conveyed by the owner thereof to such municipal township, its successor or successors, when said city of the second class was a city of the third class and a part of said township, for the express purpose of erecting thereon a township hall, and a township hall had been erected thereon by the expenditure of money raised by taxation on all property of the township, vested in the city of the second class as the legal successor of the township. The case of Board of Education of Kansas City v. School-Dist. No. 7 of Wyandotte Co., ante, 18, distinguished.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Sumner county; R. B. SHEPARD, Judge *pro tem*.

Wm. A. McDonald, A. E. Parker, and C. Everest Elliott, for plaintiff in error. George, King & Schwinn, James A. Ray, L. B. Kellogg, and Haughey & McBride, for defendant in error.

SIMPSON, C. The material facts are that on or before the 5th day of September, 1873, all the territory embraced in the present city of Wellington, the township of Wellington, and a portion of that embraced in each of the other defendant townships, constituted one single township, known as "Wellington Township." On that day one Henry H. Davidson, being the owner in fee-simple of certain real estate, conveyed to the said township of Wellington lots 11 and 12, in block 53, in the original town (now city) of Wellington. A part consideration for said conveyance was the agreement of the township of Wellington to build upon said lots a township hall by the 1st day of June, 1874. That, after an extension of time by mutual agreement the hall was built, and the title to the lots became absolute in the township of Wellington. On the 24th day of February, 1874, a portion of the original township of Wellington was detached and made a part of the township of Jackson. On the 22d day of February, 1876, another portion was detached, and made a part of the township of Seventy-Six. On the 3d day of January, 1876, another portion was detached, and made a portion of the township of Osborn. On the 30th day of August, 1879, another portion was detached, and made a part of the township of Downs. On the 14th day of February, 1880, the city of Wellington, that before that time had been a

city of the third class, was incorporated as a city of the second class, but was composed entirely of territory that had belonged to the township of Wellington. The township hall was included within the limits of the city of Wellington as a city of the second class, and has been used by the city of Wellington ever since its organization as a city of the second class as a town-hall. The deed of conveyance from Davidson to the township of Wellington recites that it is made "in consideration of the sum of one dollar and the enhanced value of lots that are owned by the said grantor that lie in the vicinity of the herein granted lots, to the said grantee, for the express purpose of erecting a township hall on herein described real estate." The lots are granted "to the township of Wellington, its successor or successors." The lots are described as being in the late town, now city, of Wellington. At the date of this conveyance Wellington was a city of the third class, and a part of Wellington township. This action was commenced by the city of Wellington, a city of the second class, alleging that the city of Wellington was in the actual possession and occupancy of said property, and was the owner in fee-simple thereof; that the defendants each and all claimed to have an interest therein; and that such claims constituted a cloud on the title of the city, etc. It ought to have been stated, at the proper place, that the costs and expenses incurred in the purchase and improvement of these lots were contributed by the tax-payers of Wellington township, as it was constituted on the 5th day of September, 1873. Each of the defendants demurred to the petition of the city of Wellington, on the ground that it did not state facts sufficient to constitute a cause of action, because it did not show that the city was the owner of the property in controversy. These demurrers were sustained by the trial court, and the questions presented by them are here for review.

1. Some preliminary questions were discussed by counsel. It was claimed that there was not attached to the petition in error any authenticated transcript containing the judgment or final order of the court, and hence that the petition in error ought to be dismissed. The clerk of the district court of Sumner county attaches to the petition and exhibits, to the bond for costs, to the *præcipe*, to the summons, to the demurrers, and to the judgment, a separate certificate under the seal of the court, stating that each of these papers is a true, full, and complete copy of the originals as they remain on file in his office in the foregoing case, the same being duly entitled. The better and the usual practice is for the clerk to attach at the end of a transcript a general certificate to the effect that the foregoing is a true, full, and complete transcript of the pleadings and judgment; but, as each pleading and the judgment is properly certified, we have no doubt but that in this particular case, being a judgment on demurrer, and the only necessary papers being the pleadings and judgment showing the exception to the ruling, the transcript is sufficient to review the ruling below.

It is also insisted that as the record presented shows only that this case came on for trial before Hon. R. B. SHEPARD, a member of the bar of this court, and does not show that he was selected in any manner known to the law as a judge *pro tem.* for the trial of this cause, this court will not review the proceedings. The record does recite this: "And the hearing and trial heretofore having been submitted to the said R. B. SHEPARD, Esq., by and with the consent of all of said parties, plaintiff and defendants, who appeared herein by their respective counsel." Now, this is one of the modes prescribed by statute for the selection of a *pro tem.* judge. Paragraph 1866, Gen. St. 1889. It is true that the record does not designate the attorney selected to try the cause as judge *pro tem.*, but it does recite that he is a member of the bar of that court, and that he was agreed upon to try the cause by all the parties in interest, and that the regular judge was disqualified to try the case because he had been of counsel. Apart from all this, no question was raised in the court below as to the power or authority of the judge *pro tem.* to hear the case, but all parties consented thereto, and therefore such question cannot be raised for the first time in this court. This is expressly decided in the case of *Higby v. Ayres*, 14 Kan. 331, and this is a stronger case, because this record affirmatively shows that the judge of the district court of Sumner county was disqualified.

2. The principal question to be determined by the demurrers filed to the petition in this case is, when territory is detached from an original municipal township to aid in the formation of four additional townships, and when a city of the second class is created within the remaining limits of the original township, how do these detachments and this creation affect the title to lots, and a township hall erected thereon, owned by the original municipality, and built by taxes levied on the property of the original township, but situated within the limits of such city of the second class, and within its limits when it was a city of the third class, and a part of the original municipality? So far as the briefs of counsel and our own research are concerned, there is no statutory rule to determine this controversy, without it be chapter 62 of the Session Laws of 1889. In the case of *Laramie Co. v. Albany Co.*, 92 U. S. 307, decided in 1875, Justice CLIFFORD, speaking for a unanimous court says: "Sixty-five years before the decree under review was rendered, a case was presented to the supreme court of Massachusetts, sitting in Maine, which involved the same principle as that which arises in the case before the court. Learned counsel were employed on both sides, and PARSONS was chief justice of the court, and delivered the opinion. First he adverted to the rights and privileges, obligations and duties, of a town, and then proceeded to say: 'If a part of its territory and inhabitants are separated from it by annexation to another, or by the erection of a new corporation, the former corporation still retains all its property, powers, rights, privileges, and

remains subject to all its obligations and duties, unless some new provision should be made by the act authorizing the separation.' *Windham v. Portland*, 4 Mass. 339. Decisions to the same effect have been made since that time in nearly all the states in the Union where such municipal subdivisions are known, until the reported cases have become quite too numerous for citation. Nor are such citations necessary, as they are all one way, showing that the principle is one of universal application. Concede its correctness, and it follows that the old town, unless the legislature otherwise provides, continues to be seised of all its lands held in a proprietary right, continues to be the sole owner of all its personal property, is entitled to all its rights of action, is bound by all its contracts, and is subject to all the duties and obligations it owed before the act was passed effecting the separation." This was said in a case wherein Laramie county brought an action against Albany and Carbon counties to compel them to contribute their just proportion to an indebtedness incurred when these two counties were a part of Laramie county, they having been established wholly out of territory included within the limits of Laramie county. This case is cited with approbation by this court in the case of *Commissioners v. Bunker*, 16 Kan. 498, Justice VALENTINE saying: "Now, in all cases, as we understand the law, where the legislature divides a county without making any legal provision for a division or apportionment of the debts or property thereof, the old county pays all the debts and takes all the property."

Territory was detached from the township of Wellington as follows: On the 24th day of February, 1874, the N.  $\frac{1}{2}$  of congressional township No. 33, range 1 W., was detached and made a part of Jackson township. On February 22, 1876, the S.  $\frac{1}{2}$  of township 31, range 1 W., was detached and made a part of the township of Seventy-Six. On January 3, 1876, the E.  $\frac{1}{2}$  of township No. 32, range 2 W., was detached and made a part of the township of Osborn. On the 13th day of August, 1879, the N. E.  $\frac{1}{4}$  of township 33, range 2 W., was detached and made a part of the township of Downs. At and during the times when these various parts of territory were detached from the township of Wellington, and aided in the formation of other townships, section 3, c. 142, Laws 1873, was in force, which provided: "All real estate heretofore and hereafter detached by a change of boundary lines from any county or township, wherein any bonds shall have been previous to such change of boundary lines legally authorized and issued by a vote of the electors of such county or township, shall be subject to taxation for the payment of such bonds, and the interest thereon, in the same manner as though no such change of boundary lines had been made." This is still the law. See paragraph 439, Gen. St. 1889. It is alleged in the petition in this case, and of course admitted by the demurrers, that the money for the purchase of the lots and for the erection of the town-hall was raised by taxation; and it is not alleged or

shown that any bonds have been issued or were now outstanding. Under the cases of *Commissioners v. Bunker*, 16 Kan. 498; *Chandler v. Reynolds*, 19 Kan. 249; *Craft v. Lofinck*, 34 Kan. 369, 8 Pac. Rep. 359,—this section of chapter 142 of the Laws of 1873 only applies in cases where bonds have been legally issued before a change of county or township boundaries. The fair implication arising from this legislative action is that, when a part of a township is detached, it is relieved of all obligations of the municipality from which it is taken, except in the simple instance of bonds having been legally issued when it was a part of that township. No bonds having been issued by Wellington township, the principle that, unless by the act authorizing separation some division of property is declared, the original municipality retains all the property, applies in this case in favor of Wellington township, and the townships of Seventy-Six, Osborn, Downs, and Jackson have no interest or claim to any part of the lots and township hall in controversy.

Counsel for the defendants in error insist that, as this is an equitable action, the plaintiff in error is in no attitude to claim relief, because, among other reasons, the property is public property, and their clients have equities in it to the extent of their contributions to the purchase and improvements thereof. A very brief statement will dissipate these foggy mists of error. Counsel represent separate and distinct municipalities, and the petition shows that small portions of the territory embraced within the original township of Wellington were at various times annexed to the townships of Seventy-Six, Osborn, Downs, and Jackson. Possibly these townships were created after this transaction, but, be that as it may, it is perfectly clear that by no possibilities could these organizations, as public corporations, have any equitable claims on the property in controversy, because some of the land and a few of the people of their respective townships at one time were situate and resided within the limits of Wellington township, and contributed by taxation to the improvement of it. It is true that the people in these townships who paid a part of the taxes might by such payment have acquired a moral obligation against the original township, which by legislative action might have ripened into a legal demand, but it would accrue to these people, and not to the municipalities. So that neither a fair application of legal principles nor a generous appeal to equitable considerations give these municipalities any claim or interest in the property. This conclusion is abundantly sustained by numerous adjudicated cases, and, while there may be found a few cases that seem to hold a contrary doctrine, the very great weight of authority establishes the principle applied. See, among other cases, those of *Town of Depere v. Town of Bellevue*, 31 Wis. 120; *Town of Milwaukee v. City of Milwaukee*, 12 Wis. 93; *Crawford Co. v. Iowa Co.*, 2 Chand. (Wis.) 14; *Hampshire v. Franklin*, 16 Mass. 76; *North Yarmouth v. Skillings*, 45 Me. 133; *Veazle v. Howland*, 47 Me. 127.

3. This narrows the controversy down to the city of Wellington and the township of Wellington, and invokes the application of other principles. It will be observed that at the time the town of Wellington became a city of the second class, it was composed of territory that had been exclusively within the boundaries of the township of Wellington after certain portions of that township had been annexed to the other townships, and constituted a part of Wellington township. This inquiry arises on this state of facts: When a city of the second class is created out of the territory of a municipal township, and the public property of the township is situated within the boundaries of such city, which municipality owns the property? In the absence of legislative regulation, the presumption is that the legislature did not consider that any regulation was necessary. *Mount Pleasant v. Beckwith*, 100 U. S. 514. It is said in this case: "Where there is no legislation on the subject, the old corporation owns all the public property within its limits, and is responsible for all debts of the corporation contracted before the separation, nor has the new municipality any claim to any portion of the public property except what falls within its boundaries, and to that the old corporation has no claim whatever;" and cites in support the cases of *Laramie Co. v. Albany Co.*, 92 U. S. 307, and *Bristol v. New Chester*, 3 N. H. 524. It is further said in the case of *Mount Pleasant v. Beckwith* "that it is not a case where the legislature creates a new town out of the territory of an old one, without making any provision for the payment of the debts antecedently contracted, as in that case it is settled law that the old corporation retains all the public property not included within the limits of the new municipality, and is liable for all the debts contracted by it before the separation took place." The case of *School Tp. of Allen v. School Town of Macy*, 109 Ind. 559, 10 N. E. Rep. 578, was one in which, prior to the incorporation of the town of Macy, it constituted a part of the township of Allen, and constituted a greater part of school-district No. 1 in that township. The school township had purchased a tract of land, received a conveyance therefor, and had erected a school-house thereon. When the town of Macy was incorporated this land, and the school-house thereon, which had been used exclusively for school purposes, were situated wholly within the territorial limits of said town of Macy; but the school township of Allen was claiming the exclusive control and ownership of said school-house, and the land upon which it was situated, asserting the right to sell and dispose of it without the consent of the school town of Macy. The school town of Macy commenced an action to quiet its title to said land and school-house, and that the township be required to convey said tract of land to it for school purposes. In Indiana an incorporated town is as much a distinct municipal corporation for school purposes as is a civil township. The court say, in affirming a decree of the court below in favor of the town of

Macy: "There cannot be, at the same time, within the same territory, two distinct municipal corporations exercising the same powers, jurisdictions, and privileges;" citing Dill. Mun. Corp. (3d Ed.) § 184. "When the town of Macy was incorporated and was organized as a school corporation, it became the successor of the school township of Allen in all educational matters connected with the public schools within its territorial limits, and, as a necessary consequence, the jurisdiction which said school township had theretofore exercised was thereafter entirely excluded. It was held in the case of *School-Dist. No. 1 v. Richardson*, 23 Pick. 62, that when a township abolishes its existing school-districts, and forms new ones, the title to the school-houses then in existence vests in the new districts in which they happen to fall. This case was followed in *School-Dist. No. 6 v. Tapley*, 1 Allen, 49, and this authority has been expressly or impliedly recognized in *Carson v. State*, 27 Ind. 465; *State v. Shields*, 56 Ind. 521; and *School Town of Leesburgh v. Plain School Tp.*, 86 Ind. 582. These conclusions were in accordance with the general principles governing the use, occupation, and control of public property situate within the territory, which has been transferred to a new governmental jurisdiction." In the case of *City of Lynn v. Inhabitants of Nahant*, 113 Mass. 433, it is expressly decided that lands held by a town, by virtue of being within its municipal boundaries, necessarily, upon the division of the town by the general court, were held in like manner by the town within whose limits they fell upon division, unless the general court expressly provided otherwise. One of the earliest, and possibly the earliest, case which directly involved this question is *North Hempstead v. Hempstead*, 2 Wend. 110. The town of North Hempstead was created out of the territory of the town of Hempstead, which owned certain land, and the question in dispute was as to the ownership of that part of the land that fell within the limits of the new town of North Hempstead, and the unanimous opinion of the court of errors was that the new town was entitled to hold in severalty the public property that fell within its limits.

We have carefully examined all the cases cited in both briefs, and some in addition thereto. A very great majority of these cases are devoted to a discussion and application of the principle that when a part of a township is annexed to another, or is detached to form a new township, the old municipality retains the property, and is liable for the debts, without other provision is made by the act of separation. Very few reported cases adjudicate the question as to which municipality is entitled to the public property that falls within a city created out of a township, because, as a rule, the legislature has made provision for an equitable division. The strongest case that can be found in the books in favor of the defendant in error (the township of Wellington) is that of *Parish of West Carroll v. Gaddis*, 34 La. Ann. 928; but, like many of the other cases, the point embraced in the controversy was

not precisely the same as here, but the general observations of the court in the course of the argument were to the effect that the township of Wellington would retain all the property. We have examined the case of *Board v. East Saginaw*, 45 Mich. 257, 7 N. W. Rep. 808, and find it very largely controlled by statutory considerations. The case of *People v. Trustees*, 86 Ill. 613, is one in which the president of the board of education of the city of Chicago claimed that, because the boundaries of the city had been extended so as to include a small portion of a country school-district, they were entitled to a part of the revenues arising from school section No. 16, that remained wholly within the limits of the country school-district, and his claim was denied. The later case of *McGurn v. Board*, (Ill.) 24 N. E. Rep. 529, (decided in May, 1890,) turns entirely upon statutory provisions. It may be fairly said that in every case in which the question was a controlling one, and it was free from statutory control, it has been held that, in cases of a new and different municipality carved out of a municipal township, the public property falling within its limits belongs to the new.

4. We take note of the distinction made in the brief of counsel for the township of Wellington between the governmental character of a municipality and its proprietary powers. In its governmental character the corporation is made by the state a local depository of certain limited and prescribed political powers, to be exercised for the public good of the state rather than for itself. In its proprietary character the theory is that the powers are not supposed to be conferred chiefly from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual. This distinction is well founded, and upon it is based the doctrine that, as to property acquired under such powers, and as to contracts with reference thereto, the corporation is not to be regarded as a public one, to the extent that the legislative power over it with reference to such property is omnipotent. In the long list of authorities cited by Judge Dillon in his work on *Municipal Corporations*, sustaining this distinction, we do not find that it exists anywhere, except in cities, and from its nature it must only apply to large cities, and in these it seems to be confined to property held by cities not absolutely necessary for the transaction of the public business, but for revenue, improvement, and development, such as bridges, wharfs, and structures of that character. It seems clear to us that the property in question was used solely and distinctly for a public purpose, and was a necessity of the municipal existence, because it had to have a place at which to transact the public business, and was not of that character that fell within the proprietary power of the township. Neither can it be claimed that the township of Wellington held this property in trust for specific uses. But the conveyance by Davidson to the township contained a limitation of the manner in

which the property should be used. *Curtis v. Board*, 43 Kan. 138, 23 Pac. Rep. 98. Neither do we think that the possession and use of the lots, and the building thereon by the city of Wellington for public purposes, would depart from the express purpose of the conveyance so as to create any forfeiture of the estate. A city of the second class, for its mayor, common council, police judge, marshal, and other officers, has more use for a town-hall than a township can have, and the use by both is so similar that it does not appear that there is any substantial departure from the literal terms of the grant. In fact, the conveyance expressly provides for the same use, both by the township and its successor, and, as we have said, the use can only differ in degree, and not in character.

5. There is another question arising on the facts in this case that seems to be more controlling in its operation than the one just discussed. The conveyance made by Davidson to the township of Wellington was of lots in the town of Wellington, which at that time was a city of the third class. This conveyance was made for the consideration "of one dollar, and the enhanced value of lots that are owned by the grantor that lie in the vicinity of the herein granted lots." The conveyance was made to the township of Wellington, "its successor or successors," and it is made for the express purpose of erecting a township hall. The city of Wellington, as a city of the second class, has become the successor by operation of law of all the territory embraced within the boundaries of the city. This succession embraces the exercise of all the powers of taxation even for county purposes, of local legislative powers which are granted to such cities, for all educational purposes, for election purposes, and for all local administrative powers known to the law. We have already seen by a quotation from Dillon on Municipal Corporations, and it is a philosophical proposition, that there cannot be, at the same time, within the same territory, two distinct municipal corporations, exercising the same power and jurisdiction. Hence the control of these lots must vest entirely in one or the other of these municipalities. Beyond all question, these lots, and the buildings thereon, are no longer a part or parcel of the territory of Wellington township, and are a part of the territory of the city of Wellington. Has the township of Wellington the legal attribute of owning real estate, even for a public purpose, outside of its territorial limits? It will not be claimed that such power exists except by express legislative enactment. It would seem that the city of Wellington, as successor of Wellington township, became invested by the express terms of the conveyance with the legal title to the lots in dispute. That at the time of the conveyance such succession was in the contemplation of the grantor, and that the words "successor or successors" were used in anticipation that Wellington, then a city of the third class, and a part of the township, would eventually grow into such proportions that its legal identity would be separated from the

township, and by the operation of the natural laws of growth and development it would emerge into a distinct and separate municipality. There can be no question but that the city of Wellington is the legal successor, so far as the territory within its limits is concerned, of the township of Wellington. *Curtis v. Board*, 43 Kan. 138, 23 Pac. Rep. 98. As such successor, it takes the lots and the buildings thereon, subject to the limitation in the manner of their use.

6. In the recent case of *Board of Education of Kansas City v. School-Dist. No. 7 of Wyandotte Co.*, ante, 13, some expressions in the opinion are in conflict with this decision. That was a purely equitable action, its object being to restrain the officers of school-district No. 7 from any interference with the control by the board of the school-house. It seemed to us then that the cases of *Helzer v. Yohn*, 37 Ind. 415, and *Reckert v. City of Peru*, 60 Ind. 473, were in point and were controlling. It will be noticed by a critical examination of these cases that the decisions were largely controlled by the fact that only a portion of the school-district was taken into the city of Indianapolis in the one case and into the city of Peru in the other; and hence the court concluded that it would not be equitable to grant the relief prayed for. The distinction between these cases and that of *School Tp. of Allen v. School Town of Macy*, 109 Ind. 559, 10 N. E. Rep. 578, is clearly stated in the latter case, and, as we think, it is just the difference between *Board of Education v. School-Dist. No. 7 of Wyandotte Co.* and the case we are now considering. There is this marked difference between the cases: This is an action to quiet title under the Code by a party who for many years has been in the exclusive possession of the property, claiming to be the holder of the legal title. The *Wyandotte County Case* was one in which a party claimed to be entitled to possession by virtue of an extension of the boundaries of the city, but whose right of possession was denied, and it was sought to settle the title by injunction; and the universal rule is that to prevent interference of possession and control by injunction the party applying for the provisional remedy must hold the title. The real question in that case was, who owned the school-house and the ground upon which it was built? and this question ought not to be determined on a motion to vacate a temporary injunction. Be that as it may, we are now of the opinion that the city of Wellington is the legal successor of the township of Wellington, so far as this property is concerned, both by operation of law, by the express terms of the conveyance, by the necessity of a municipality having jurisdiction of property exclusively within its limits, and by the fact that no power is given to townships by the statutes of the state to hold real estate outside of its limits, as it cannot be used when so situated for any public purpose of the township, and it cannot be subjected to the free and unrestrained possession and control of the authorities of the township without collisions with the authority of the city.

7. Attention is called to an act of the legislature, being chapter 62 of the Laws of 1889, which it is claimed disposes of the interests of these various municipalities on equitable principles. This act reads as follows: "An act to provide for the apportionment of public property in Sumner county, Kansas, by a sale of lots eleven and twelve, in block fifty-three, in Wellington, Kansas, and apportion the proceeds of the same among the townships of Seventy-Six, Downs, Osborn, Jackson, Wellington, and the city of Wellington, in said county. Preamble: Whereas, that in 1873 the present city of Wellington, the present townships of Wellington, Seventy-Six, Osborn, Downs, and Jackson were one single township, known as 'Wellington Township,' in Sumner county, Kansas; and whereas, while said city and townships so composed one township, there was purchased by said township lots eleven (11) and twelve, (12,) in block fifty-three, (53,) in Wellington, Sumner county, Kansas, and erected upon the same, at a cost of ten thousand eight hundred and twenty-nine dollars and seventy-nine cents, (\$10,829.79,) a township hall, now known as the 'Old Court-House,' and whereas, since the erection of said building the city of Wellington has been organized into a city of the second class, and then (there) has been detached from the territory of the original township of Wellington the territory now making the townships of Seventy-Six, Osborn, Downs, Jackson, and the city of Wellington; and whereas, the proportional part of said cost of erecting the said township hall which was contributed by the present city of Wellington was \$4,928.83, by the present township of Seventy-Six was \$814.76, by the present township of Osborn was \$625.10, by the present township of Downs was \$251, by the present township of Jackson was \$595.99, by the present township of Wellington was \$3,614.11; and whereas, there still remains in the treasury of the township of Wellington, of said sum contributed towards the erection of said building, the sum of \$678.69; and whereas, the legal title to said building and lots is in the township of Wellington: Therefore, Section 1. Be it enacted by the legislature of Kansas, that the sheriff of Sumner county, Kansas, shall, within thirty days after this act takes effect, proceed to have advertised, appraised, and sold, in the same manner as is now provided by law for selling real estate under order of sale from the district court, lots eleven (11) and twelve, (12,) in block fifty-three, (53,) in Wellington, Sumner county, Kansas, and make a report of said sale to the district court of said county and state, in like manner as is now provided by law in sales of real estate as far as applicable. Sec. 2. It shall be the duty of said district court to confirm the sale mentioned in this act, if the same is made in accordance with this act, and order the sheriff of Sumner county, Kansas, upon the payment into court the purchase money, a deed to the purchaser, which deed shall be in all respects binding, and confer upon the purchaser a full and complete title in fee-sim-

ple to said lots eleven and twelve, in block fifty-three, in Wellington, Kansas. Sec. 3. The district judge of said court shall, by an order under his hand, direct the clerk of the district court to disburse the sum realized from the sale of the lots named in this act, among the following named municipalities in Sumner county, Kansas, and in the proportion as follows: To the township of Seventy-Six, that per cent. of the proceeds of sale that \$814.76 is of \$10,829.79; to the township of Osborn, that per centum of the proceeds of the sale that \$625.10 is of \$10,829.79; to the township of Downs, that per centum of the proceeds of sale that \$251 is of \$10,829.79; to the township of Wellington, that per centum of the proceeds of sale that \$3,614 is of \$10,829.79; to the township of Jackson, that per centum of the proceeds of sale that \$595.99 is of \$10,829.79; and to the city of Wellington, that per cent. of the proceeds of sale that \$4,928.83 is of \$10,829.79: provided, that shall said judge find that any part of the moneys contributed towards the erection of the building mentioned in this act has not been disbursed by the township of Wellington, then the sum so found to remain with said township shall be deducted from said township *pro rata*. Sec. 4. The purchaser of said lots shall have all unpaid rents, and is hereby empowered to maintain an action in any court of competent jurisdiction for the same. Sec. 5. This act shall take effect and be in force from and after its publication in the official state paper."

Discarding the preamble, and considering the body of the act only, it may be at first said that it is doubtful if the legislature can decide a case pending in the courts, and if, when there is a controversy about the title to real estate, the legislative branch of the state government can declare the title to be vested in one or the other of the litigants. In the second place, if force and effect is given to this act of the legislature, the express purpose of the conveyance by Davidson to the township and its successor is not only defeated, but compliance with its terms is rendered impossible. As we have remarked elsewhere, the manner of the use of the property is expressly limited by the language used in the deed of conveyance, and the absolute sale of the property as directed by this act of the legislature is in violation of that use or manner of use. This act provides that the property shall be sold, and that a sheriff's deed shall be made to the purchaser that will vest in him the absolute fee-simple title to the same. This is not a proper exercise of legislative power, in any view, and cannot have the effect to make any final disposition of this property contrary to and in violation of the avowed purpose and express object of the grant. It follows from all these considerations that we are constrained to recommend that the judgment of the district court of Sumner be reversed, and the cause remanded, with instructions to overrule the demurrers.

PER CURIAM. It is so ordered; all the justices concurring.



“(46 Kan. 197)”

INTERSTATE CONSOLIDATED RAPID TRANSIT RY. CO. v. EARLY.

(Supreme Court of Kansas. April 11, 1891.)

MUNICIPAL CORPORATIONS — GRADE OF STREETS — DAMAGES.

1. A city has the right to establish the grade of its streets, and it is only when the grade is changed after being once established that damages can be allowed therefor to property owners. Paragraph 562, Gen. St. 1889.

2. Where a street-railway company is permitted by a city to construct its road in a street of the city and upon the established grade thereof, such road, with permission of the city, may cut down or grade the street so as to bring it to the established grade. In doing so the railway company acts for the city, and in bringing the street, or any part thereof, to an established grade, it is not liable to adjoining lot-owners on account of cutting down or grading the street, if the grading is done in a good and workman-like manner, and confined wholly within the street.

(Syllabus by the Court.)

Error from district court, Wyandotte county; O. L. MILLER, Judge.

On the 25th day of January, 1887, L. J. Early commenced his action against the Interstate Consolidated Rapid Transit Railway Company to recover \$3,000 because of the construction of a double-track railway on Sixth street in Kansas City, Kan., whereby it was alleged that the ingress to and egress from plaintiff's premises on Sixth street were destroyed. Trial had before the court with a jury. The jury returned a verdict for the plaintiff, and assessed his damages at \$500. They also made and filed the following special findings of fact: “(1) If you find for the plaintiff in any sum on account of construction and operation of a railroad by the defendant on Sixth street in front of plaintiff's premises, how much of such sum do you find to arise exclusively from the grading done by the defendant on said street? Answer. \$500. (2) State whether the ingress to or egress from the plaintiff's premises on the Sixth-Street side thereof has been wholly destroyed by the construction and operation of defendant's railroad. A. It has. (3) State whether the ingress to or egress from plaintiff's premises have been simply made temporarily less convenient or permanently destroyed by the construction and operation of defendant's railroad. A. Permanently destroyed. (4) State what you find was the value of plaintiff's property immediately before the defendant began the construction and operation of its road. A. Three thousand six hundred dollars. (5) State what you find to be the value of plaintiff's property immediately after defendant began the construction and operation of its road. A. Three thousand one hundred dollars. (6) State whether or not the rental value of plaintiff's property has been increased by the construction and operation of the defendant's road. A. Unable to answer, as there are no buildings.” The railroad company filed a motion for a new trial, which was overruled. Judgment was entered upon the verdict. The railroad company excepted, and brings the case here.

N. A. Loomis and Warner, Dean & Hugeman, for plaintiff in error. Hale, Fife & Craig, for defendant in error.

HORTON, C. J., (after stating the facts as above.) This was an action brought in the court below by L. J. Early against the Interstate Rapid Transit Railway Company to recover damages to certain lots owned by him in Kansas City, in this state, on account of the construction of its railway on Sixth street in front of his property. Soon after, because of the consolidation of this and other companies under the name of the Interstate Consolidated Rapid Transit Railway Company, an amended petition was filed. Trial had before the court with a jury. Judgment was rendered for the plaintiff below for \$500 and costs. The railway company excepted, and brings the case here. Sixth street in the old city of Wyandotte, (now Kansas City, Kan.,) between Minnesota avenue and the south end of Sixth street, is a public street, varying in width at various places. It was the chief street in the old city connecting the north and south ends. In some places, between Minnesota avenue and Orville street, Sixth street was as wide as 90 feet, but in front of the property of Mr. Early it is somewhat difficult to determine the exact width of the street. Upon his part it is claimed to be 45 feet only, while Mr. McAlpine, one of his witnesses, testified that the street at that point was from 60 to 80 feet wide. It had been traveled a great number of years. The city had improved it somewhat by making a cut in front of this property, varying at the north-west corner thereof to the south-west corner from two to eight feet. It left the property well situated for residence or business purposes. In 1884 and 1885 ordinances were adopted authorizing the railway company to construct its road on Sixth street. There was no grade in front of the property of Mr. Early until after these ordinances were passed. The ordinances that authorized the railway company to construct its road on the street fixed the official grade of the street. These ordinances provided for the construction of a double-track railway past the property in controversy upon the street at the established grade thereof. Mr. Early owned a number of vacant lots upon Sixth street in the old city of Wyandotte at the time the railway company built its road thereon. The lots face west, and corner upon Orville street. The railway runs past these lots in a north and south direction. The city having failed to bring Sixth street to grade as by the ordinances it had agreed to do, the railway company proceeded in April, 1886, to do the grading; and, as the railway was to be built, according to the terms of the ordinance, upon the street at the established grade thereof, the company was obliged to grade so much of the street in front of Mr. Early's property as was necessary for the construction and operation of the road. In October, 1886, the railway company commenced the operation of its trains past his property. Late in 1886 this action was commenced. Upon January 25, 1887, the amended petition was filed. The grade that the railway company made in front of this property was about 18 feet deep at the south line of the property, and varied as it went north, un-

til it was something like 7 or 8 feet at the north line. The cut made in front of the Early property was about 30 feet wide at the top and about 23 feet wide at the bottom. A double-track railway was constructed in the street. The tracks take up about 15 feet, although it is claimed that from the ends of the ties of the road about 22 feet of the street are occupied. The jury, in their special findings, stated that they assessed the damages of the landowner at \$500, and that these damages were allowed solely on account of the grading done by the railway company. In grading Sixth street for the construction of the street railway the company acted for the city. They held a position, as it were, of a contractor for the city. The city established the grade, and, under the statute, had the right to do so. Gen. St. 1889, par. 562. It is only when the grade of a street, alley, lane, or avenue within a city is changed after being once established that damages can be allowed the property owners which may be caused by the change of grade. Of course the railway company, in grading Sixth street under authority from the city, was compelled to cut down the street in front of the Early property, but it had the lawful right to do that. This cutting or grading of necessity, to some extent destroyed plaintiff's means of ingress and egress from the street, because by cutting the street, or a part of it, down to its established grade, it left the Early property above grade, or higher than the street. The railway company ought not to be held liable because the city failed to grade the street to its full width at the time the company constructed and put in operation its railway. The trial court so instructed the jury. It is possible from the evidence that there was a temporary obstruction of the street on account of the failure of the railway company to properly construct its road and track, but the jury did not allow damages for any act of omission or commission of this kind. Then, again, the railway company had a reasonable time after grading the street to construct its tracks and road-bed, and to put in macadam or ballast. This case is not like *Railway Co. v. Twine*, 23 Kan. 585; *Railroad Co. v. Andrews*, 26 Kan. 702, and 30 Kan. 590, 2 Pac. Rep. 677,—because the real complaint in this case is that the damages were caused by cutting the street down to the established grade required by the city. It is almost impossible to tell what, if any, permanent damage the Early property will suffer on account of the construction of the street railway until Sixth street is brought to grade. If the grading was properly done in a good and workmanlike manner, and confined wholly within the street, Early cannot recover because in cutting the street down to grade his lots are left elevated or above grade. The jury hearing this case do not seem to have fully understood this rule. They were not clearly or sufficiently instructed upon this point; hence the erroneous verdict. As to Railroad companies occupying streets, see *Railroad Co. v. Larson*, 40 Kan. 301, 19 Pac. Rep. 661; *Railway Co. v. Cuykendall*, 42 Kan. 234, 21 Pac. Rep. 1051; *Railway Co. v.*

*Smith*, 44 Kan. —, 25 Pac. Rep. 623; and *Railway Co. v. Mahler*, 44 Kan. —, ante, 22. The judgment of the district court will be reversed, and cause remanded for a new trial. All the justices concurring.

(46 Kan. 88)

HARDY et al. v. FIRST NAT. BANK OF NEWTON.

(Supreme Court of Kansas. April 11, 1891.)

RESCISSION OF CONTRACT—CANCELLATION OF NOTES—INJUNCTION.

In an action to rescind a contract for the purchase of real estate, the cancellation of the notes given in payment of such purchase, and to restrain the purchaser of said notes from collecting the same, all of the parties interested in the transaction should be made parties to the action, either as plaintiffs or defendants; and *held*, that an injunction should not be granted to restrain the purchaser of such notes from collecting the same if it appeared from the petition of the plaintiffs that they had a plain and adequate remedy at law.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Harvey county; L. HOUK, Judge.

*Bowman & Bucher and James McKinstry*, for plaintiff in error. *Brown & Kline*, for defendant in error.

GREEN, C. The plaintiffs in error, with W. K. F. Vila, originally brought this action against S. Lehman, A. B. Gilbert, and the First National Bank of Newton, in the district court of Harvey county. The plaintiffs alleged various fraudulent acts upon the part of the defendants Lehman and Gilbert and others, whereby they were induced to associate themselves with the defendants named and others in the purchase of some real estate, to be platted as an addition to the city of Newton; that a corporation was organized under the name of the "Harvey County Investment Company," and certain land purchased and conveyed to said company; that each member of the association paid in cash the sum of \$1,000, except Vila, who paid his entire share in cash, amounting to \$2,800. The other members of the association executed notes for the balance of the unpaid interest in said company, and these notes, with the cash paid in, were used to pay for the land purchased. It was further alleged that these notes were delivered to Lehman and Gilbert, who occupied the position of president and secretary, respectively, of the investment company; and that they sold them to the First National Bank, of which Lehman was president, and Gilbert was cashier, and the bank had knowledge of the alleged fraudulent transactions; that the bank had brought suit against the plaintiffs, as makers of some of the notes, and was proceeding to collect the same. The plaintiffs asked for a judgment against Lehman and Gilbert for \$8,800, and for a rescission of the contract of purchase of the land, and that the bank be enjoined from collecting the notes sued upon until the final determination of this action, and, if the plaintiffs should recover in this suit, that the injunction be made perpetual. To this petition the bank demurred,

and the same was sustained by the court, upon the grounds that there was a misjoinder of different causes of action, a defect of parties plaintiff and defendant, and that the petition did not state facts sufficient to constitute a cause of action against the bank. One of the plaintiffs, Vila, then voluntarily dismissed his action as to all the defendants, and the other plaintiffs dismissed their action as to the defendants Lehman and Gilbert, leaving the First National Bank the only defendant; and the record is brought to this court by the plaintiffs in error, who ask a reversal of the decision of the district court in sustaining the demurrer of the bank to the petition. We think the demurrer was properly sustained. A rescission of the original contract for the purchase of the land was asked, and all the parties interested should have been joined as plaintiffs or defendants. The corporation was not even made a party. Again, we are of the opinion that if the bank had notice through its president and cashier of the alleged frauds, as plaintiffs contend, then the plaintiffs would have a good defense against the two notes sued on, which suit was attempted to be enjoined by this action. We might assign another reason why the decision of the district court should not be disturbed. The plaintiffs voluntarily dismissed their action against all of the defendants except the bank. They were seeking a judgment against the other defendants, and asked the court to restrain the bank from collecting its notes until the alleged claims of the plaintiffs against these defendants could be adjudicated. They then placed it beyond the power of the court to settle the question sought to be litigated by dismissing the principal defendants, but still insist that the bank should be restrained from prosecuting its action against them. We know of no rule which requires such an interposition upon the part of a court of equity. Legal rights should be left to the decision of a legal forum, and, in the absence of special circumstances warranting the interposition of the extraordinary aid of courts of equity, such courts will not interfere to protect a purely legal right properly triable at law. *High, Inj. § 29; Wooden v. Wooden, 3 N. J. Eq. 429.* We recommend an affirmance of the judgment of the court below.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 765)

TRIPP & MOORE BOOT & SHOE CO. v.  
MARTIN.

(Supreme Court of Kansas. April 11, 1891.)

TRANSACTIONS WITH AGENT—LIABILITY TO  
PRINCIPAL—PLEADING—VERIFICATION OF  
ANSWER—NEW TRIAL—SURPRISE.

1. If one deals *bona fide* with an agent as owner, without knowledge of his agency, and has no good reason to know of such agency, he is justified in treating the agent as the owner, and the payment of the purchase price to him with a pre existing debt will be a defense to an action by the owner for the value of the goods and merchandise.

2. Under the provisions of section 108 of the Civil Code, an account, to be duly verified by affi-

davit, must be sworn to positively. *Atchison v. Bartholow, 4 Kan. 124.*

3. If a plaintiff finds himself unprepared to meet the defendant's evidence, he should ask at the trial for time to meet it. Generally this will be allowed upon such terms as may seem just; but if this is not allowed he always has it in his power to dismiss his action without prejudice, which will leave him at liberty to sue again for the same cause of action. He cannot, as a general rule, be permitted to take the chances upon the evidence to which he does not object, and, when judgment is rendered against him, obtain a new trial, simply because he was surprised at the evidence presented.

(Syllabus by the Court.)

Error from district court, Wyandotte county; O. L. MILLER, Judge.

Hayward & Griffith and F. H. Foster, for plaintiff in error. Thomas W. Heatley, for defendant in error.

HORTON, C. J. This was an action by the Tripp & Moore Boot & Shoe Company against Joseph Martin upon an account for boots and shoes, amounting to \$791.47 and interest. The answer of the defendant set up: *First*, a general denial; *second*, payment; *third*, payment by E. M. Sharp, deceased; *fourth*, a counter-claim for \$400. A jury was waived, and trial had before the court. A general finding was made for the defendant, and judgment rendered in his favor for costs. The plaintiff excepted, and brings the case here.

A preliminary question is presented upon the record. On the 26th of November, 1887, the motion for a new trial was overruled, and the plaintiff was given 60 days to make a case for this court. The defendant was given 20 days thereafter to suggest amendments, and the case was ordered to be settled upon 5 days' notice. The 60 days would have expired January 26, 1888. On the 21st of January, 1888, the plaintiff was given until the 10th of February, 1888, to make and serve its case. This was done on the 1st day of February, 1888. The attorney for the defendant accepted service of the case, expressly stating, however, "No waiver." The case was settled and signed on the 15th day of February, 1888. Under the order of the 26th of November, 1887, the defendant had 20 days after the service of the case on the 1st day of February, 1888, in which to suggest amendments. The case made was signed and settled before that time had expired. Within the decisions of *Railway Co. v. City of Fort Scott, 15 Kan. 435; Weeks v. Medler, 18 Kan. 425; and Railway Co. v. Roach, Id. 592.*—It is doubtful if the case made can be considered. "It nowhere appears that the judge considered any amendments, or that any were suggested, or that counsel had none to suggest, or that they had waived in any manner their right to suggest them." *Railway Co. v. Roach, Id.* Even if we consider the case in this court upon its merits we cannot reverse the judgment rendered. Where there is a general finding and judgment of the court, the judgment must stand if there is evidence to support it. *Major v. Major, 2 Kan. 337; Ulrich v. Ulrich, 8 Kan. 402; Railway Co. v. Kunzel, 17 Kan. 145; Bentley v. Brown, 37*

Kan. 14, 14 Pac. Rep. 431; Peacock v. Boyle, 41 Kan. 492, 21 Pac. Rep. 586.

It appears from the evidence presented in the trial court that the Tripp & Moore Boot & Shoe Company sold boots and shoes at Kansas City, Mo., through one E. M. Sharp, who acted as their agent from the summer of 1884 until his death, in 1885. The defendant testified that he bought the boots and shoes the 1st day of April, 1885, of E. M. Sharp, and denied that he ever received any bill or statement of the boots and shoes from the plaintiff until more than a year after he had bought and paid for them. He also testified, among other things, as follows: "Question. Did you know one E. M. Sharp during his life-time? Answer. Yes. Q. Where was he doing business? A. In Kansas City, Mo., and in this city. Q. What was his business? A. He was in the boot and shoe business, as commission broker; an agent in various ways; handling boots and shoes. Q. Have you examined this statement here [handing witness paper] of the plaintiff in this case, and marked 'Exhibit A,' and dated October 1, 1885? A. Yes, sir. Q. State to the court whether or not you ever purchased that bill of goods from the plaintiff in this case, the Tripp & Moore Boot & Shoe Company. A. I did not. Q. State whether or not at any time you received from the plaintiff in this action any statement of any kind for any bill of goods—that one or any other. A. I never did. Q. When was the first time that you had any knowledge that they made any claim against you,—what time of year was it? A. I can't give the exact date. It was in the fore part of the summer or spring of this year,—1887. Q. Where have you been living during the time since April, 1885? A. In this consolidated city. Q. And in Armourdale? A. Yes, sir. Q. State whether or not you ever purchased any goods directly or indirectly from the plaintiff in this case. A. I never did. Q. You spoke a minute ago about Mr. Sharp doing a commission business over in Kansas City, Mo., there. What do you know about it? A. Well, I was employed by him, and was in his room and business during the time—most of the time. Q. What sort of business did he carry on? Tell the court what he done in regard to buying and selling. That is what I want to get at without leading you. A. Well, his plan, as near as I can state to the court, was to buy goods wherever he could find anything that he thought was a bargain,—take the agency, or buy the goods outright and sell, or order the same as any other commission man,—the wholesale boot and shoe houses. Q. He had a store in Kansas City? A. Yes, sir. Q. State how the goods were received there when he bought them in the east from parties,—when they were received. A. The goods were billed to E. M. Sharp from Tripp and Moore and Chicago houses, and two or three eastern houses. I can't, without a little time, think of all the places that he got goods from. He bought goods sometimes in Kansas City, from W. W. Kendall—it was then—and bought goods from Victor B. Buck. Q. When he bought them, where

were the goods put? A. They were put in this store-room,—405 Delaware street. Q. When the goods were there, what did he do in the way of selling them? A. Sold them the same as any other wholesale jobbing house did; billed the goods and collected the pay for them. Q. State what the fact is in regard to that,—whether E. M. Sharp, doing business there, became indebted to you in any way? A. Yes. Q. In what sum? A. Well, I can't state exactly; between \$800 and \$1,000. Mr. Sharp kept the books, and had the books in his possession when he died, and I have never been able to get hold of them. Q. Did Mr. Sharp pay you then in any way? A. Mr. Sharp paid me by selling me a bill of goods. Q. Now, then, what time of the year was that? A. In April,—the first of April, 1885. Q. Now, then, tell the circumstances under which they were sold and delivered to you. A. Mr. Sharp's health failed, and he was not able to run the business. The business was getting down. He called me to his bedside one day. He was able to write and keep his books, but not able to go down town. To balance accounts he sold me about \$800 worth of boots and shoes. Q. Well, what did he do with them? A. Delivered them to me. Q. What did you do with them? A. I took them to Armourdale, and opened a retail boot and shoe shop down there. Q. Were those the only goods you ever got from any body in Kansas City that year,—was it or not? A. No, sir; I bought goods from Kendall, and I bought goods from Thomas. Q. I will ask you, did you ever buy in that year any goods from the plaintiff in this action? A. No, sir."

"If the purchaser of property does not know that he is dealing with an agent of the owner, and has not good reason to know it, he is justified in treating the agent as the owner; and payment of the purchase price to him will be a defense to an action by the owner for the amount." *Windmill Co. v. Thorson*, 46 Iowa, 181; *Peel v. Shepherd*, 58 Ga. 365; *Pratt v. Collins*, 20 Hun, 126; *Frame v. Coal Co.*, 97 Pa. St. 309. It is familiar law that if one deal *bona fide* with an agent as owner, without knowledge of his agency, he may set off any claim he may have against the agent in answer to the demand of the principal. *Story, Ag. §§ 420, 421; 2 Kent, Comm. 632*, where numerous authorities are collected. See, also, *Benj. Sales*, § 1108, p. 959. It is claimed, however, that if the defendant did not know that the Tripp & Moore Boot & Shoe Company owned the boots and shoes which Sharp sold to the defendant, he had good reason to know it, and therefore that the defendant could not pay for the property by writing off a debt due to him from Sharp. *Phillips v. Reitz*, 16 Kan. 396; *Kurtz v. Miller*, 26 Kan. 314; *Gollober v. Martin*, 33 Kan. 252, 6 Pac. Rep. 267; *Henderson v. Creamer*, 39 Kan. 679, 18 Pac. Rep. 926. If the trial court had found that the purchase by Sharp from his principal was fraudulent, or if the court had found that the defendant had good reason to know that Sharp did not own the boots and shoes sold to him, then the plaintiff would have been

entitled to recover; but the general finding is against the plaintiff, and we cannot say that it is wholly unsupported by the evidence. As there was evidence to sustain the finding and judgment of the trial court in every essential particular, we cannot now reverse the judgment simply because it does not seem to be sustained by a preponderance of the evidence. *Railway Co. v. Salmon*, 14 Kan. 512. It is also claimed that the trial court committed error in not striking the answer from the files and rendering judgment upon the petition or account sued on. It is said that the account was verified by affidavit, and, as the answer was not verified, there was no issue to try. Section 108, Civil Code. An examination of the record shows that the petition was not duly verified within the provisions of the statute. It was not sworn to positively. *Atchison v. Bartholow*, 4 Kan. 124. Finally, it is claimed that the plaintiff was surprised by the evidence offered by the defendant, tending to show that he did not know that in buying the boots and shoes he was dealing with an agent of the plaintiff, and had no good reason to know it. It is also said in this connection that there is a variance between the evidence and the answer. The plaintiff did not object or except to any of the evidence offered by the defendant. If he had done so, the court might have permitted the answer to be amended upon such terms as were just. If the plaintiff was surprised at the evidence offered, he could have asked for a continuance, or could have dismissed his action, and afterwards commenced a new one to recover the amount claimed. He saw fit to take his chances with the court upon the evidence as it was presented. He must therefore be held to abide the result. 3 *Grah. & W. New Trials*, 964-968. The judgment of the district court will be affirmed. All the justices concurring.

(46 Kan. 114)

#### CITY OF NEW KIOWA V. CRAVEN.

(*Supreme Court of Kansas*. April 11, 1891.)

MUNICIPAL CORPORATIONS—CITY PRISON—INJURIES RECEIVED BY PRISONERS—LIABILITY OF CITY.

1. The case of *La Clef v. City of Concordia*, 41 Kan. 323, 21 Pac. Rep. 272, followed.

2. Neither paragraph 1013, Gen. St. 1889, nor paragraph 3552, Gen. St. 1889, compels a city of the third class to keep and maintain a city prison which shall be comfortable, suitable, and healthy. Paragraph 1013 gives a city marshal authority to keep all persons arrested in the city prison, county jail, or some other suitable and safe place. Paragraph 3552 concerns county jails only, and has no application to city prisons or jails.

(*Syllabus by the Court.*)

Error from district court, Barber county; C. W. ELLIS, Judge.

*Sample & Long*, for plaintiff in error.  
*W. S. Denton and T. S. Brown*, for defendant in error.

HORTON, C. J. On the 28th day of September, 1886, Thomas Craven, the husband of Mrs. Kate Craven, was arrested in the city of New Kiowa, in Barber county, by the city marshal, for being drunk in the streets of the city, and also for using in-

decent and profane language. He was taken to the city prison by the marshal in the afternoon of the 28th of September, and confined in the jail until about 9 o'clock the next morning. On the 9th of October, 1886, he died. Subsequently Mrs. Kate Craven, his widow, was appointed administratrix of his estate, and on the 3d day of December, 1886, she brought her action against the city of New Kiowa, a city of the third class, to recover the sum of \$10,000. She alleged that the city prison was a small wooden building, poorly ventilated, dark, filthy, and uninhabitable; that the city of New Kiowa failed to properly ventilate the prison, or provide a bed for persons confined therein to sleep; that on account of the exposure and confinement in the prison, together with being compelled to breathe the poisonous air thereof, her husband, Thomas Craven, contracted a violent disease, of which he afterwards died. Trial before the court with a jury. The jury found a verdict for \$1,000 against the city, and judgment was entered thereon. The city excepted, and brings the case here. It is contended on the part of the city that the case of *La Clef v. City of Concordia*, 41 Kan. 323, 21 Pac. Rep. 272, is decisive against the right of any recovery by the plaintiff below. In that case it was decided that, "where a person is confined in a city prison, upon a conviction for disturbing the peace and quiet of the city, the city is not liable for damages for injuries sustained by such person by reason of the bad character of the prison, or the negligence of the officer in charge of the same." On the part of plaintiff below it is insisted that the *La Clef* Case is not conclusive. It is stated that there are statutes making it the duty of a city of the third class, to which class the city of New Kiowa belongs, if it undertakes to keep and maintain a city prison, that it shall be comfortable and safe. The only statutes referred to by counsel for plaintiff below in support of their assertion are as follows: Paragraph 1013, Gen. St. 1889, which reads: "The marshal shall be chief of police, and shall at all times have power to make arrests, with or without process, or order the arrest of all offenders against the laws of the state, or of the city, by day or by night; to keep all persons arrested in the city prison, county jail, or other proper place; to prevent their escape until a trial can be had before the proper officer; and to execute all processes issued by the police judge, and delivered to him for that purpose." And paragraph 3552, Gen. St. 1889, which provides: "All prisoners shall be treated with humanity, and in a manner calculated to promote their reformation. Juvenile prisoners shall be kept, if the jail will admit of it, in apartments separate from those containing more experienced and hardened criminals. The visits of parents and friends, who desire to exert a moral influence over them, shall, at all reasonable times, be permitted." Neither of these statutes makes it the duty of a city of the third class to keep or maintain a comfortable and safe city prison. Paragraph 1013 gives a city marshal authority to keep all persons arrested in the city pris-

on, county jail, or other proper place. By this statute no duty is imposed upon the city. Paragraph 3552 is a part of the statute concerning county jails, and has no application to city prisons or jails. Notwithstanding this statute, it was decided in *Pfefferle v. Commissioners*, 39 Kan. 432, 18 Pac. Rep. 506, that "a county is not liable to the inmates of its county jail for negligently permitting such jail to become and remain in such a bad condition that the inmates thereof become sick and diseased." If a county is not liable under this statute for negligently permitting its jail to become and remain in a bad condition, certainly it cannot be claimed that this statute, which was adopted to control county jails, and not city jails, will make a city liable for negligently permitting its jail to become and remain in an unhealthy condition. It would be illogical and unjust to hold that a statute concerning county jails, that did not and could not make counties liable for failing to keep a comfortable and safe county jail, shall be so construed as to make cities liable for failing to keep a comfortable and safe city jail. Upon the evidence presented upon the trial, the plaintiff below was not entitled to recover. See, also, *Peters v. City of Lindsborg*, 40 Kan. 634, 20 Pac. Rep. 490. The judgment of the district court will be reversed, and the cause remanded for further proceedings, in accordance with the views herein expressed. All the justices concurring.

CHICAGO, I. & K. R. CO. v. TOWNSDIN.

(*Supreme Court of Kansas.* April 11, 1891.)

COSTS—CONDEMNATION PROCEEDINGS—TENDER OF JUDGMENT—REFUSAL.

1. After a land-owner appeals from the award of commissioners appointed to condemn real estate for the right of way of a railroad company, the proceeding in the district court becomes a civil action, and the railroad company may offer, under the provisions of section 528 of the Civil Code, to confess judgment for a part of the amount claimed; and if the land-owner refuses to accept such confession of judgment in full of his demands, and upon the trial does not recover more than was so offered, he must pay all the costs of the railroad company incurred after the offer.

2. Where an offer is made in court to confess judgment, under the provisions of section 528 of the Civil Code, and subsequently a larger offer is made by the defendant, yet, if the first offer is not withdrawn and the plaintiff does not recover more than was first offered, he must pay all the costs of the defendant incurred after such offer.

(*Syllabus by the Court.*)

Error from district court, Cloud county; E. HUTCHINSON, Judge.

The Chicago, Iowa & Kansas Railroad Company instituted condemnation proceedings for a right of way over William S. Townsdin's premises. The commissioners assessed his damages at \$149.75. He appealed to the district court. The jury assessed his damage at \$194.90, and judgment was entered thereon, with the costs. The railroad company contends that Townsdin should be taxed with the costs, under section 528 of the Civil Code. That section reads: "After an action for the recovery of money is brought, the defendant may offer in court to con-

less judgment for part of the amount claimed, or part of the causes involved in the action; whereupon, if the plaintiff, being present, refuse to accept such confession of judgment in full of his demands against the defendant in the action, or having had such notice that the offer would be made, of its amount, and of the time of making it, as the court shall deem reasonable, fail to attend, and on the trial do not recover more than was so offered to be confessed, such plaintiff shall pay all the costs of the defendant incurred after the offer. The offer shall not be deemed to be an admission of the cause of action, or the amount to which the plaintiff is entitled, nor be given in evidence upon the trial." The case came on for trial at the April term of the court for 1885. After the impaneling of the jury, but before any witnesses had been sworn, or any evidence offered, the railroad company offered in open court to confess judgment for \$206.25, with accrued costs, which offer was in writing, and filed with the clerk, and (omitting title) was in words and figures as follows: "Now comes the above-named appellee, and offers in writing to allow judgment to be taken against it for \$206.25, with accrued costs. F. W. STURGES, Attorney for Appellee." This was indorsed by the clerk as filed June 11, 1885. The offer was refused, and the cause proceeded to trial, and resulted in a verdict for the plaintiff in the sum of \$327. This verdict was set aside with the consent of Townsdin, and a new trial granted. The case came on for trial on August 18, 1885, but before any witnesses had been sworn, or any evidence offered, the railroad company made a second offer in open court to confess judgment for the sum of \$300 and accrued costs, and which offer was also in writing and filed with the clerk, as in the first instance. Townsdin refused this offer, and the trial to the jury resulted in a verdict for the plaintiff of \$292.67½. This verdict was set aside, and a new trial granted. The case was for the third time called for trial on March 1, 1886, to a jury, and resulted in a verdict for the plaintiff of \$456.19. This time the railroad company objected to the verdict, and filed a motion for a new trial, which was overruled, and judgment entered upon the verdict. Upon this judgment error proceedings were prosecuted in this court, which resulted in a reversal of such judgment. *Railroad Co. v. Townsdin*, 38 Kan. 78, 15 Pac. Rep. 889. The case came on for trial for the fourth time on March 6, 1888, to a jury, and resulted in a verdict for Townsdin of \$194.90, and this time the railroad company filed a motion for a new trial, which was overruled by the court, and judgment was rendered on the verdict in favor of Townsdin for "the sum of \$194.90 as and for his damages, and that the award be so corrected, and, further, that Townsdin have and recover of and from the railroad company his costs herein expended, taxed at \$220.75." The railroad company excepted and filed its motion to retax the costs, which, as amended, reads: "Now comes the above-named appellee, and moves the court to retax the costs herein by taxing

to appellant all costs incurred after the offer to confess judgment for \$206.25, made June 11, 1885; or, if this be refused, then all costs after the offer to confess judgment for \$300, made August 18, 1885." This motion was overruled. The railroad company excepted, and brings the case here.

W. W. Guthrie and Kennett & Peck, for plaintiff in error. L. J. Crans, for defendant in error.

HORTON, C. J., (*after stating the facts as above.*) The Chicago, Iowa & Kansas Railroad Company commenced proceedings for the condemnation of a certain strip of land owned by William S. Townsadin for railroad purposes. Townsadin was dissatisfied with the award of the commissioners, and appealed to the district court. Upon the final trial he recovered the sum of \$194.90. Subsequently the trial court ordered the assessment of the commissioners to be corrected in accordance with the verdict, and rendered judgment in favor of Townsadin and against the railroad company for the costs, taxed at \$220.75. As the railroad company offered in open court to confess judgment for a larger amount than that recovered by Townsadin upon the final trial, and as he refused to accept the offer, its contention is that Townsadin must pay all of the costs incurred after the offer. Section 528, Civil Code. The condemnation proceedings originally instituted were special only, not an action in the district court. After the appeal was taken, the proceeding was turned into an action to be heard, tried, and disposed of as other actions in the district court. While the judgment did not pass the title to the land, nor to the right of way, it did determine the amount which the railroad company was required to pay to the owner of the land or to the county treasurer for his use to secure the right of way. The judgment for costs in such an action is rendered in the form of an ordinary personal judgment. Technically, the language of section 528 of the Civil Code does not embrace proceedings in condemnation, because it refers to actions "brought for the recovery of money;" but the spirit and intent of that section does apply where an appeal is taken from the award of damages. *Fuller v. Wells*, 42 Kan. 551, 22 Pac. Rep. 561. In such a case the trial court may require new pleadings to be filed, and damages are properly allowable for the actual value of the land taken by the railroad company, and for the consequential diminution in value of the land not taken. In *Seymour v. Cooper*, 26 Kan. 539, the exemption statute was construed to apply to the personal services or earnings of a debtor in attachment or garnishment proceedings. The statutes do not anywhere in express terms create such an exemption, and yet an exemption was declared in such a case, because within the evident spirit and intent of the legislature. The offer of the railroad company on June 11, 1885, was \$206.25 with accrued costs. The making of its subsequent offer did not waive or set aside its first offer, and therefore, as the verdict and judgment

were less than the first offer, Townsadin cannot recover any costs after June 11, 1885. The judgment of the district court will be reversed, with the direction to the court below to retax the costs in accordance with the views herein expressed. All the justices concurring.

(46 Kan. 1)

O'BRIEN *et al.* v. BUGBEE *et al.*

(Supreme Court of Kansas. April 11, 1891.)

TITLE TO MAINTAIN EJECTMENT — INDIANS — DESCENT OF REAL PROPERTY—EVIDENCE.

1. In an action in the nature of ejectment, the plaintiff must recover upon the strength of his own title, and not upon the weakness of the title of the defendant, who has the actual possession of the real estate.

2. In 1880, under the tribal organization of the Shawnee Indians, the descent of real estate was cast in accordance with the custom and decision of that tribe.

3. Where a plaintiff relies upon title to real estate alleged to be cast by descent upon his grantor in accordance with the custom and decision of an Indian tribe, he must establish the custom or decision of the tribe as to descent or distribution at the time of the death of the former owner or possessor, from whom he claims his grant or inherited the property.

4. Where a plaintiff brings his action in the nature of ejectment against a defendant in the actual possession of Indian land properly patented to a member of the Shawnee tribe, (now deceased,) under the provisions of a treaty between the United States and the Shawnee Indians, concluded on the 10th day of May, 1854, and the act of congress of March 3, 1859, and such defendant claims color of title and possession under a deed from the chiefs of the tribe, approved by the secretary of the interior, the prior possession of such Indian land by the plaintiff is not sufficient for him to recover upon as against such a defendant, if such plaintiff fails to show any title or other right of possession on his part.

(Syllabus by the Court.)

Error from district court, Johnson county; J. P. HINDMAN, Judge.

On the 7th of July, 1887, John J. O'Brien commenced his action against Thomas Bugbee, Henry Cresswell, John C. McCoy, Sr., Charles Elliott, Frank M. Lyon, W. W. Harris, John C. McCoy, Jr., Jo Smith, and David Updegraff, in ejectment, and also for partition of the following described real estate, situated in Johnson county: The W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , and the N. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , of section 1, and the E.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 2,—all in township 12, of range 23, (207.44 acres.) The defendants Thomas Bugbee, Henry W. Cresswell, and John C. McCoy, Sr., filed their separate general denials. David Updegraff, in his separate answer, claimed to be the owner of an undivided one-half of said land. Trial had before the district court without a jury at its May term for 1888. The court made the following special findings of fact:

"(1) That on the 28th day of December, 1859, the lands in controversy, to-wit, the west half of the north-west quarter, and the north-east quarter of the north-west quarter, of section 1, and the east half of the north-east quarter of section 2, all in township 12, of range 23 east, in Johnson county, Kansas, (200 acres,) were duly patented by the United States of America,



through the then president, unto Polly Manture, a member of the tribe of Shawnee Indians. The said patent, upon its face, restricts a sale by the said patentee of said lands, without the approval of the secretary of the interior of the United States, under such rules and regulations as he may from time to time prescribe.

"(2) That said Polly Manture and George Buchanan, a white man, were duly joined in marriage in the spring of the year 1855, in Johnson county, Kan., and thereafter had born to them a daughter named Sally Buchanan, and that said George and Polly Buchanan cohabited as husband and wife until her death, and they never had any other child or children.

"(3) That said lands were taken actual possession of by said Polly and George Buchanan as early as the year 1857, and were improved and cultivated by him until his death.

"(4) That Polly Manture Buchanan died intestate on the farm, in the year 1860, seized in fee of the lands and tenements in controversy, and that George and Sally Buchanan survived her, and that said George Buchanan died thereon in the year 1879.

"(5) That Sally Buchanan married one Gottlieb Zeigler, a white man, in said county, on September 20, 1874, and cohabited with him, on said farm as his wife, until the 9th day of December, 1874, when she died intestate, without child or children, her husband and her father, George Buchanan, surviving her, and then residing on the lands in controversy.

"(6) That in the year 1861 said George Buchanan intermarried with a widow named Ophelia Maria Gibbs, (sometimes called and known as Maria Gibbs,) who had a son named Marow Gibbs by a former husband. By this wife the said George Buchanan had no child or children, and they all remained on said lands and cultivated same until the death of George Buchanan. George Buchanan and she cohabited as husband and wife from that period until his death, leaving her surviving him.

"(7) That on the — day of August, 1879, said George Buchanan died, leaving a last will and testament, wherein and whereby he devised all the lands and tenements in controversy unto the said Marow Gibbs, in fee-simple, which last will and testament was afterwards duly probated in the probate court of Johnson county, state of Kansas, and his widow, the said Ophelia Maria Buchanan, (formerly Gibbs,) in writing, and in due form of law, relinquished in the said probate court all her rights under the said will, and under the law in such case made and provided, and consented in writing to the said devise of all said lands and tenements unto her son, Marow Gibbs, who remained in possession with his mother, the Widow Buchanan, and he cultivated the said lands and tenements until the year 1883, when said McCoy took possession of all said lands and tenements.

"(8) That said Marow Gibbs and wife on the 9th day of February, 1883, for value received, duly conveyed all said lands and tenements unto John J. O'Brien, the plain-

tiff in the action; which deed was duly recorded in the proper office on the 26th day of February, 1883.

"(9) That on the 10th day of June, 1875, the said Gottlieb Zeigler (claiming to be the heir of Sally Zeigler, deceased, formerly Buchanan) duly conveyed all said lands and tenements unto James H. McCartney for value received, which conveyance was duly recorded in the proper office on the 10th day of January, 1878.

"(10) On the 5th day of August, 1875, the said Gottlieb Zeigler duly conveyed all said lands and tenements, for value received, unto David Updegraff, one of the defendants in this action; which conveyance was duly recorded in the proper office on the 5th day of August, 1875.

"(11) On the 21st day of March, 1876, the said James H. McCartney, for value received, duly conveyed all his interest and estate in and to said lands and tenements unto the said David Updegraff; which said conveyance was duly recorded in the proper office on the 14th day of June, 1876.

"(12) That the said George Buchanan, from 1855 to 1862, was seen at the payhouse every year; and that the United States government paid the annuities in those years to the tribe in gold and silver coin, and that Buchanan always paid in gold and silver, to the Shawnee Indian post trader, his yearly store account, immediately after said payment of annuities.

"(13) That prior to the year 1868 the tribe of Shawnee Indians had no written law of their own, regulating or governing the descent, distribution, and inheritance of lands and tenements from deceased Shawnee Indians, who died possessed of their head-rights, allotments under the treaty of May 10, 1854.

"(14) That from 1864 up to the year 1868 the tribe of Shawnee Indians operated under the laws of Kansas relative to and governing the descent, distribution, and inheritance of the lands of individual Shawnees, deceased, by the council and chiefs adopting for the tribe the said laws of Kansas.

"(15) That on April 2, 1866, George Buchanan and his wife (*née* Gibbs) conveyed, by deed duly acknowledged, for the sum of \$640, (as appears in the deed to Joachim Rathjen,) parcel of the lands in controversy, to-wit, south-east quarter of north-east quarter of section 2, and the south-west quarter of the north-west quarter of section 1, (80 acres,) all in township 12, on range 23, in Johnson county, Kan., and which said conveyance was duly recorded on April 2, 1866; and which deed recites that it was made, executed, and delivered by said George Buchanan, as sole heir at law of Polly Manture, deceased, and which deed is not approved by the secretary of the Interior.

"(16) That afterwards the said Joachim Rathjen duly conveyed all his estate in and to said eighty acres, for value received, unto John C. McCoy, one of the defendants in this action, and which said deed was duly and forthwith recorded in the proper office.

"(17) I find, as a further fact in the case, that the following instrument was deliv-

ered to John C. McCoy on the 3d day of February, 1882, pertaining to the lands in controversy, to-wit: 'Union Indian Agency, Muscogee, Indian Ter., February 3rd, 1882. We, Charles Bluejacket and Charles Tucker, (chiefs of the Shawnee tribe of Indians, late of Kansas, now of the Indian Territory,) parties of the first part, for and in consideration of the sum of fifteen hundred dollars (\$1,500.00) in hand paid by John C. McCoy, party of the second part, the receipt whereof is hereby acknowledged, do grant, bargain, sell, and convey unto the said John C. McCoy, and to his heirs and assigns, forever, the following described tract, piece, or parcel of land, situate in Johnson county, state of Kansas, to-wit: The west half of the north-west quarter, and the north-east quarter of the north-west quarter, of section (1) one, and the east half of the north-east quarter of section 2, all in township No. (12) twelve, range No. (23) twenty-three east, and being the same land patented to Polly Manture, a deceased member of Shawnee tribe,—to have and to hold the said above-described pieces or parcels of land, together with the appurtenances thereunto belonging, unto the said John C. McCoy, his heirs and assigns, forever, in terms of general warranty. In testimony whereof we have hereunto set our hands and seals the day and year above written. CHARLES BLUEJACKET. [Seal.] CHARLES TUCKER. [Seal.] Attest: J. GORE, EMILY D. TUFTS, Union Agency, Indian Territory—ss.: I, John D. Tufts, United States Indian agent for the Union Agency, Indian Territory, hereby certify that Charles Bluejacket and Charles Tucker, the grantors named in the within instrument of writing, personally appeared before me, and signed the same in my presence, and acknowledged the execution thereof as their free act and deed, for the purposes therein expressed. In witness whereof I have hereunto set my hand this third day of February, 1882. JOHN D. TUFTS, United States Indian Agent,—which was afterwards submitted to the secretary of the interior for approval, and by him approved, as appears from the following indorsement thereon: 'Department of the Interior, Office of Indian Affairs. October 24th, 1882. The within deed from Charles Bluejacket and Charles Tucker, Shawnee chiefs, for lands of Polly Manture, to John C. McCoy, is respectfully submitted to the secretary of the interior for his approval. H. PIERCE, Commissioner. Department of the Interior, October 27, 1882. The within deed is hereby approved. M. H. JOSLYN, Acting Sec'y. Filed for record and recorded at 12 m., November 13, 1882, in Book 43, page 595. R. E. STEVENSON, Register of Deeds. By J. A. STEPHENSON, Deputy.'

"(18) On the 24th day of January, 1887, the said John C. McCoy and wife duly conveyed all said lands and tenements, for the sum of \$14,662.50, unto Thomas Bugbee and Henry W. Cresswell, which said conveyance was duly recorded in the proper office on the 26th day of January, 1887, and the said Bugbee and Cresswell have been in actual possession of all said land and tenements by their tenants, ever

since March 1, 1887; the said McCoy then taking a mortgage thereon for a large portion of the purchase money; said McCoy being in actual possession of all said lands and tenements from March 1, 1883, until the said March 1, 1887.

"(19) That said John C. McCoy occupied the said 200 acres in controversy, and enjoyed the rents, issues, and profits thereof, from the 1st day of March, 1883, until the 1st day of March, 1887, and that the rental value of said land and tenements for and during said period was and is of the sum of \$1,000.

"(20) That said Bugbee and Cresswell occupied, used, and enjoyed the rents, issues, and profits of said 200 acres in controversy from the 1st day of March, 1887, until the present time, and that the rental value thereof during said period was and is the sum of \$500.

"(21) In the year 1861, and while James B. Abbott was the United States local agent for the tribe of Shawnee Indians in Kansas, the said tribe of Indians, through its chiefs and councilmen, adopted orally the written laws of the state of Kansas, then in force, relating to the descent, distribution, and inheritance of real and personal property, and thenceforth, until said tribe left the state, the said laws were their guidance; and that prior to said period the said tribe of Indians had no law, written or unwritten, nor any custom or usage of their own, regulating the descent, distribution, and inheritance of real property of which any member of the tribe dies seised."

Upon the findings of fact the court rendered judgment against the plaintiff John J. O'Brien and in favor of all the defendants excepting David Updegraff. O'Brien and Updegraff excepted and bring the case here.

*A. Smith Devenney*, for plaintiffs in error. *F. R. Ogg and Peak, Yeager & Bull*, for defendants in error.

HORTON, C. J., (after stating the facts as above.) 'This was an action in the nature of ejectment. John J. O'Brien claims to be the owner of and entitled to the immediate possession of 200 acres of land in Johnson county. David Updegraff, one of the defendants, in his separate answer claims to be the owner of and entitled to the immediate possession of an undivided one-half of the land. Thomas Bugbee and Henry Cresswell claim both title and possession. Polly Manture, a Shawnee Indian woman, was the common source of title. The land was patented to her by the United States on the 28th day of December, 1859, as her allotment under the provisions of a treaty between the United States and the Shawnee Indians, concluded on the 10th day of May, 1854, and the act of congress approved March 3, 1859. This patent contained the following restriction upon the alienation of the land by Polly Manture and her heirs, to-wit: "Have given and granted, and by these presents do give and grant, unto the said Polly Manture and to her heirs, the tracts of land above described, but with the stipulation, prescribed by the secretary of the interior under the act of congress afore-

said of March 3, 1859, that the said tract shall never be conveyed by the grantee or her heirs without the consent of the secretary of the interior for the time being." In the spring of 1855 Polly Manture was joined in marriage to one George Buchanan, a white man, in Johnson county, in this state. Buchanan and wife took actual possession in 1856 of and improved the lands, and cultivated them until their deaths, respectively. They had one child born unto them, named Sally Buchanan, who married Gottlieb Zeigler. Polly died on the farm in 1860, leaving surviving her a husband and the child, Sally. Buchanan remained on the farm, cultivated it all, except a few acres he used for pasture; what he did not use he leased to others. After the death of his wife, Polly, he married a widow by the name of Gibbs, with whom he continued to live upon the land until August, 1879, at which time he died, leaving a will, which was probated, by which he attempted to bequeath all of the land to Marow Gibbs, son of his last wife by a former husband. George Buchanan had no children by his last wife. The plaintiff John J. O'Brien claims the land through a conveyance from Marow Gibbs and wife, dated February 9, 1883, and recorded February 26, 1883. Gibbs was a white man. Sally Buchanan, the only child of Polly and George Buchanan, was married to Gottlieb Zeigler, a white man, in 1874, and died within three or four months after her marriage, leaving no issue, and without having disposed of her interest in the land. Gottlieb Zeigler conveyed an undivided one-half of the land to James H. McCartney on the 10th day of June, 1875, and David Updegraff claims this undivided one-half through a conveyance from McCartney. On the 2d day of April, 1866, George Buchanan and his then wife conveyed 80 acres of the land in controversy to Joachim Rathjen, who afterwards conveyed the same to the defendant John C. McCoy, Sr. Neither the will of George Buchanan, nor any of the conveyances above mentioned, were approved by the secretary of the interior. On the 3d day of February, 1882, Charles Blue Jacket and Charles Tucker, chiefs of the Shawnee tribe of Indians, in consideration of \$1,500, by deed of general warranty conveyed all the lands to John C. McCoy, Sr., which deed was on the same day duly acknowledged before John D. Tufts, United States Indian agent, and on the 27th day of October, 1882, was approved by the secretary of the interior, and recorded in the records of the county of Johnson on the 13th day of November, 1882. The defendant John C. McCoy, Sr., on the 3d day of March, 1883, took possession of the land under the two last-mentioned deeds, and continued in the uninterrupted possession thereof until he conveyed the same through his sons on the 1st of March, 1887, in consideration of the sum of \$14,662.50, to the defendants Thomas Bugbee and Henry W. Cresswell, and delivered possession thereof to them, and Bugbee and Cresswell have continued in the possession of the land until the present time. The trial court decided against O'Brien and Updegraff, and in favor of Bugbee and Cresswell. The former except-

ed, and complain of the judgment of the court.

The 200 acres in controversy are known as "Shawnee Indian Lands," and are included in the 200,000 acres or more ceded by the United States government to the tribe of Shawnee Indians by treaty of May 10, 1854, between the government and the Indians. See 10 U. S. St. at Large, p. 1053. One of the articles of the treaty provides for the issuing of patents to the several members of the tribes and "heads of families," as follows: "Congress may hereafter provide for the issuing to such Shawnees as may make separate selections, patents for the same, with such guards and restrictions as may seem advisable for their protection therein." By an act approved March 3, 1859, congress authorized the secretary of the interior to issue patents to certain Indians, including the Shawnees, "under such conditions and limitations, and under such guards and restrictions, as may be prescribed by the secretary."

The principal question in this case is, was descent cast upon George Buchanan, the husband, and upon Sally, the child, when Polly Buchanan, *née* Manture, died in 1860, in possession of the land? The trial court made the following special findings of fact: "In the year 1861, and while James B. Abbott was United States local agent for the tribe of Shawnee Indians in Kansas, the said tribe of Indians, through its chiefs and councilmen, adopted, orally, the written laws of the state of Kansas then in force, relating to descent, distribution, and inheritance of real and personal property, and thenceforth, until said tribe left the state, the said laws were their guidance; and that prior to said period the said tribe of Indians had no law, written or unwritten, nor any custom or usage of their own regulating the descent, distribution, and inheritance of real property of which any member of the tribe died seised." "That from 1864 up to the year 1868 the tribe of Shawnee Indians operated under the laws of Kansas relative to and governing the descent, distribution, and inheriting of the lands of individual Shawnees, deceased, by the council and chiefs adopting for the tribe the said laws of Kansas." James B. Abbott, United States local agent for the tribe of the Shawnees from June, 1861, to 1868, testified upon the trial that some time in the year 1868 he understood that the Shawnee tribe passed a resolution about descents, distributions, and inheritance of Shawnee lands differing from the laws of the state of Kansas. In view of the evidence, and the findings of the trial court, it cannot be said that at the time Polly Buchanan, *née* Manture, died, the laws of Kansas concerning descent or distribution of the lands of the Shawnee tribe had any operation; nor can any presumption be indulged in that the customs or laws of the Shawnees in this matter followed the Kansas law, or were similar to it. The evidence and the findings are against any such presumption. In *Brown v. Steele*, 23 Kan. 672, it was said: "That it appearing that the tribal organization (of the Shawnee Indians) was still recognized by the

political department of the United States government, under the decision of the supreme court of the United States in the Case of Kansas Indians, 5 Wall. 737, the descent is cast, not under the Kansas law, but in accordance with the Shawnee law and decision." Sally Zeigler, *née* Buchannan, died in 1874, and there is no evidence or finding showing, or tending to show, that the laws of Kansas concerning descent or distribution had any operation among the Shawnee tribe at that time. As O'Brien, in order to have any title or possession to the land in dispute, must have established heirship or title to the land in George Buchannan, he is not entitled to recover the land, or any part thereof, if he failed to make satisfactory proof thereof. The same may be said concerning the alleged title of David Updegraff, who claimed through a conveyance from Gottlieb Zeigler, who married Sally Buchannan, even if we assume that Sally Zeigler, *née* Buchannan, inherited anything from her mother, Polly Buchannan, *née* Manture. In the Case of Kansas Indians, 5 Wall. 737, Mr. Justice Davis, for the court, said "This people [the Shawnees] have their own customs and laws by which they are governed. Because some of these customs have been abandoned, owing to the proximity of their white neighbors, may be an evidence of the superior influence of our race, it does not tend to prove that their tribal organization is not preserved. There is no evidence in the record to show that the Indians with separate estates have not the same rights in the tribe as those whose estates are held in common. Their machinery of government, though simple, is adapted to their intelligence and wants, and effective, with faithful agents to watch over them. \* \* \* It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, but, until they are clothed with the rights and bound to all the duties of citizens, they enjoy the privilege of total immunity from state taxation. \* \* \* While the general government has a superintending care over their interests, and continues to treat with them as a nation, the state of Kansas is estopped from denying their title to it. \* \* \* As long as the United States recognizes their national character, they are under the protection of treaties and the laws of congress, and their property is withdrawn from the operation of state laws."

At the time that this action was brought, Bugbee and Cresswell were in the actual possession of the land. John C. McCoy, Sr., under whom they claim title, took actual possession on the 3d day of March, 1883. Therefore the defendants, through themselves and their grantors, had been in possession of the land when this action was brought for more than four years. It is elementary that a party seeking to recover possession of real property must do so upon the strength of his own title, not upon the weakness of the title of his adversary. Therefore, as there is no evidence in the record showing, or tending to show, that George Buchannan or Sally Buchannan inherited any interest in the

land from Polly Buchannan, *née* Manture, the judgment of the trial court refusing possession to O'Brien and Updegraff, who claim through these parties, must be sustained. O'Brien and Updegraff claim that George Buchannan and Sally Buchannan were the heirs at law of Polly Buchannan. On the other hand, Bugbee and Cresswell claim that, by the law and decision of the Shawnees, the title escheated to the tribe, and therefore that the chiefs of the tribe had full authority to execute, with the approval of the secretary of the interior, the deed of February 3, 1882, to John C. McCoy, Sr. The burden of proof in this matter was upon O'Brien and Updegraff. They ought to have shown that in 1860, at the death of Polly Buchannan, the descent was cast upon George Buchannan or Sally Buchannan, or both, under the law and decision of the Shawnee tribe. This was not done. The law or decision of a country, a state, or an Indian tribe may make any person an heir. An heir at law is simply one who succeeds to the estate of a deceased person under the statute of a country, a state, or the decision of an Indian tribe. *McKinney v. Stewart*, 5 Kan. 334; *Delashmutt v. Parrent*, 40 Kan. 641, 20 Pac. Rep. 504; *Caldwell v. Miller*, 44 Kan. 12, 23 Pac. Rep. 946; *Brown v. Steele*, 23 Kan. 672.

The probabilities are, from some of the evidence offered, that under the law and decision of the Shawnee tribe of Indians in force in 1860, when Polly Buchannan died, and in force in 1874, when Sally Zeigler died, that, as George Buchannan and Gottlieb Zeigler were white men, they could not inherit from either Polly Buchannan or Sally Zeigler, and that after the death of Polly Buchannan and Sally Zeigler no one, excepting the Shawnee tribe or their chiefs, or the government, could confer legal title to the land upon any one. But this was not established, unless we indulge in presumptions. In the absence of any evidence tending to show the law or decision of the Shawnee tribe of Indians relating to descent or distribution of lands in 1860, we cannot say what person, if any, succeeded to the estate of Polly Buchannan, deceased. It is shown by the record that Bugbee and Cresswell hold under a deed from the chiefs of the Shawnee tribe, dated February 3, 1882. This deed was approved by the secretary of the interior on October 27, 1882. If any presumptions are to be indulged in, as the general government has the superintending care over the interests of the Shawnee Indians, and as their property is withdrawn from the operation of the state laws, we might presume that the deed of February 3, 1882, approved by the secretary of the interior, was made in accordance with the Shawnee law, and conferred title. We need not go that far in this case. Clearly, John C. McCoy, Sr., and his grantors were not and are not trespassers upon the land. John C. McCoy, Sr., took possession of the land on the 3d day of March, 1883, after he had obtained his deed from the chiefs of the Shawnee tribe, and after it had been approved by the secretary of the interior, and properly recorded in the office of the register of deeds

in Johnson county; therefore his possession was with color and claim of title. His grantees, including Bugbee and Cresswell, held and now hold possession, with color and claim of title. Even if the chiefs of the Shawnee tribe, with the approval of the secretary of the interior, could not confer title, we think it is clearly evident, from the control that the government exercises over the Shawnees and their lands, that they had authority, with the consent of the secretary of the interior, to give John C. McCoy, Sr., possession of the land, in the absence of proof showing that any other person had any legal title, or the right of possession. The case of *Douglass v. Ruffin*, 38 Kan. 530, 16 Pac. Rep. 783, in this view, does not militate against the judgment of the court below. The case of *Hale v. Wilder*, 8 Kan. 545, has no application, because this court held in that case that the secretary of the interior was not authorized to approve a deed to the land therein referred to. Neither O'Brien or Updegraff are, or have been, in the possession of the land, and both have failed to establish better title than Bugbee and Cresswell, who are in actual possession. Neither can O'Brien or Updegraff claim any title under the statute of limitations on account of the possession of their grantors, or the parties through whom they claim, because the title or possession of Polly Manture was so restricted and limited that adverse possession could not give title without the consent of the secretary of the interior. Again, the deed from George Buchannan to Joachim Rathjen, who quitclaimed to John C. McCoy, Sr., on the 12th of August, 1881, counts for nothing. It was never approved by the secretary of the interior, and was void; therefore neither McCoy nor his grantees are estopped by any recitations therein contained. 7 Amer. & Eng. Enc. Law, p. 5, note 2; *Merriam v. Railroad Co.*, 117 Mass. 241; 3 Washb. Real Prop. p. 106. Further, if George Buchannan had inherited, under the Kansas laws, one-half of the land, free from the restrictions of the patent, 80 acres of it would have gone to John C. McCoy, Sr., under his deed of April 2, 1886, although not approved by the secretary of the interior, as he did not die until August, 1879. O'Brien only claims from Marow Gibbs under the will of George Buchannan. Clearly, Buchannan's deed of April 2, 1886, is as valid to 80 acres as his will of 1879 to any other part. So, upon any legal view of the case, O'Brien has no claim or title to 80 acres of the land in dispute. But the actual possession of all the land being in Bugbee and Cresswell under color and claim of title, and their right of possession not having been overthrown by any facts disclosed in the record, the judgment of the district court will be affirmed. All the justices concurring.

(46 Kan. 170)

DRINKWATER et al. v. SAUBLE.

(Supreme Court of Kansas. April 11, 1891.)

APPEAL — REVIEW OF VERDICT — ABATEMENT OF NUISANCE — HEARING — JOINDER OF CAUSES.

1. It is the duty of the supreme court, if it can, to give such a construction to the findings of the trial court and the jury, and to the general v. 26P. no. 7—28

verdict of the jury, as will harmonize them, and make them support the judgment.

2. An action to abate a mill-dam for the reason that it causes injury to the property of an upper proprietor is an action to abate a nuisance, and is an equitable remedy, and the trial may be before the court, or before a jury, or before a referee, or a part before one and a part before another, as the court, in its discretion, may determine.

3. A plaintiff in an action upon a cause of action for damages arising from injuries to his land occasioned by the overflowing of the same with water caused by the wrongful construction and use of a mill-dam, may unite with such cause of action a cause of action to abate the mill-dam, or to perpetually enjoin its use, so far as its use is wrongful and a nuisance.

4. The evidence, the findings of the court and jury, the general verdict of the jury, and the judgment of the court considered, and held, that no material error as against the rights of the plaintiffs in error was committed.

(Syllabus by the Court.)

Error from district court, Chase county; FRANK DOSTER, Judge.

*Sanders & Rees* and *Rightmire & Radcliffe*, for plaintiffs in error. *Mudden Bros.* and *John Martin*, for defendant in error.

VALENTINE, J. This was an action commenced in the district court of Chase county on February 3, 1888, by David Sauble against O. H. Drinkwater and P. P. Schriver, to recover damages for alleged injuries to the plaintiff's land, alleged to have been caused by the erection by the defendants in October, 1886, of a mill-dam across the Cottonwood river to the height of 10 feet, and causing the water therein to rise upon the plaintiff's land to the height of 5 feet above its ordinary and natural height, and thereby causing the alleged injuries; and the plaintiff also asked for the abatement of the dam to the extent of 5 feet from the top. The defendants answered, alleging that the dam complained of was the mere replacement of a former dam which had been in existence and maintained by them for more than 15 years prior to the erection of the new dam under a parol agreement between themselves and the plaintiff's grantors; and that the new dam was not higher than the old one, and did not cause the water to flow back further or to rise higher on the plaintiff's land than the old one did. The plaintiff replied by filing a general denial. A trial was had before the court and a jury, and the jury rendered the following verdict, and in answer to interrogatories made the following special findings, to-wit: Verdict: "We, the jury impaneled and sworn in the above-entitled case, do upon our oath find for plaintiff, and assess his damages at \$60." Special findings: "(1) What was the height of the old dam when first constructed, and up to January, 1870? Answer. Eight feet. (2) What was the height of the new dam when this suit was brought? A. Eight feet eight and one-half inches. (3) Was not the new dam erected 68 feet lower down on the riffle from where the old dam was located? A. Yes. (4) What was the amount of fall between the old and the new dam? A. Six inches. (5) Did the water, while the old dam was in use, for

the new mill pass through the old flume of the old mill where the wheel stood when in use for the old mill, and go directly into the flume of the new mill? A. Yes. (6) What is the difference in inches in the height of the floor of the flume between where the wheel stood in the old mill and where it stands now? A. About six inches. (7) What was the distance from or difference between the head-water to tail-water on the old dam from 1868 to 1881, at fall of dam? A. About eight inches. (8) What is now the distance from or difference between the head-water and tail-water at the new dam when at fall of dam? A. Seven feet eight and a half inches, according to evidence. (9) With an ordinary stage of water in the river, does the new dam cause dead water further up the river than the old dam did when in good order? If so, how much further up the stream? A. Yes, to first clause. No definite testimony to the last clause." The court also made the following finding, to-wit: "It was further considered, ordered, and adjudged by the court that said new mill-dam constructed by said defendants was built in continuation of the old dam, and that the new dam is and was eight inches higher than the old dam, and that said new dam be taken down and abated by said defendants to the height of eight inches from the top of said dam." Upon this verdict and these findings the court below rendered judgment in favor of the plaintiff and against the defendants for \$60 damages, and for the abatement of the dam to the extent of eight inches from the top; and the defendants, as plaintiffs in error, bring the case to this court for review.

Two principal questions are involved in this case: *First*. Did the defendants, by building and maintaining the old dam as they did, acquire a right to build and maintain a new dam of the same capacity as the old one, or, in other words, one that would back the water or cause it to rise upon the plaintiff's land as high as the old one did? *Second*. If the defendants did acquire any such right, then did they depart from the same by constructing the new dam in such a manner as to cause the water to flow back further or to rise higher upon the plaintiff's land than was done by the old dam? Without deciding the first question, we shall pass to the second one, to-wit: If the defendants had a right to erect and maintain a new dam, did they construct the same in accordance with such right? No claim of error is made with regard to anything that occurred in the court below prior to the rendering of the verdict and the making of the special findings by the jury; and no objection was urged as against such verdict and findings at the time when the same were rendered and made, nor until a motion for a new trial was filed. The objections now urged against them are as follows: It is claimed that they are not supported by sufficient evidence; that the special findings are inconsistent with each other and inconsistent with the general verdict; that they do not mean what the court below and the jury evidently believed they meant; and that they are not sufficient to uphold

the judgment actually rendered in the case. Objections are also urged against the finding made by the court itself. It is claimed that such finding is not supported by the evidence, and is contrary to law, and that the court had no power to make it. It is true the findings of the jury are not as intelligible as they might be, and as to the seventh there must be some mistake; but still, with regard to all the material findings made by the jury, we think they are capable of being harmonized with each other and with the general verdict, and substantially with the finding made by the court itself; and, taking all the findings and the general verdict together, we think they support the judgment; and it is our duty to give to them such a construction, if we can, as will harmonize them, and make them support the judgment. *Bevens v. Smith*, 42 Kan. 250, 251, 21 Pac. Rep. 1064, and cases there cited; *Railway Co. v. Fray*, 43 Kan. 750, 759, 23 Pac. Rep. 1039, and cases there cited; *Nichols v. Weaver*, 7 Kan. 373; *Simpson v. Greeley*, 8 Kan. 586; *Railway Co. v. Ritz*, 33 Kan. 404, 6 Pac. Rep. 533. The general verdict is a finding in favor of the plaintiff and against the defendants upon all the issues in the case. It is therefore virtually a finding that the new dam is higher than the old one was; that it causes the water to flow back further and to rise higher upon the plaintiff's land than the old one did; and that the plaintiff was injured and damaged by reason thereof and by the wrongs of the defendants. It was also found specially by the jury that the new dam is 8 feet 8½ inches high, and that the old dam was only 8 feet high; that the new dam causes the water to flow back further up the river than the old dam did; and that the plaintiff was thereby damaged to the amount of \$60. Evidently the jury intended to find that the new dam, in altitude, measuring from the same level, was 8½ inches higher than the old dam was; and the court itself found that the new dam was 8 inches higher than the old dam was, and ordered that the new dam should be abated to that extent. An action to abate a mill-dam for the reason that it causes injury to the property of an upper proprietor is an action to abate a nuisance, and an action to abate a nuisance, as well as an action to enjoin a nuisance, is an equitable remedy. *Gould, Waters*, § 555; 3 Pom. Eq. Jur. § 1359. And in all actions of an equitable character the trial may be before the court, or before a jury, or before a referee, or a part before one and a part before another, as the court, in its discretion, shall determine. *Civil Code*, §§ 266, 267; *Hunt v. Spencer*, 20 Kan. 126; *Hixon v. George*, 18 Kan. 253, 256, 257; *Carlin v. Donegan*, 15 Kan. 495; *Woodman v. Davis*, 32 Kan. 344, 346, 347, 4 Pac. Rep. 262, and cases there cited. The court below undoubtedly had the right to make the finding which it did; and upon all the findings, as made by the court and jury, we cannot say that the judgment rendered by the court is erroneous; nor can we say that such findings are not supported by sufficient evidence. There seems also to be a claim that there is a misjoinder of causes of action, but evidently there

is not. A plaintiff in an action upon a cause of action for damages arising from injuries to his land occasioned by the overflowing of the same with water caused by the wrongful construction and use of a mill-dam may unite with such cause of action a cause of action to abate the mill-dam, or to perpetually enjoin its use, so far as its use is wrongful and a nuisance. *Akin v. Davis*, 11 Kan. 580. Some slight errors have intervened in this case, as before intimated, but no substantial error has been committed as against the rights of the plaintiffs in error. There was evidence introduced that tended to show that the new dam caused the water to rise upon the plaintiff's land much more than eight inches higher than the old dam caused it to rise. The judgment of the court below will be affirmed. All the justices concurring.

(46 Kan. 14)

**PARKER v. CITY OF ATCHISON.**

(*Supreme Court of Kansas.* April 11, 1891.)

**MUNICIPAL CORPORATIONS — CHANGE OF STREET GRADE — DAMAGES.**

Where a city of the first class changes the grade of one of its streets, an abutting lot-owner will be entitled, under the statutes, to any damage which he may suffer thereby; and in a suit therefor the jury may take into consideration the condition of the plaintiff's property, the street and the grade, and also the market value of the property before and after the grading; and where his property is injured in value, the measure of his damages will be the difference in the market value brought about by reason of the change of the grade; but where the property is not injured in value by reason of the change of the grade he will not be entitled to recover anything.

(*Syllabus by the Court.*)

Error from district court, Atchison county; W. D. GILBERT, Judge.

W. W. & W. F. Guthrie, for plaintiff in error. W. R. Smith and H. C. Solomon, for defendant in error.

VALENTINE, J. This proceeding in error in this court is founded upon an appeal by James W. Parker to the district court from the action of the appraisers denying to him damages claimed by him to have been caused by a change of the grade of a portion of Sixth street in front of his property, in the city of Atchison. Parker was the plaintiff in the district court, and is the plaintiff in error in this court; while the city of Atchison was the defendant in the district court, and is the defendant in error in this court. The plaintiff's supposed right to damages is founded solely upon the provisions of section 18, c. 37, of the Laws of 1881, (Gen. St. 1889, par. 562,) which section reads as follows: "Sec. 18. The mayor and council shall have the power to establish by ordinance the grade of any street, alley, lane, or avenue within the city; and when the grade of any street, alley, lane, or avenue shall have been so established, or shall have been heretofore established, and the grade thereof accepted by the council, such grade shall not be changed until declared necessary by resolution by a three-fourths vote of all the council elected, and not then until the damage to property owners, which may be caused by such change of grade, shall

have been assessed by three disinterested appraisers, who shall be appointed by the mayor, with the consent of the council for that purpose, who shall make such appraisal, and file their report under oath with the city clerk, within twenty days after receiving notice of their appointment from the city clerk; and the city clerk shall give notice to interested property owners by publication in the official paper of the city for at least ten days prior to the assessment of damages, which notice shall specify the names of the appraisers, the time when they will meet to make such appraisal, and the name of the street between the points wherein such change of grade is to be made, and the amount of damages so assessed shall be deposited with the city treasurer, subject to the order of said property owner or owners, or their agent or agents, before any such change of grade shall be made; and any person feeling himself aggrieved by such amount of damages may appeal therefrom within ten days after confirmation of said report by the council, by serving a written notice upon the mayor, or, in his absence, the acting mayor, or, in his absence, the city clerk, of such intention to appeal to the district court, and by executing a bond to the city, conditioned to faithfully prosecute such appeal to a final determination thereof, and to pay all costs so incurred in case such appellant does not recover a judgment greater than the damages awarded by said appraisers. The taking of such appeal shall not operate in any manner to prevent the change of said grade; and the cost and expense of changing the grade of said street and grading the same shall be paid by the city." The case was tried before the court and a jury, and a verdict and judgment were rendered in favor of the defendant and against the plaintiff, and the plaintiff brings the case to this court.

The facts of the case are substantially as follows: The plaintiff owned and owns lots numbered 11, 12, 13, and 14, in block numbered 39, in that part of the city of Atchison known as "Old Atchison." The lots lie west of Sixth street, north of Main street, and south of an alley which runs east and west through the middle of the block. The ground occupied by the lots is low when compared with the surrounding land, the stream called "White Clay Creek" running through such lots, and a portion of the lots occupying its bed. The grade of Sixth street was changed in 1887, and was increased in height from nothing at the alley at the north-east corner of the plaintiff's property to 12 feet 9 inches at the north line of Main street and at the south-east corner of the plaintiff's property, the object of this change of grade being for the purpose of constructing a viaduct over Main street and over a large number of railroad tracks. The work was commenced in March, 1887, and was completed some time in the summer of 1887; and the viaduct was completed and opened for travel in April, 1888. At the line between the plaintiff's land and Sixth street, a retaining wall of great thickness and of solid masonry was built. A portion of the wall, about 18 or 20 inches in thickness,



was built with the consent of the plaintiff upon the plaintiff's land, and it was built in such a manner that it could be used by the plaintiff in making improvements upon his land. Evidence was introduced on the trial to show how the plaintiff's land lay, how the grade and the viaduct were constructed, of what materials they were constructed, the value of the plaintiff's property immediately before the grading was done, and also the value of his property afterwards; and these things were taken into consideration by the jury. The case, however, was tried upon the theory as stated by the court to the jury in the following instruction, which reads as follows: "(4) In determining the amount of damages plaintiff is entitled to recover in this action, if any, you will ascertain from the evidence the market value of lots 11, 12, 13, and 14, described in plaintiff's petition, immediately prior to said change of grade, and their market value immediately after said change of grade, and if you find that their market value was less after said change of grade than before, then the difference in such values would be the amount plaintiff would be entitled to recover of the defendant in this action, and you should give him a verdict for that amount; but if you should find that the market value of said lots was as great or greater after said change of grade as before, the plaintiff would not be entitled to recover, and you should return a verdict for defendant." We would think from the evidence that the plaintiff's property was in fact of much greater value after the change of the grade and by reason thereof than it was before. But it is claimed by the plaintiff that nothing should be taken into consideration in determining the amount of his recovery except that which would tend to cause injury or inconvenience; that nothing should be taken into consideration which would tend to make the property more valuable or more convenient for use; that all evils, inconveniences, disadvantages, and losses caused by the change of the grade should be carefully brought together, massed and aggregated, and be allowed damages for the whole of the same; while all the benefits, conveniences, advantages, and gains should be carefully excluded from all consideration. We think the plaintiff is wrong. In making the change of the grade the city took nothing from the plaintiff. The fee in the street was and is in the county, in trust for the use and benefit of the public in general; and the exclusive control of the street, with the right to the exclusive control thereof, was and is in the city. It is true that a portion of the retaining wall 18 or 20 inches in thickness was built upon the plaintiff's property upon the east side of lot numbered 14; but it was so built with the consent of the plaintiff, and it now belongs to the plaintiff, and is a benefit to his lots, instead of being an injury thereto. Except for the statute above quoted, the plaintiff would not be entitled to recover anything under any circumstances, even if the change of the grade had injured him; and with the statute, we do not think that he can recover where the change of the grade has really and actual-

ly benefited him. As to another point in the case, see the case of *City of Topeka v. Martineau*, 42 Kan. 387, 22 Pac. Rep. 419. We think the case was tried in the court below upon the right theory, and that no material error was committed in the case, and therefore the judgment of the court below will be affirmed. All the justices concurring.

(46 Kan. 152)

### HOWELL *et al.* v. HOUGH *et al.*

(*Supreme Court of Kansas.* April 11, 1891.)

#### NOVATION—APPOINTMENT OF RECEIVER—POWERS.

1. A person for whose benefit a promise to another, upon a sufficient consideration, is made, may bring an action in his own name on the contract against the promisor, but he cannot be compelled to act upon or accept such contract.

2. The appointment of a receiver by the district court secures to that court the power to control all controversies affecting the property which the receiver has obtained possession of.

3. Where H., J. & Co. contracted with B., H. & Co. to turn over sufficient accounts or notes received from them to satisfy a claim of \$1,000 due from B., H. & Co. to a bank, and the bank refuses to receive the accounts or notes in payment of its claim against B., H. & Co., H., J. & Co. are excused from turning over the accounts or notes by the refusal of the bank to act upon or accept the contract until the bank or its assignees make a demand therefor; and where such demand is made by the assignees of the bank, or parties holding under the bank after a receiver has been appointed to take possession of and collect the accounts or notes turned over by B., H. & Co., H., J. & Co. are relieved from complying with such demand, because the accounts or notes are at the time of the demand *in custodia legis*. After the receiver is appointed, the assignees, or the parties interested, if they have any right or claim to the accounts or notes, must make their application for their part thereof to the district court which appointed the receiver and has the control of such accounts and notes.

(*Syllabus by the Court.*)

Error from district court, Atchison county; W. D. GILBERT, Judge.

On the 16th day of January, 1885, the firm of Buzan, Hough & Co., of Wetmore, Nemaha county, was indebted to Howell, Jewett & Co., of Atchison, to the amount of \$5,300, and interest, for five accepted drafts dated in January 1885. At this time the firm of Buzan, Hough & Co. was running a lumber business at Wetmore, and had succeeded the firm of Buzan, Hazeltine & Co., under an arrangement by which the new firm guaranteed to pay and assumed the debts and liabilities of the old. At the time named a representative of the firm of Howell, Jewett & Co. went from Atchison to Wetmore, and took from Buzan, Hough & Co., and Buzan, Hazeltine & Co., a bill of sale of the lumber in their yards, and an assignment of their accounts and notes, under an arrangement that the same were to be applied in payment of the indebtedness due from Buzan, Hough & Co. and Buzan, Hazeltine & Co. to Howell, Jewett & Co., to the amount as above stated. At the same time the following written assignment was executed and delivered: "Wetmore, Kansas, Jan. 16th, '85. We this day assign and set over to Howell, Jewett & Co. all accounts and notes due and to be due, as shown in Exhibit A; also all other accounts and other evidence of debts due to us. The above

assignment and transfer is made to secure said Howell, Jewett & Co. for five accepted drafts dated January, 1885, and aggregating \$5,300, and interest. Howell, Jewett & Co. hereby agree to turn over sufficient accounts or notes to satisfy the claim of the Nemaha County Bank for (\$1,000.00) one thousand dollars, and H. H. Lynn for (\$2,000.00) two thousand dollars and interest, and to pay to the creditors of Buzan, Hough & Co. and Buzan, Hazeltine & Co. the balance collected on the accounts and notes after the claim of Howell, Jewett & Co. is satisfied. [Signed] BUZAN, HOUGH & CO. BUZAN, HAZELTINE & CO. Witness: H. J. JEWETT." At the date of this agreement the firm of Buzan, Hough & Co. was indebted to the Bank of Nemaha County for \$1,021.40, and the indebtedness was evidenced by a promissory note in words and figures following, to-wit: "\$1,021.40. December 11th, 1884. Sixty days after December 19th, after date, we promise to pay to the order of J. H. Johnson, cashier, at the Bank of Nemaha County, ten hundred twenty-one and 45-100 (\$1,021.45) dollars, value received. Interest at twelve per cent. per annum until paid. BUZAN, HOUGH & CO. W. P. BUZAN, H. A. HOUGH, T. J. WOLFLEY, and A. M. HOUGH. No. 4059. Due Feb. 17-20." Howell, Jewett & Co. received \$9,578.19 in notes and accounts. They realized from the proceeds of these, before the garnishment of them, from creditors, \$1,400, and before the commencement of this action, \$6,000. On the 10th day of January, 1888, A. M. Hough and T. J. Wolfley commenced their action against Howell, Jewett & Co. to recover \$1,048.63, claiming that they had contracted on January 16, 1885, for a valuable consideration, to satisfy the note of Buzan, Hough & Co. to the bank of Nemaha county, which was payable February 17, 1885; that A. M. Hough and T. J. Wolfley were sureties upon that note, and that they were entitled to recover from Howell, Jewett & Co. the amount thereof. Trial had before the court with a jury. The jury returned a verdict for Hough and Wolfley against Howell, Jewett & Co., for \$1,021.40, and also returned the following answers to questions submitted: "Particular questions of fact on the part of plaintiffs: (1) What amount in cash had the defendants realized from the notes and accounts transferred to them under the said contract of January 16, 1885, up to the time that garnishment proceedings were commenced against the defendants? Answer. \$1,400. (2) How much in cash had the defendants received as the proceeds of such notes and accounts prior to the commencement of this action? A. \$6,000. (3) Were the plaintiffs accommodation sureties for the makers of said Nemaha County Bank note? A. Yes. (4) Were the plaintiffs compelled by legal proceedings at the suit of the said bank to pay off and satisfy said note to said bank? A. Yes. (5) Did the plaintiffs in fact pay off and satisfy such note to the said bank prior to the commencement of this action? A. Yes. (6) What amount, in addition to the principal debt of said note, were defendants compelled by legal proceedings to pay by way of costs for the satisfac-

tion of such note? A. \$50. (7) Were said Buzan, Hough & Co. and Buzan, Hazeltine & Co. insolvent after the transfer of such notes and accounts to defendants of date January 16, 1885? A. Supposed to be. (8) Up to the commencement of this action, had the defendants obtained to their own use the benefits of all the notes and accounts transferred to them of the said date, January 16, 1885, so far as then realized upon? A. Yes. (9) Have the notes and accounts transferred to defendants of date January 16, 1885, been held and controlled by the defendants for their use and benefit, in so far as same have not been realized upon? A. Yes. Particular questions submitted by the defendants: (1) Was the plaintiff T. J. Wolfley a member of the firm of Buzan, Hough & Co.? A. N. (2) Did the cashier of the Nemaha County Bank refuse to receive from Howell, Jewett & Co. notes and accounts to be applied in satisfaction of the claim of the bank? A. Yes. (2) Did the cashier of the Nemaha County Bank refuse to receive from Howell, Jewett & Co. notes and accounts to be applied in satisfaction of the claim of the bank? A. Yes. (3) About the time the notes became due, did the cashier of the Nemaha County Bank state to John Stowell, the defendants' agent, that the bank would not receive notes and accounts from the defendants, for the reason that he considered the securities on them good? A. Yes. (4) Were Howell, Jewett & Co. garnished in three cases soon after they came into the possession of the notes and accounts? A. Yes; and not until they had collected \$1,400." The defendants filed a motion for judgment upon the findings, which was overruled, and they also filed a motion for a new trial, which was overruled. Judgment was entered for the plaintiffs, and against the defendants, for the amount of the verdict. The defendants excepted, and bring the case here.

*Smith & Solomon*, for plaintiffs in error.  
*W. W. & W. F. Guthrie*, for defendants in error.

*HORTON, C. J., (after stating the facts as above.)* A. M. Hough and T. J. Wolfley brought their action against Howell, Jewett & Co. upon a written agreement dated January 16, 1885, entered into between Howell, Jewett & Co., Buzan, Hough & Co., and Buzan, Hazeltine & Co. In this written agreement, Howell, Jewett & Co., agreed to turn over sufficient accounts or notes received by them from Buzan, Hough & Co. to satisfy \$1,000 and interest on a note held by the Nemaha County Bank, dated December 11, 1884, payable 60 days after December 19, 1884, and executed by Buzan, Hough & Co., and also by A. M. Hough and T. J. Wolfley. A. M. Hough and T. J. Wolfley claimed in their petition that they were sureties upon the note; that they had been sued thereon; and that judgment had been rendered against them, which they satisfied. They further alleged that they were entitled to enforce the written agreement of January 16, 1885, against Howell, Jewett & Co., because the firm had realized from the accounts and notes large amounts of

money; and had refused, although a demand had been made upon them, to turn over sufficient accounts and notes to satisfy \$1,000 and interest on the note given to the Nemaha County Bank. Hough and Wolfley recovered from Howell, Jewett & Co. upon the trial \$1,021.40 and costs. The defendants below excepted, and bring the case here.

It appears from the findings of the jury that after the execution of the contract of January 16, 1885, the cashier of the Nemaha County Bank said to an agent of Howell, Jewett & Co. that the bank would not receive accounts or notes from them to satisfy the note of December 11, 1884, or any part thereof, because he considered the sureties upon the note good; that the cashier refused to receive from Howell, Jewett & Co. any accounts or notes to satisfy the claim of the bank, and that Howell, Jewett & Co. were garnished in three cases by the creditors of Buzan, Hough & Co., or Buzan, Hazeltine & Co., soon after they came into the possession of the accounts or notes mentioned in the contract of January 16, 1885, but, before being garnished, they collected on the accounts or notes \$1,400. It also appears from the record that on the 29th day of April, 1885, in an action then pending in the district court of Nemaha county, wherein the Wetmore State Bank was the plaintiff, and Buzan, Hazeltine & Co. and other parties were defendants, that a receiver was appointed to take charge of the accounts and notes turned over to Howell, Jewett & Co. by Buzan, Hazeltine & Co. and Buzan, Hough & Co. On the same day, in an action then pending in the district court of Nemaha county, wherein Jacob Haish was the plaintiff, and Buzan, Hazeltine & Co. were the defendants, the same person who was appointed receiver in the action of the Wetmore State Bank against Buzan, Hazeltine & Co. was also appointed the receiver in the Haish action to take charge of and collect the same accounts and notes referred to in the petition in this case. The accounts and notes were directed to be collected by the receiver, and from the proceeds thereof it was ordered that there should first be paid the claim of Howell, Jewett & Co. against Buzan, Hazeltine & Co. and Buzan, Hough & Co.; second, the claim of the Wetmore State Bank against Buzan, Hazeltine & Co., and the claim of Jacob Haish against Buzan, Hazeltine & Co., according to their respective priorities. It also appears from the record that the receiver, who was appointed in both actions to take charge of the accounts and notes, has not yet been discharged. The offer of Howell, Jewett & Co., to the Nemaha County Bank to turn over accounts or notes to the bank to satisfy \$1,000 and interest on the note of December 11, 1884, was made about the time the note became payable. The judgment upon the note of December 11, 1884, was rendered on the 29th day of April, 1885, but Hough and Wolfley did not pay or satisfy any part thereof until after that time. They obtained a transfer or assignment of this judgment on October 3, 1887. The demand made by A. M. Hough and T. J. Wolfley

upon Howell, Jewett & Co., to turn over sufficient accounts or notes to satisfy the claim of the Nemaha County Bank for \$1,000 and interest, which they had satisfied, was not made until after the transfer or assignment of the judgment to them. This, of course, was long after the receiver had been appointed and had taken possession of the accounts and notes.

Upon the trial, Howell, Jewett & Co. asked the court to instruct the jury as follows: "(1) The jury are instructed that as a receiver had been appointed on April 29, 1885, in the district court of Nemaha county, to take charge of the accounts and notes formerly belonging to Buzan, Hough & Co., that the possession of the receiver of the accounts and notes took the same out of the control of Howell, Jewett & Co., and placed them in the hands of the court, and, after the receiver took possession of the accounts and notes, the defendants were excused from any failure to deliver or tender any part of the same to the Bank of Nemaha County. (2) The jury are instructed that it can make no difference in which case the receiver was appointed; his possession of the accounts and notes could not be disturbed by Howell, Jewett & Co., or any other person, so long as he was acting as such receiver. (3) The jury are instructed that it is admitted in this case that John Stowell was appointed receiver in the district court of Nemaha county on the 29th of April, 1885, in the case of Jacob Haish v. Buzan, Hough & Co.: that he took charge of the accounts and notes formerly belonging to Buzan, Hough & Co.; and that he has never been discharged, and is now the duly acting and qualified receiver in said case." The court refused to give these instructions, but instructed the jury that: "If you believe from the evidence that the note described in plaintiffs' petition was executed as therein stated, and that the Nemaha County Bank brought suit against the plaintiffs as sureties on the note, and that plaintiffs, by reason of being sureties on the note, were required to pay the same; and you further believe from the evidence that Buzan, Hough & Co. and Buzan, Hazeltine & Co. assigned and set over to Howell, Jewett & Co., on the 16th day of January, 1885, all accounts and notes due and to be due, and also other accounts and other evidences of debt due to them, and that by such assignment Howell, Jewett & Co. agreed to turn over sufficient accounts or notes to satisfy the claim of the Nemaha County Bank for \$1,000, as claimed in plaintiffs' petition; and you further believe from the evidence that Howell, Jewett & Co. have in no manner paid plaintiffs their claim sued on, or that Howell, Jewett & Co. have not turned over to the Nemaha County Bank, or to J. H. Johnson, as cashier of the bank, sufficient accounts or notes to satisfy the claim of the Nemaha County Bank for \$1,000, or that the defendants have never tendered to the bank or to the cashier sufficient accounts or notes to satisfy the claim,—you will return a verdict for the plaintiffs, unless you further believe from the evidence that John Stowell was appointed as receiver by the district

court of Nemaha county, and as such receiver took charge of the accounts and notes assigned to Howell, Jewett & Co. by Buzan, Hough & Co. and Buzan, Hazeltine & Co., before the defendants had realized anything from the accounts and notes. In such case you will return a verdict for defendants."

The court below seems to have tried this case upon the theory that Howell, Jewett & Co. were obligated by the agreement of January 16, 1885, to pay to the Nemaha County Bank \$1,000 and interest in money, and that, as they had collected on the accounts and notes turned over to them more than that amount before the appointment of the receiver, they were liable to Hough and Wolfley. Such is not the proper construction of the contract of January 16, 1885. "It is unquestionably true that in this state a person, for whose benefit a promise to another upon a sufficient consideration is made, may maintain an action on the contract in his own name against the promisor." *Burton v. Larkin*, 86 Kan. 246, 13 Pac. Rep. 398. Therefore, under the contract of January 16, 1885, the Nemaha County Bank could have made a demand upon Howell, Jewett & Co. for sufficient accounts or notes to satisfy its claim against Buzan, Hough & Co., of \$1,000 and interest, but it was not obliged to accept or act upon the contract of January 16, 1885, and it could not be compelled to act upon or accept that contract. When the bank refused to receive any accounts or notes from Howell, Jewett & Co., that firm was not compelled to pay money in place of the accounts or notes, and was excused or relieved from turning over to the bank any accounts or notes until a notice or demand was given to or made upon them. Such notice or demand was not given or made until after the appointment of the receiver in the several actions pending in the district court of Nemaha county. Then it was too late to make a demand upon Howell, Jewett & Co. for the accounts or notes, because, after the receiver was appointed, the accounts and notes were *in custodia legis*. After the receiver was appointed, A. M. Hough and T. J. Wolfley ought to have made their claim for the accounts or notes to satisfy the judgment rendered upon the note of December 11, 1884, to the district court of Nemaha county, not to Howell, Jewett & Co. "The appointment of a receiver does not determine any right, or affect the title of either party, in any manner whatever. He is the officer of the court, and truly the hand of the court. His holding is the holding of the court from him from whom the possession was taken. He is appointed on behalf of all parties, and not of the plaintiff or of one defendant only. His appointment is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it." *Ellicott v. Warford*, 4 Md. 85; High, Rec. pp. 2, 3. In *Bank v. Simpson*, 22 Kan. 414, it was said that "the appointment of a receiver of the effects and property of the partnership in the action of *Simpson* against *Crippen*, by the court be-

low, secured to that court the power to control, at its discretion, all controversies which affected the property placed in his custody. It thereafter had the right to take to itself all such controversies, and compel parties to proceed nowhere else than in its own forum." *Railroad Co. v. Smith*, 19 Kan. 229. The instructions prayed for by the defendants below concerning the possession of the accounts and notes by the receiver ought to have been given to the jury; and the instruction concerning the receiver which was given, in view of the facts disclosed by the record, was misleading, and therefore erroneous.

It is suggested on the part of the plaintiffs below that, as the appointment of the receiver by the district court of Nemaha county was consented to by Howell, Jewett & Co., and the other parties to the actions, that Howell, Jewett & Co. are not excused or relieved from complying with the demand of Hough and Wolfley. The proceedings in the actions in the district court of Nemaha county of the Wetmore State Bank and Jacob Haish against Buzan, Hazeltine & Co. and other parties are not void, even if made with the consent of the parties to the actions. Unless those proceedings were without jurisdiction or fraudulent, they are binding upon all parties. It is not shown that these proceedings were without jurisdiction or fraudulent. We must therefore consider them valid.

A great many other questions were discussed upon the oral argument, and are also referred to in the briefs; but as the evidence clearly shows that the Nemaha County Bank refused to act upon or accept the contract of January 16, 1885, and as it is undisputed that the receiver was appointed to take charge of the accounts and notes in controversy on the 29th of April, 1885, before A. M. Hough and T. J. Wolfley had made any demand, or had the right to make any demand, upon Howell, Jewett & Co., for the accounts or notes, it is unnecessary, in view of what has already been said, to pass upon these questions. The judgment of the district court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. All the justices concurring.

(46 Kan. 161)

ADAMS v. ATCHISON, T. & S. F. R. Co.

(*Supreme Court of Kansas*. April 11, 1891.)

KILLING STOCK — FARM CROSSINGS — TRESPASSING ANIMALS.

1. A land-owner whose farm is divided by a railroad is entitled to necessary crossings; and where the railroad company fences its track through his farm, and constructs gates in the fences at such crossings for the accommodation of the land-owner or his tenant, the duty rests upon him to keep the gates closed, and, if he neglects to do so, and his animals pass through them upon the track and are killed, without the negligence of those operating the trains, the railroad company is not liable for the loss.

2. In such a case, where the animals of a third person jump into the inclosure, and are wrongfully upon the premises of such land-owner, and then pass through the gate and are killed by a train, without the negligence of those in charge of the same, the owner of such trespassing animals is entitled to no greater rights than the

land-owner, and cannot recover from the company.

(Syllabus by the Court.)

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

J. M. Adams brought an action against the Atchison, Topeka & Santa Fe Railroad Company for the value of a mule, which, it is alleged, was killed by the engine and cars of the railroad company at a point on the road which was not inclosed by a good and lawful fence. The case was tried with a jury, which rendered a verdict in favor of the plaintiff, and assessed his damages at \$125, and awarded \$25 as attorney's fees. The jury also returned the following findings of fact in answer to special questions submitted to them by the defendant: "(1) Did not the animal of said plaintiff which was killed go from plaintiff's premises into Judge Carey's premises and from thence onto the right of way of defendant railroad company; and was it not in the night-time? Answer. Yes. (2) Was not the fence between the plaintiff's land and Judge Carey's land, at the place where the animal in question went upon Judge Carey's land, in a defective condition? A. Yes. (3) How did the animal in question get from the plaintiff's land onto Judge Carey's land? A. By jumping the fence. (4) At the time of the accident, was not the defendant's road or right of way inclosed with a good and lawful fence, and a gate at the crossing to Judge Carey's land, good and sufficient to keep animals, such as mules, off from said right of way, if said gate were closed? A. Yes. (5) How did the animal in question get from plaintiff's premises onto the right of way or track of the railroad company? A. Through the open gate. (6) Was not the gate through which the animal in question is supposed to have gotten upon the right of way of defendant placed in the right-of-way fence separating Judge Carey's land from the railroad, and at a private crossing, and placed there to be used by Judge Carey and his tenants in crossing said right of way to different portions of his farm? A. Yes. (7) Who opened the gate, and left the same remain open, last, prior to the escape of the animal through the same, prior to the accident? A. No evidence. (8) How long prior to said accident had said gate remained open? A. The larger portion of a week. (9) How was the animal killed, or what caused the accident? A. By the locomotive or cars of the defendant. (10) Was the defendant guilty of culpable negligence causing the injury and the death of the animal in question? A. Yes. (11) If you answer the last question in the affirmative, state in what such negligence, if any, consisted. A. In not using more diligence in keeping the gate shut. (12) Was said animal permitted to go upon Judge Carey's premises by leave or license of Judge Carey or his tenants? A. No evidence. (13) If you answer the last question in the affirmative, state when such leave or license was given, and by whom. A. No evidence." Upon a motion of the railroad company, the court rendered judgment in its favor on the spe-

cial findings of the jury, and gave judgment in favor of the railroad company for its costs. The plaintiff complains of the ruling of the court in holding the special findings to be inconsistent with the general verdict, and in giving judgment thereon for the company.

*H. H. Harris*, for plaintiff in error. *Geo. R. Peck, A. A. Hurd, and Robert Dunlap*, for defendant in error.

JOHNSTON, J., (after stating the facts as above.) The railroad company is liable for injuring or killing animals in the operation of its railroad at any points on its road which might be but are not fenced; but in the present case the railroad company had inclosed its road at the place where the mule went upon the railway and was killed with a good and lawful fence, fully sufficient to have prevented the mule from going upon the road. The railway ran through Carey's land, and the fences had been provided with gates, so that he and his tenants might pass from one portion of the farm to the other. The mule which was killed went through a gate which had been left open by some one, but it does not appear that the gate was opened by the railway employees. There was no evidence to show who left the gate open before the killing of the mule, but as the crossing and gates were provided for the accommodation of the land-owner, to be opened and closed at his convenience, the presumption, if any arises, would be that he or his tenants left it open. It is the statutory duty of the railroad company to make and maintain sufficient and secure fences on either side of its railroad, and if it fails to erect a sufficient fence it is liable for animals killed, without proof of negligence on the part of the company. But where it has built a good and sufficient fence, with suitable and sufficient gates at the necessary crossings, it has performed its statutory duty, and nothing more is required except to maintain the inclosure. Where the railroad separates the different parts of the farm, the land-owner is entitled to drive-ways and farm crossings, in order to enable him to go from one portion of the farm to another. (Railroad Co. v. Kregelo, 32 Kan. 608, 5 Pac. Rep. 15;) and in order to utilize such crossings it is necessary that gates should be placed in the fences erected by the railroad company. Having provided gates at these crossings for the convenience of the land-owner, whose duty is it to keep the gates closed? He may open the gates as often as his convenience or necessities may demand. When he may desire to open and use the gates, or how long it may be necessary that they should remain open, the employees of the railroad company cannot know. As he may open and close them at his convenience, and without the knowledge of the company, he must, in the nature of things, be held responsible for the closing of the gates. The making of crossings and the placing of gates in the fences, so that the crossings may be used, is of no advantage to the company. They only increase the hazard and expense, and doubtless the company would prefer that the fences were

without gates or openings. But the land-owner is entitled to necessary crossings, and cannot be deprived of their use by the company. As he may use them at will, in the absence of the employes of the railroad company, the gates are within his control, and the duty of keeping them closed must rest on him. To place upon the railroad company the responsibility of keeping the gates closed would require that an employe of the company should be stationed at every crossing to see that the land-owner performed the implied obligation resting upon him of closing a gate provided for his special benefit. This would be an impracticable and unreasonable burden, and was manifestly not within the contemplation of the legislature. If the fence provided by the railroad company was defective, or the gate and its fastenings insufficient, then a different rule would apply; but in this case the sufficiency of the fence constructed by the railroad company and the gate which it provided is not questioned. We think it is clearly the duty of the land-owner or his tenant to close the gates and keep them closed; and, if he neglect to do so, and his stock is killed or injured, without the negligence of those operating the trains, the railroad company is not liable. If the owner of the land, who is responsible for the closing of the gate, could not recover, does Adams, whose mule broke into Carey's inclosure, occupy any better position? It appears that the fence between plaintiff's land and Carey's was defective, and that the mule jumped into Carey's inclosure in the night-time, and went through the gate constructed for the use and accommodation of Carey upon the railroad track, and was killed. As his mule was a trespasser upon the Carey farm, and as the injury and loss occurred through his negligence and wrong, he is entitled to no greater rights than Carey would have, and is not entitled to recover. The case of *Railroad Co. v. Adkins*, 23 Ind. 340, is a case directly in point; and, although the authority of that case has been questioned in the later cases, we think it contains the better reasoning, and correctly decided the law. See, also, *Harrington v. Railroad Co.*, 71 Mo. 384; *Binicker v. Railroad Co.*, 83 Mo. 660; *Hook v. Railroad Co.*, 58 N. H. 251; *Railroad Co. v. Etzler*, (Ind.) 19 N. E. Rep. 615, and 21 N. E. Rep. 466; *Railroad Co. v. Shimer*, 17 Ind. 295; *Railroad Co. v. Mosler*, (Ind.) 17 N. E. Rep. 109; *Railroad Co. v. Rollins*, 5 Kan. 167; *Railway Co. v. Methven*, 21 Ohio St. 586; *Eames v. Railroad Co.*, 96 Mass. 151. We think the district court reached a correct conclusion, and therefore its judgment will be affirmed. All the justices concurring.

(46 Kan. 131)

BRADY v. BANTA *et al.*

(Supreme Court of Kansas. April 11, 1891.)

HOMESTEAD—RIGHTS OF WIDOW AND CHILDREN—PARTITION—SECOND MARRIAGE.

1. Where real estate is occupied by a man and his family as a homestead at the time of his death, and afterwards by his widow and children, and the widow marries again, the home-

stead may be partitioned between her and the children.

2. When real estate descends to a widow and children as a homestead, and such widow marries again, but with her children continues to occupy said real estate as a homestead, the marriage of said widow does not destroy the homestead character of said real estate so as to subject it to the payment of the debts of the decedent.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Rice county; ANSEL R. CLARK, Judge.

A. M. Lasley, for plaintiff in error. J. W. Brinkerhoff, for defendant in error.

STRANG, C. This was an action brought by Emma J. Banta, formerly Emma J. Brady, wife of Milton C. Brady, deceased, against Robert M. Brady, John E. Brady, Everitt M. Brady, and Cora M. Brady, minor children of Milton C. Brady, to partition the N. E.  $\frac{1}{4}$  of section 20, township 20 S., of range 6 W. John A. Brady, the plaintiff in error, who was the owner and holder of certain mortgages executed by Milton C. Brady and Emma J. Brady during the life-time of Milton C. Brady, which are liens upon said land, became a party to the suit to foreclose his mortgage. Said John A. Brady was also, at the time of the bringing of said suit in partition, the owner of certain unsecured claims against the estate of Milton C. Brady, deceased, which had been presented and allowed by the probate judge of Rice county in favor of said John A. Brady, and against said estate, for which he also demanded judgment against the estate of Milton C. Brady, deceased. J. W. Brinkerhoff was the owner and holder of a mortgage executed to him by Emma J. Banta before the institution of the suit in partition. The case was tried on the 26th of January, 1888, before the court without a jury, upon the following stipulations:

"Comes now the plaintiff, by Brinkerhoff and Brinkerhoff, her attorneys, and A. M. Lasley, attorney for John A. Brady, one of the defendants herein, on this 26th day of January, 1888, the case having been regularly called for trial, and for the purpose of the trial of this case it is agreed and stipulated that the facts in this case are as follows, except that evidence of John Bland and plaintiff is also to be used to show facts: (1) That on the 1st day of April, 1881, Milton C. Brady and Emma J. Brady, the plaintiff herein, were husband and wife, and were owners of the following described real estate situated in Rice county, state of Kansas, to-wit: The north-east  $\frac{1}{4}$  sec. 20, T. 20 S., R. 6 W. 6th P. M., and that on that date the said Milton C. Brady and wife gave two mortgages on said real estate, one to the American Freehold Mortgage Company of London, Limited, to secure a note of \$800, given by them to said mortgage company of that date, and one to secure a note of \$4.16 given by them to W. T. Nicholas; that the mortgage to secure the \$800 note was a first mortgage lien, and the mortgage to secure the \$4.16 note was a second mortgage lien. (2) That the plaintiff and Milton C. Brady lived together as husband

and wife until the 18th day of September, 1883, upon the above-described real estate as their homestead, when the said Milton C. Brady, the then husband of the plaintiff died, leaving the plaintiff herein his widow, and Robert M. Brady, John E. Brady, Everitt Brady, and Cora Brady, his children and minor heirs at law, who are still minors, the oldest of whom is now eight years old, and living with the plaintiff. (4) That on the 1st day of February, 1885, the plaintiff herein married one of the defendants herein, viz., J. N. Banta; and that they have lived together as husband and wife upon said real estate from that time until the present. (5) That the estate of the said Milton C. Brady was administered upon, and that he had no other real estate than that mentioned above; and that his personal estate was duly administered, and his debts paid so far as the property would pay them. (6) That the defendant herein, John A. Brady, is and was a brother of Milton C. Brady, now deceased. (7) That the \$800 note and mortgage to secure the same, and the \$4.16 note and the mortgage to secure the same, were duly assigned to John A. Brady, he paying valuable consideration for the same; these mortgages were on the land above described. (8) That there is now due the said John A. Brady on the \$800 note \$400 with interest at 12 per cent. from the 4th day of April, 1886; and that there is now due the said John A. Brady \$4.16, and interest thereon at 12 per cent. from the 4th day of April, 1886; and that said John A. Brady paid the taxes on said real estate to the amount of \$30.07, and that that amount is due him with interest at 12 per cent. from the 23d day of November, 1886; and that the said John A. Brady, the defendant herein, is entitled to a foreclosure of said mortgages as a first and second lien, on said real estate for the abovespecified amounts and interest due. (9) That John A. Brady, the defendant herein, purchased claims against said estate of several parties as follows: Of Skiles and Wirshing, on January 25, 1884, \$123.58; A. Minser, \$2.55, on August 12, 1885; J. Hanna & Co., \$95, August 11, 1885; J. H. Smith, \$23.31, February 6, 1884; P. C. Magoffin, \$30, August 12, 1885; H. J. Konantz, \$15, August 12, 1885; W. G. Elliott, \$25, October 29, 1883; Landis and Hollinger \$116.35. That the said John A. Brady made proof of said claims in the probate court of Rice county, Kansas, against the estate of the said Milton C. Brady, August 18, 1885, and the same was allowed against said estate, and entered in said probate court as claims against said estate, proved according to law. That the amount of said claims, principal and interest, to date is \$586.16; and that the same has never been paid, or any part thereof. (10) That the administrator of the estate of Milton C. Brady had made his final settlement with the probate court prior to the beginning of this action, and that all the property formerly belonging to the said Milton C. Brady has been administered except the above described real estate." Together with certain evidence upon which the court found the following additional facts: "In addition to the facts agreed to in the stipulations the

court finds from the evidence that plaintiff and her minor children have continued to reside upon the premises in question ever since the death of plaintiff's former husband, and that they have at no time abandoned the same and still continue to reside thereon." Upon the above facts, as stipulated by the parties, and found by the court, the court made the following conclusions of law: "As conclusions of law the court finds the land in question is subject to be partitioned in this action; that John A. Brady has a lien upon the premises under his mortgage for \$493.49; that said mortgages may be foreclosed in this action; that the marriage of plaintiff with defendant N. J. Banta does not render said premises liable to John A. Brady's claims under the allowance made therefor by the probate court, and that he has no lien on said premises for said claims; that the homestead right of plaintiff and her minor children to said premises is not divested by reason of such marriage of plaintiff with defendant N. J. Banta."

On the above facts and conclusions of law the court held that John A. Brady was entitled to recover of and from the plaintiff Emma J. Banta the sum of \$493.49, and that said sum was a first lien upon the premises described in her petition, and gave him, John A. Brady, a judgment for said sum against said Emma J. Banta, with interest thereon at 12 per cent. The court also ordered the land sold at the end of six months, unless Emma J. Banta should pay said sum of \$493.49, with interest and cost; and ordered the proceeds of said sale to be applied as follows: *First.* To the payment of the costs in the case. *Second.* To the payment of said sum of \$493.49 and interest thereon to John A. Brady. *Third.* The residue, if any, to be paid to said plaintiff and the other defendants as follows: Emma J. Banta one-half, Robert M. Brady one-eighth, John E. Brady one-eighth, Everitt Brady one-eighth, and Cora M. Brady one-eighth. The court also rendered judgment in favor of J. E. Brinkerhoff against Emma J. Banta and J. N. Banta for \$153 and interest at 12 per cent., and made said judgment a lien on the interest of Emma J. Banta and J. N. Banta in the real estate in controversy, subject to the lien of John A. Brady thereon. The court further ordered that, if Emma J. Banta should pay said judgments, interest, and costs, within six months from the day of the judgment, a writ of partition should issue dividing the land, one-half to Emma J. Banta, and one-eighth each to Robert M. Brady, John E. Brady, Everitt Brady, and Cora M. Brady. The defendant, John A. Brady, objected to the conclusions of law and the judgment rendered in the case, and filed a motion for a new trial, which was overruled.

The first point the plaintiff in error calls the attention of the court to is embodied in the following question: When a husband, residing upon land, his homestead, dies, leaving a widow and children, and the widow afterwards marries, but with her children first, and afterwards with her children and second husband, continues all the time to reside on and occupy said



homestead, does the land continue the homestead of said family, and, as such, remain exempt from debts and liabilities of the deceased husband after the marriage of his said widow, or does it cease, upon said marriage, and because thereof, to be the homestead of the family, and become subject to the debts of the deceased husband like other lands? A solution of this question involves a construction of paragraph 2593 of the General Statutes of 1889, which paragraph reads as follows: "A homestead to the extent of 160 acres of farming land, or of one acre within the limits of an incorporated town or city, occupied by the intestate and his family at the time of his death as a residence, and continued to be so occupied by his widow and children after his death, together with all the improvements on the same, shall be wholly exempt from distribution under any of the laws of this state, and from the payment of debts of the intestate, but shall be the absolute property of the said widow and children: Provided, however, that the provisions of this section shall not apply to any incumbrance given by the consent of both husband and wife, nor to obligations for the purchase of said premises, nor to liens for the erection of improvements thereon." The contention of the plaintiff in error is that the marriage of the widow destroys the homestead character of the land constituting the homestead of her former husband and herself, and by operation of law removes the exemption of the land from the debts of the first husband, which this section gives to a homestead, notwithstanding the former wife and her children by her first husband have continuously resided on and occupied the land since the death of the former husband and father. We do not think this position is tenable. There is no express provision in the statute supporting the contention of the plaintiff in error. The whole contention so far as this statute is concerned, is based upon a mere inference arising from the use of the word "widow" therein. We do not think the legislature, by the word "widow" in this paragraph, intended to say that the mere marriage of the widow of a decedent should operate to destroy the homestead character of the home left her and her children by the former husband. Such marriage must be accompanied by some other act, as abandonment, by her going to live with her husband elsewhere, to affect the homestead character of the home left her by her deceased husband. The section would mean exactly the same if it read, "and continued to be so occupied by his former wife and children after his death." Instead of reading as now, "and continued to be so occupied by his widow and children after his death." If it read thus, there would be no contention that the marriage of his former wife would affect the homestead character of the home. But suppose the marriage of the widow in this case did affect the homestead as to her, could it be said that it also deprived the children of their homestead interest in the land left them as a homestead by their deceased parent? Clearly not. If the widow should marry,

and then abandon the homestead, to live with her husband elsewhere, she would undoubtedly lose her homestead right therein: and so she would if she should abandon the homestead without marrying; but in either event her act would not deprive the children, who stuck to the homestead of their deceased father after his death, of their homestead rights therein. We do not think the marriage of the widow of the decedent, where she with her husband continues to occupy the homestead the same after marriage as before, operates to remove the provisions of the homestead law exempting it from the debts and liabilities of the deceased debtor. In *Vandiver v. Vandiver*, 20 Kan. 501, this court uses the following language: "No good reason exists why the homestead of the intestate, 'towards which the eye of the creditor need never be turned,' in the life-time of the debtor, shall, upon his death, be liable for claims of creditors when continued to be occupied by the widow or children of such debtor." That was an action for partition of a homestead, and the exact question we are discussing in this case was not in that case; but, as bearing upon the question involved herein, we quote the following in addition to what is quoted above from the opinion in that case: "We are not called upon now to determine the nature of the occupancy after the death of a debtor to exempt the homestead from the payment of his debts; but certainly the requirement of 'occupancy' should be liberally construed, so as to favor the beneficial purposes of these sections of the law." Exemption laws of all kinds are to be liberally construed in favor of the purpose for which they were enacted. *Mallory v. Berry*, 16 Kan. 295; *Rasure v. Hart*, 18 Kan. 340; *Donmyer v. Donmyer*, 43 Kan. 444, 23 Pac. Rep. 627; *Bank v. Warner*, 22 Kan. 537.

The second inquiry relates to the distribution of the homestead. Was the order of the court in relation to the partition thereof erroneous? We answer in the negative. The statute expressly provides for such an order. Gen. St. 1889, par. 2596, reads as follows: "If the intestate left a widow and children, and the widow again marry, or when all of said children arrive at the age of majority, said homestead shall be divided, one-half in value to the widow, and the other one-half to the children." See, also, *Vandiver v. Vandiver*, 20 Kan. 501; *Hafer v. Hafer*, 36 Kan. 524, 13 Pac. Rep. 821.

We think the third inquiry of the plaintiff in error is answered by the answer to the first. If the marriage of Emma J. Brady with J. N. Banta did not destroy the homestead character of the home left by the intestate to his widow and children, it follows that said homestead remained exempt from the debts of said intestate so long as occupied by his former wife or children, except so far as those debts were made liens thereon during the life-time of said intestate. The court below seems to have dropped into an error in requiring Emma J. Banta to pay the whole of the judgment of John A. Brady. His mortgages were a lien upon the whole

of said homestead. Emma A. Banta succeeded to only a one-half interest therein, while the children of the intestate succeeded to the other one-half interest therein. The judgment of John A. Brady should be against the whole of said homestead, and be paid by the widow and children in proportion to their interest therein. The judgment should be so modified, and in all other respects it is recommended that it be affirmed.

**PER CURIAM.** It is so ordered; all the justices concurring.

(46 Kan. 192)

**HALSTEAD LUMBER CO. v. SUTTON et al.**  
(Supreme Court of Kansas. April 11, 1891.)

**BREACH OF CONTRACT—FAILURE TO DELIVER GOODS SOLD—DAMAGES—OBJECTIONS TO JUDGMENT.**

1. It is the duty of a party who has suffered an injury from the non-performance of a contract to take reasonable measures to make the injury or damage for which he intends to hold the other party liable as light as possible.

2. Upon the breach of a contract to deliver merchandise, the vendee, as a general rule, is entitled to recover as damages the difference between the purchase price and the market price at the time and place of delivery, together with interest.

3. Under special circumstances, as where merchandise is purchased for a particular purpose, and to be delivered at a specified time, and where it cannot be purchased in the market at the place of delivery, and these facts are known to the vendor, the general rule of damages would be inadequate to compensate the vendee for a delay or a non-delivery of the merchandise, but in such a case he would be entitled to recover the actual loss directly and naturally resulting from the default of the vendor.

4. A party complaining that the general finding and judgment of the court includes elements of damage not warranted, or that the court adopted an incorrect measure of damages, should obtain special findings or some statement or ruling of the court, showing the considerations upon which the judgment rests; and *held*, that the record in the present case does not properly present these questions for review.

(Syllabus by the Court.)

Error from district court, Rice county, ANSEL R. CLARK, Judge.

A. M. Lasley, for plaintiff in error. J. W. Brinkerhoff and C. F. Foley, for defendants in error.

**JOHNSTON, J.** The plaintiff brought this action to recover from defendants a balance claimed to be due for lumber sold and furnished to defendants. The defendants alleged payment in full as a first defense, and for the second and third defenses counter-claims were pleaded. The cause was tried without a jury, and the court found the balance unpaid upon the lumber furnished was \$204.40, that the lumber, however, was not delivered in accordance with the contract of sale; and that defendants, who had contracted to furnish the lumber purchased to certain other parties, were compelled to pay damages in consequence of plaintiff's failure, and that they were damaged by the delay and non-delivery of the lumber in the sum of \$171; and the court adjudged that plaintiff recover the sum of \$29.40. Plaintiff is dissatisfied with the amount awarded, and comes here asking

a reversal, but the condition of the record is such that a satisfactory determination of the principal question discussed cannot be made. The plaintiff objected to the introduction of any evidence under the second count of the answer, and upon the ground that it failed to state facts sufficient to constitute a defense. In brief, the count alleges that defendants contracted to deliver certain lumber at Lyons, Kan., for a certain purpose, and at a specified time, but that they failed to deliver it at the time agreed upon, nor until a long time afterwards, whereby defendants suffered loss and damage to the extent of \$150, which they asked might be allowed as a counter-claim against any amount recovered by plaintiff. The principal objection urged is that the count showed an acceptance of the lumber at a later time than that agreed upon, and that this acceptance is a waiver of the objection to deliver according to the contract. The allegations in the count, however, do not bear out the claim. It is not alleged that there was an acceptance by the defendants of the lumber furnished, and, even if the count contained such an allegation, it would not constitute a waiver. The defendants, who were regularly engaged in the lumber business, could accept the lumber when it arrived, and still recover for any actual loss suffered by them which was the direct result of the plaintiff's failure to deliver according to contract. The acceptance and use of the material lessened the injury of the defendants, and correspondingly reduced the plaintiff's liability for its failure. The testimony in the case discloses that the lumber was of such a character as could not be procured in the market at Lyons, and that the owners of the buildings for whom it was contracted were daily incurring expense and loss by the plaintiff's failure to provide the lumber at the time specified. It was the duty of the defendants, therefore, to make the injury as light as possible by taking and using the material upon its arrival. To have returned the lumber to the plaintiff would not have lessened the damages which had already accrued, but would have aggravated the injury, and enhanced the plaintiff's liability.

In the third count it is alleged, in substance, that one car-load of lumber, agreed to be furnished by the plaintiff for a certain purpose, of which the plaintiff was informed, was never delivered, by reason which defendants were obliged to enter the market and purchase the lumber at an advanced price, and were thus compelled to pay the sum of \$54.53 more than the price at which plaintiff had agreed to sell and deliver the same, and that the price which the defendants paid for this lumber was the reasonable market price; and this amount they set up as a counter-claim.

The objection that there was no allegation that plaintiff refused to furnish the lumber according to contract, or that defendants may possibly have directed plaintiff not to deliver the lumber, is unsubstantial, and requires no notice. It appears that this part of the purchase could be supplied from the local market, and when

the plaintiff failed the defendants, as was their duty, went upon the market, and purchased the lumber at the market price, and thus prevented additional loss and injury. Under the general rule they were entitled to recover the difference between the contract price and the market value of the lumber at that time, together with interest. The allegations of the count were certainly sufficient to overcome the objection that was made against it.

The objection principally discussed by plaintiff in error is that the court adopted an incorrect measure of damages, and that the testimony did not sustain the general finding and judgment that was rendered. It cannot be ascertained from the record what elements of damage were considered by the court in arriving at its judgment. There were no instructions, and no special findings were asked or made, to indicate the elements considered by the court, and which controlled its judgment. In order to properly raise the question in this court, the plaintiff should have obtained special findings; but without these, or some statement from the court showing the elements which enter into its judgment, we cannot intelligently examine the question attempted to be raised. The testimony tends to show that the lumber was contracted for for a special purpose; that it was of a character which could not be supplied from the local market; that the plaintiff specially agreed to deliver the lumber at a stated time and for a particular purpose, and that the loss which occurred was within the contemplation of both parties; that the defendants again and again prompted the plaintiff to hurry up the delivery, and informed it that the delay would occasion injury for which plaintiff would be held liable, but that they would endeavor to lessen the damages as much as possible; that after this time plaintiff sent tracers and telegrams, and made other efforts to find and deliver the lumber, which it was bringing from Arkansas, but which for some reason was delayed. There is testimony that some of the damages arose from a shortage in the quantity claimed to have been furnished; some of it, from the advanced price paid for the car of lumber which was never furnished. There is testimony in regard to the loss suffered from the delay and idleness of the men who were engaged on the building, but who could not proceed without the lumber, which plaintiff had not yet delivered; and also testimony of the length of time that the owners of the buildings were deprived of their use through the fault of plaintiff; and testimony of the rental value of the buildings during this time of delay. There is also testimony tending to show that defendants were prompt and diligent in staying the injury; and, considering all of the testimony, the amount of damages allowed to defendants is quite reasonable. The elements of damage, however, which were considered by the court, and upon which its judgment rests, we cannot determine. The facts are such as to take the case out of the general rule of damages, which limits the recovery to the difference between the contract price

and the market price. There are special circumstances disclosed in the record which bring the case within the doctrine of *Richardson v. Chynoweth*, 28 Wis. 656, where it is stated that "there may be cases where parties contract for articles with reference to use or sale on some particular occasion, and where, by reason of want of time, or their situation in respect to the market, they would, on a failure to receive them on the contract, be unable to supply themselves for that occasion, in which this general rule of damages would wholly fail to compensate for the actual loss. In such cases, time is of the essence of the contract. It would be like a contract to complete at a given time a ship designed to be employed in a particular trade, or a house to be occupied, or an engine to run a particular mill or manufactory. In such cases where the contracting party is advised of the special purpose of the thing to be completed, and of the damage that would naturally accrue from failure to complete it at the specified time, and in view of this expressly stipulates to furnish it at a given time, there is no reason why he should not be responsible for such damage as is the direct natural result of his failure, even though beyond the mere difference between the contract and market price." See, also, *Shepard v. Gas Co.*, 15 Wis. 818; *Messmore v. Lead Co.*, 40 N. Y. 422; *Griffin v. Colver*, 18 N. Y. 489; *Morrison v. Lovejoy*, 6 Minn. 319, (Gil. 117); 2 Suth. Dam. 488-493. Under the special circumstances of this case, the defendants were entitled to full compensation for the loss actually sustained, and which was the probable and proximate result of the plaintiff's default. Although we cannot say from the record what items and elements were considered by the court in making up its judgment, we think there is sufficient evidence to sustain the judgment that was rendered. The other objections are not sufficiently material to require attention, and, as we find nothing in the record that would warrant a reversal, the judgment of the district court will be affirmed.

All the justices concurring.

(46 Kan. 138)

#### CAIN BROS. CO. v. WALLACE.

(Supreme Court of Kansas. April 11, 1891.)

AUTHORITY OF AGENT—EVIDENCE—SPECIAL FINDINGS—INSTRUCTIONS—IMPEACHMENT OF VERDICT BY JURY.

1. When a corporation carries on the business of buying and shipping grain through an agent, and the authority of such agent to purchase grain in wagon-load lots upon inspection is conceded, it is competent to introduce evidence to show the inspection and purchase of grain by such agent, to determine the scope and authority of his agency, and to ascertain whether the purchase of certain grain sued for was within the fair scope of his authority as the agent of such corporation.

2. Special findings examined, and found to be supported by evidence, and not inconsistent with the general verdict.

3. Instructions given to a jury should be taken and considered together as an entirety.

4. Statements of a jurymen of what took place during the trial of an action, made after the rendition of the verdict and the separation of the jury, and not under oath, are simply hearsay evidence, and it is not error for the trial court

to overrule a motion for a new trial, based upon affidavits of such hearsay statements.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Atchison county; W. D. GILBERT, Judge.

W. W. & W. F. Guthrie, for plaintiff in error. H. M. Jackson, for defendant in error.

GREEN, C. This action was commenced in the district court of Atchison county, by B. F. Wallace, against Cain Bros. Company, to recover the sum of \$978.65 as a balance claimed to be due him for wheat sold to the defendant. The petition alleged "that on or about the 20th day of October, A. D. 1886, the defendant, Cain Brothers Company, was and still is a corporation, duly incorporated and organized under the laws of the state of Kansas, and as such was doing business in divers counties of said state of Kansas as a buyer, seller, and shipper of grain; and that on or about said October 20, 1886, and for a long time prior and also subsequent thereto, one R. B. Buck was the duly-authorized and acting agent of said defendant company in the matter of making contracts for and in buying and shipping of grain in behalf of said company in the county of Jewell and in the state of Kansas, and that on or about said 20th day of October, A. D. 1886, said defendant, by and through its duly-authorized and acting agent, R. B. Buck, upon examination, inspection, and test of the certain grain then belonging to and the property of this plaintiff, contracted with this plaintiff for the purchase of a large quantity of wheat then in the possession of the plaintiff, to be delivered on board of cars at Jewell City, Kansas, near the place of business of said defendant company at said Jewell City, and thereafter, and under and by the terms of said contract, and between the said 20th day of October, A. D. 1886, and the 6th day of November, A. D. 1886, this plaintiff delivered to said defendant on board the cars at said Jewell City 5,310 bushels and 55 pounds of wheat, for which the said defendant, by and through its said acting and duly-authorized agent, contracted, promised, and agreed to pay to this plaintiff the price and sum of 50 cents per bushel, or \$2,655.45. That of said sum said defendant paid to this plaintiff the sum of \$1,676.80, and the balance due to plaintiff thereon is \$978.65." To this petition the defendant answered by a general denial, and, as a second defense, alleged "that, although said R. B. Buck was in the employ of the defendant at the said time, he was not then or at any other time the duly-authorized and acting agent of the defendant in the matter of making contracts for and in buying and shipping grain on behalf of defendant;" and then denied specifically the contract for the sale of wheat by plaintiff, and alleged what was claimed by defendant as being the contract in relation thereto, alleging in brief that the contract was to ship the grain to Atchison, to be delivered and graded at Atchison; and then alleged that said wheat was not of the grade represented and contracted for, and that for that rea-

son the said grain was shipped to St. Louis and other markets and sold, and the proceeds, accounted as \$788.65, paid to plaintiff in full settlement thereof; and for a further defense set up a counterclaim for \$250 damages by reason of the failure of the plaintiff to perform his contract. The jury returned a verdict in favor of plaintiff for the sum of \$728. A motion for a new trial was overruled. Judgment was rendered for the amount of the verdict and costs, and the defendant brings the case to this court.

1. The first assignment of error is the introduction of evidence, upon the part of the plaintiff, to show the authority of R. B. Buck to make the contract alleged in plaintiff's petition. It was conceded that the defendant opened its business in Jewell City about the 1st of September, 1886, for the purpose of buying grain, and that Buck was in charge of such business, and authorized to purchase grain under certain restrictions. The evidence complained of tended to prove Buck's authority to make the contract claimed by plaintiff, by showing that he inspected, received, and paid for different lots of wheat, as brought to defendant's warehouse. We think the evidence was competent. The authority of the agent was not in writing, so as to make the scope of such authority a question of law for the court. Buck was the recognized agent of the defendant, so that the question was not whether the relation of principal and agent existed, but what was the scope of the agency? The fact and scope of an agency may be determined not alone by what the principal may tell the agent to do, but also from what he knows, or in the exercise of ordinary care might know, as to what the agent is doing. It has been said: "In most cases, if not in all, the question of agency is a matter of fact, which it is the province of a jury to determine upon, under the instructions of the court; and if the testimony tends to prove that the person acting as agent had authority from his principal to do the act, then it is manifest that the court cannot exclude from the jury the act itself, without overstepping the law of its duty, and assuming to determine a matter which belongs to the jury, to-wit, the authority of the agent to do the act. The correct rule is this: If there is no proof whatever tending to prove the agency, the act may be excluded from the jury by the court; but, if there is any evidence tending to prove the authority of the agent, then the act cannot be excluded from them, for they are the judges of the sufficiency and weight of the evidence." *McClung's Ex'rs v. Spotswood*, 19 Ala. 165; *Brett v. Bassett*, 63 Iowa, 840, 19 N. W. Rep. 210; *Thomp. Trials*, § 1370; *Jacobson v. Poindexter*, 42 Ark. 97; *Kingsley v. Pitts*, 51 Vt. 414.

2. The plaintiff in error claims that the special findings of the jury are against the weight of the evidence, and therefore must be set aside, and a new trial ordered. It is insisted, in support of this claim, that plaintiff had delivered all of his wheat raised in 1886 from the thrasher, excepting about 200 bushels, prior to October 20, 1886, and amounted to 1,524 bush-

els, together with a crop of oats raised in the same year, amounting to \$683.25 for wheat, and \$178.25 for oats; making a total of \$861.50; and from this state of facts it is argued that the plaintiff's crop of wheat raised in 1886 could not have been in the consignment shipped between October 25th and November 12th, and that a certain item of \$441.63 could not have been for the 1886 wheat, but for the crop of 1885; and, also, that the sum of \$1,347.03 was paid on account of the wheat crop of 1885; and that, therefore, there could not be a balance, as the jury found, of \$670.09 on account of the 1885 crop. According to the evidence of the plaintiff, he delivered about 5,700 bushels of wheat to the defendant, and had received payments at different times aggregating \$2,650.15, and that the grain sold amounted to \$2,655.45, so that, according to his own evidence in the first instance, he had been paid for his grain. The production of a check for \$361.50 and a draft for \$500, with the plaintiff's indorsements seemed to confirm the defendant in its position. This matter, however, was explained to the apparent satisfaction of the jury. It was shown that the plaintiff had sold a lot of wheat and oats which he had received from some of his neighbors, and it had been delivered to the defendant, and paid for by a draft for \$500 and a check given by Buck upon a local bank in Jewell City for \$361.50, and had no connection with grain sued for; and having been settled for, had doubtless passed out of the mind of the plaintiff until the transaction was recalled by the production of the draft and check.

The plaintiff in error calls attention to the inconsistency between the answers to questions numbered 4 and 6 and the answer to No. 7 of plaintiff's series of questions. We think the answers can be very easily reconciled by the fact that they referred to two different sales,—4 and 6 had reference to the wheat which had been sold and settled for, and 7 related to the last wheat delivered. Keeping in mind the two transactions, which were separate and distinct sales, we think there is some evidence to support the series of special findings submitted by the plaintiff, and that they are not inconsistent. The findings in the defendant's series of questions and answers plaintiff in error claims are equally wrong, and says that No. 3 finds this wheat not inferior to No. 2, and calls our attention to the evidence in regard to the official inspection at Atchison. The finding was as follows: "Was the wheat sued for in this action greatly inferior in quality to that contracted by the plaintiff to be delivered to defendant? Answer, No." This finding is not subject to the objection made by the plaintiff in error. Objection is made to the fourth finding, that Atchison inspection was not intended, and the argument is urged that Buck had received 1,524 bushels of wheat upon his own inspection, and counsel ask why was the grain inspected in Atchison, if it was not to be delivered there. The claim of the plaintiff was that the inspection and delivery was at Jewell City, and

the defendant insisted that the contract called for Atchison delivery and inspection. The jury found with the plaintiff, and there was evidence to support the finding. We have carefully examined the evidence bearing upon the other special findings complained of, and, without mentioning each specially, we think they are not subject to the strictures placed upon them by counsel, and are not unsupported by evidence. The next complaint of counsel is the jury's refusal to answer this special question: "Did the defendant in good faith cause the wheat, the subject of this action, to be inspected, and thereafter make disposition of the same? Answer, Unable to say." No objection was made to the answer when the jury returned with the general verdict, and the error cannot now be considered. *Arthur v. Wallace*, 8 Kan. 267; *Railway Co. v. Pointer*, 14 Kan. 52.

Our attention is next called to the general charge of the court, and complaint is made that it is misleading, particularly instructions numbered 6 and 7. In these instructions the court said to the jury that if they found that the agent had such authority, and made the contract as alleged by plaintiff and stated in the first of the instructions, then the plaintiff would be entitled to recover the difference between the aggregate amount of wheat so delivered under the contract and the amount paid thereon, not exceeding \$672.06, with 7 per cent. interest from the time of the delivery at Jewell City; that if they should find that the contract was made between the plaintiff and defendant, as stated in the first and sixth instructions, it would not be necessary for them to consider the counter-claim of the defendant. The delivery of the wheat was admitted, and there was no controversy over the amount. We see no error in these instructions, taken in connection with the balance of the charge. "Instructions should be read and construed in connection with one another and as a whole, and where detached sentences which, standing alone, might seem inaccurate, are so qualified by other portions of the charge as to fully state the law of the case, and not calculated to mislead, they afford no ground for reversal." *Railroad Co. v. Andrews*, 41 Kan. 383, 21 Pac. Rep. 276.

4. The last assignment of error urged is the misconduct of the jury. This claim is supported by the affidavits of two of the members of the corporation as to what one of the jurors told them after the trial had been concluded and the jury discharged. Statements made by a juror after the trial, and not under oath, are not competent evidence. They would simply be hearsay, and, when the testimony of the juror himself is not offered, should not be considered. *Sharpe v. Williams*, 41 Kan. 56, 20 Pac. Rep. 497; *Gottlieb v. Jasper*, 27 Kan. 770. We recommend an affirmation of the judgment.

PEU CRIAM. It is so ordered; all the justices concurring.

(45 Kan. 733)

## CADY V. CASE.

(Supreme Court of Kansas. April 11, 1891.)

## EXEMPLARY DAMAGES.

Malone v. Murphy, 3 Kan. 250; Wiley v. Keokuk, 6 Kan. 94,—and other similar decisions of this court, holding that, whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law allows the jury to give what is called exemplary or vindictive damages, followed.

(Syllabus by the Court.)

Error from district court, Cloud county; E. HUTCHINSON, Judge.

Deck Houston and Kennett & Peck, for plaintiff in error. Pulsifer & Alexander, for defendant in error.

PER CURIAM. The principal question discussed in this case upon the argument was whether exemplary damages ought to be allowed in any civil action, and we are asked to re-examine this question, and reverse the prior decisions of this court permitting exemplary or vindictive damages. Our own decisions for a long time have established that, whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law allows the jury to give what is called exemplary or vindictive damages. We could not depart from this doctrine now without overruling all of the prior decisions of this court upon this subject, and we are not willing to do so. In the case of Malone v. Murphy, 2 Kan. 250. (in 1864,) it was said that "we would rather adopt the compensatory theory, believing it to be more nearly logically correct; but the other having been long established, recognized, and acted upon by enlightened courts, we are not disposed to change it, where a change would make no difference in results. In giving this rule to juries in cases the details and circumstances of which are calculated to inflame their passions, the court should be very careful to indulge in no loose expressions which would indicate that the feelings of the jury were in any manner to influence their action." In Wiley v. Keokuk, 6 Kan. 94, (in 1870,) it was said that "these instructions raise the question, so much discussed of late by writers upon law, as to whether such damages as are called 'exemplary,' 'vindictive,' or 'punitive' ought ever to be allowed. We content ourselves with following the current of authorities, and decide that the instructions go no further than such authorities warrant. If the law is wrong, let the law-making power correct it. The rule, as laid down by the court below, has already received the sanction of this court. Malone v. Murphy, 2 Kan. 250. The whole subject is discussed *pro* and *con*, and the authorities referred to, in 2 Greenl. Ev. § 253, and note, and sections 254, 255; and Sedg. Dam. (4th Ed.) p. 533, and note. And after all this discussion the supreme court of the United States decide the law as laid down in theseing the opinion of the court, well says: "If repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By

the common as well as by the statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages inflicted by way of penalty or punishment, given to the party injured.' We have no doubt that such is the law. Whether it be founded in sound reason or not is not so much our province to say as to determine if it be law. The writer hereof believes it to be not only good law, but founded on sound principles, and beneficial in its application. It often furnishes the only restraint upon a bad man, who cares little for his neighbor's character, his person, or his property. The party injured pursues the wrong-doer to punishment when society is too careless to do so." These decisions have since been followed in the cases of Hefley v. Baker, 19 Kan. 9; Titus v. Corkins, 21 Kan. 722; Jockers v. Borgman, 29 Kan. 109; Winstead v. Hulme, 32 Kan. 568, 4 Pac. Rep. 994, Railway Co. v. Rice, 38 Kan. 403, 404, 16 Pac. Rep. 817; Clark v. Weir, 37 Kan. 98, 14 Pac. Rep. 533; West v. Telegraph Co., 39 Kan. 93, 17 Pac. Rep. 807; Manufacturing Co. v. Boyce, 36 Kan. 351, 13 Pac. Rep. 609; the other questions discussed are disposed of by the following cases: Towdln v. Nutt, 19 Kan. 282; City of Wyandotte v. Gibson, 25 Kan. 242; Rose v. Hayden, 35 Kan. 107, 10 Pac. Rep. 554, and cases there cited; Relley v. Haynes, 38 Kan. 282, 16 Pac. Rep. 440; Bryan v. McNaughton, 38 Kan. 98, 16 Pac. Rep. 57; Woods v. Hamilton, 39 Kan. 70, 17 Pac. Rep. 335. The judgment of the district court will be affirmed. All the justices concurring.

(46 Kan. 97)

BRECHER V. IRELAND *et al.*

(Supreme Court of Kansas. April 11, 1891.)

## FORECLOSURE OF MORTGAGES — SALE OF LAND — JUDGMENT AGAINST VENDEE.

1. Where an action is commenced upon a note and to foreclose a mortgage on real property given to secure the note, and the mortgagors are made parties defendant, and they file an answer or cross-petition alleging that one B., who is not referred to or mentioned in the petition, has purchased the real property and assumed the payment of the mortgage, and subsequently, upon the *præcipe* of the defendants, B. is personally served with a summons in the case requiring him to answer the petition on file, it is error for the court, in his absence, and without any pleadings having been filed by him, to render against him a personal judgment, when the petition does not state any cause of action against him, or mention or refer to him.

2. The case of Kimball v. Connor, 3 Kan. 414, distinguished.

(Syllabus by the Court.)

Error from district court, Lyon county; CHARLES B. GRAVES, Judge.  
C. N. Sterry, for plaintiff in error. Kellogg & Sedgwick, for defendant in error.

HORTON, C. J. On the 26th day of March, 1888, A. C. Ireland filed his petition in foreclosure against C. V. Holmes, Olive P. Holmes, E. N. Evans, and Mary M. Evans, to recover the sum of \$450 upon a promissory note executed by C. V. Holmes to him, and asking to foreclose a mortgage given by C. V. and Olive P. Holmes to secure the note. The petition alleged

that the defendants E. N. Evans and Mary M. Evans had some inferior, adverse interest in the mortgaged premises. A summons was issued on the petition and personally served upon each defendant. On the 1st of April, 1888, the defendants C. V. and Olive P. Holmes filed in the cause an answer and cross-petition. The answer, among other things, alleged that on the 28d day of January, 1887, C. V. Holmes and wife executed and delivered to E. A. Beecher a conveyance of the mortgaged premises; that, as a part of the consideration for the conveyance, E. A. Beecher assumed and agreed with them to pay the note or indebtedness secured by the mortgage. At the May, 1888, term of the court, an order was made for E. A. Beecher to be made a party defendant, and on the same day a *præcipe* for a summons was filed by the attorney for the defendant C. V. Holmes, and on this *præcipe* a summons was issued, which was served upon E. A. Beecher personally, and which required him to answer the petition of the plaintiff. At the September, 1888, term of the court, without any amendment to the petition, and without E. A. Beecher having ever appeared, A. C. Ireland recovered judgment against E. A. Beecher and C. V. Holmes for the sum of \$510, and obtained a decree to sell the mortgaged property, and to make any deficiency off the property of E. A. Beecher. Afterwards, and at the same term of the court, Beecher appeared specially, and moved to set the judgment aside. This motion was overruled, and he brings the case here. The petition which E. A. Beecher was required to answer by the summons personally served upon him did not contain his name, nor were there any allegations therein sufficient to sustain or uphold any personal judgment against him. *Short v. Noon-er*, 16 Kan. 220; *Neitzel v. Hunter*, 19 Kan. 221. It was therefore error for the court, as to Beecher, to do more than render a decree for the foreclosure of the mortgage, and a sale thereof to satisfy the judgment, costs, and expenses. Counsel for the plaintiff below cite *Kimball v. Connor*, 3 Kan. 414, and allege under that decision that Beecher was required to take notice of all the pleadings on file at the date of the issuance of the summons served upon him. In that case it was decided that, when the original summons is served upon a defendant, he is in court for every purpose connected with the action, and is bound to take notice of every subsequent step taken therein. It was further held in the case that the defendant, having been served with a summons to answer the petition, was bound to notice the answer or cross-petition subsequently filed by a co-defendant. This case is somewhat different. The defendant was called upon to answer a petition which did not state any cause of action against him or refer to him in any way, and no subsequent answer or cross-petition was filed after the issuance of the summons served upon him. It was admitted on the hearing of his motion that the defendant E. N. Evans, at the commencement of the action and during its pendency, was the owner of the mortgaged premises by purchase from

Beecher, subject to the mortgage. Therefore, if the petition had alleged these facts or any cause of action against Beecher, or if his attention had been called to the answer or cross-petition of C. V. and Olive P. Holmes by any subsequent order or notice personally served upon him, he could have had the judgment rendered so as to have made Evans personally liable before execution could issue against either himself or the Holmeses. We have already held in several cases that, if a defendant has been personally served with a summons, the petition cannot be materially changed without notice when the defendant is in default or is absent. *Halght v. Schuck*, 6 Kan. 192; *Alvey v. Wilson*, 9 Kan. 401; *Railroad Co. v. Van Riper*, 19 Kan. 317. We are unwilling to extend the case of *Kimball v. Connor*, 3 Kan. 414, and therefore think that the trial court committed error in rendering a personal judgment against Beecher, in view of all the circumstances attending this case. The judgment of the district court will be reversed, and cause remanded for further proceedings. All the justices concurring.

(46 Kan. 117)

NORDMARK *et ux.* v. NYSTROM.

(Supreme Court of Kansas. April 11, 1891.)

APPEAL—JURISDICTIONAL AMOUNT.

No appeal lies from the judgment of a justice of the peace in an action of replevin tried with a jury, where the value of the property replevied, and the amount claimed as damages for its detention, taken together, do not exceed the sum of \$30.

(Syllabus by the Court.)

Error from district court, Republic county; E. HUTCHINSON, Judge.

A. D. Wilson, for plaintiffs in error. A. B. Wilder, for defendant in error.

JOHNSTON, J. This was an action of replevin, brought by Gust. Nystrom before a justice of the peace, for the recovery of personal property from Charles Nordmark and Mrs. Charles Nordmark, which was described by him as follows: "Four old turkeys, (one gobbler and three hens,) of the value of 75 cents each; twenty young turkeys, of the value of 40 cents each; and all of the aggregate value of \$11." He alleged that the property was wrongfully detained from him, and that the damage for the wrongful detention was \$8. The property was taken by an officer upon an order of delivery, but was returned to the defendants below upon the execution of a redelivery bond. The cause was tried with a jury, and a verdict was rendered in favor of the plaintiff, Nystrom, finding the right of property in him, and that the value of the same was \$11, and assessed his damages for illegal detention at 60 cents. Judgment was rendered upon the verdict, and an appeal was taken by the Nordmarks to the district court. There a motion was made to dismiss the appeal, upon the ground that the cause had been tried by a jury, and that the amount involved did not exceed \$20. This motion was sustained and the appeal dismissed, and this ruling is assigned for error.

Did an appeal lie from the judgment of the justice of the peace, which was that



the plaintiff was entitled to the possession of the property, or the sum of \$11, the value thereof, in case a return could not be made, and that he recover the sum of 60 cents as damages for illegal detention? The Justices' Code (section 120) provides for an appeal from the final judgment of a justice of the peace in all cases except where it is otherwise specially provided. Then section 132 of the act provides that no appeal shall be allowed "in jury trials where neither party claims in his bill of particulars a sum exceeding \$20." It is claimed that the action of replevin does not come within the provision quoted, because the primary thing in question is the recovery of possession, and not the value of the property or the damages for its detention. While the gist of a replevin action is the wrongful detention, and the purpose is to obtain the return of the property, or, in case a return cannot be had, a recovery of the value of the same, together with damages for the wrongful detention, yet it is essential that the value of the property in controversy should be stated. It is expressly provided that the action shall not be brought until an affidavit is filed, containing, among other statements, the actual value of the property; and, when several articles are claimed, the value of each article shall be stated as nearly as practicable. Section 56. In this way the amount in controversy or which is claimed by the plaintiff is disclosed. The affidavit may stand and be treated as the bill of particulars, and serve as the pleading under which proof is offered; and it is also provided that the value of the property stated in the affidavit shall fix the jurisdiction of the justice as far as such value is concerned. Section 62. Where the property has been delivered to the plaintiff, and he fails to prosecute his action to final judgment, the defendant may have a jury impaneled to inquire into the right of property, and his right of possession to the property taken; and if satisfied that the defendant was entitled to the property at the commencement of the action, or is entitled to the possession at such time, they shall find accordingly, and further find the value of such property, or the value of the possession thereof, and also damages for withholding the same. Section 63. It is further provided that in all cases where the property has been delivered to the plaintiff, and the jury shall find for the defendant, either that he had the right of property or the right of possession, they shall also find the value of the property or the value of the possession, (section 64;) and the judgment in such case shall be for the return of the property, or for the value thereof, or the value of the possession of the same, in case a return cannot be had, and for damages and costs, (section 65.) Then, again, "when the property claimed has not been taken, the action may proceed as one for damages only, and the plaintiff shall be entitled to such damages as may be right and proper." Section 67. When an action is brought by a mortgagee to recover chattels given by him as security, only the amount of his special interest is involved in the controversy, and the payment of

the amount by the mortgagor or other interested person discharges the lien and defeats the right of possession. It will thus be seen that the value of the property in controversy is a leading consideration from the inception of the action of replevin until the rendition of the final judgment, and in some cases it is the primary thing in dispute. The amount claimed, or the value of that which is claimed, is shown throughout by the pleadings and proceedings; and we are inclined to the opinion that the action comes fairly within the spirit and purpose of the provision limiting appeals where the amount in controversy is not more than \$20, and there has been a jury trial. This question has been suggested, but never decided, by this court. *Miller v. Bogart*, 19 Kan. 117. The case of *Martin v. Armstrong*, 12 Ohio St. 548, is referred to as an authority in favor of the right of appeal; but the Ohio Code, under which the decision was made, does not require a statement of the value of the property in the affidavit for replevin, and this omission is one of the principal considerations upon which the decision rests. In Kansas, as we have seen, the value of the property must be stated in the affidavit, and this affidavit may stand as the pleading in the case. Under a somewhat similar provision limiting appeals in Vermont, it was held that the value of the property replevied, together with the damages demanded for its taking and detention, is the amount in controversy, which determines the right of appeal, and that, where the sum of these did not exceed \$20, the action was not appealable. *Fisk v. Wallace*, 51 Vt. 418; *Andrews v. Baker*, 59 Vt. 656, 10 Atl. Rep. 465. See, also, *Cobbey*, Rep. § 1246. The amount in controversy in the present case was \$19, being the value of the property, which was \$11, and the damages claimed, which was \$8; and therefore the court correctly ruled that the case was not appealable. The judgment dismissing the appeal will be affirmed. All the justices concurring.

(46 Kan. 73)

*HAZLETON et al. v REED et al.*

(Supreme Court of Kansas. April 11, 1891.)

## WILLS—REVOCATION.

It may be laid down as a general rule that a written instrument which discloses the intention of the maker respecting the posthumous destination of his property, and which is not to operate until after his death, is testamentary in its character, and not a deed or contract, and may be revoked. *Reed v. Hazleton*, 37 Kan. 321, 15 Pac. Rep. 177.

(Syllabus by the Court.)

Error from district court, Ottawa county; M. B. NICHOLSON, Judge.

*Garver & Bond*, for plaintiffs in error.  
*R. R. Rees and W. E. Richards*, for defendants in error.

**HORTON, C. J.** This was an action brought in the court below by the widow and minor children of John Hazleton, deceased, against James C. Reed, executor of the last will of Henry Ricket, deceased, and other parties, to enforce an alleged contract for the conveyance of certain real estate executed on the 9th of March, 1883,

by John Hazleton and Henry Ricket. Henry Ricket died on the 15th of September, 1883. John Hazleton died on the 9th of April, 1888. Upon the part of the plaintiffs it is claimed that, within the terms of the contract, Ricket was under obligation to make such provisions by deed or will as would vest the title to the land in Hazleton; that the mere method or form adopted for this purpose cannot be held to be material, so that the intention of the parties is carried out; that it is the duty of the court to ascertain the intention of the parties with reference to the subject-matter of their agreement, when that can be done; that it was the intention of both Ricket and Hazleton that the land should become the property of the latter upon the former's death; and therefore that the district court erred in sustaining the demurrer of the defendants, upon the ground that the petition did not state sufficient facts to constitute a cause of action. The written memorandum of the alleged contract was under consideration by this court in the case of *Reed v. Hazleton*, 37 Kan. 321, 15 Pac. Rep. 177. The facts of this case, together with a copy of the memorandum, are recited in full in the foregoing case, and need not be repeated here. In the former opinion handed down it was said: "Under the view which we take of this instrument, it will be unnecessary to examine the nature of a contract of bargain and sale, and a covenant to stand seized to the use of the grantee, which are discussed in the briefs filed in this action. We believe that it ought not to be placed in either of those classes of conveyances. \* \* \* This article of agreement does not contain any of the usual operative words of a conveyance, with the possible exception of this clause: 'After the death of said Henry Ricket, of the first party, the right and title of the land in question shall vest in the said John Hazleton, of the second party.' That provision has no present operation, and could be revoked by the grantor at any time. It was testamentary. \* \* \* The old man wisely kept possession and control of his home, to prepare for the possible change in the feelings of himself and Hazleton. Hazleton was not without recourse if he had performed services for which he had not been paid. He could have presented his claim against the estate, and the courts were open to aid him in obtaining his dues." This disposes of the case. In *Turner v. Scott*, 51 Pa. St. 128, on the 22d of November, 1849, the father, John Scott, executed an instrument to his son, John W. Scott, purporting to convey his farm. The consideration for the execution of the instrument was the natural love and affection which the father had for his son, and also an agreement from the son that he was to live with the father, assist him in his work on the land, and maintain the mother during her natural life, if she survived her husband. The instrument contained the following provisions: "Excepting and reserving, nevertheless, the entire use and possession of said premises, unto the said John Scott and his assigns, for and during the term of his natural life; and this conveyance in

no way to take effect until after the decease of the said John Scott, the grantor." The son commenced to live with his father upon the land mentioned in the instrument, but after a time they quarreled. The father turned the son out, and on the 26th of February, 1861, made a will revoking the instrument executed to his son, which had been put upon record in the proper county. The chief justice of the court, in construing the written instrument from John Scott to his son, John W. Scott, said: "We see nothing in the covenant of warranty to change our construction of the operative words of the grant. As these words were expressly limited to take effect only after the death of the grantor, they were necessarily revocable words. The doctrine of the cases is that, whatever the form of the instrument, if it vest no present interest, but only appoints what is to be done after the death of the maker, it is a testamentary instrument. It signifies nothing that the parties meant to make a deed instead of a will. If they have used language which the law holds to be testamentary, their intention is to be gathered from the legal import of the words they have employed, for all parties must be judged by the legal meaning of their words." In *Leaver v. Gauss*, (Iowa,) 17 N. W. Rep. 522, Leaver and wife executed to Gauss an instrument somewhat in the form of a deed, but it was provided therein that it should take effect only after the death of himself and wife. It is claimed that a valuable consideration was paid therefor by Gauss. One of the provisions of the written instrument was "that the grantee is to take no estate during the lives of the grantors." In that case it was held that "a deed which recites, as one of its express provisions, that 'the grantee is to take no estate during the lives of the grantors,' is testamentary in its character, and, even if consideration was paid for it, may be revoked; no present estate subject to a life-estate being created thereby." In *Sperber v. Balster*, 68 Ga. 317, August Kohler executed a written instrument purporting to convey to Sophestina Sperber 650 acres of land, in consideration of services rendered him by Sophestina as a nurse. The instrument provided "that it should have full effect at his death." The chief justice of the court said in that case that "it is wholly unnecessary to cite cases or invoke precedents in construing a paper like this, with a view to get at his meaning in respect to the time when he intended title, right, property, to pass out of himself into the object of his bounty. It is enough to lay down the universal principle, embodied in our Code, § 2395, which is in these words: 'No particular form of words is necessary to constitute a will; and in all cases, to determine the character of an instrument, whether it is testamentary or not, the test is the intention of the maker, from the whole instrument, read in the light of the surrounding circumstances. If such intention be to convey a present estate, though the possession be postponed until after his death, the instrument is a deed; if the intention be to convey an interest accruing and

having effect only after his death, it is a will.' So reading this instrument, we construe it to be clearly a will; at all events, we all hold that such is the better legal view of it." In *Kinnebrew v. Kinnebrew*, 35 Ala. 628, it was decided that "an instrument under seal, in form a deed of gift, by which the grantor, in consideration of the natural love and affection for the grantee, who was his grandson, and the present payment of five dollars by the grantee, conveys to the latter, by the words 'do by these presents give and grant' a slave, 'and fifteen hundred dollars in cash, to be paid to him out of my [grantor's] estate at my death, by my executor or administrator,' held a deed of gift as to the slave, but as to the money a purely voluntary executory trust, which a court of equity would not enforce as an instrument *inter vivos*, but which was valid and operative as a will." On the part of the plaintiff counsel refer with great confidence to the case of *Sutton v. Hayden*, 62 Mo. 101. In that case an arrangement was made by Mrs. Green with her brother to take his daughter, her own niece and godchild, and make her her heir at her (Mrs. Green's) death. Subsequently she promised that if the niece would come and live with her, (Mrs. Green,) and would be a daughter to her and nurse and take care of her the remainder of her life, all that she had should be hers (the niece's) at her (Mrs. Green's) death. The niece, Nancy A. Sutton, accepted the offer, and, relying upon the promises of her aunt, entered into her services, and continued with her about 15 years. Mrs. Green failed to make any deed or will, and died intestate. In that case the court held that a specific performance of the agreement of Mrs. Green could be compelled in equity, and that case is followed in several other Missouri cases. This case, however, is quite different from them in many particulars, especially in this: that Hazleton did not care for Ricket but a comparatively short time,—from the 1st of April, 1882, until the 15th of September, 1883, when Ricket died. By the express provisions of the articles of agreement, Ricket was to retain during his life-time full and peaceable possession of all the land, and Hazleton was to live with Ricket,—not Ricket with Hazleton,—and Hazleton was to have no right or title in the land until after the death of Ricket. The provision in the article of agreement concerning the land in dispute was held by us in the former opinion to be testamentary only. We adhere to this ruling. "It may be laid down as a general rule that an instrument in the form of a deed, signed, sealed, and delivered as such, if it discloses the intention of the maker respecting the posthumous destination of his property, and is not to operate until after his death, is a will, and not a deed." 19 Cent. Law J. 47.

The difference between the cases cited in the former opinion and the case of *Sutton v. Hayden*, supra, and other similar cases, is this: that in the former cases the courts seem to think that the grantees could have recovered for any claim or service which they could establish, without seeking relief in a court of equity; in the latter

cases the courts evidently proceeded upon the theory that the law furnishes no standard whereby the value of such services can be estimated, and equity can only make an approximation in that direction by decreeing the specific execution of the contract. In the *Sutton-Hayden* case the niece gave for many years to the discharge of her manifold cares, down to the period of her aunt's death, an unhesitating and unwearied tenderness and attention, which are only bestowed where affection prompts them. In *Barkworth v. Young*, 4 Drew, 1, A., on the marriage of his daughter with B., agreed to leave his daughter an equal portion with his other children. Of course, in such a case, no compensation could be agreed upon or established, and equity alone could afford relief. In *Rhodes v. Rhodes*, 3 Sandf. ch. 279, the services therein contracted for could not and were not intended to be compensated with money, and were also incapable of computation by any pecuniary standard. In this case the services of Hazleton with Ricket were so brief, being only for about 18 months, that the value of the same could easily be computed. The judgment of the district court will be affirmed. All the justices concurring.

(46 Kan. 129)

PATE V. FITZHUGH.

(Supreme Court of Kansas. April 11, 1891.)

BILL OF PARTICULARS — SUFFICIENCY — HARMLESS ERROR—EXCESSIVE DAMAGES.

1. A bill of particulars is not subject to the same degree of strictness as a pleading filed in a court of record; it is sufficient if all of the material facts are so stated as to apprise the opposite party of the nature of the demand against him.

2. The admission or exclusion of evidence which does not amount to prejudicial error is not sufficient cause for a reversal of a judgment otherwise supported by evidence.

3. Evidence examined, and found that the verdict of the jury is not excessive.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Finney county; A. J. AB-BOTT, Judge.

*Brown, Blerer & Cottrell*, for plaintiff in error. *Hopkins & Hoskinson*, for defendant in error.

GREEN, C. This was an action to recover a commission as a real-estate agent by C. D. Fitzhugh against William Pate brought originally in justice's court, and appealed to the district court of Finney county, where the same was tried before a jury, and resulted in a verdict and judgment for the plaintiff for the sum of \$75. The plaintiff in error asks a reversal of this judgment, upon the grounds (1) that the plaintiff's bill of particulars did not state facts sufficient to constitute a cause of action; (2) that the court erred in excluding certain evidence; (3) in admitting certain statements as to what the purchaser of the real estates said; and (4) that the damages recovered were excessive. The bill of particulars is sufficient. It alleged an indebtedness; that the defendant employed the plaintiff to solicit a customer to purchase a certain quarter section of land in Finney county; that defendant

agreed to pay 5 per cent., or the customary commission for selling land; that he secured a customer who purchased the land for \$2,000; and that the defendant refused to pay the plaintiff. These statements were followed with an allegation that there was due the plaintiff on the sale \$100. We think the bill of particulars stated a good cause of action. Pleadings in actions before justices of the peace are not to be viewed with great strictness, and mere technical objections should be disregarded. *Krouse v. Pratt*, 37 Kan. 651, 16 Pac. Rep. 103; *Railway Co. v. Brown*, 14 Kan. 557; *Lobenstein v. McGraw*, 11 Kan. 645. The ruling of the court upon the admission of certain evidence, and admitting statements that the purchaser of the land made, was immaterial error. The statement that Gove, the purchaser, had bought or traded for the land, was admitted by Pate in his own evidence, and this statement made to the plaintiff became immaterial, as it did not materially prejudice the rights of the defendant, and should not cause a reversal of the case. *Chellis v. Coble*, 37 Kan. 558, 15 Pac. Rep. 505. The last error complained of is that the damages were excessive. The evidence of other real-estate agents was to the effect that 5 per cent. upon the first \$1,000, and 2½ per cent. upon sums over \$1,000, was the usual commission. There was some evidence that the plaintiff only demanded \$10, but the plaintiff's explanation of this was that it was an offer made by way of a compromise. The jury fairly passed upon the evidence, and returned a verdict for \$75; and there was evidence to support it. The judgment of the district court should be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 100)

ATCHISON, T. & S. F. R. CO. v. MCGINNIS.

(*Supreme Court of Kansas*. April 11, 1891.)

ACTION FOR PERSONAL INJURIES—EXEMPLARY DAMAGES—INJURIES TO WIFE.

1. In an action to recover damages for personal injuries, the negligence established must be wanton, willful, or malicious, to justify punitive or exemplary damages.

2. Where there is no testimony showing that the negligence is so gross as to amount to wantonness, and no willful or malicious acts are proven, actual or compensatory damages, merely, is the rule.

3. It is error to leave the question of punitive or exemplary damages to the jury, when there is no testimony to warrant a verdict for such damages.

4. In an action by a married woman, living with her husband, to recover damages for personal injuries, she cannot recover for "lost time," for "medical attendance," nor for "impaired capacity to labor." Her services belong to her husband, and he must furnish her with medical attention; hence he alone suffers pecuniary damages because of "loss of time," "medical attention," and "impaired capacity to labor" of the wife, and the action for such damages must be in his name.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Barton county; ANSEL R. CLARK, Judge.

Geo. R. Peck, A. A. Hurd, and Robert

Dunlap, for plaintiff in error. *Diffenbacher & Banta*, for defendant in error.

STRANG, C. October 12, 1886, Jane McGinnis, desiring to go from Great Bend, in Barton county, to the town of Chase, in Rice county, purchased a ticket at the former for the latter place. She rode on the early passenger train from Great Bend to Ellinwood, where she had to change from the main line of plaintiff's railroad to the M. & M. branch of the same. At Ellinwood she got on the way-car of a freight train which carried passengers. The train, which consisted of 14 freight-cars and the way-car, left Ellinwood early in the morning, just as day was breaking. It ran out from the station to the switch which connects the main line with the branch, some half or three-quarters of a mile from the station, where, by reason of the switch having been left open, the engine, tender, and two cars ran off the track. Mrs. McGinnis was sitting on the seat against the side of the car. The sudden stopping of the train threw her from her seat across the car, and down upon the floor. When she got up it was found that her ear was somewhat bruised and scratched, but no other injuries were visible. She walked over to the town, and remained until evening, and then took the passenger train for Chase, where she got into a wagon, and rode into the country a short distance, and remained all night, going back on the train in the morning to Great Bend. Just after the accident, and before Mrs. McGinnis left the car, she was asked if she was hurt, and she said not seriously. Some weeks after the accident she called a physician, and claimed to be injured in the spine, shoulder, breast, eye, and arm. The physician examined her, and found no visible evidence of injury at any of these points. She, however, claimed to be injured, and the doctor said there was some evidence from the pulse and the appearance of her tongue of some disturbance of the system, but he could not tell what it was, nor what produced it, only as he got the cause from Mrs. McGinnis. August 13, 1887, she brought her suit against the plaintiff company for damages. It was tried by the court and a jury, resulting in both a general and a special verdict for the plaintiff below. A motion was made by the defendant below to set aside the general verdict, which was for \$2,000, because it did not correspond with the special verdict; which motion was sustained. A motion was then made by the defendant below for a new trial, and one by the plaintiff below for a judgment on the special verdict. The motion for a new trial was overruled; and after the plaintiff had remitted \$235, and the court had stricken out \$765, the motion for judgment was sustained, and judgment entered for \$1,000. The company brings the case here for review.

In view of the *remittitur* made by the plaintiff below, the first alleged error we will notice is the action of the court in giving the instruction complained of. The seventh instruction, complained of, reads as follows: "The jury are instructed that the petition alleges that the defend-

ant, not regarding its duty, conducted itself so carelessly, negligently, and unskillfully that the train upon which plaintiff was riding ran off the track, whereby and by reason of which the plaintiff was injured. It is the law that in actions of this kind, if the evidence proves that the complaining party received personal injury, and thereby suffered actual damages, and if the evidence further proves that such injuries and damages were sustained by reason of the gross negligence or gross carelessness of the defendant in operating its train, then the jury are not limited in their finding to the mere compensation for the actual damages sustained, but they may give in addition a further sum as exemplary or punitive damages as a salutary example, and as a sort of punishment, to deter the party committing the injury, as well as others, from again offending in like manner." We think this instruction clearly wrong. There is no allegation in the petition that the defendant below was guilty of gross negligence in connection with the accident; and there is no evidence in the case to justify such an instruction. The accident occurred by reason of the switch having been left open. It was not left open by any one connected with the train on which the plaintiff below was injured, and there is no evidence in the case to show who left it open. So far as the evidence in the case is concerned, it may have been turned and left open by a stranger, for whose act the company could not be held responsible. There is nothing in the evidence tending to show wantonness, malice, or reckless disregard of the life of the passenger by any of the agents of the company. On the other hand, the evidence shows that the agents of the company expressed their sorrow that Mrs. McGinnis was hurt, and were sympathetic and gentlemanly in their demeanor. In the case of *Railroad Co. v. Kler*, 21 Pac. Rep. 770, this court laid down the rule as follows: In an action to recover damages for personal injuries, the negligence established must be wanton, willful, or malicious, to justify punitive or exemplary damages. Where there is no testimony showing that the negligence is so gross as to amount to wantonness, and no willful or malicious acts are proven, actual compensatory damages merely is the rule. Therefore, to leave the question of punitive or exemplary damages to the jury, when there is no testimony to warrant such damages, is improper. In this case the jury found that the company was guilty of gross negligence, and say that such gross negligence consists in leaving the switch open; and yet, as stated above, the evidence does not disclose who left the switch open, — whether an agent or servant of the company or a stranger. This case fairly illustrates the impropriety and danger of leaving the question of punitive or exemplary damages to the jury without evidence to warrant a finding of such damages. *Railroad Co. v. Arms*, 91 U. S. 489; *Dorrah v. Railroad Co.*, (Miss.) 3 South. Rep. 36; *Batterson v. Railroad Co.*, (Mich.) 13 N. W. Rep. 508; *Railroad Co. v. McHenry*, 24 Kan. 501-504.

The jury found the plaintiff below was damaged \$500 by reason of impaired capacity to labor. This, and the item of \$200 found in favor of the plaintiff for loss of time, which was afterwards remitted, are matters for which the plaintiff below cannot recover. She is and was a married woman, living with and keeping house for her husband. She was not engaged in any other business. Her services as the wife of her husband were due to him. She received no compensation therefor, and could not suffer any damages by reason of loss of time or impaired ability to serve him. He alone could recover for such damages. *City of Wyandotte v. Agan*, 37 Kan. 528, 15 Pac. Rep. 529.

The jury found the plaintiff below was damaged \$65 by reason of peril and fright. Damages of this kind are too remote. A person who is placed in peril by the negligence of another, but who escapes without injury, may not recover damages simply because he had been placed in a perilous position. Nor is mere fright the subject of damages. Fright must be accompanied by some actual injury caused thereby, and traceable directly thereto, to be subject of damages. Mere fright, unaccompanied by any injury resulting therefrom, cannot be the subject of damages. *Commissioners v. Coultas*, L. R. 13 App. Cas. 222.

The jury found the plaintiff below had suffered \$500 actual damages. It also found the items constituting these actual damages. It found \$200 for loss of time, \$35 for cost of medical attendance, \$65 for peril and fright, \$100 for physical pain and suffering, and \$100 for mental anguish. All these itemized parts of the \$500 are parts of the actual damages, and included within the whole sum of actual damages as found, to-wit, the sum of \$500. But the sum of \$235 was remitted by the plaintiff herself, as not recoverable in this action. The sum of \$65 found for peril and fright must be eliminated, because damages may not be recovered for peril and fright. This reduces the actual damages to \$200, constituted as follows: \$100 for physical pain and suffering, and \$100 for mental anguish. The plaintiff in error says this last item should not be allowed, because there is no distinct claim for it in the petition. We think there is sufficient in the petition to permit this finding to stand; and, the jury having passed upon the evidence in relation thereto, we decline to strike it out. This leaves \$200 of the judgment in favor of the plaintiff to stand. We recommend, therefore, that the judgment be so modified as to reduce it to \$200, or a new trial be granted.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 100)

ELLIS *et al.* v. CROWL *et al.*

(Supreme Court of Kansas. April 11, 1891.)

WRONGFUL ATTACHMENT — DAMAGES — RES ADJUDICATA.

A sheriff levied orders of attachment upon a stock of merchandise, as the property of C., and took the same into his possession. E. & O., who claimed the property, brought an action of

replevin against the sheriff, demanding a return of the property, together with damages for its unlawful detention. Judgment was given in their favor for a return of the property and for costs; which judgment was fully satisfied and discharged by the return of the goods and the full payment of the costs, as the judgment required. Afterwards an action was brought against the sheriff and the sureties on his official bond, to recover damages for the wrongful taking and detention of the property. *Held*, that the adjudication in the replevin action is conclusive upon the parties, and a bar to the maintenance of a second action. *Held, further*, that the sureties of the sheriff can avail themselves of the bar of the former adjudication, and are released from liability.

(*Syllabus by the Court.*)

Error from district court, Pottawattamie county; R. B. SPILLMAN, Judge.

*Keller & Noble*, for plaintiffs in error.  
*Hayden & Hayden* and *W. F. Challis*, for defendants in error.

JOHNSTON, J. The plaintiffs brought an action against L. W. Crowl, as sheriff, and W. W. Emmons, E. Walker, and A. Richards, as sureties on the official bond of Crowl, to recover damages for the seizure and detention of a stock of merchandise. In their petition, after setting forth the election of Sheriff Crowl, and the execution and acceptance of his official bond, they alleged that certain orders of attachment, issued from the district court of Pottawattamie county, directing the sheriff to attach the property of one T. J. Coverdale, were placed in the hands of the sheriff to be executed according to law; but that, instead of levying upon the property of Coverdale, he wrongfully attached and took into his possession a stock of general merchandise which was the property of the plaintiffs, valued at about \$5,000, and retained the possession of the same from the 20th day of September, 1886, until the 16th day of March, 1887. They allege that by reason of the unlawful seizure and detention of the goods, and the cost and expense of recovering the same, they were damaged in the sum of \$5,000. The answer of the defendants was a general denial, except that Crowl was sheriff, and the other defendants were sureties on his official bond as such sheriff; and, for a second defense, alleged "that on the 23d day of December, 1886, in the district court of Pottawattamie county, state of Kansas, said Ellis & Osborn, the plaintiffs herein, duly filed their petition against L. W. Crowl, one of the defendants herein, setting forth and alleging their right to the immediate possession of the stock of goods and merchandise mentioned and described in the plaintiff's petition herein, and demanding a return thereof, and a judgment for the sum of \$1,500, damages, alleged to have been sustained by reason of the detention, and such proceedings were thereupon had in said suit that said L. W. Crowl appeared and answered to the petition, and a final judgment was therein rendered; that in said action one of the questions litigated and decided was the amount of damage, if any, which the said plaintiffs had sustained by reason of the detention of the said goods by the said L. W. Crowl; that

in and by a judgment and decree of said court it was adjudged and determined that the said plaintiffs were entitled to the return of the goods mentioned and described in said petition, and that in default thereof for their value therein stated, and that said plaintiffs also have and recover of and from said L. W. Crowl their costs herein, taxed at \$—, which said judgment was fully satisfied and discharged by the return of said goods and chattels, and the full payment of said costs before the commencement of this action; that said plaintiffs utterly failed to recover a judgment for the damages alleged to have been sustained by them in their said petition, or any part thereof." The plaintiffs demurred to the second count of the answer, for the reason that the facts therein stated did not constitute a defense. The demurrer was overruled by the court, and, the plaintiffs electing to stand on their demurrer, judgment was rendered in favor of the defendants for their costs.

The only question involved is whether the former adjudication in the replevin action against Crowl is a bar to this action brought by the same plaintiffs against him and the sureties on his official bond. This question the district court answered in the affirmative, and we think correctly. The plaintiffs had the choice of several remedies for the wrong that had been committed. They were entitled to damages for the wrongful taking and detention, and among other remedies had their action against the sheriff on his bond for the conversion of the property, and also the action of replevin to recover the property or its value, and all damages sustained for its wrongful seizure and detention; and they chose the latter. In that action, according to the allegations of the answer, they not only asked for the recovery of the property attached, but they asked for the damages which they had sustained by reason of the seizure and detention. It is true they did not recover damages in that action, but the right to damages was an issue in the case, and was necessarily tried and determined. The judgment in that case was satisfied before the commencement of this proceeding, and is conclusive upon the parties and their privies upon every question which under the pleadings was or might have been litigated and determined. In the former action the plaintiffs could have recovered full compensation for the loss sustained by the taking and detention of their property, and to as full a measure of damages as if they had first chosen the present remedy. *Bell v. Campbell*, 17 Kan. 211. In the cited case the question of what was the proper measure of damages in a replevin case was under consideration, and Justice VALENTINE, who delivered the opinion, said: "In some cases, deterioration of the property from injury, neglect, etc., while wrongfully detained, must be considered as an element in the allowance of damages. In other cases, the decrease in the market value of the property must be taken into consideration. In other cases, perhaps few, gross malice, fraud, and oppression may be taken into consideration for the purpose of giving exempla-

ry damages. In other cases, the value of the use of the property must be taken into consideration for the purpose of giving compensatory damages. \* \* \* And still in other cases, other damages than those above mentioned are sometimes allowed in actions of replevin. \* \* \* Indeed, in every action of replevin, the plaintiff or the defendant, as the case may be, should be allowed to recover all the damages, not too remote, which he has actually sustained by reason of the wrongful detention of the property, in whatever way such damages may have resulted. Exact compensation for his loss is the true rule." If plaintiffs had first instituted this action instead of replevin, they could have had no more than "exact compensation" for the injury suffered. The issue in this case, so far as damages for detention is concerned, is substantially the same as in the former. The same elements of damages are to be considered, and substantially the same proof would be required to sustain the issue in either case. It is claimed that there is not the requisite identity of parties to constitute the former adjudication a bar to the present action; and this, for the reason that the replevin action was brought against the sheriff only, while the present action is against him and his sureties. The determination of any issue or fact by a court of competent jurisdiction is conclusive upon both the parties and their privies. If the sheriff can avail himself of the bar of the former adjudication, then there is no question but what his sureties are relieved from responsibility. They are only responsible for his default, and any adjudication which exonerates him is equally effectual in releasing his sureties from liability. Wells, Res Adj. § 105. The matter in controversy here, as presented by the pleadings, was fairly embraced within the issues of the replevin action, and as it was there determined by a court of competent jurisdiction, and the judgment then given has been satisfied and discharged, the controversy must be regarded as forever at rest. Public policy and the well-established rules of law forbid that the unsuccessful party should be allowed to renew the contest or continue a litigation which has been once considered and decided. *Bank v. Rude*, 23 Kan. 146; *Commissioners v. McIntosh*, 30 Kan. 234, 1 Pac. Rep. 572; *Whitaker v. Hawley*, 30 Kan. 317, 1 Pac. Rep. 508; *Holsington v. Brakey*, 31 Kan. 560, 3 Pac. Rep. 353; *Shepard v. Stockham*, 44 Kan. —, 25 Pac. Rep. 559; *Dawson v. Baum*, (Wash. T.) 19 Pac. Rep. 46; *Sullivan v. Baxter*, 150 Mass. 261, 22 N. E. Rep. 895; *Bridge Co. v. Sargent*, 27 Ohio St. 233; *Freem. Judgm.* § 272; Wells, Res Adj. §§ 249-253. The judgment of the district court will be affirmed. All the justices concurring.

(46 Kan. 96)

HIGH V. HILL.

(Supreme Court of Kansas. April 11, 1891.)

PLEADING—BILL OF PARTICULARS.

"The plaintiff alleges for his cause of action against Jonathan High the use of one two-horse wagon from the 26th day of September, 1887, to the 21st day of November, 1887, 50 days in time between dates, at twenty-five cents per day,

\$12.50." Held, that the above bill of particulars filed in the justice's court states a cause of action in favor of the plaintiff therein named against Jonathan High.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Cherokee county; GEORGE CHANDLER, Judge.

J. H. Crichton and F. M. Smith, for plaintiff in error. A. H. Skidmore and P. L. Soper, for defendant in error.

STRANG, C. This cause was begun before H. I. DEAL, a justice of the peace of Cherokee county, on a claim of \$12.50 for the alleged use of a wagon. The bill of particulars was challenged in the justice's court, and was there held to be good. The case was then taken to the district court on a petition in error, where the proceedings had in the justice's court were reviewed and affirmed. In the light of the many decisions of this court holding that almost any statement of plaintiff's cause of action in a justice's court will be held good for reasons in such decisions given, it would seem as though it was about time to let up on a case involving but \$12.50, and with no important principle or question therein calling for a decision, after two courts had said the bill of particulars was good; but, as the plaintiff in error does not seem to be satisfied with the decision of two courts against him, we cheerfully add our opinion to that of the courts below, and say that we have examined the bill of particulars in this case, and find it sufficient. It is recommended that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 45)

BETZ V. WILLIAMS &amp; WHITE LAND &amp; LOAN CO.

(Supreme Court of Kansas. April 11, 1891.)

REAL-ESTATE AGENT — RIGHT TO COMMISSIONS.

1. A land agent or broker, who has made arrangements with the land-owner that, if he finds a purchaser to take the land at a specified sum, he is to have a stated commission, becomes entitled to his commission for selling the land if he procures for his principal a party with whom he is satisfied, who enters into a written contract with such principal to buy the real estate at the specified price, and is financially able to perform the conditions of the contract, although the principal, having the option by the contract to declare a forfeiture thereof if the installments are not paid in accordance with its terms, declares the contract forfeited on account of the non-payment of an installment when it becomes due.

2. The case of *Stewart v. Fowler*, 37 Kan. 677, 15 Pac. Rep. 918, referred to and commented upon.

(Syllabus by the Court.)

Error from district court, Harvey county; L. HOUK, Judge.

Bowman & Bucher, for plaintiff in error. Clarence Spooner, for defendant in error.

HORTON, C. J. The Williams & White Land & Loan Company brought their action against Mrs. A. M. Betz to recover a commission of \$195, alleged to be due them from her for services rendered in the



sale of certain real estate belonging to her. The trial was had before the court with a jury, and resulted in a verdict for Mrs. Betz. The land and loan company filed its motion for a new trial, which was granted. Mrs. Betz excepted, and brings the case here. The motion for a new trial alleged misconduct of the jury; that the verdict and judgment were not sustained by sufficient evidence, were contrary to the facts, and also contrary to the law. The court, in sustaining the motion for a new trial, did not announce any reason for so doing. It is therefore impossible to say, upon the record presented, that "the trial court passed upon some pure, simple, and unmixed question of law." This court has decided time and again that "the granting of a new trial is largely in the discretion of the trial court; and where a new trial is given, and the record does not show upon what grounds the court granted such new trial, but the record does show errors upon which the trial court might have granted a new trial, the order granting such trial will not be disturbed." *Barney v. Dudley*, 40 Kan. 247, 19 Pac. Rep. 550; *Howell v. Pugh*, 25 Kan. 96; *City of Sedan v. Church*, 29 Kan. 190. As a new trial is to be had, the question of law discussed in the briefs will be referred to.

The contention is that as the contract which Mrs. Betz entered into with T. C. Brewer and F. D. Tripp, the purchasers or parties agreeing to purchase, was not a contract of sale, but simply a contract to sell, that, therefore, the land and loan company did not earn its commission. *Stewart v. Fowler*, 37 Kan. 677, 15 Pac. Rep. 918, is claimed to be decisive against the right to recover any commission. In that case it was said: "Where a contract for a commission for the sale of land provides that the land must be sold to a person ready, willing, and able to buy, it is not enough that there has been a contract to sell made. There must have been a sale before the commission is earned." But this was further qualified by the facts disclosed in the case, that the purchaser was unwilling to buy according to the terms of the contract, and also his ability to pay the purchase price was not affirmatively shown. It was said in that case that the burden of the purchaser's ability to pay was upon the plaintiff to establish, and therefore that the instructions prayed for in that case, to the effect that the purchaser was ready, willing, and able to perform the conditions of the sale before the commission was earned, should have been given. The facts stated in the opinion must be considered in connection with the law declared in the syllabus. In this case the trial court charged the jury, among other things, as follows: "(2) It is admitted that the defendant had the tract of land in question for sale, and employed the plaintiff as agent to assist in effecting such sale, and that it was agreed between the parties that the rate of commission, in case a commission was earned, should be five per cent. on the first thousand dollars of the purchase money, and two and one-half per cent. on the balance. It is further admitted that the language

used by the parties in making their agreement was that, if plaintiff found a purchaser, he was to sell the land for \$85 per acre, making \$6,800, and was to receive therefor the above-named commission. (3) It is further admitted that the plaintiff found and offered, as purchasers of the land, one Tripp and one Brewer, and that the defendant and her husband on the one part, and said Tripp and Brewer on the other part, entered into a written agreement, which has been read in evidence, whereby said defendant and her husband agreed to sell said land for the said sum of \$6,800 to said second parties, and said second parties agreed to purchase said land and pay therefor the said sum, divided in payments as specified in the contract; and it was further agreed that, in case the second parties fail to make any payment as specified, the defendant could declare said contract determined and forfeited, and should have the right to retain any purchase money already paid. (4) And it is further admitted that the second parties, Tripp and Brewer, failed to make the second payment, in amount \$900, as required by the terms of the contract, and thereafter the defendant declared and treated said contract as determined, and all the rights of the second parties thereunder as forfeited. (5) The jury are instructed that the contract above described is not, in its terms, a contract of sale, or a contract by which a sale was effected, but is simply a contract to sell upon certain named conditions. By its terms, Tripp and Brewer bound themselves to buy the land and pay the purchase money, and the defendant had the right in law to hold them to the terms of the contract. Upon the default of Tripp and Brewer, she had the option to sue for the enforcement of the contract, or declare it at an end, so far as they were concerned. (6) But, as to the rights of the plaintiff in this transaction, the court instructs the jury that if Tripp and Brewer, who were put in communication with the defendant by the plaintiff, or either of them, at the time the contract was made, were not only willing to purchase the land in question, but solvent, and able to pay for said land according to the terms fixed by the defendant, in that case the plaintiff, by what he did, earned the commission agreed upon, and has the right to recover such commission, notwithstanding the fact that said Tripp and Brewer failed to make the second payment as agreed. (7) The jury are instructed that, Tripp and Brewer having failed in punctuality in making payment, it is not to be presumed that they were solvent and able to pay, but the burden of showing this fact, by the greater weight of the evidence, is upon the plaintiff."

These instructions properly presented the law to the jury. There was evidence offered upon the trial tending to show that Tripp and Brewer, or at least Brewer, was worth \$9,700 above all of his indebtedness and exemptions, and therefore was able to buy. It is true that when pay-day came it does not appear that he was ready and willing to make his payments according to the written contract

of sale, but Mrs. Betz could have enforced the payments specified in the written contract, and, as the contract gave her the sole option to forfeit it in case of failure of payment according to its terms, she need not have declared a forfeiture, unless she preferred so to do. Tripp and Brewer could not, by the terms of the contract, declare any forfeiture. They had no option in the matter. Therefore, if the evidence concerning the ability of Brewer to buy is to be believed, the land and loan company earned its commission and is entitled to recover. *Keys v. Johnson*, 68 Pa. St. 42; *Stewart v. Fowler*, supra; *Glentworth v. Luther*, 21 Barb. 145; *Buckingham v. Harris*, (Colo.) 15 Pac. Rep. 819; *Goos v. Brown*, (Minn.) 18 N. W. Rep. 290; *Willes v. Smith*, (Wis.) 45 N. W. Rep. 666. We gather from the briefs that the trial court set the verdict aside because the jury did not follow its instructions, or because, without any good reason therefor, they arbitrarily disregarded the evidence concerning the ability of Brewer to buy. The order of the district court granting a new trial will be affirmed. All the justices concurring.

#### PETTIGREW v. LEWIS *et al.*

(*Supreme Court of Kansas*. April 11, 1891.)

##### MALPRACTICE—EVIDENCE.

In an action for malpractice against physicians and surgeons to recover damages for an alleged unskillful and negligent operation upon the plaintiff's eye, which resulted in injury and disease, the plaintiff must affirmatively prove that the injury and disease were produced by the operation, and that the defendants did not exercise ordinary skill and care in performing the operation. Proof that the plaintiff's eyes have become weak and sore since the operation was performed is insufficient to establish a liability against the defendants.

(*Syllabus by the Court.*)

Error from district court, Elk county; M. G. TROUP, Judge.

*J. D. McBrian & Son*, for plaintiff in error. *A. M. Jackson*, for defendants in error.

JOHNSTON, J. Sarah A. Pettigrew brought an action against J. F. Lewis and J. F. Willard, partners as Lewis & Willard, to recover damages in the sum of \$5,000, alleged to have resulted from a negligent, careless, and unskillful operation performed on her eye by Willard. She alleged that defendants held themselves out to the public as skillful surgeons, well qualified to perform operations upon the eyes and to treat the same; that she had an affection of one eye called "strabismus," and that the defendants undertook to straighten the eye, but performed the operation in such a negligent, careless, and unskillful manner that her eye became sore and weak, rendering her unable to complete her education or to perform ordinary household work. She avers that she has suffered and still suffers great physical pain in consequence of the unskillful operation and treatment, which has continued to increase since the time of the operation. The answer of the defendants was a general denial. The parties proceeded to a trial upon the issues formed, but after the

plaintiff had concluded her evidence the court sustained a demurrer thereto, holding that it was insufficient to establish a liability against the defendants, or either of them, and gave judgment accordingly. The plaintiff complains, and urges that the testimony offered by her was sufficient to take the cause to the jury. The sufficiency of the evidence is the only question that we need to consider. Plaintiff offered proof to show that an operation was performed on her left eye by Dr. Willard on January 16, 1886; that prior to the operation her eye was strong and in good condition, except as to the affection of strabismus. The operation was successful so far as straightening her eye was concerned, but she stated that afterwards neither the eye operated on nor the right eye was as strong as before. She stated that some time after the operation she had what she called "a spell of the sore eyes." The lids were afterwards somewhat inflamed, and her eye watered when she was out in the wind or cold. When she returned to school she found her eyes were weak, and that it was necessary to bring objects closer to her in order to see clearly. It further appeared, however, that a father, brother, and sister were afflicted with sore and defective eyes. Was the proof sufficient to sustain a cause of action against the defendants? We agree with the district court that it did not show the operation to have been unskillfully and negligently performed, nor yet that the present condition of her eyes was the result of the operation that was performed. No proof was offered of the instruments used or the manner in which the operation was performed. No medical or scientific evidence was offered showing the cause of the present condition of the plaintiff's eyes, nor that the defendants were negligent or careless in the performance of the operation. In fact no witnesses having special skill or knowledge with reference to the treatment of the eyes were introduced in behalf of the plaintiff. The burden rested on the plaintiff to show a want of due care, skill, and diligence in the operation, and that the defective condition now existing is the result of such want of care, skill, and diligence. The defendants were not held to the exercise of the highest degree of skill, nor as warranting a cure. It is clear from the evidence that there was no special contract to that effect; and, while something is claimed by the defendants on account of a variance between the pleadings and proof, we agree with the claim of the plaintiff that the doctor, having undertaken the operation, was held to the exercise of due care and skill. "His contract as implied in law is that he possesses that reasonable degree of learning, skill, and experience which is ordinarily possessed by others of his profession; that he will use reasonable and ordinary care and diligence in the treatment of the case which he undertakes; and that he will use his best judgment in all cases of doubt as to the proper course of treatment. He is not responsible in damages for want of success, unless it is shown to result from a want of ordinary skill and learning, and

such as is ordinarily possessed by others of his profession, or from want of ordinary care and attention. He is not presumed to engage for extraordinary skill or for extraordinary diligence and care, nor can he be made responsible in damages for errors in judgment or mere mistakes in matters of reasonable doubt or uncertainty." *Tefft v. Wilcox*, 6 Kan. 46; *Branner v. Stormont*, 9 Kan. 51; 14 Amer. & Eng. Enc. Law, 78. There was no proof, however, of a want of skill or care on the part of the defendants; and negligence cannot be presumed. The mere fact that the plaintiff's eyes have been weak and sore since the operation was performed does not prove negligence in the defendants, nor establish a liability against them. To maintain her action, the plaintiff should have offered the evidence of skilled witnesses to show that the present condition of her eyes was the result of the operation, and that it was unskillfully and negligently performed. "This evidence must, from the very nature of the case, come from experts, as other witnesses are not competent to give it, nor are juries supposed to be conversant with what is peculiar with the science and practice of the professions of medicine and surgery to that degree which will enable them to dispense with all explanations." *Tefft v. Wilcox*, supra. "The question whether a surgical operation has been unskillfully performed or not is one of science, and is to be determined by the testimony of skillful surgeons as to their opinion, founded either wholly on an examination of the part operated upon, or partly on such examination, and partly on information derived from the patient; or partly on such examination, partly on such information, and partly on facts conceded or proved at the trial; or partly on such examination and partly on facts conceded or proved at the trial." *McClell. Mal.* 304. It would have been easy for the plaintiff to have submitted to an examination by an experienced physician or oculist capable of determining whether the condition of her eyes was the result of the operation, and whether that operation was performed with reasonable skill and care. Cases may arise where there is such gross negligence and want of skill in performing an operation as to dispense with the testimony of professional witnesses; but not so in the present case. It is not conceded or proved that the weakness of her eyes had materially resulted from the operation; and, even if it was, the questions would still arise: Was she in a fit physical condition to undergo the operation? Did the defendants, before beginning the operation, make due examination to determine her condition and the necessity for an operation? Was the operation performed in a careful and skillful manner? What was the standard of professional skill and scientific knowledge required of these men in that locality? Was the after-treatment and were the directions given for the subsequent care of the eye such as would meet the approval of the profession in its present advanced condition? If a mistake was made, was it a case of reasonable doubt or uncertainty or a mere error in

judgment for which there is no responsibility? It was the duty of the defendants "to exercise ordinary care and skill, and, this being a duty imposed by law, it will be presumed that the operation was carefully and skillfully performed, in the absence of proof to the contrary. As all persons are presumed to have duly performed any duty imposed on them, negligence cannot be presumed, but must be affirmatively proved. This principle is especially applicable in suits against physicians and surgeons for injuries sustained by reason of alleged unskillful and careless treatment." *State v. Housekeeper*, 70 Md. 171, 16 Atl. Rep. 382. The present condition of her eyes may be attributed to many other causes. It may be the result of disease contracted in that vicinity, or from misuse and improper exposure of her eyes; or it may be an hereditary complaint similar to that with which her brother, sister, and other members of the family were afflicted. Whatever may be the cause, we cannot say that it is the result of the fault or negligence of the defendants. The operation may have been performed at a suitable time, with proper instruments, and in the most skillful and efficient manner, and yet have failed; and in the absence of competent proof, showing that the defect in plaintiff's eyes was due to a want of ordinary care and skill on the part of the defendants, the district court ruled correctly in sustaining the demurrer to the evidence. See *Getchell v. Hill*, 21 Minn. 464; *McCandless v. McWha*, 25 Pa. St. 95; *Leighton v. Sargent*, 7 Fost. (N. H.) 460; *Holtzman v. Hoy*, 19 Ill. App. 459; *Vanhooser v. Berghoff*, 90 Mo. 487, 3 S. W. Rep. 72; *State v. Housekeeper*, 70 Md. 162, 16 Atl. Rep. 382; *Whart. & S. Med. Jur.* § 768. The judgment of the district court will be affirmed. All the justices concurring.

(46 Kan. 19)

## DAVIS v. JENKINS.

(Supreme Court of Kansas. April 11, 1891.)

## SALE OF LAND—FRAUDULENT REPRESENTATIONS—DAMAGES—ATTACHMENT AFTER VERDICT.

1. Where a party who claims to possess a right to a timber-culture claim under the laws of the United States, and to own and control the relinquishment of the same, fraudulently misrepresents the location and quality of the land to one who, relying upon his representations, purchases and pays for his relinquishment and right, such purchaser is entitled to recover the damages actually sustained; and the fact that the purchaser, in making his entry, filed an affidavit in the United States land-office that the land was prairie, and devoid of timber, will not defeat his recovery.

2. In the action to recover damages for the fraud practiced by the seller upon the purchaser, the non-taxable character of land so entered is a proper consideration for the jury in determining the value of such a claim and right of entry.

3. An attachment may be allowed in a civil action for the recovery of money after the return of a verdict, and before the final judgment thereon is rendered and recorded.

(Syllabus by the Court.)

Error from district court, Finney county; A. J. ABBOTT, Judge.

Enoch E. Jenkins recovered a judgment against Frank Davis of \$900 in the district court of Finney county. In his petition he alleged that the "plaintiff, on or

about the 8th day of October, 1898, bargained with the said defendant to buy of him a relinquishment of a certain tree claim and piece or parcel of land of the said defendant, which relinquishment he (said defendant) represented to own and control, and the land included in said claim and relinquishment thereto to be good, level, prairie sod, and tillable land, and situated in Finney county, Kansas, 6 miles west of Ivanhoe, and suitable for timber-culture and agricultural purposes, and especially desirable, and would just suit the plaintiff, who then and there expressed a desire to purchase, enter, and cultivate a claim under the U. S. land laws, known as 'timber culture claim.' Plaintiff, further complaining of the defendant, says that at the time of said bargaining said defendant well knew that each and all of his representations so made as aforesaid by said defendant were false; that the said plaintiff, then confiding in the truth of said representations, and believing them to be true, and supposing that said defendant actually owned and controlled said relinquishment, and that the land included in said claim so relinquished was good, level, prairie sod, and tillable land, and was situated in Finney county, Kansas, 6 miles west of Ivanhoe, and was suitable for agricultural and timber-culture purposes, agreed to pay for said relinquishment and claim the sum of seventy-five (75) dollars, and did then pay said defendant the sum so agreed upon as aforesaid, and did use and exhaust his (said plaintiff's) rights under the timber-culture laws on said tract of land, defendant representing that he had just filed a relinquishment thereto in the U. S. land-office, so plaintiff could file and enter same as a tree claim, whereas in truth and in fact the said defendant did not own nor control, and had not owned nor controlled, any such relinquishment; that the land represented to be included in the claim conveyed by said defendant, as aforesaid, was unappropriated public domain, and had never been entered under any of the public land laws, and was not good prairie sod, and tillable land, situated in Finney county, Kansas, 6 miles west of Ivanhoe, but was rough, hilly, mountainous sand hills, and untillable piles of pure sand, and was situated — miles south of Hartland, in Hamilton county, Kansas, in the country known as the 'Sand Hills,' and is unfit for agricultural purposes and for timber-culture purposes, and is wholly worthless; whereby the said plaintiff has sustained damages to the amount of fifteen hundred (1,500) dollars, to-wit: The sum so paid as aforesaid, to-wit, seventy-five (75) dollars; (2) the value of said plaintiff's rights under the timber-culture laws, to-wit, seven hundred and fifty (750) dollars; and (3) the difference in value between 160 acres of good, level, prairie sod, and tillable land, situated as represented by said defendant, (less the government price,) and 160 acres of rough, hilly, mountainous sand hills, and untillable piles of pure sand, situated as the facts show it, less the government price therefor. Wherefore the said plaintiff pays judgment against said defendant

for the said sum of fifteen hundred (1,500) dollars, his damages so as aforesaid sustained, for costs of suit, and for all other and further proper relief." The defendant admitted in his answer the sale of his interest in the claim, but denied that he represented the same to be good, level, prairie sod, and tillable land, situated in Finney county, six miles west of Ivanhoe, and suitable for timber-culture and agricultural purposes, or that he made any representations whatever as to the quality of soil, or purposes for which it was adapted, or where the same was located. Upon the issues framed, a trial was had before a jury, which resulted in a verdict in favor of the plaintiff. After the verdict was returned, but before judgment was given, the court, on the application of the plaintiff, granted an order of attachment, which was levied upon the real estate of the defendant. A motion was made to dissolve the attachment upon various grounds, and the court sustained the motion as to the homestead of the defendant, but overruled it as to other real estate which had been levied upon. The defendant brings the case to this court for review.

*H. R. Boyd*, for plaintiff in error. *Brown, Bierer & Cotteral*, for defendant in error.

*JOHNSTON, J., (after stating the facts as above.)* This case is founded on the alleged fraud and deceit practiced by Davis on Jenkins in a transaction relating to a timber-culture claim, and we fail to see why the petition does not set forth a cause of action. In substance, it avers that Davis, who claimed a right under the United States laws to a tract of land, and that he owned and controlled the relinquishment of the same, represented it to be well-located, good, level, tillable land, suitable for timber-culture and agricultural purposes, and especially adapted to the wants of Jenkins, who wished to enter a timber-culture claim under the United States land laws. He confided in the truth of the representations made by Davis, and purchased and paid him for the relinquishment and claim. He avers that the representations were false in every particular; that Davis had no right in the claim, and did not own or control the relinquishment thereto; that the tract was not located where he represented that it was; that it was not level, tillable land, and not suitable for agricultural and timber-culture purposes, but, on the contrary, was rough, hilly, mountainous sand hills, and untillable piles of pure sand, and wholly worthless. Jenkins alleged that by reason of the fraud and deceit practiced upon him by Davis he had parted with his property, exhausted his rights under the timber-culture laws of the United States, and been otherwise damaged in the total sum of \$1,500. The fact that Jenkins was required to make an affidavit when he placed his timber-culture filing on the land does not debar him from recovering the damages which he actually sustained. It is claimed that, if he complied with the act of congress in making the affidavit, he must have known the character of the land, and therefore could not have relied upon the representations of Davis. In this

affidavit the applicant swears that the land was prairie, or devoid of timber, but is not required to state anything in regard to the quality of the soil, or the purposes for which it was adapted. 1 Supp. Rev. St. U. S. 348. Jenkins may have been acquainted with the fact that the land was prairie, and devoid of timber, without having a knowledge of the exact location, or whether it was good, tillable land, suitable for agriculture and the cultivation of timber. If he relied upon the representations, as alleged, and was thereby deceived to his injury, he may recover for the damage sustained, although he might have ascertained by a further search and inquiry that the statements made by Davis were untrue. McKee v. Eaton, 26 Kan. 226; Claggett v. Crall, 12 Kan. 393.

In instructing the jury, the court stated that land entered under the timber-culture act was not taxable from the time the entry is made until final proof is made and a final certificate is received from the register of the land-office, and that final proof may be made at the expiration of 8 years, but it is not necessarily made until the expiration of 13 years. It is not claimed that this is an incorrect statement of the law, but it is contended that it is inapplicable in the case. The non-taxable feature of a timber-culture claim was a proper consideration for the jury in determining the value of such a claim, and of the right to enter the same. No error was committed by the court in granting an attachment after the return of the verdict. The statute provides that an attachment may issue "at or after the commencement" of an action. The order may therefore be granted at any time during the pendency of the action, and before the final determination of the same. In the present case, after the verdict was returned, notice of a motion for a new trial was immediately given, and the motion was duly filed within the statutory time. It is true that after a judgment is recorded it is effectual, notwithstanding the pendency of a motion for a new trial, (Church v. Goodin, 22 Kan. 527;) but here the judgment was reserved until the disposition of the motion for a new trial. The plaintiff in error asks, what is to be gained by the levy of an attachment, after verdict, upon real estate, since the judgment, when finally rendered, becomes a lien upon the real estate from the first day of the term of court? A sufficient answer to the inquiry is that no judgment was recorded; and if the court had set aside the verdict which had been returned, and had granted a new trial, there would have been no lien nor any protection against the fraudulent disposition of the real estate by the plaintiff in error. The purpose of an attachment is to seize and hold the property until it can be subjected to execution; and a party is entitled to the benefit of an attachment until the entry of a judgment upon which an execution may issue. Until the judgment is finally entered, an attachment may be had, and a lien of the same continues till it is merged in the judgment finally rendered and recorded. The priority obtained by the attachment continues after the entry

of judgment until execution issues. Speelman v. Chaffee, 5 Colo. 247; Lynch v. Crary, 52 N. Y. 181; Bagley v. Ward, 37 Cal. 121; Schieb v. Baldwin, 22 How. Pr. 278; Drake, Attachm. § 224.

There is some contention with respect to the sufficiency of the evidence; but the record does not properly show that all of the evidence is preserved, and hence no consideration of that subject is demanded. Hill v. Bank, 42 Kan. 364, 22 Pac. Rep. 324. We have read the testimony contained in the record, however, and are inclined to the opinion that it is sufficient to sustain the verdict and judgment that were given. Judgment affirmed. All the justices concurring.

(46 Kan. 83)

#### CONWELL v. LOWRANCE.

(Supreme Court of Kansas. April 11, 1891.)

##### PERMISSION TO SUE RECEIVER—REVOCAION.

After the court has granted permission to the first mortgagee of chattels, who was in possession of the mortgaged property when a receiver appointed on an *ex parte* application took possession of them, to sue the receiver in replevin, and the suit had been commenced, and all proceedings had conformed to the order of the court, and a large amount of costs had accrued, it is an abuse of the discretionary power of the court to revoke the permission to sue the receiver and dismiss the action.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Finney county; A. J. ABOTT, Judge.

H. R. Boyd and Brown, Bierer & Cotteral, for plaintiff in error. Geo. E. Morgan, H. F. Mason, and Hopkins & Hoskinson, for defendant in error.

SIMPSON, C. The material facts are: On the 1st day of December, 1888, the plaintiff in error was in the possession of a stock of drugs and drug-store fixtures, situate in a building on lot 10, in block 36, in Garden City, known as the "George H. De Waters Drug-Store." The plaintiff in error took possession of these goods under a claim that he had a chattel mortgage that was a first lien on said stock of drugs, to secure a *bona fide* indebtedness to him, and that the conditions of said chattel mortgage had been broken. On that day, to-wit, the 1st day of December, 1888, the said George H. De Waters executed and delivered to the Finney County National Bank, to F. Finnup, and R. M. Morton, a chattel mortgage on the same stock of drugs and drug-store fixtures, to secure the bank in the sum of \$1,500, Morton in the sum of \$550, and Finnup in the sum of \$360. On this day these parties, the bank, Morton, and Finnup, commenced an action against De Waters, asking judgments for the respective amounts due the plaintiffs, and making other creditors of De Waters parties defendant, requiring them to answer and set up their respective liens, asking for the appointment of a receiver, the sale of the stock of merchandise, and an application of the proceeds of sale to the payment of the liens thereon in the order of their priority. An *ex parte* application by the plaintiffs in this action was made to the judge at chambers for the appoint-

ment of a receiver, and one was appointed on the said 1st day of December, 1888. The receiver took the oath and filed a bond as required by law, that was duly approved, and made a demand on Conwell for the stock of drugs and fixtures. Conwell refused to deliver them to the receiver. The judge of the district court made an order at chambers, directing the sheriff to take the stock of drugs from Conwell, and deliver them to the receiver, and this was done. The sheriff was ordered to bring Conwell before the judge to show cause why he should not be punished for contempt. The judge finally concluded that he had no power at chambers to punish Conwell for contempt, and ordered him to appear before the court on the 1st day of January, 1889, it being one of the judicial days of the regular January term of the district court of Finney county. On the 18th day of December, 1888, Conwell made an application for leave to sue the receiver in replevin, to the judge of the district court at chambers, and leave was granted. Under the order granting leave to sue, and on the 14th day of December, 1888, Conwell commenced an action in replevin against the receiver, an order of delivery was issued, and the sheriff put Conwell in possession of the stock of drugs. On the 14th day of January the court, of its own motion, set aside the order allowing Conwell to sue the receiver in replevin, and then dismissed the action brought by Conwell. All proper exceptions were saved, a motion for a new trial was made and overruled, and the cause brought here for review. On the hearing of the motion to vacate the order granting Conwell permission to sue the receiver in replevin, Conwell offered to show by De Waters that he had a valid *bona fide* chattel mortgage upon the property that was a first lien thereon, but this was refused. It appears from the record that the defendants in error allege that Conwell held possession of the stock of goods under and by virtue of a bill of sale that was claimed to be fraudulent.

The power of the court to appoint a receiver must be exercised with great caution, and with a due regard to the rights and interests of all parties interested in the property. It is not to be allowed when other adequate remedy exists. High, Rec. 369. It is only in extreme cases that a court will appoint a receiver for chattel property in possession of a mortgagee having the first lien, and the obvious reason for this is that the statutes of the state authorize the mortgagee to take possession on condition broken, and this gives him the absolute legal right to possession; and, to authorize a receiver to take the possession of the mortgaged chattels away from one having apparently the first lien, there must be a very strong showing of fraud. This is familiar doctrine, to be found both in Beach and High on Receivers. It is said by Jones on Chattel Mortgages, § 439: "The appointment of a receiver of mortgaged chattels held by a mortgagee in possession will only be made in cases of pressing necessity, in order to secure the rights of the mortgagor or others claiming under him." A mortgagee

in possession will not be dispossessed by the appointment of a receiver on the ground that the property in controversy is a newspaper and printing establishment, which it is desirous to sell as an active business in actual operation. *Rapier v. Paper Co.*, 64 Ala. 330. A mortgagee rightfully in the possession of mortgaged property cannot be deprived of it by the levy of an execution upon it, or the making of an attachment of it by a creditor of the mortgagor. *Pike v. Colvin*, 67 Ill. 227; *Marsh v. Lawrence*, 4 Cow. 481; *Moore v. Murdock*, 26 Cal. 514; *Volney Stamps v. Gilman*, 43 Miss. 456; *Troy v. Smith*, 33 Ala. 469. If an officer attempt to take the property upon an execution issued against a mortgagor, the execution not being a lien prior to the mortgage, the mortgagee is justified in forcibly resisting the officer. *Wentworth v. People*, 4 Scam. 550. But, if the officer succeeds in taking the property, the mortgagee may sue him for conversion, and recover the value of the property, (*Worthington v. Hanna*, 23 Mich. 530; *Nelson v. Wheelock*, 46 Ill. 25,) or the value of his interest in the goods, (*Becker v. Dunham*, 27 Minn. 32, 6 N. W. Rep. 406; *Bailey v. Godfrey*, 54 Ill. 507.) A mortgagee of a chattel is entitled to the possession of it against a collector of taxes, who, after the mortgage, has distrained it for a tax due from the mortgagor. *Fuller v. Day*, 103 Mass. 481. These citations are sufficient to show how strongly the courts regard the right of possession of a first mortgagee of chattels. Applying this principle to the facts in this case, so far as they are developed by the record, we doubt whether the showing was sufficient to authorize the appointment of a receiver. The appointment was made on an *ex parte* application in an action on chattel mortgages executed by the debtor to the plaintiffs, at a time when the mortgaged property was in the actual possession of Conwell, the action being commenced within a few hours after the execution of the chattel mortgages. Conwell ought to have had notice of the application; he resided and the goods were situated in the same town in which the order was made. Under these circumstances, we regard the order made to allow Conwell to sue the receiver in replevin, and determine his statutory right to the possession of the goods, as one in the interest of justice, and as one having a tendency to correct the doubtful order appointing the receiver. Conwell obeyed the order allowing him to sue, in letter and spirit, and no good cause is shown why the permission to sue should be revoked. It is a matter resting very largely in the discretion of the court, but it is a legal discretion, and not arbitrary power, and is to be exercised with due regard to the rights of parties. Under the peculiar circumstances of this case, we do not think it was a fair exercise of the discretionary power of the court to dismiss the action of replevin brought by Conwell against the receiver after permission to sue had been granted, in the interests of justice, as we deem it, after Conwell had complied with all the requirements of the order, after a large amount of costs must have been neces-

sarily created, and after it is apparent that Conwell's right to possession can be speedily determined by this form of action. Of course, the appointment of the receiver cannot be questioned or passed upon in such action, the only inquiry being whether Conwell, by virtue of his chattel mortgage, being a first lien on the chattels, is entitled to possession, or the receiver, by virtue of his appointment and the order of the court directing him to take possession. If the chattel mortgage of Conwell is void or fraudulent for any reason, it can be shown in this action as affecting his right to possession. We recommend that the order of the district court revoking permission to sue the receiver, and dismissing the action, be reversed, and the cause remanded for trial.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 759)

WHITE *et al.* v. BIRD.

(*Supreme Court of Kansas.* April 11, 1891.)

OBJECTIONS NOT RAISED BELOW—REVIEW ON APPEAL—CONFLICTING EVIDENCE.

1. Motions and questions not ruled upon by the trial court, or not otherwise disposed of, will not be noticed by this court.

2. When a cause is submitted to the court for trial and a jury waived, and there is a conflict of evidence on every material fact, and there is some evidence to sustain the general findings of the trial court necessarily included in the judgment, such findings and judgment will not be disturbed.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Cheyenne county; LOUIS K. PRATT, Judge.

M. A. Wilson and Rossington, Smith & Dallas, for plaintiff in error. S. W. McElroy, for defendant in error.

SIMPSON, C. Bird commenced this action in the district court of Cheyenne county, claiming that on the 11th day of April, 1885, Eva Ostrander, Charles Muller, Samuel McKnight, and Lawrence Flanigan each purchased a quarter section of school land situate in Cheyenne county from the state of Kansas, the whole purchase embracing section 36, township 2 south, of range 46 west. This purchase was made under the provisions of the "Act to provide for the sale of school lands," approved February 22, 1864, and acts amendatory and supplemental thereto. That certificates of purchase were issued to each by the county clerk of Rawlins county, to which the county of Cheyenne was then attached. That these certificates of purchase were duly assigned by these respective purchasers to Beverstock and Cochran, who were purchasers for value, having paid \$100 for each assignment. He further alleges that, after said certificates were assigned and were in the possession of Beverstock and Cochran, they were either lost or stolen, without fault or negligence on their part; that after they were so lost or stolen they were sold by some of the defendants without the knowledge or consent of said Beverstock and Coch-

ran; that the names of Beverstock and Cochran were erased from the assignments made to them by the original purchasers, without their knowledge or consent; that the defendants, Henry K. White, E. S. Douglass, and E. K. White claim to be present owners of said certificates of purchase of the several pieces of school land. He further alleges that, when it was discovered that said certificates of purchase then owned and in the possession of Beverstock and Cochran were lost or stolen, such proceedings were had as to cause the clerk of Rawlins county to deliver to Beverstock and Cochran certified copies of said certificates of purchase and the assignments thereon to Beverstock and Cochran; that on the 2d day of October, 1885, Beverstock and Cochran, for and in consideration of the sum of \$885 in hand paid them by one Charles B. France, duly assigned said certificates of purchase to the said France, and that said Charles B. France did subsequently assign said certificates of purchase to the said Bird, who, by virtue of such assignments, became the absolute and unqualified owner of the same; that the assignments of Beverstock and Cochran to France, and from France to Bird, are in writing, indorsed on the back of the certified copies; that afterwards Bird tendered to the treasurer of Rawlins county all the interest due and payable on said four certificates of purchase, who refused to accept the same; but that said treasurer did permit the defendant E. K. White to pay the same; that in 1886 the said Bird, desiring to make final payment of the four certificates of purchase, tendered to the county treasurer the full purchase price for said land, together with interest from the day of sale to the day of tender, which was refused. Attached to the petition are copies of the four certificates of purchase and the written assignments of the four original purchasers to Beverstock and Cochran, the petition being verified. Among the other prayers for relief was one that the defendants be restrained from claiming any interest in and to said certificates of purchase. A temporary injunction was allowed until the final hearing. The defendants Henry K. White, who was sued as E. K. White, E. S. Douglass, and C. F. Mathieson, filed the answer, admitting the purchase by Flanigan, McKnight, Ostrander, and Muller, as described in the petition, and that each received a certificate of purchase. They admit that they now claim by virtue of certain assignments made by the said original purchasers and their assignees to be the absolute owners of each and all of these certificates of purchase, each owning an undivided third interest therein. They further aver that long before they or any of their co-defendants acquired any interest in said certificates, and before the pretended acquisition of any interest in said certificates of purchase by Bird, the said Beverstock and Cochran repeatedly disavowed any claim or interest to or in said land or in said certificates, and caused the same to be sold without any visible appearance of any ownership by them therein, and to be delivered to those under whom these de-



endants claim title to said certificates, they buying the same from other persons than Beverstock and Cochran, and paying therefor upon the faith of such representations and disclaimer of ownership and interest therein by said Beverstock and Cochran. This answer is verified. Of the other defendants, Hendricks, Russell, Tindall, and Hemming filed disclaimers. The defendants Way and Kerndt made default, and filed no answers, so that the real controversy is between Bird on the one hand and White, Douglass, and Mathieson on the other. The cause was tried to the court, and a general judgment entered in the following language: "This day this cause came on to be heard on the issue joined between the parties, the plaintiff in person, and by Attorneys S. W. McElroy and John D. Hayes, and the defendants by their attorneys, James Donovan and M. A. Wilson. The plaintiff introduced his testimony and rested, then the defendants their testimony and rested, and the court, being fully advised in the premises, do find that the plaintiff, at the commencement of this action, was and now is the owner of four certificates of purchase, as follows, to-wit, the same being fully described in plaintiff's petition, and embracing the entire section thirty-six, in township two south, of range forty-one west, in Cheyenne county, Kansas. The court further finds that the said plaintiff derived his title to the said certificates of purchase from one Charles B. France, and said France his title from Beverstock and Cochran, and Beverstock and Cochran from the four original purchasers of the said land, to whom the state of Kansas issued certificates of purchase, which were on the 11th day of April, 1885, assigned to said Beverstock and Cochran, and Beverstock and Cochran to Charles B. France duly assigned October 2, 1885, and said Charles B. France transferred same to the plaintiff herein before the commencement of this action; that the said four original certificates issued to the four original purchasers were lost and unlawfully mutilated, and the names of Beverstock and Cochran were erased from each of said certificates of purchase, and afterwards the name of C. P. Russell was inserted in the said original assignments in place of the names of Beverstock and Cochran, the original and first assignees, and that such erasure was made, and the name of C. P. Russell inserted, without the knowledge and consent of Beverstock and Cochran, or either of them; that the defendants Henry K. White, Edward S. Douglass, and C. F. Mathieson are now in possession of the four original certificates of assignment, and claim their title to the same from said C. P. Russell, and C. P. Russell from N. A. Way. And the court further finds that the said N. A. Way had no interest in said certificates or right to said land; that the fraudulent alteration of said four assignments was illegal and void, and passed no title to said certificates, nor any valid interest in said land. It is therefore ordered, adjudged, and decreed by the court that the plaintiff's interest and title to said certificates of purchase is paramount and superior to the interest of the defendants,

and he entitled to a patent to section 36, township 2 south, of range 41 west, from the state of Kansas upon the payment of the amount due the state upon said contracts, and the furthersum of one hundred three and 68-100 dollars to the clerk of the court for Henry K. White, the same being the amount the said White has paid as interest on the said contracts; and it is further ordered, adjudged, and decreed by the court that the interest of the defendants in and to said land and certificates of purchase be forever canceled and held for naught, and the plaintiff's ownership in and to said certificates of purchase and right to said land therein described forever sustained, and the defendants pay the costs of this suit, taxed at \$41.45, for which let execution issue." A motion for a new trial was overruled, and White, Douglass, and Mathieson bring the case here for review.

Only two assignments of error are insisted upon here. The first is that these plaintiffs in error were entitled to a judgment on the pleadings, and the second is that the trial court erred in not sustaining the motion of the plaintiff in error in the nature of a demurrer to the evidence. Numerous inquiries present themselves on a perusal of this record, and their determination may have the effect to dispose of a number of questions discussed by counsel for plaintiffs in error. The case was tried by the court on the 15th day of May, 1888, and on that day a motion was filed by attorneys for White, Douglass, and Mathieson, asking that judgment be rendered in their favor because the evidence introduced by the plaintiff (Bird) fails to show a cause of action, and because the testimony of the plaintiff fails to show any legal or equitable interest in his favor. The record fails to show anywhere that there was any ruling or disposition whatever of this motion. The attorneys of the plaintiffs in error classify this motion as a demurrer to the evidence, and assuming this to be a demurrer, still the lower court never acted on it, and we cannot. The motion for a new trial assigned as causes therefor the following: *First*, that the decision is contrary to the evidence; *second*, that the plaintiff, Benjamin Bird, is not the party in interest, and has no legal or equitable standing in this court, as is shown by the testimony and the record; *third*, that the plaintiff in this action relies on duplicate certificates issued by the county clerk of Rawlins county, Kan., without any authority by law; *fourth*, that Beverstock and Cochran made an assignment on the duplicate certificates, knowing at the same time that the original certificates were in the hands of other parties; *fifth*, that there is no legal evidence of any trust being established between France and Bird, or that C. B. France held any trust in said duplicate certificates for Benjamin Bird; *sixth*, that whatever interest is claimed by Bird was acquired by a quitclaim deed from Beverstock and Cochran; *seventh*, that no instruments in writing have been introduced in evidence to establish any legal or equitable interest of Benjamin Bird, C. B. France, or Beverstock and Cochran.

It will be noticed that the only statutory cause assigned for a new trial was that the decision was contrary to the evidence, and we have to indulge in a very liberal construction of statutory expression to construe this into the scope of the sixth subdivision of section 306 of the Civil Code. The other causes assigned for a new trial are (if they are anything) errors of law occurring at the trial, but they are not saved by proper objections and exceptions, and are general statements of propositions that seem to have lodgment in the minds of counsel, but never formulated by distinct and specific questions to witnesses, nor called to the attention of the court as legal questions arising on the facts presented at the trial; so that it seems to us that the only question fairly presented by the record is whether the judgment is sustained by sufficient evidence. We find that certified copies of the original certificates of purchase are attached to the amended petition, and that these show a written assignment from the original purchasers to Beverstock and Cochran, duly acknowledged by each purchaser before the county clerk. This at least makes a *prima facie* case that the original certificates were so assigned. One of the controverted questions of fact was whether they were so assigned, and there is some evidence that they were not, especially by Hemming, and there is also some evidence tending to show that they had been, but the names were erased. These original certificates were delivered by Meiksell to Hemming at the instigation of Way. Cochran does not know how they left his possession, and there is no word of explanation from either Meiksell or Way how they became possessed of them. There is no doubt of the assignment to and possession of Cochran,—that he bought the certificates, whether with the understanding or without it that Way was to have an interest. So there is a conflict as to whether or not at the time Beverstock and Cochran applied to the county clerk, and received certified copies of the certificates and assignments, they knew that the originals were in existence, and not lost or stolen as they pretended to believe. So there is a conflict as to whether or not White, when he purchased the original certificates, had knowledge from Bird that the persons he bought from had no interest in them. We cite these various conflicts in the evidence for the purpose of invoking the operation of a rule so often expressed that its repetition is becoming wearisome,—that where the evidence is conflicting, and there is sufficient or any evidence to sustain the judgment, it would not be disturbed by this court, for the reason that the trial court or the jury has an opportunity to see the witnesses, observe their bearing and demeanor, and has opportunities for comparison that this court cannot have. There is some evidence to sustain the judgment, and all we can do in this state of the record is to recommend that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

v.26r.no.7—30

# HURD v. SIMPSON et al.<sup>1</sup>

(Supreme Court of Kansas. April 11, 1891.)

## DEFECT OF PARTIES—ACTION FOR PRICE OF LAND.

1. A defect of parties should be raised either by answer or demurrer, and, when not so taken advantage of, is usually waived.

2. The evidence examined, and found sufficient to support the special findings and judgment of the trial court.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Harper county; J. T. HERRICK, Judge.

George E. McMahon, for plaintiff in error. Shepard, Grove & Shepard, for defendants in error.

GREEN, C. This was an action brought by the defendants in error, who are husband and wife, to recover the balance of the purchase price of certain real estate in the city of Anthony, in Harper county. The title to a portion of the real estate was in each one of the plaintiffs below. On the 11th day of March, 1887, S. E. Adams, John F. Goggin, and B. F. Smith were engaged in the real-estate business in Anthony, under the name of the Anthony Real-Estate Exchange. The real estate in question was placed in the hands of said firm, and sold on the same day for \$5,650, and a deed was made by R. J. and Mary H. Simpson to W. H. Hurd, the plaintiff in error. The court below found that S. E. Adams, one of the members of the real-estate exchange, in behalf of the plaintiffs below, sold said real estate to W. H. Hurd, John F. Goggin, and J. T. Holdridge; that there was a mortgage upon the premises for \$2,800, which the purchasers were to assume as a part of the consideration; that \$750 was the only part of the purchase price paid to the plaintiffs below, or either of them; that two of the lots conveyed to the plaintiff in error were sold and deeded by him to the purchaser, the consideration expressed being \$800; that on the 16th day of May, 1887, W. H. Hurd paid interest upon the mortgage upon the land deeded to him, amounting to the sum of \$288. From the conclusions of fact the trial court found that the plaintiffs were entitled to recover the sum of \$2,010, with interest at 7 per cent. per annum from the 11th day of March, 1887, for which judgment was rendered in the court below. The plaintiff in error assigns error, and brings the record to this court for review.

The first assignment is that the court erred in overruling defendant's objection to the misjoinder of plaintiffs. This objection was not made by answer or demurrer, and hence cannot be considered. The answer was a general denial. The rule is well settled that a misjoinder or defect of parties is waived if not taken advantage of by demurrer or answer. Commissioners v. Coman, 43 Kan. 676, 23 Pac. Rep. 1038; Coulson v. Wing, 42 Kan. 507, 22 Pac. Rep. 570; Woodman v. Davis, 32 Kan. 344, 4 Pac. Rep. 262; Thomas v. Reynolds, 29 Kan. 304. The next contention of the plaintiff in error is that there was a failure of proof upon the part of the plaintiffs below, and hence a demurrer to the evidence

<sup>1</sup> Petition for rehearing pending.

should have been sustained. We have carefully considered all the evidence in the record, and we think there is sufficient to uphold each and all of the special findings of fact. The plaintiff in error had knowledge of the fact that the land was deeded to him a short time after the execution of the same; he and his wife executed a warranty deed to a portion of the same property conveyed to him by this deed from the plaintiffs below; and he also paid the interest upon the mortgage. There certainly was evidence of the recognition of the purchase of the land. We find no error in the proceedings of the court below, and the judgment should therefore be affirmed.

**PER CURIAM.** It is so ordered; all the justices concurring.

(46 Kan. 90)

**HITCHCOCK v. CITY OF OBERLIN.**

(*Supreme Court of Kansas. April 11, 1891.*)

**OBSTRUCTION OF STREETS—INJUNCTION—PLEADING—EVIDENCE.**

1. In an injunction proceeding by a city of the third class to enjoin an interference with an alleged public street therein, a petition which alleges that the strip of ground in controversy is a street in Rodehaver's addition to said city, and within the corporate limits thereof, and under its control, sufficiently locates said alleged street, and shows that the city has jurisdiction over the same.

2. The objections to the admission of certain testimony examined, and *held*, that under the circumstances of this case the admission of the evidence complained of does not constitute material error.

3. The evidence in the case examined, and *held* sufficient to uphold the judgment therein.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Decatur county; L. K. PRATT, Judge.

A. G. McBride and S. D. Decker, for plaintiff in error. S. W. McElroy, for defendant in error.

**STRANG, C.** This is a proceeding by injunction, commenced in the city of Oberlin, to enjoin the plaintiff in error from interfering with a certain alleged street in said city. In June, 1879, Hitchcock and others purchased a piece of ground of Rodehaver for the purpose of platting it as an addition to said city of Oberlin. They organized, and obtained a charter from the state granting them corporate powers, under which they platted said ground, dividing it into lots and blocks, with streets and alleys, and filed said plat of record. Running east and west along the north side of said land, as platted, was left a strip of ground 85 feet wide. The word "North" was written on that part of the plat representing said strip. The contention of the city of Oberlin in the court below was that said strip left on the north side of said plat, and marked with the word "North," was created a street, and named "North Street," on said plat. The defendant below denied that such strip was a street, and claimed that having commenced platting on the south side, and surveyed the ground into blocks and streets until they reached the north side, they had the strip in controversy left. That it was not wide

enough for blocks, and was left temporarily, with the view of obtaining more land adjoining it of Rodehaver sufficient for a tier of full blocks, when they intended to block and lot it the same as the balance of the land; but, not obtaining any more land, the strip simply lay unplatted. They claim the word "North" written on that part of the plat was not written there as and for the name of a street, but simply to designate the point of compass. The matter was heard by the court, which rendered a judgment perpetuating the injunction, and for costs. Motion for new trial was overruled.

The first assignment of error is based upon the action of the court in overruling the objection of the plaintiff in error to the reception of evidence under the petition as finally amended. Counsel allege that the petition does not show where the strip of land claimed by the city to be a street was located. It is claimed that the petition must allege that the strip was a public highway, and located within the city limits. Conceding this to be the law, an examination of the petition shows the position of the plaintiff in error is untenable. The petition alleges that the strip in question is a street in the city of Oberlin, and within the corporate limits of said city, and under the control thereof.

The second error alleged consists in the action of the court in allowing John Wilson and others to testify to what John Rodehaver had said and done in connection with the sale of certain lots he had sold in and out of the addition heretofore mentioned. Rodehaver was a member and director of the corporation that owned the addition. He acted as salesman for said corporation in selling lots in said addition, and the court permitted Wilson and others who had purchased lots from said corporation, through Rodehaver, to testify to what Rodehaver said about the strip of land lying on the north side of said addition at the time and when he was selling said lots to them. They testified that Rodehaver told them, at such time, that said strip of land was a street,—was North street. Some of said parties purchased lots in the addition fronting on said strip of land that Rodehaver represented was North street, and say they purchased on the strength of such representations so made by Rodehaver that such strip was a street, and that they would not have purchased but for the belief of said representations that the strip was a street. We think the evidence was entirely proper. Rodehaver was not only an officer of the corporation which had platted and which owned the addition, including the strip in controversy, but he was, at the time of making the representations, presumably the agent of said corporation for the sale of their lots; at least, he was acting as such, and the representations reproduced were made in connection with his sale of the lots.

There was another class of testimony admitted that does not come so clearly within any rule of evidence. Rodehaver owned the land directly north of the 85-foot strip, and he was selling lots on his side of the strip and facing the same, and

in connection with the sale of these lots he also represented that the 85-foot strip was a street. The court allowed these representations to be proven. In the sale of these lots he was acting for himself, and his statements that the strip was a street were, so far as the question involved in the cases concerned, but the statements of an officer of the corporation. If he had been a principal officer for the corporation, such as president, his statements would probably have been evidence; but he was only a director of the company. There was but little of this evidence, and, when received, the court said it wanted to hear all about the matter; and, when the defendant offered like testimony, the court received it, going so far as to let the defendant below prove his own statements to his hired man, to the effect that the strip was not a street. There was much more evidence of this kind introduced by the defendant below than by the plaintiff. The case was being tried by the court, which evidently gave evidence of its character little weight. There was other proper evidence sufficient to sustain the judgment of the court. The acting secretary of the corporation testified that at a meeting of said corporation for the purpose of dividing among the members of the corporation what lots were left unsold, so as to close up the business of the corporation, this 85-foot strip was by the members of the corporation called "North Street," and was by them at that time treated as a street; that there was no attempt to or talk about dividing the strip while they were engaged in dividing the lots; but that lots facing the strip were mentioned and talked about as facing North street. It was also proved that houses had been built on both sides of said strip; that fences had been erected and trees set out in line with the strip as a street; and that such fences and trees had been in existence for several years, during which the plaintiff in error, who was the chief officer of the corporation, had resided in the city of Oberlin, and necessarily near to the alleged North street. It was also shown that from the date of the platting of the ground constituting the addition the said strip had been used as a highway by the public. The city authorities treated it as a street by building small bridges or sluice-ways thereon, in order to render it passable. In view of all this evidence in support of the judgment of the court, we do not think the liberality of the court in the reception of evidence constitutes material error, especially as such liberality was exercised in behalf of the plaintiff in error to even a greater extent than it was in behalf of the defendant in error. "Dedications by maps and plats are sometimes so made as to render it difficult to determine their nature and extent. We think it a safe general rule to resolve doubts in such cases against the donor, and, within reasonable limits, to construe the dedication so as to benefit the public rather than the donor. Naturally, the presumption is that one who records a plat, and marks upon it spaces that appear to form no part of the platted lots, dedicates the land represented by the space thus excluded to

the public use." Elliott, *Roads & S.* p. 111; *City of Denver v. Clements*, 3 Colo. 484; *Noyes v. Ward*, 19 Conn. 250; *Hanson v. Eastman*, 21 Minn. 509; *Sanborn v. Railroad Co.*, 16 Wis. 20; *Yates v. Judd*, 18 Wis. 126. We think the judgment is supported by sufficient evidence. We recommend that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered.

HORTON, C. J., and JOHNSTON, J., concur.

VALENTINE, J. I concur in the decision of this case. This court has always been liberal in sustaining dedications of property for public purposes, however made, and in sustaining them as intended by the dedicator or proprietor. *Commissioners v. Lathrop*, 9 Kan. 453; *Association v. Meninger*, 14 Kan. 312; *Commissioners of Wyandotte Co. v. Presbyterian Church*, 30 Kan. 620, 1 Pac. Rep. 109; *Brooks v. City of Topeka*, 34 Kan. 277, 8 Pac. Rep. 392; *Board of Com'rs of Miami Co. v. Wilgus*, 42 Kan. 457, 22 Pac. Rep. 615; *Hayes v. Houke*, 45 Kan. —, 25 Pac. Rep. 860. But where property has never been dedicated at all for any kind of public purpose, by any word, act, sign, figure, map, plat, field-notes, or acknowledgment, as was the case in the case of *Fisher v. Carpenter*, 38 Kan. 184, 12 Pac. Rep. 941, this court does not hold that there has been any dedication, and certainly does not hold that there has been a dedication for some specific or particular purpose, as for a public street. In the case last cited, the plaintiff in the trial court, *Carpenter*, commenced his action against the defendant, *Fisher*, to restrain and enjoin him from obstructing a piece of ground 250 feet in length east and west, 34 feet in width at the west end, and 89 feet in width at the east end, upon the sole ground that it was a public street. *Carpenter* was and is a private individual, having no interest in any of the property platted as *Fisher's* addition, of which it is claimed by *Carpenter* that this piece of ground constitutes a part. Now, if this piece of ground was not dedicated for any public purpose at all, or if it was in fact dedicated for some other public purpose than for a public street, as, for instance, for a public park, common, school, seminary, college, jail, court-house, church, cemetery, hospital, asylum, city hall, or market, then the plaintiff could not maintain his action. The piece of ground, however, was not dedicated at all for any public purpose in any manner, or by any word or act of any kind; and taking the statutes relating to the subject, and the map, field-notes, and acknowledgment filed by the proprietor of the said addition, they together show affirmatively that the piece of ground was not dedicated, nor intended to be dedicated, by the proprietor for a street.

(46 Kan. 58)

HOY v. GRIGGS.

(*Supreme Court of Kansas*. April 11, 1891.)

SALE OF CHATELLETS — DECLARATIONS OF VENDOR — POSSESSION AND TITLE.

1. The declarations of a vendor of personal property as to his possession and title, when he

is not in the actual possession of the property, are not admissible to affect the title of his grantees.

2. A contract for the sale of hay, made by A. to B., is not admissible in evidence in an action between A. and C., D. & Co., which involves the right to the possession of the hay as between them.

3. When C., D. & Co. make a contract with one S. to cut and stack hay at so much per ton from lands to which C. D. & Co. have the grass rights, and at stated intervals the stacks are measured, numbered, and marked in the name of C., D. & Co., and S. is paid for his work, S. never had the legal possession, nor became the legal owner, of the hay.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Butler county; T. A. KRAMER, Judge *pro tem*.

*Clogston, Hamilton, Fuller & Cubbison, and B. R. Leydig*, for plaintiff in error. *George Gardner and Redden & Schumacher*, for defendant in error.

SIMPSON, C. This was an action in replevin to recover possession of certain hay. The material facts are that some time in the month of July, 1887, Douglass, Keyes & Co. made a contract with one William Sproul to put up for them all the hay that he could with his force and teams on sections 13, 14, and 23, in township 23, range 6, in Sycamore township, Butler county. This hay was to be stacked on the land above described, or on land belonging to Sproul. This hay was to be cut on grass lands furnished by Douglass, Keyes & Co., who had leased land for that purpose, and a large part, if not all, the hay was cut on that land. On the 5th day of September, 1887, Sproul executed and delivered to Douglass, Keyes & Co. a bill of sale for 10 stacks of hay, estimated to contain 100 tons, then in stack on the S.  $\frac{1}{2}$  of section 13; also for 8 small stacks, estimated to contain 40 tons, located on the same land, and 2 stacks, estimated to contain 15 tons, inside the fence, on Sproul's quarter section of land. In this bill of sale Sproul acknowledges having received \$310, being payment in full for said hay. Each of the stacks of hay enumerated in the bill of sale of September 5th was numbered and marked with a piece of lath, with the name of Douglass, Keyes & Co., placed near the bottom of the stack. On the 13th day of the same month Sproul executed another bill of sale for several more stacks of hay put up after September 5th. These stacks were numbered and marked in the name of Douglass, Keyes & Co. on a piece of lath placed near the bottom of the stack. The sum of \$121.50 is acknowledged as payment in full of this lot of hay. On the 23d day of September another bill of sale was executed by Sproul to Douglass, Keyes & Co. for 176 tons of hay, the bill of sale reciting that this includes all the hay that was put up on section 23 to this date. It also recites that Douglass, Keyes & Co. furnished the grass, and it acknowledges the receipt of \$308 for full payment of the cutting and putting it into the stack. Hoy was the agent of Douglass, Keyes & Co., and had charge of the hay, and it was in his possession, and he looked after it. On the 6th day of September, 1887, Sproul made a contract with Griggs,

with whom he had dealings, and from whom he had been buying provisions with which to feed his workmen, and to whom he was indebted, to sell Griggs all the hay he had put up. At the time Griggs made this contract with Sproul he had not seen the hay, and did not go out to where Sproul was putting up hay until the 11th day of September. In the mean time he agreed with Sproul that he (Griggs) would pay the hired help by whose aid Sproul was cutting and stacking the hay. About the 23d day of October, 1887, Douglass, Keyes & Co. learned that Griggs had taken possession of the hay, and was having it baled and shipped, and they sent Hoy, the plaintiff in error, up there, who took possession of the hay, and held it. On the 2d day of November this action was commenced in replevin by Griggs against Hoy to recover the possession of the hay. The case was tried by a *pro tem* judge, and a jury, at the April term of the district court of Butler county, and a verdict returned for Griggs, and a judgment rendered in his favor that, at the commencement of this action, the plaintiff was the owner of and entitled to the possession of the property in controversy. A motion for a new trial was made and overruled, and all exceptions saved. We ought to have stated that neither Griggs nor Douglass, Keyes & Co. knew of the contracts that Sproul had made with the other until about the time Griggs commenced to have the hay baled and shipped.

Among the many assignments of error made by counsel for plaintiff in error we select two as being important.

1. The trial court, over the objection of the plaintiff in error, permitted Griggs to introduce and read in evidence to the jury a contract made between Griggs and Brown for the purchase by Brown of Griggs of the hay in controversy, and also permitted Griggs, while on the witness stand, to state what Sproul said respecting this hay at the time this contract between Griggs and Brown was made, also permitted the deposition of Brown to be read in evidence, reciting this same conversation. The pretense under which this was done was that the contract was virtually one between Sproul and Brown, and, assuming this to be true, we are at a loss to account on what principle the declarations of Sproul and a contract for the sale of this hay to another person can be admitted to bind Douglass, Keyes & Co., in their absence, and without their knowledge. It is true that under certain circumstances the declarations of a party in possession of chattels in respect to the ownership thereof are admissible, but such declarations were not made under such circumstances as entitle them to any consideration in this case. Sproul was not in the visible possession of this hay. It was not a matter of common observation to all that he had been in the possession, use, and enjoyment of it for a long time, acting as the owner, and always and on all occasions claiming to be the owner of it, for this is the law. And not that alone; it has been repeatedly and universally held that such declarations, to be binding, must have been made at a time when the

declarant had the title to the property in question, and his admission, subsequent to a sale made by him, cannot be received to affect the title of his grantees. Again, if it is conceded that the contract was in fact one between Sproul and Brown, whereby the hay was sold directly by Sproul to Brown, what right has Griggs to maintain this action? Under such circumstances, the right to the possession is in Brown, and not in Griggs. The admission of this contract, and the evidence of Griggs and Brown as to the statements of Sproul as to his ownership of the hay at the time the contract between Griggs and Brown was entered into, all in the absence and without the knowledge of Douglass, Keyes & Co., were material errors.

The only ground upon which counsel for defendant in error seek to justify the admission of the declarations of Sproul at the time he sold the hay to Griggs is this: That as Douglass, Keyes & Co. and Griggs both claim under Sproul, he being the common source of title to the hay, his declarations concerning the property in controversy would be competent evidence against his grantees. But this is not the law; the same principle quoted above applies. The declarations or admissions of the grantor must be made while he is in possession of the property. So declarations of the seller of personal property made after a sale, and after he has parted with the property, are not admissible against the buyer. 1 Greenl. Ev. (14th Ed.) § 190, and foot-notes. Apply this to the facts in this case, and it appears that on the 6th day of September, when Sproul asserted, in the presence of Griggs and Brown, that he was the owner and was in possession of the hay, he had sold it the day before to Douglass, Keyes & Co.; indeed, put it up under a previous contract with them, had yielded possession, and had in writing acknowledged full payment for the same. Again, it may be seriously doubted whether Sproul ever had either the title or the possession of the hay. His contract with Douglass, Keyes & Co. was to cut and stack hay from grass lands furnished by them, and the evidence discloses that most, if not all, of the hay cut and stacked by Sproul was from land to which Douglass, Keyes & Co. had the grass rights. A fair construction of this contract, with the accompanying facts, seems to determine that under no circumstances can it be fairly said that Sproul was either in legal possession or had title to the hay. It seems conclusive, therefore, that his declarations respecting ownership or possession were not admissible for any purpose. We have no doubt but that the admission of this contract between Griggs and Brown was one of the things that tended to influence and prejudice the mind of the average juror against the plaintiff in error. The same may be said, and we think with more force, as to the admission of the declarations of Sproul on the 6th of September, at the time he sold the hay to Griggs, and Griggs sold it to Brown.

2. The trial court gave the following instruction, numbered 13: "If you find that both parties are in the same position, in

this, that each of them in good faith and without fault hired said Sproul to put in the hay replevied in this action, or a part thereof, and that through the fault of said Sproul each were deceived, and that neither party has, by any subsequent act, obtained a superior right over the other; and you also find that one of the parties can be placed in the same position that he was in before said contract was made, and that the other cannot be placed in the same position he was in before such contract was made,—then you should find in favor of that party who cannot be placed in the same position as he was before the contract was made, to the extent of the amount of hay put up under such contract made with each." We cannot see any possible application of this instruction to the facts in this case; indeed, the exact facts in the case are not stated in the instruction. This is not a case that calls for any new or novel application of principle. Douglass, Keyes & Co. are first in right and first in time. The same principle controls here as if one person had furnished a tailor materials with which to make him a full suit of clothes, and agreed to pay him a certain price for his work, and the tailor had sold the suit when made to another. The case cited to support this instruction is that of *Henderson v. Gibbs*, 39 Kan. 679, 18 Pac. Rep. 926. In that case property was fraudulently procured by a purchaser from an innocent owner, and the fraudulent vendee afterwards sells the property to an innocent and *bona fide* purchaser, the only consideration moving from one to the other in the last sale being the partial payment of a pre-existing debt due from the fraudulent vendee to the second purchaser, and it is held under this state of facts that the original owner may rescind the contract made by him with his fraudulent vendee, and recover his property. Now, suppose this decision applied to the facts in this particular case, what would be the result of a fair application of it? Was Sproul the original owner, and the hay procured from him by Griggs in a fraudulent manner? or was Griggs the original owner, and had somebody fraudulently procured the hay from him? or were Douglass, Keyes & Co. the original owners, and did Sproul fraudulently procure the hay from them? It will be seen that the only possible theory upon which the rule in *Henderson v. Gibbs* can be made to apply to this case is upon the assumption that Sproul was the innocent owner of the hay, and that Griggs was his fraudulent vendee, and this application will not be satisfactory to the defendant in error. There are several very controlling reasons why Sproul cannot be regarded as the original owner. Even if at one time he was the owner of the hay, he had sold to Douglass, Keyes & Co. before Griggs bought, and hence had divested himself of ownership; and, secondly, he never was the owner, and never was in the legal possession of the hay, because by the terms of his contract all he agreed to do was to cut and stack hay on lands furnished by Douglass, Keyes & Co. The instruction was a most pernicious error.

3. The jury, by their verdict, and the court by its ruling on the motion for a new trial, entirely ignored the twelfth instruction, as follows: "You are instructed that if one S. C. Rodman owned the south-west quarter and the west half of the south-east quarter of section 13, township 23, range 6 east, in Butler county, Kan., and that before the hay was cut from said land said S. C. Rodman had leased in writing to Douglass, Keyes & Co. said land, and said Douglass, Keyes & Co. had employed William Sprout to put up the hay on said land, then defendant would be entitled to the possession of all the hay cut from said above-described land." This instruction is all right as far as it goes, and, while there is some confusion in the minds of witnesses as to the sections and fractional parts of sections upon which the hay was cut, there is sufficient in the evidence to establish the fact that a part, at least, of the hay was cut upon land that had been leased by Rodman to Douglass, Keyes & Co.; but the jury ignored the fact, and both jury and court disregarded the instruction. There can be no reasonable contention but that, in any view that may be taken of the facts in this case, Douglass, Keyes & Co. were entitled to the possession of all hay cut and stacked before the 6th day of September, and that they were entitled to all hay cut from the lands leased by them from Rodman. The verdict of the jury and the ruling of the trial court on the motion for a new trial totally ignored their legal rights with reference to these propositions, and it was grievous error so to do. It is recommended that the judgment be reversed, and a new trial granted.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 43)

#### GRAY V. BRYANT.

(Supreme Court of Kansas. April 11, 1891.)

##### ACTION ON ACCOUNT—VERIFICATION—ANSWER.

1. Where a civil action is commenced before a justice of the peace upon an account for work and labor performed, which account is duly verified by affidavit, such account will be taken as true under section 84 of the justices' act, unless the denial of the same be verified by affidavit. *Railway Co. v. Gould*, 44 Kan. 68, 24 Pac. Rep. 352; *Baughman v. Hale*, (Kan.) 25 Pac. Rep. 856.

2. In such a case a defendant who has no set-off or counter-claim to file or prove cannot, in the absence of a verified denial, show that the account sued on is incorrect or has been extinguished by payment.

(Syllabus by the Court.)

Error from district court, Chase county; FRANK DOSTER, Judge.

*Madden Bros.*, for plaintiff in error. *Thomas H. Grisham*, for defendant in error.

HORTON, C. J. James Bryant, by his next friend, Joseph Bryant, commenced his action against Arthur Gray before a justice of the peace upon an account of six dollars for work and labor. The account was properly verified, although the affidavit annexed was evidently filed for the purpose of verifying its correctness, and also for showing the plaintiff was unable

to give security for costs on account of poverty. Upon the day set for the hearing before the justice Gray obtained a continuance for 15 days by filing his affidavit alleging the absence of material witnesses. Upon the day the action was tried before the justice, Gray failed to appear, and no witnesses were introduced in his behalf. The justice rendered judgment against him for six dollars and costs. Gray appealed to the district court, and after five months had expired the case was called for trial in that court, but, as Gray had filed no verified denial, judgment was rendered again against him for six dollars, with interest and costs. When the case was called for trial in the district court Gray attempted to deny the correctness of the account by offering to show that it had been paid, and also asked for a jury. This was refused, because the correctness of the account had not been denied by affidavit. Within the prior decisions of this court no error was committed in the rulings of the district court. *Railway Co. v. Gould*, 44 Kan. 68, 24 Pac. Rep. 352; *Baughman v. Hale*, (Kan.) 25 Pac. Rep. 856, (Feb. 7, 1891.) No attempt was made by Gray to allege or prove any set-off or counter-claim. He attempted to disprove the correctness of the verified account by showing that it had been extinguished or paid. Within the authority of *Baughman v. Hale*, supra, the court, under the circumstances of this case, committed no error in refusing to allow the defendant to file an affidavit denying the correctness of the account. The offer was made so late that the trial court did not abuse its discretion. The judgment of the district court will be affirmed. All the justices concurring.

(46 Kan. 67)

#### CHANDLER V. NEIL.

(Supreme Court of Kansas. April 11, 1891.)

##### EJECTMENT—SUFFICIENCY OF ANSWER.

Where, in an action of ejectment for a town lot by one who relies on a deed from M., the defendant answers, alleging a prior purchase of the lot from the agents of M. by verbal contract, on which he paid part of the purchase money at the time, and went into immediate possession of the premises, and alleges that subsequently, and within the period fixed for the delivery of the deed and payment of the balance of the purchase money he tendered such balance, and also alleges he has made lasting and valuable improvements on the lot, held, that such answer states a defense, and it is not error to overrule a demurrer thereto which avers that such answer does not state facts sufficient to constitute a defense.

(Syllabus by Strang, C.)

Commissioners' decision. Error to district court, Decatur county; LOUIS K. PRATT, Judge.

*A. G. McBride, May & McElroy*, and *G. Webb Bertram*, for plaintiff in error. *Wilson & Hays* and *S. D. Decker*, for defendant in error.

STRANG, C. Action in ejectment for lot 1, in block 6, in the city of Oberlin, Decatur county, Kan., and for mesne profits. The action was brought in the court below in the names of Henry S. Beardsley and Charles E. Chandler, plaintiffs, against J. R. Neil and L. E. Cross, defendants. It



was afterwards dismissed as to Cross, and we do not know where Beardsley fell out, nor why he was ever in, as he had conveyed the lot to Chandler before suit. However, he does not seem to be here. Neil answered, claiming superior title to the lot in controversy. Plaintiff demurred to the second amended answer of the defendant, which was overruled, and exception allowed. The case was tried before the court without a jury, and a general judgment was rendered in favor of the defendant. Plaintiff interposed a motion for new trial, which was overruled.

The first contention of the plaintiff in error is that the court erred in not sustaining his demurrer to the defendant's second amended answer. This demurrer alleged that the answer did not contain facts sufficient to constitute a cause of action. We think the court was right in overruling the demurrer. The answer states a defense. It sets up a purchase of the lot in question from J. P. Mathis, through his agents, Wilson and Adelman, by a verbal contract, at a time long prior to the sale of the lot by said Mathis to Beardsley, from whom Chandler obtained his title, and alleges part payment of the purchase money, a tender of the balance due on the contract, possession of the property, which is admitted by the plaintiffs, and his erection of lasting and valuable improvements thereon. The receipt mentioned by counsel for plaintiff in this connection was not a contract, but a simple receipt for money paid on a verbal contract, and beyond that it cuts no figure in the case. The defendant recovered on the strength of his title under the verbal contract with the agents of Mathis, and his possession thereunder. It is admitted that Wilson and Adelman were the agents of Mathis for the sale of the lot in controversy. The undisputed evidence in the case shows that they sold the lot to Neil for \$240, and gave him possession of the premises immediately. Neil paid \$20 down when the contract was made, and was to pay the balance when the deed was ready. Wilson thought it would take 30 days to get the deed round from Mathis. Before the 30 days were up, Neil tendered the balance of the money to the agents of whom he purchased, and afterwards to Mathis himself, and demanded a deed. What more could he have done? What more was required of him? Nothing. He was entitled to a deed, and, being entitled to a deed, the court was right in adjudging that he should have one, with his costs. The evidence shows bad faith on the part of Mathis. On the witness stand he says his refusal to execute the deed was because the sale was made on 30 days' time, when in fact the balance of the purchase money was tendered before the time fixed by his own agents at which they would be able to deliver a deed. Wilson's evidence undoubtedly discloses the real reason why Mathis refused to execute a deed, when he says upon the witness stand that Mathis asked him "if there was not some way for him to squirm out of the Neil contract." Mathis had learned that there was likely to be a railroad built into Oberlin, and he considered his lot worth more money, and

he wanted "to squirm out" of his sale to Neil. The judgment is fully sustained by the evidence. We find no error in the record, and therefore recommend that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 735)

# STRUTHERS v. FULLER et al.

(Supreme Court of Kansas. April 11, 1891.)

REVIEW ON APPEAL—FAILURE TO ASSIGN ERRORS  
—CONTINUANCE—ABSENCE OF WITNESS.

1. When errors complained of relate to matters occurring on the trial, for which a new trial was prayed, but the action of the court in overruling the motion for a new trial is not assigned for error, they cannot be considered in this court. *Carson v. Funk*, 27 Kan. 524; *Clark v. Schnur*, 40 Kan. 72, 19 Pac. Rep. 327,—cited and followed.

2. An affidavit supporting a motion for continuance on account of the absence of a material witness must show that the party has been sufficiently diligent in his efforts to obtain the witness. It must set forth specific acts of diligence, such as search and inquiry. It is not enough that the party alleges that he made diligent inquiry, without stating how, where, and of whom he inquired. *Kilmer v. Railroad Co.*, 37 Kan. 84, 14 Pac. Rep. 465, cited and followed.

(Syllabus by Simpson, C.)

Commissioners' decision. Error to district court, Shawnee county; JOHN GUTHRIE, Judge.

*Jetmore & Son* and *G. A. Huron*, for plaintiff in error. *D. E. Sowers* and *W. R. Hazen*, for defendants in error.

SIMPSON, C. This action was brought by John F. Struthers on the official bond of A. M. Fuller, as sheriff of Shawnee county, and Joab Mulvane, John Sutherland, and J. W. Stout, sureties on the bond, to recover the sum of \$1,182.25 damages for the unlawful conversion of plaintiff's goods and chattels, attached by the defendant, as such sheriff, in favor of Brown Bros. against and as the property of Schermerhorn Bros. The case was tried by a jury, and a verdict returned and a judgment rendered for the defendants. The plaintiff, having made an unsuccessful motion for a new trial, brings the case here for review. The errors assigned are: *First*, error of the court in overruling the motion of plaintiff for a continuance of the case; *second*, error in refusing to admit competent and material evidence offered by the plaintiff; *third*, error in admitting illegal and incompetent evidence for the defendants; *fourth*, the verdict is not sustained by the evidence; *fifth*, the verdict is contrary to law.

1. As to all the errors assigned, except the first, the record is in such condition that we cannot consider them. All these assignments of error are such as relate to matters occurring on the trial, and for which a new trial was asked, and the record must show that the action of the trial court overruling the motion for a new trial is assigned as error, or no question is properly raised for the consideration of this court. *Clark v. Schnur*, 40 Kan. 72, 19 Pac. Rep. 327, and cases therein.

2. The plaintiff below made a motion

for a continuance, and supported it by an affidavit reciting that he could not go to trial safely without the presence of a material witness, one S. B. Maxwell. That he expected to prove by said Maxwell that the plaintiff purchased in good faith from Schermerhorn Bros. the personal property for the unlawful conversion of which this suit is brought. That said witness will testify that in the month of August, 1887, he resided in the city of Topeka, at No. 520 Harrison street, where he was keeping a boarding-house, and that P. V. Schermerhorn boarded with him. That on the 11th day of August, 1887, at about 6 o'clock P. M., he had a conversation with Schermerhorn with reference to an item printed in the Evening Journal of that date, headed "Rather Mixed," and mentioned the fact that a writ of attachment had that day been levied upon the goods held by the plaintiff to satisfy a claim for over \$1,600, in which conversation he said to Schermerhorn that, according to this statement in the Journal, he did not sell out to Struthers, but made an assignment to him; to which Schermerhorn replied: "This is not true. I made a fair and square sale to Struthers, and have got all my pay;" whereupon Maxwell said to him, "How, then, can your creditors take Struthers' goods to pay your debts?" To which Schermerhorn replied, "I do not know." Of course the only pretense under which such statements could be admissible would be to impeach Schermerhorn; and it is alleged in the affidavit that Schermerhorn's deposition had been taken by the defendants to use on the trial. The affiant further alleged "that he had used due diligence to obtain the testimony of Maxwell at this time, and that he had made diligent search and inquiry as to the whereabouts of said witness in order to secure his evidence, and that on the 20th of February he caused a subpoena to be issued for him, which was returned on the 22d of February, indorsed 'Not found;' that he did not know until said subpoena was issued that Maxwell was not a resident of Shawnee county, but he is now informed and believes that he is a resident of Solomon City, Dickinson county, Kansas." The affidavit is in the usual form in all respects except as hereinafter stated. The sole object of the presence of this witness was to impeach Schermerhorn on some statement he had made in his deposition. This deposition had been taken in August, 1887, and this trial was had on the 23d of February, 1888. The only showing of diligence made by the plaintiff was that he had made inquiries and had a subpoena issued on the 20th of February, but he does not state the extent of the inquiries, when they were made, of whom they were made, or any other fact that would allow the court to determine whether or not a proper degree of diligence was exercised. Then he expressly states in the affidavit that he did not know until since the subpoena was issued that Maxwell was not a resident of Shawnee county. This shows that a witness he regarded as an important and material one to impeach a man whose deposition was taken in August,

1887, he made no inquiry for, or obtained no knowledge of, until after the 20th of February, 1888, when his cause was set down for trial on the 23d day of February, 1888. The trial court did not abuse its discretion in overruling the motion for continuance. We recommend that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 107)

STATE *ex rel.* SPURGEON, County Attorney,  
v. LOOMIS, Mayor, *et al.*

(*Supreme Court of Kansas.* April 11, 1891.)

PETITION FOR INJUNCTION—VERIFICATION.

In an action for an injunction it is not necessary that the petition should be sworn to, if the application upon which the injunction is asked is properly verified.

(*Syllabus by Green, C.*)

Commissioners' decision. Error to district court, Stanton county; A. J. ABOTT, Judge.

*E. B. Spurgeon and Brown, Blerer & Cotteral*, for plaintiff in error. *S. N. Wheeler and Culhoun & Garwood*, for defendants in error.

GREEN, C. This was an action for an injunction in the district court of Stanton county to restrain the officers of Johnson City from an alleged misappropriation of the funds of the city. In the absence of the district judge from the county, the probate judge granted a temporary injunction upon an application duly verified. A motion was afterwards made before the district judge to dissolve this temporary order made by the probate judge, which was sustained upon the ground that the petition upon which the injunction was asked was not verified. It is admitted by the record that the petition was not sworn to, but that the application which was presented to the probate judge was properly verified. The only question, then, presented for our determination is whether a verification of the application alone is sufficient. We think it is. The application for an injunction in this case stated that the relator had filed a petition in the district court for an injunction; that a copy of the petition was attached to the application and made a part of the same. The verification was by the county attorney and another person, and each swore that he had read the application and the exhibit thereto attached, and that they were true. We are of the opinion that this is a substantial compliance with sections 238 and 239 of the Code of Civil Procedure. The verification really covered the allegations of the petition as well as the application. We think it was manifest error for the court to dissolve the injunction upon the sole ground that the petition was not sworn to, when there was an application properly verified presented to the judge granting the remedy which satisfactorily established the plaintiff's equities. We recommend that the order of the district judge dissolving the preliminary injunction be set aside, that the restraining order heretofore granted

by the probate judge be continued until otherwise disposed of, and that the cause be remanded for further proceedings.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 24)

GETTO *et al.* v. FRIEND *et al.*

(*Supreme Court of Kansas.* April 11, 1891.)

INTEREST ON JUDGMENT—MECHANIC'S LIEN—EXTENT.

1. Section 5, c. 164, Laws 1889, provides: "When a rate of interest is specified in any contract, that rate shall continue until full payment is made, and any judgment rendered on any such contract shall bear the same rate of interest mentioned in the contract; \* \* \* but in no case shall such rate exceed ten per cent. per annum;" but the concluding words of this section have no application to a contract made on the 7th day of June, 1887, that bears interest at the rate of 12 per cent. per annum, and applies only to contracts made after the date when said section took effect. It was material error for the trial court to render a judgment bearing interest at only 10 per cent. per annum on a contract for 12 per cent., dated June 7, 1887.

2. In actions to foreclose mechanics' liens for work done and for material furnished under a contract with one who has an executory contract for the purchase of a city lot, and is in possession thereof, the lien of the mechanic or materialman must be measured by the extent of the equity of the purchaser under the executory contract.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error to court of common pleas, Sedgwick county; JACOB M. BALDERSTON, Judge.

*Moore & Douglass and Sankey, Campbell & Auldson*, for plaintiffs in error. *Wilson & Brubacher, Dale & Wall, Hatton & Rugles, and Schoonover & Coates*, for defendants in error.

SIMPSON, C. Four actions were commenced in the court below to foreclose so many mechanics' liens upon property known as "Lot No. 13, on Goethe Avenue, in Getto's Second Addition to the City of Wichita." All parties holding mortgages upon the property were made defendants in these actions. These suits were consolidated, tried by the court, the order of priority of all liens was determined, and the final decree established the rights of all parties. Two of the parties bring questions affecting their rights to this court for review. The material facts are that on the 23d day of May, 1888, Peter Getto, who was the owner of said lot No. 13, sold by contract said lot to A. H. Peavey for the sum of \$1,100. Peavey paid \$50 cash, and agreed to give his note, due in one year, for the balance of the purchase money, secured by a mortgage on the lot. It was agreed between Getto and Peavey that the latter should build a house on the lot and that Getto should permit Peavey to obtain a loan on the lot, and give a first mortgage as security therefor, and that Getto's mortgage for the purchase money should be subject to the mortgage given by Peavey to obtain the money with which to build a house. Acting on this agreement, Peavey secured a loan from one George C. Strong to secure which he executed two mortgages to Strong,—one

for \$1,000, and one for \$150. Getto having previously executed a deed for the lot to Peavey, and delivered it to Strong, Peavey and wife executed and delivered mortgages to Strong and Getto; the mortgage to the latter reciting that it was subject to mortgages to Strong for \$1,150. The deed from Getto to Peavey, and the mortgages from Peavey and wife to Strong, were deposited for record on the 4th day of June, at 5:20 P. M. The mortgage from Peavey and wife to Getto was deposited for record the same day at 5:30 P. M. On this state of facts, omitting the details as to the mechanic's liens, the trial court found as follows: "The court finds that the said defendant A. H. Peavey is indebted to the said J. Friend, plaintiff, in the sum of one hundred six and 33-100 dollars, (\$106.33.) That he is indebted to said plaintiff, Robert Carson in the sum of thirty-nine and 51-100 dollars (\$39.51.) That he is indebted to the said plaintiff H. C. Hawkins thirty dollars (\$30.00.) That he is indebted to the said plaintiff C. F. Hawley in the sum of forty-seven and 64-100 dollars (\$47.64.) That he is indebted to Oliver Brothers in the sum of five hundred sixty-seven and 30-100 dollars (\$567.30.) That he is indebted to A. J. Hurst in the sum of seventy-four and 38-100 dollars, (\$74.38.) That he is indebted to Trimble Brothers & Threlkeld in the sum of twenty-nine and 96-100 dollars (\$29.96.) That he is indebted to Goodyear & Co., in the sum of forty-three and 42-100 dollars (\$43.42.) That he is indebted to Peter Getto in the sum of \$1,270.50 That he is indebted to James Melrose in the sum of \$1,250. That he is indebted to Coleman Rogers in the sum of \$187.50. That all of said sums except the three last named are for work, labor, and materials furnished said A. H. Peavey by said named parties for the purpose and use in the erection of a certain building on the property in controversy, to-wit, lot thirteen, (13,) on Goethe avenue, in Getto's Second Addition to the city of Wichita, in Sedgwick county, Kansas, and that said parties all filed their proper and verified statements of said work, labor, and materials in the office of the clerk of the district court of Sedgwick county, Kansas, in the manner and within the time provided by law in relation thereto. That at the time of the commencement of said actions to foreclose said mechanics' liens all of said parties aforesaid had a valid and existing lien upon the premises described as aforesaid to the amount of their respective claims aforesaid. That the said last three named parties, at the time of the commencement of this action, had a lien upon said premises aforesaid to the amount of their respective claims by virtue of mortgages thereon executed by said A. H. Peavey to themselves or their assignors. The court further finds, as to the priority of said liens, that the mortgage executed by said A. H. Peavey to said Peter Getto should be declared a first and prior lien on the premises in controversy, and that the lien of said J. Friend, Robert Carson, H. C. Hawkins, C. F. Hawley, Oliver Brothers, Trimble Brothers & Threlkeld, A. J. Hurst, and Goodyear & Co. should be declared a

second lien upon said premises; that the mortgage given to George C. Strong, and assigned to Melrose, should be declared a third lien upon said premises; and that the mortgage given to George C. Strong, and assigned to Coleman Rogers, should be declared a fourth lien upon said premises; that said James Melrose should be substituted to the rights of said Peter Getto in said first mortgage lien to the amount of \$1,000, with interest thereon at the rate of twelve per cent. per annum from the 1st day of June, 1887; and that said Coleman Rogers should be substituted to the rights of said Peter Getto in the balance of said first mortgage to the amount of \$20.50, with interest thereon at the rate of twelve per cent. per annum from the 1st day of June, 1887, and the balance of said Coleman Rogers' interest in said mortgage should be declared to follow the liens of all said parties who are heretofore declared to be second lienholders on said premises; that said Peter Getto's mortgage should be declared a last lien upon said premises, thereby following the interest of all the said parties claiming a lien upon said premises as aforesaid. The court further finds that each of said mortgages held by Getto, Melrose, and Rogers has the words 'appraisement waived' therein inserted; and that said parties last named are now entitled to have said mortgages foreclosed; and the right to enter a further judgment for the foreclosure of said mortgages, or any of them, for the sale of said property thereunder, without appraisement, is hereby expressly reserved to said Getto, Melrose, and Rogers, respectively, in case the said property should fail to sell, within six months from the date hereof, for two-thirds of the appraised value thereof under the terms of the present judgment. It is therefore considered, ordered, and adjudged by the court that said plaintiff J. Friend have and recover judgment against said A. H. Peavey in the sum of one hundred and six and thirty-three one-hundredths dollars, (\$106.33,) with six per cent. from this date." To this judgment exceptions were saved by Getto and Rogers, and they bring the questions affecting their interests to this court for review. Getto claims that the trial court erred in deciding that his purchase-money mortgage was a junior lien to the mortgages of Melrose and Rogers and the mechanics' liens.

1. The facts disclosed by the record in relation to the mechanics' liens are as follows: It is admitted in the answer of Getto that he sold said lot No. 13 to A. H. Peavey on or about the 1st day of May, 1887. Hannah, under contract with Peavey, commenced to build a stone foundation for a large house on the 17th day of May, 1887. Peavey bought lumber for the construction of a barn on the lot from Oliver Bros. early in May. These facts show possession of the lot by Peavey in pursuance of his contract of purchase from Getto, and are sufficient of themselves to sustain the priority of the mechanics' liens on the equity of Peavey, as they attach from the time of the commencement of the building, by the express terms of the stat-

ute, and as declared in the case of *Thomas v. Mowers*, 27 Kan. 265. Of course, the priority of these liens on the equity of Peavey cannot be successfully controverted; but how they are affected by the subsequent conveyances and mortgages is the serious question with which we have to grapple, and the case cited above does not help us in any respect. The case of *Seltz v. Railway Co.*, 16 Kan. 133, is a somewhat instructive one. In its main features it resembles the one we are considering. In that case, as in this, the contract for labor and materials was made with the owner of the equitable title. There had been only a partial payment made of the purchase money by the holder of the equitable title. The original contract for purchase and sale of the premises was in parol. At the time labor was performed and material furnished, possession was shown under the verbal contract. A mortgage was subsequently executed to secure the balance of the purchase money, as in this case. The cases differ in this: in one, a conveyance was made vesting the legal title in the debtor; in the other, no conveyance of the legal title was made. On this state of facts this court say, *arguendo*, "that the mechanics' liens operated upon the whole of the estate which the person procuring the labor and the materials may have in and to the property for which he procures the same, whatever may be the character of the estate, but that such lien cannot operate upon anything more than such estate; and, as far as it does operate, it is the paramount lien upon the enhanced value given to such estate by the labor and materials." The law provides, (section 630, Code:) "Such liens shall be preferred to all other liens or incumbrances which may attach to or upon such land, buildings, or improvements, or either of them, subsequent to the commencement of such building." Another case that must not be overlooked in the consideration of this one is that of *Lumber Co. v. Schweiter*, 44 Kan. —, 25 Pac. Rep. 592. Some of the material facts in that case are that Schweiter sold Jones a lot on the 29th day of May, who agreed to build a house on it. When the house was inclosed, Schweiter was to convey the lot to Jones, and Jones should have the privilege to place a mortgage thereon, which should be a first lien, and should execute a mortgage to secure balance of purchase money; and until the execution, delivery, and record of the deed and mortgage Jones should keep the lot clear of all liens, taxes, and judgments. It was agreed between Schweiter and Jones that the title to the lot, both legal and equitable, should remain in Schweiter until the conveyance and mortgages were made. On the 2d of May, Jones contracted with the Chicago Lumber Company for the lumber and material with which to build a house on the lot, and a delivery of the material was begun on that day, and completed on the 27th of June. On the 20th of May, Schweiter executed and delivered a deed to Jones of the lot, and at the same time Jones and wife executed a mortgage for money borrowed, and for the balance of the purchase money of the lot. All these instruments

were recorded on the 23d of May. On September 9th, the lumber company filed its statement, claiming a lien for the lumber and materials used in the construction of the house; and at the trial the district court found that the mortgage securing the borrowed money was the first lien, Schweiter's mortgage the second, and the lumber company's the third. The lumber company brought the case to this court, but the judgment below was affirmed; great stress being laid in the opinion on the fact that Schweiter retained both the legal and equitable title to the lot until the deed and mortgages were executed. While there was no express stipulation between Getto and Peavey in this case to that effect, the agreement was that Peavey should execute a mortgage to secure the building fund, which by the consent of Getto should be a first and superior lien to that of Getto for the balance of his purchase money. By all the ordinary rules of law, those furnishing material to and doing work for Peavey were bound to ascertain the nature and extent of his equity in the lot. To the extent of that equity, whatever it may be, the materials furnished and the work performed is a lien dating from the commencement of the building, and prior to all subsequent liens or incumbrances; but in the language of Justice VALENTINE in the case of *Seitz v. Railway Co.*, 16 Kan. 183, "a lien upon an estate cannot be greater than the estate itself; a stream cannot rise higher than its fountain." It seems, therefore, that the operation of the mechanics' liens must be limited to the equity of Peavey in the lot, and that the trial court erred in determining the priority of liens; the true order being, so far as the legal estate is concerned—*First*, the mortgage to Melrose; *second*, the mortgage to Rogers; *third*, the mortgage to Getto; *fourth*, the mechanics' liens; and upon the equitable estate of Peavey, first the mechanics' liens, and the mortgages following them in the order above stated.

2. Another error complained of by both Getto and Rogers is that the trial court rendered judgments in their favor to bear interest at the rate of 10 per cent. per annum only, when the notes upon which the judgments are founded bear interest at the rate of 12 per cent. per annum. These notes were secured by mortgages, and bear date on the 1st of June, 1887, payable in 2½ years after date. The law in force at the time of the execution of these notes was section 6, c. 51, Comp. Laws 1885, and it provided: "When a rate of interest is specified in any contract, that rate shall continue until full payment is made; and any judgment rendered on any such contract shall bear the same rate of interest mentioned in the contract, which rate shall be specified in the contract; but in no case shall such rate exceed twelve per cent. per annum." Intermediate the date of the note and the trial of this case, the legislature changed the section of the law above quoted so as to make the concluding words read, "but in no case shall such rate exceed ten per cent. per annum." See section 5, c. 164, Laws 1889. The trial court provided in its decree that

the judgments rendered on the notes of date June 1, 1887, should bear interest at the rate of 10 per cent. per annum. The contention of counsel for plaintiff in error is that the amendment of section 5 by the legislature of 1889 only operates on contracts made after the amendment became the law, and could not impair the obligation of contracts made before that date. This contention is abundantly sustained by repeated decisions of the supreme court of the United States, and our plain duty is to follow these adjudications. These decisions are constructions of a provision of the constitution of the United States that declares that "no state shall pass any law impairing the obligation of contracts." The plith of all these decisions is clearly expressed by a quotation from the case of *Edwards v. Kearzey*, 96 U.S. 595. Mr Justice SWAYNE, speaking for the court, says: "The remedy subsisting in a state when and where a contract is made, and is to be performed, is a part of its obligation; and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is therefore void." This was said in respect to a provision of the constitution of the state of North Carolina that exempted personal property of a debtor to the value of \$500 from sale under execution or other final process issued for the collection of any debt; the court holding that the exemption was not valid as regards contracts made before the adoption of the constitution of that state. This rule applies to all state legislation that affects the validity, construction, discharge, and enforcement of contracts made before such legislation took effect. *Von Hoffman v. City of Quincy*, 4 Wall. 535. "One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree, manner, or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force." *Bank v. Sharp*, 6 How. 301. Returning to the facts in this case, it cannot be seriously doubted but that the reduction of the interest on the notes by the decree of the trial court was a material impairment of the obligation of the contracts. If it is once conceded that the legislature of the state, and the courts of the state by virtue of such legislation, can reduce the rate of interest specified in the contract, then there is no limit to such power. In this case 2 per cent. per annum was taken from the rate agreed upon. If this can be done, there is then no legal objection to a reduction of 10 per cent. per annum. If the obligation to pay interest can be impaired, why cannot the obligation to pay a part of the principal be also impaired? The legislature of the state reduced the maximum rate of interest that could be recovered on any contract from 12 to 10 per cent. by this amendment; but we do not suppose that it was within the legislative intent to affect contracts made before the passage of the amended law. It follows that on all contracts made prior to the amendment of 1889 the

old law governs, and to those made after that date the new law applies. The trial court erred in fixing the rate of interest that the judgment should bear from the time of its rendition at 10 per cent. The judgment creditor is entitled to the rate specified in the contract. There was also error in adjusting the liens; and for these errors we recommend that the judgment be reversed, and the cause remanded to the trial court to render a judgment as indicated in this opinion.

**PER CURIAM.** It is so ordered; all the justices concurring.

(44 Kan. 618)

**STATE V. DOUGLASS.**

(Supreme Court of Kansas. April 11, 1891.)

**CONSENTING TO COMMISSION OF CRIME—EVIDENCE OF CHARACTER.**

1. A person consenting to a thing which is innocent in itself does not thereby commit a public offense, although the thing may at the time appear to him to be a public offense, and although he may at the time believe the same to be a public offense.

2. Mentally consenting to the commission of a crime, where no expressed consent, either by word or act, is given, does not make the person consenting guilty of any offense.

3. Evidence in a criminal case, as to the good character of the defendant, may be introduced for the purpose of disproving guilt, and if upon the whole of the evidence introduced, including that of the good character of the defendant, the jury entertain a reasonable doubt as to the defendant's guilt, he should be acquitted.

(Syllabus by the Court.)

Appeal from district court, Shawnee county; JOHN GUTHRIE, Judge.

David Overmeyer, for appellant. L. B. Kellogg, Atty. Gen., and R. B. Welch, for the State.

**VALENTINE, J.** The defendant, William Douglass, was prosecuted criminally in the district court of Shawnee county, upon information, under sections 103 and 106 of the act relating to crimes and punishments, for willfully and feloniously, on October 22, 1888, placing an obstruction, a railroad tie, upon the railroad track of the Chicago, Kansas & Nebraska Railway, St. Joseph & Iowa Railroad Company, lessee, about four miles west of the city of Topeka. He was tried before the court and a jury in January, 1890, and was convicted, and was afterwards sentenced to imprisonment in the penitentiary for the term of five years from February 15, 1890. Afterwards he appealed to the supreme court, and on November 8, 1890, the judgment of the district court was affirmed. *State v. Douglass*, 44 Kan. —, 24 Pac. Rep. 1118. In due time a motion for a rehearing was filed, and it is now presented to this court for consideration.

The defendant claims that the court below erred in giving the following, among other, instructions to the jury: "*Eighth.* If you believe from the evidence that another person than the defendant willfully placed the railroad tie on the rails or track of the railroad described in the information on or about October 22d, 1888, in this county,—actually placed the tie or solid piece of timber on the said rails or track of the

said railroad,—and you further find from the evidence, beyond a reasonable doubt, that the defendant was present when the tie or timber was placed on the railroad track, and encouraged, consented to, aided, or advised such other person to place said obstruction on the said railroad track, then the defendant will be equally guilty as if he had willfully placed the obstruction on the track himself, with his own hands. *Ninth.* If you believe from the evidence that the special agent, Thompson, or any agent of the railroad company, had reason to believe that the defendant on October 22, 1888, intended to go up the railroad from Topeka, and that it was suspected that the defendant might place an obstruction on the railroad, in such case it would be proper for the agent of the railroad to send agents or servants along the railroad track to observe and watch the movements of the defendant; such diligence on the part of the railroad company was not only lawful, but highly commendable. *Tenth.* If you believe from the evidence that the defendant and one Spenk, on the afternoon of October 22, 1888, started, in company with each other, from Topeka to the point on the railroad where it is alleged that the obstruction was placed on the railroad track, and that said Spenk was in the employment of the railroad company, or had been in the employment of the company, and that at some time before the obstruction was placed upon the railroad, if you find it was placed on the railroad track as charged in the information, the said defendant agreed or had an understanding that an obstruction should be placed on the track of the railroad by either of them, or both together, and you find from the evidence beyond a reasonable doubt that the defendant placed the said obstruction on the railroad track at the time and place and in the manner charged in the information, or that Spenk placed the said obstruction on the railroad as charged in the information with the consent of the defendant, or that the defendant counseled, aided, or abetted Spenk in placing the obstruction on the track as charged, then it is your duty to find the defendant guilty as charged, notwithstanding you may believe that Spenk was in the employ of the railroad company." *Twelfth.* If you believe from the evidence that on the afternoon of October 22, 1888, the defendant was in a state of intoxication, still this would not constitute a defense of the offense charged in the information, if the offense was committed by the defendant or by his consent, unless the defendant was in such a state of stupefaction as to be unconscious of right or wrong, and then the defendant would not be excusable, if you find from the evidence, beyond a reasonable doubt, that the defendant started from Topeka with the formed plan or design to accomplish the offense charged in the information, and in pursuance of such plan or agreement the defendant started from Topeka alone or with another, and placed the obstruction on the railroad track as charged, or counseled, aided, abetted, or advised another to place the obstruction on the track of the rail-

road. *Thirteenth.* There has been evidence offered by the defendant respecting his good character as a peaceable, orderly, law-abiding citizen, and such evidence is competent and proper to be considered by the jury in connection with other evidence in the case in determining the guilt or innocence of the defendant of the matters charged against him; and such evidence is particularly important for the defendant in cases where there may be a doubt as to the guilt, and in all such cases the question of character should resolve such doubt, whatever it may be, in favor of the defendant; but in all cases, where all the evidence clearly shows guilt beyond a reasonable doubt, then such former good character can be of little value."

The principal objections urged against the foregoing instructions are as follows: *First.* It is claimed that these instructions told the jury, in effect, that if the obstruction was placed upon the railroad track by some person other than the defendant, and if the defendant was present and "consented to" the same, (see eighth instruction,) or whether he was present or absent, if the same was "done with the consent of the defendant," (see tenth instruction,) "or by his consent," (see twelfth instruction,) he should be found guilty of the offense charged against him. *Second.* It is further claimed that the twelfth instruction, with regard to intoxication, does not correctly state the law. *Third.* It is also claimed that the thirteenth instruction, with regard to good character, is erroneous. We shall consider these matters in their order.

Evidence was introduced on the trial tending to prove, among others, the following facts: Prior to October 22, 1888, the defendant believed that he had a grievance as against the railroad company. He claimed that he had discovered an obstruction upon the railroad track, had removed it, had reported the same to the railroad company, and that the railroad company had never offered to pay him anything therefor, but had always afterwards treated him with distrust and suspicion; and in fact the company had so treated him. C. H. Thompson and George Spenk were in the employment of the railroad company, and, among other things, it was their duty to watch the actions of the defendant. On October 22, 1888, Spenk invited the defendant to go with him up the railroad track west of the city of Topeka. The defendant consented. Spenk purchased a bottle of whiskey to take along with them, and they went. But before going Spenk informed Thompson with respect to their contemplated trip, and Thompson then determined to go out that way too. Thompson then applied to the sheriff of the county to detail an officer to go along with him, Thompson, and the sheriff selected Albert McLean, a deputy constable. The defendant and Spenk started soon after noon of that day. They rode a part of the way and walked the remainder. They traveled until they arrived at or near a bridge on the railroad about four miles west of Topeka, when they separated. Thompson and McLean traveled with a horse and buggy, and carried

with them arms and handcuffs. They probably arrived within the vicinity of the bridge prior to the arrival of the defendant and Spenk, when they stopped. Two colored boys, named Dennis, were also seen near this bridge. Thompson threw a railroad tie off the bridge, but as to who put it on there was and is no direct evidence. Very soon afterwards Thompson, McLean, and the defendant came together very near the bridge, and Thompson and McLean arrested the defendant, and put the handcuffs on him. What became of Spenk is not shown, and he did not testify in the case. He was not present when the arrest was made. The two colored boys were still near the bridge, and one of them testified on the trial. Thompson, McLean, and the defendant also testified on the trial. The defendant testified that he did not put the tie on the railroad bridge or track, and that he did not know anything about it. There was much other testimony, but it is not necessary, for the purposes of the question now under consideration, that we should state it. The foregoing instructions, with regard to the defendant's consenting to the tie being placed on the railroad track, were evidently given upon the hypothesis that the tie may have been placed upon the railroad track by Spenk, and that the defendant consented thereto. One of such instructions was given upon the hypothesis that the defendant may have been present when the tie was placed upon the railroad track, and the others were given upon the hypothesis that he may have been present or may have been absent, and that he would be guilty of the offense charged against him, if he consented thereto, whether he was present or absent. The eighth instruction speaks of the defendant as being guilty if he was present and "consented to" the transaction. The tenth instruction uses the words, "or that Spenk placed the said obstruction on the railroad as charged in the information, with the consent of the defendant," without reference to the defendant's presence or absence; and the instruction is also to the effect that the defendant should be found guilty in such a case, "notwithstanding you [the jury] may believe that Spenk was in the employ of the railroad company." The twelfth instruction states that intoxication "would not constitute a defense of the offense charged in the information, if the offense was committed by the defendant, or by his consent, unless the defendant was in such a state of stupefaction as to be unconscious of right or wrong," and the consent here spoken of is without reference to the defendant's presence or absence. If, however, Spenk actually committed a crime by placing a tie upon the railroad track, and if the defendant had knowledge of Spenk's actions or intended actions, and that Spenk intended to commit or was committing a crime, and if the defendant consented thereto, by any word, act, sign, or motion, in such an intelligent and affirmative manner as to give encouragement to Spenk to commit the offense, the defendant would also be guilty equally with Spenk, whether the defendant was present or



absent at the time. Two questions, among others, are involved in these instructions: *First*. Did Spenk commit any public offense? *Second*. Was the consent of the defendant, if he ever gave any consent, of that open or expressed kind as would give encouragement to Spenk to commit the offense? The defendant's theory, as expressed by his counsel, is that Thompson and Spenk were *pseudo* detectives, in the employment of the railroad company, who combined to lead the defendant into doing something that would result in his being convicted of a crime and sent to the penitentiary; that what they did was done as employees of the railroad company, ostensibly for its benefit, and not for its injury, nor for the injury of any one except the defendant; that it was one of them, Spenk, who placed the tie upon the railroad track, and as he did the same as an employee of the railroad company, which made the act virtually that of the railroad company, no offense was committed, either with or without the consent of the defendant, or to which the defendant could consent; and the defendant further claims that, even if a crime was committed by Spenk, still that the defendant did not give any consent thereto, by any word or act, and therefore that he could not be guilty of committing any offense, even if he at the time knew that Spenk intended to commit or was committing a crime, and even if he at the time mentally consented thereto. If Spenk was actually an employee of the railroad company, and if he placed such tie upon the railroad track as such employee, and had no intention whatever of doing anything to injure the railroad company or its passengers or freight, and expecting such tie soon to be removed from the railroad track, Spenk would not have committed any offense, and the defendant, by consenting to his acts, if he did consent, would only have been consenting to innocent conduct. A railroad company certainly has a right to place an obstruction upon its own track, where no wrong is intended or could reasonably be expected. In this state our statutes provide that "any person who counsels, aids, or abets in the commission of any offense may be charged, tried, and convicted in the same manner as if he were a principal." Crim. Code, § 115. But we have no statute that makes the consenting to a thing, which is innocent in itself, an offense, although the person consenting thereto may have believed the thing to be an offense; nor have we any statute making the consenting to even the commission of a crime an offense, unless the consent amounts to the counseling, aiding, or abetting in the commission of such crime. Hence, where a thing is not an offense at all, a party cannot be guilty of committing an offense by merely consenting thereto; and, even where the thing is an offense, a party can be guilty of committing an offense by consenting thereto, only where his consent is of that affirmative and expressed character which amounts to a counseling, aiding, or abetting in the commission of the offense. "He must do or say something showing consent to the felonious purpose,

and must contribute to its execution." 1 Amer. & Eng. Enc. Law, 63, 64. That a person consenting to a thing, innocent in itself, does not thereby commit a public offense, although the thing may at the time appear to him to be a public offense, and although he may at the time believe the same to be a public offense, see the following cases: *Allen v. State*, 40 Ala 334; *Speiden v. State*, 3 Tex. App. 156; *Reg. v. Johnson*, 1 Carr. & M. 218, 41 E. C. L. 123; *State v. Jansen*, 22 Kan. 498, 505, et seq. And that mental consent to a crime, where no expressed consent is given by any word or act, does not make the person consenting guilty of any offense, see the following authorities: *Clem v. State*, 33 Ind. 418; *State v. Cox*, 65 Mo. 29; *White v. People*, 81 Ill. 333; *State v. Hildreth*, 9 Ired. 440; 1 Whart. Crim. Law, §§ 211, 211a, 211d.

In the case of *Clem v. State*, supra, the trial court instructed the jury, among other things, as follows: "If she [the defendant] was present at the time and place of the murder, in any way assisting, aiding, encouraging, or contributing towards the murder, she would be guilty as a principal in the crime; so, if the murder was perpetrated with her knowledge and consent or connivance, she is a principal." Pages 430, 431. Upon this instruction the supreme court commented as follows: "Question is made as to the correctness of the last clause of this instruction. When the jury was told that if the defendant 'was present at the time and place of the murder, in any way assisting, aiding, encouraging, or contributing towards the murder, she would be guilty as a principal in the crime,' language was employed embracing every possible case in which she could be guilty as a principal in the second degree. The definition given was full and exhaustive. Nothing could be added to it without error, though it might properly enough be illustrated and explained, that the jury might understand fully the meaning of the language employed, and how to apply it to the facts of the case on trial. This, if done correctly, might be an aid to the jury, and would be entirely unobjectionable." Page 431. "Under this instruction the jury would understand that if they believed from the evidence that the prisoner was present when the murder was committed, and was willing or desirous that the bloody deed should be done, they must find her guilty, though that desire had been kept by her a secret, and was entirely unknown to him who inflicted the deadly blow. It is plainly not the law that one can be guilty of murder without overt act, who by neither word nor gesture has done anything to contribute to the commission of the homicide, or to assist, encourage, or evince approval of it at or before the fact, and of whom it only appears that he was present and knew of the crime and mentally approved it. The silent thought, however wicked in view of the searcher of hearts, is not a crime against our laws, but is left by them to another than a human tribunal." Page 432. In the case of *State v. Cox*, supra, it was held that "the mere mental

approval by a by-stander of a murder committed in his presence does not make him an accomplice in the murder." In the case of *White v. People*, supra, the supreme court of Illinois used the following language: "By the second instruction the jury are told that one who stands by when a crime is committed in his presence by another, and consents to the perpetration of the crime, is a principal in the offense, and must be punished as such. The law is that one who 'stands by, and aids, abets, or assists' \* \* \* the perpetration of the crime,' is an accessory, and 'shall be considered as principal,' etc. Rev. St. 1874, p. 393, § 274. There is a plain distinction between 'consenting' to a crime and 'aiding, abetting, or assisting' in its perpetration. Aiding, abetting, or assisting are affirmative in their character. Consenting may be a mere negative acquiescence, not in any way made known at the time to the principal malefactor. Such consenting, though involving moral turpitude, does not come up to the meaning of the words of the statute. The words of the statute are stronger than those of the instruction." Page 337.

It is now the opinion of this court that the court below erred in its use of the words "consent" and "consented" in the foregoing instructions, and for such error its judgment must be reversed. At the time of our former decision in this case we entertained a different opinion, but the argument on the motion for a rehearing has convinced us that we were in error. The words "consent" and "consented" should be eliminated from the instructions.

The question with reference to intoxication we do not think, under the evidence in the case, requires any comment, as it does not appear from the evidence that the defendant was intoxicated at all at the time when the tie was placed upon the railroad track or at the time when it was taken off.

With respect to character, the thirteenth instruction of the court below is perhaps subject to criticism. Evidence in criminal cases of the good character of the defendant may be introduced for the purpose of disproving guilt, and if, upon the whole of the evidence introduced, including that of the good character of the defendant, the jury entertain a reasonable doubt as to the defendant's guilt, he should be acquitted. 3 Amer. & Eng. Enc. Law, 110, 111. Our former judgment, affirming the judgment of the district court, will be set aside, and the judgment of such court will be reversed, and cause remanded for a new trial. All the justices concurring.

(46 Kan. 294)

STATE ex rel. KELLOGG, Attorney General,  
v. PLYMELL.

(Supreme Court of Kansas. April 11, 1891.)

COUNTY COMMISSIONERS — ELIGIBILITY — HOLDING  
TWO OFFICES.

1. In this state a person holding a city office cannot hold at the same time the office of county commissioner.

2. The evidence in this case examined, and held to show that the defendant was holding the office of city clerk of West Plains, a city of the

third class, at the time he qualified and entered upon the discharge of the duties of the office of county commissioner of Meade county.

(Syllabus by the Court.)

Original proceeding in *quo warranto*.

On the 29th day of April, 1890, the following petition, omitting caption, was filed in this court: "Now comes L. B. Kellogg, attorney general of the state of Kansas, and gives the court to understand and be informed that at the general election held November 6, 1889, in the third commissioners' district in and for the county of Meade, the defendant, C. M. Plymell, was a candidate for the office of county commissioner for said district, and received a majority of the votes cast in said district for said office; and upon the canvass of the returns of said election by the board of county commissioners of said county, sitting as a canvassing board, the defendant, Plymell, was declared to have been elected to said office; and in the month of January, 1890, the defendant entered upon the discharge of the duties of said office, and has ever since continued to exercise the duties pertaining to said office, and is still exercising the powers, duties, and privileges appertaining thereto. The attorney general further gives the court to understand and be informed that at the time said election was held, at the time said canvass was made, and at the time the defendant entered upon the discharge of the duties of said office, the defendant was ineligible to be elected to said office, and is ineligible to hold the same, for the reason that at the time said election was held, and at the time the defendant pretended to qualify as such county commissioner, and at the time he pretended to enter upon the discharge of the duties of said office, the defendant was the duly appointed and qualified city clerk of the city of West Plains, and was holding said office, and performing the duties thereof, the said city then and there being duly incorporated as a city of the third class, under and by virtue of the laws of the state of Kansas. Wherefore the said attorney general demands judgment against the defendant, C. M. Plymell, that he be ousted from said office, and that the plaintiff have and recover of and from the defendant its costs in this behalf expended. L. B. KELLOGG, Attorney General. WEBB & WEBB and F. B. LINDSAY, of Counsel." On the 11th day of January, 1891, the defendant filed the following answer, omitting caption: "For answer to the petition of the said plaintiff, defendant says—*First*. Defendant admits that at the general election held November 6, 1889, in the third commissioners' district in and for the county of Meade, he received a plurality of the votes cast in said district for the office of county commissioner, and further admits that he received a certificate of election as said commissioner for the third district of said county, and further admits that he entered upon the discharge of the duties of said office in the month of January, 1890, and has ever since exercised, and is now exercising, the powers, duties, and privileges appertaining to said office. *Second*. And said defendant, for a second defense to said petition, says that at the

time of the general election in Meade county, Kansas, held November 6, 1889, the city of West Plains was pretending to have been organized and was acting as a duly-incorporated city of the third class, but that as a matter of fact the city of West Plains was not duly-incorporated as a city of the third class. And said defendant further admits that at the time of said general election he was appointed and acting as said city clerk of said pretended city of West Plains, Kansas, and had qualified as said clerk before said election; but this defendant denies that at the time he qualified as county commissioner, and at the time he entered upon the discharge of the duties of his office as said commissioner, he was the appointed and qualified city clerk of said pretended city of West Plains. And this defendant further says that subsequent to said election held in said county on the 6th day of November, 1889, he resigned the office of city clerk of said pretended city of West Plains, Kansas, at an open meeting of the mayor and council of said pretended city, and that his resignation as city clerk of said pretended city was then and there duly accepted. And said defendant further says that at no time since his resignation, and at its acceptance, which occurred on or about the 20th day of November, 1889, was he reappointed to the said office of city clerk of said pretended city. *Third.* And said defendant, for a third ground of defense to said petition, says that he denies that the said city of West Plains, Kansas, was at the time of said general election held in said county on the 6th day of November, 1889, or at any time subsequent thereto, a duly-incorporated city of the third class under and by virtue of the laws of the state of Kansas. *Fourth.* And said defendant, for the fourth ground of defense to said petition, says that he denies each and every other allegation in said petition not hereinbefore specifically denied. C. M. PLYMELL, Defendant." Subsequently the plaintiff filed a reply containing a general denial of all new matter.

*Webb & Lindsay, for plaintiff. Samuel Lawrence and P. L. Soper, for defendant.*

HORTON, C. J., (after stating the facts as above.) In the fall of 1889, C. M. Plymell became a candidate for the office of county commissioner of the third district for Meade county, while he was holding the office of city clerk of West Plains, a city of that county of the third class. At the election on the 6th of November, 1889, he was successful. He subsequently qualified and acted as county commissioner. Paragraph 1622, Gen. St. 1889, reads: "No persons holding any state, county, township, or city office, or any employe, officer, or stockholder in any railroad in which the county owns stock, shall be eligible to the office of county commissioner." This action was brought to oust Plymell from his office as commissioner. It is contended that he was ineligible to be elected to this office while holding the office of city clerk. It is further contended that he was holding the office of city clerk of West Plains when he qualified as county commissioner, on the 26th day of November,

1889, and that he also continued to hold the office of city clerk after he entered upon the discharge of his duties as county commissioner on the 13th day of January, 1890. On the part of the defendant, it is admitted that he was the duly appointed and acting clerk of the city of West Plains when he was elected to the office of county commissioner, but he claims that in November, 1889, he resigned the office of city clerk, and did not hold that office when he qualified as county commissioner, or when he entered upon the discharge of his duties as such officer.

Whether the defendant was ineligible to be elected to the office of county commissioner while holding the office of city clerk we need not decide. The authorities upon this question are somewhat conflicting. *State v. Clarke*, 8 Nev. 570; *Carson v. McPhetridge*, 15 Ind. 327; *State v. Murray*, 28 Wis. 96; *Searcy v. Grow*, 15 Cal. 121; *Brady v. Howe*, 50 Miss. 626; *State v. Fisher*, 28 Vt. 714; *Privett v. Bickford*, 26 Kan. 52. We are not satisfied, from the evidence introduced upon the trial, that Plymell resigned his office as city clerk in good faith before the 13th day of January, 1890, when he entered upon the duties of the office of county commissioner. He testified that he resigned his office of city clerk between November 10 and 15, 1889. Two members of the city council, I. E. Smith and James Apple, support his evidence, and testify that the city council accepted his resignation. Plymell admits, however, that his resignation was not in writing, and it appears that no record thereof was kept by himself or the city council, and no written minute can be found in the recorded proceedings of the city council showing any such resignation. He testified, among other things, as follows: "Question. Let me ask you, Mr. Plymell, if there was not a special meeting of the city council about the 23d day of April, 1890, at which you tendered your resignation as city clerk. Answer. I think there was. Q. Was you city clerk at that time? A. I had resigned before, but it had not been put on the minutes of the meeting; so I handed in my resignation in writing about that time. Q. Who were the city council at that time? A. I. E. Smith, C. E. Woolen, O. J. Loofborow, James Apple, and Perry Marker. Q. Who was the mayor? A. M. S. Parsons. Q. Was your resignation accepted at that time by the council? A. It was. Q. Did you perform any duties as city clerk of West Plains after the resignation you speak of, about November 10, 1889? A. After I first resigned, and after they had accepted my resignation, the acting mayor told me to act as city clerk and do the work until they could appoint another." On February 5, 1890, Plymell, as city clerk, attested the signature of W. C. Gould, mayor, to an order to C. S. Rockey, county treasurer, in favor of E. M. Mears, the city treasurer of West Plains; and on April 21, 1890, as city clerk, he attested the signature of M. S. Parsons, mayor, to an order of C. S. Rockey, county treasurer, in favor of E. M. Mears, city treasurer of the city of West Plains. R. W. Griggs testified that he was the county attorney of Meade county from

September, 1888, until January 9, 1891; that on April 23, 1890, he wrote to Plymell informing him that he was illegally holding the office of county commissioner; that the next day he saw him, and he said, "I resigned the office of city clerk, and filed a new bond," or that he would do so shortly, and that would enable him to continue in office. Moses Black testified that he is the register of deeds for Meade county; that the defendant filed his official bond on November 27, 1889; that he filed another bond on the 24th day of April, 1890; and that he filed still another bond on the 2d day of May, 1890. W. C. Gould testified that he was the mayor of West Plains from April, 1889, until February, 1890; that the defendant was the city clerk from the spring of 1889 until February, 1890; and that he never resigned, or offered to resign, his office during that time. M. S. Parsons testified that he is the mayor of West Plains; that Plymell was the city clerk up to April, 1890. Henry B. Stone testified that he was a councilman of the city of West Plains from April, 1889, until January, 1890, and that Plymell was the city clerk and discharged the duties thereof during that time. After his pretended resignation, in November, 1889, of the office of city clerk, Plymell continued to hold the office of city clerk, and continued to act as such officer, for several months after he entered upon the discharge of the duties of his office of county commissioner. This is not permitted. A person holding a city office cannot at the same time hold the office of county commissioner. *Rogers v. Slonaker*, 32 Kan. 191, 4 Pac. Rep. 138; paragraph 1622, Gen. St. 1889. Plymell violated the statute in attempting to qualify and hold the office of county commissioner for several months while he was still city clerk. The prayer of the petition will be granted, with costs.

All the justices concurring.

#### STATE v. CLARK.

(*Supreme Court of Kansas. April 11, 1891.*)

##### FALSE PRETENSES—EVIDENCE.

In a prosecution for obtaining money under false pretenses, it is necessary for the state to prove the intent to defraud, the false pretenses made with the intent, and the fraud thereby accomplished must be shown, to warrant a conviction.

(*Syllabus by Green, C.*)

Commissioners' decision. Appeal from district court, Wyandotte county; O. L. MILLER, Judge.

A. H. Case, Anderson & Littick, and Ellis Lewis, for appellant. L. B. Kellogg, Atty. Gen., and Winfield Freeman, for the State.

GREEN, C. The defendant in this case was convicted in the district court of Wyandotte county of obtaining money under false pretenses. It was charged in the information that he obtained the sum of \$5,600 from the Stock-Yards Bank at Kansas City, Kan., by falsely representing to the agent of the bank that he was the owner of 143 head of native Missouri four-year-old steers, and had good right

to mortgage the same. The evidence for the state disclosed the fact that the defendant was indebted to the firm of Irwin, Allen & Co., of Kansas City, in the sum of \$3,100 at the time the money was charged to have been obtained. To procure the loan of \$5,600, the defendant gave a chattel mortgage upon the 143 head of steers and some other stock, and also furnished as indorsers upon the note which he executed Irwin, Allen & Co. and W. H. Conklin. Out of the loan thus procured the defendant paid Irwin, Allen & Co. the amount due them, and received from the bank three cashier's checks for the balance of the \$5,600. Some six weeks after the mortgage was given, it was disclosed that the defendant did not have all of the cattle he had included in the mortgage, and the bank took possession of the stock described in the mortgage which could be found, and sold the same, realizing therefrom the sum of \$3,969, leaving a balance of \$1,831 upon the note given for the debt, and interest. The evidence upon the part of the state and defense showed that the indorsers upon this note were good, and the balance could have been collected if suit had been instituted; but no effort was made before the filing of the information in this case to collect the amount due, except some conferences over the matter, and personal requests to pay the balance due. It seems to have been conceded that Irwin, Allen & Co. and W. H. Conklin were financially responsible. Can it be said, under this state of facts, that an offense, under the statute, for obtaining money or property from the bank by false pretenses has been made out?

To constitute the offense charged in the information, under section 94 of the crimes act, four elements must concur, which should be averred and proved: (1) There must be an intent to defraud; (2) there must be an actual fraud committed; (3) false pretenses must have been used for the purpose of perpetrating the fraud; and (4) the fraud must be accomplished by means of the false pretenses made use of for the purpose, viz., they must be the cause, in whole or in part, which induced the owner to part with his property. *State v. Mathews*, 44 Kan. —, 25 Pac. Rep. 36; *Com. v. Drew*, 19 Pick. 179; *People v. Jordan*, 66 Cal. 10, 4 Pac. Rep. 773; 2 Bish. Crim. Proc. § 163; *People v. Wakely*, 62 Mich. 297, 28 N. W. Rep. 871. Tested by the above rules, which seem to be supported by reason and authority, it must appear that some one has been defrauded, to insure a conviction. This one element is essential. Can it be said that the Stock-Yards Bank has actually been defrauded by the defendant, when it holds a note upon which there is a balance of less than \$2,000, and the indorsers thereon are solvent, and no steps are taken to enforce the collection? The language of the court in the case of *People v. Wakely*, supra, is: "But it does not amount in law to a false pretense unless made with a fraudulent intent, and the person parting with the property is actually defrauded." Was the Stock-Yards Bank actually defrauded? What right was it deprived of in the business transaction? It had parted with its

money, but it held a note which was conceded to be good, aside from the security given by the defendant; and we fail to see in what way it was injured. If it was not defrauded, this essential ingredient of the crime charged was lacking, and, unless evidence can be produced to show that the bank was actually defrauded, the defendant should be discharged. It is recommended that the judgment of the court below be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 726)

FIRST NAT. BANK OF LEOTI v. FISHER,  
Treasurer, et al.

(Supreme Court of Kansas. April 11, 1891.)

TAXATION OF NATIONAL BANKS — DEDUCTIONS TO STOCKHOLDERS.

1. The assessment of the entire capital stock of a national bank "in solido" against the bank itself is invalid.

2. The only way that the capital stock of a national bank can be reached is by the assessment of the shares of the different or individual stockholders. Under the statute of this state, the bank may pay the tax assessed upon the shares of its different stockholders, and it will have a lien thereon when it pays such tax until the same is satisfied; but if, from any cause, the tax levied upon the different stockholders is not paid by the bank, the property of the individual stockholders will be liable therefor.

3. The individual stockholders of a national bank are allowed the same deductions from the assessment against them upon their shares of stock as other tax-payers in the state, owning moneyed capital, are allowed; but, of course, no double deduction or exemption can be allowed to any stockholder.

(Syllabus by the Court.)

Error from district court, Wichita county; V. H. GRINSTEAD, Judge.

J. S. Newby and E. C. Little, for plaintiff in error. W. B. Washington, for defendant in error.

HORTON, C. J. The First National Bank of Leoti commenced this action to restrain the collection of certain taxes assessed against it. An order temporarily restraining the treasurer and sheriff from levying and collecting the same from the property of the bank was granted. The defendants demurred to the plaintiff's petition upon the ground that there was a defect of parties defendant, that the petition did not state facts sufficient to grant the relief prayed for, and that it did not state a cause of action against the defendants. The court sustained the demurrer, and dissolved the restraining order. The plaintiff excepted, and brings the case here. The petition alleges that the plaintiff is, and was at all times mentioned, a national bank; that E. W. Fisher and John H. Edwards are treasurer and sheriff, respectively, of Wichita county; that on May 10, 1890, the treasurer issued a tax-warrant against the plaintiff for \$1,569.14 to the sheriff, and that the whole amount thereof was erroneously, wrongfully, and illegally assessed against plaintiff. The petition further states that on the 22d of March, 1889, the township assessor took a statement of the amount of property held by the bank, and a statement of the

amount of stock of the bank, as the personal property of the bank, and so assessed it, "in solido," without notifying the stockholders, and without giving them opportunity to claim exemptions. The petition further alleges that in January, 1890, the board of county commissioners, having demanded and received from the president of the bank a list of stockholders, with the amount of stock held by each on March 1, 1889, and of surplus, undivided profits, and real estate, increased the bank assessment on the stock, which had once before been assessed, so that \$700.84 were added to the amount of the tax, and that this was done without giving any notice to the stockholders, and that the assessment against the property was made as before, "in solido," and as the property of the bank.

It is contended that the method of the officers in assessing and attempting to collect the taxes complained of is contrary to section 5219 of the United States Revised Statutes, and also contrary to various sections of chapter 107, Gen. St. 1889, providing for the assessment and collection of taxes. Said section 5219 reads: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all of the shares of national banking associations located within the state, subject only to two restrictions,—that the taxation shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes to the same extent, according to its value, as other real property is taxed." Paragraph 6868, Gen. St. 1889, being section 22, art. 6, of the act relating to the assessment and collection of taxes, provides that "stockholders in banks and banking associations organized under the laws of this state or the United States shall be assessed and taxed on the true value of their shares of stock in the city or township where such bank or banking association is located; and the president, cashier, or other managing officer thereof, shall, under oath, return to the assessor, on demand, a list of the names of the stockholders, and the amount and value of stock held by each, together with the value of any undivided profits or surplus; and said bank or banking association shall pay the tax assessed upon said stock and undivided profits or surplus, and shall have lien thereon until the same is satisfied: provided, that if, from any cause, the taxes levied upon the stock of any banking association shall not be paid by said association, the property of the individual stockholders shall be held liable therefor:

provided, further, that if any portion of the capital stock of any bank or banking association shall be invested in real estate, and the bank shall hold a title in fee-simple thereto, the assessed value of said real estate shall be deducted from the original assessment of the paid-up capital stock of said bank or banking association, and said real estate shall be assessed as other lands or lots: and provided, further, that banking stock or capital shall not be assessed at any higher rate than other property." It has been many times held by the supreme court of the United States that the authority of the states to tax the shares of national bank stock is derived wholly from the act of congress, and that without the consent of congress these bank-stock shares could not be taxed by state authorities at all. *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank*, 9 Wheat. 738; *Weston v. Charleston*, 2 Pet. 449; *People v. Weaver*, 100 U. S. 539-543. The statute of the state may determine and direct the manner and place of taxing all shares of national bank associations located within the state, subject, however, to the restrictions of section 5219, Rev. St. U. S., under the state statute, which is in accord with the United States statute. Authority is given to tax the shares of national banks as part of the taxable estates of the owners of the shares, but in levying these taxes the state is prohibited from assessing them at a greater rate than is assessed upon other moneyed capital in the hands of other individual tax-payers. The tax so authorized by congress "is a several tax upon the shares of each individual stockholder or shareholder, as distinguished from a lumping tax, or a tax 'in solido,' upon the bank itself." *Bank v. City of Richmond*, 39 Fed. Rep. 309; *Bank v. City of Richmond*, 42 Fed. Rep. 877. The shares of national banks must be assessed for taxation as the property of the individual stockholders or shareholders, respectively. *Hershire v. Bank*, 35 Iowa, 272. Under the statute of our state, and according to general practice in other states, the national banks pay the taxes thus assessed for the individual stockholders; but the tax cannot be a lumping tax, or a tax "in solido," upon the bank only. *Bradley v. People*, 4 Wall. 459; *Bank v. Com.*, 9 Wall. 353.

It is conceded in this case that the assessment of the 22d of March, 1889, was and is void. The second assessment, according to the allegations of the petition, was a lumping tax, or a tax "in solido," upon the capital stock of the national bank, and not upon the shares, or upon the individual owners of the shares. The assessment of the entire stock of the bank "in solido" against the bank was invalid. *DRUMMOND, J.*, said, in *Collins v. Chicago*, 4 Biss. 472, that "the capital stock of the national bank, as such, cannot be assessed under state authority. The only way that such a stock can be reached is to assess the shares of the different stockholders in the same manner that assessments are made in other cases against property owned by the citizens and inhabitants of the state." *Bank v. Britton*, 105 U. S. 323; *Ball, Banks*, 215-224. It was said in *Van*

*Allen v. Assessors*, 3 Wall. 596, that "in most of the states, if not in all, the personal property of all individuals and corporations is listed, valued, and assessed by public officers under legislative authority. The first proviso of Rev. St. U. S. § 5219, simply requires that the shares of individuals in national banking associations shall be included in this valuation and assessment; and, inasmuch as personal property of different descriptions is often valued and assessed by different rules, it further requires that it shall not be so included at a greater rate than is assessed upon other moneyed capital in the hands of citizens. \* \* \* Now, by taxation in common we understand taxation by a common rule and in equal degrees. To tax the shares of citizens in these associations by other rules, or in greater degrees, than other like property, would as effectually retard, impede, burden, and control the operation of the national currency act as to tax the associations themselves or their lawful operations, and would be clearly unwarranted by the constitution." The individual stockholders of a national bank are allowed the same deductions from the amount assessed against them upon their shares of stock as other tax-payers in the state, owning moneyed capital, are allowed. But, of course, no double deduction or exemption can be allowed to any stockholder. *Whitbeck v. Bank*, 8 Sup. Ct. Rep. 1121; *Wasson v. Bank*, (Ind.) 8 N. E. Rep. 97. Therefore the second assessment against the bank was void; and as both assessments were void, the officers of Wichita county had no right to issue a warrant for their collection, or for the collection of any part of the same. It is urged, however, that the bank must pay, or offer to pay, any part of the tax lawfully or justly due, before it can obtain the relief prayed for. According to the allegations of the petition, however, there is no part of the tax lawfully or justly due. The judgment of the district court will be reversed, and cause remanded for further proceedings in accordance with the views herein expressed.

(45 Kan. 731)

STATE *ex rel.* v. BOARD OF COUNTY COMMISSIONERS OF WABAUNSEE COUNTY.

(Supreme Court of Kansas. April 11, 1891.)

CONSTITUTIONAL LAW—TITLE OF ACT—REPAIR OF BRIDGES.

Sess. Laws Kan. 1889, c. 98, entitled "An act authorizing the county commissioners of Wabaunsee county to appropriate money," etc., provides: "The county commissioners of Wabaunsee county are hereby authorized and empowered, and it is made their duty, to appropriate such sum of money as may be necessary to keep in repair" a certain bridge. *Held*, that the words, "it is hereby made their duty," being broader than the title, must, to sustain the constitutionality of the act, be regarded as nugatory; that it was discretionary with the commissioners to make repairs, and they could not be compelled to do so by *mandamus*.

Original proceeding in *mandamus*.

*L. B. Kellogg*, Atty. Gen., and *J. F. Peffer*, for plaintiff. *Hazen & Isenhardt* and *J. B. Barnes*, for defendant.

PER CURIAM. The question in this case comes up on a motion filed by plaintiff for

judgment on the pleadings, and therefore the only question for this court to decide is whether the petition and answer entitle the plaintiff to the relief sought. This depends upon the construction of chapter 98, Sess. Laws 1889. The title of this act is, "An act authorizing the county commissioners of Wabaunsee county to appropriate money," etc. The act itself contains this language: "The county commissioners of Wabaunsee county are hereby authorized and empowered, and it is hereby made their duty, to appropriate such sum of money as may be necessary to keep in repair," etc. The words "it is hereby made their duty," if given full force, are broader than the title. To sustain the constitutionality of the act, these words must be regarded as nugatory, and the act must be construed as merely authorizing the county commissioners at their discretion to repair the bridge. Under this construction of the act, the county commissioners cannot be compelled by *mandamus* to make any repairs. *Town of Cantril v. Sainer*, 59 Iowa, 26, 12 N. W. Rep. 753; *City of Emporia v. Volmer*, 12 Kan. 630; *Stebbins v. Mayer*, 38 Kan. 573, 16 Pac. Rep. 745. The peremptory writ will be denied.

(46 Kan. 54)

SCHOOL-DIST. NO. 2 IN WABAUNSEE COUNTY  
v. BOYER *et al.*

(Supreme Court of Kansas. April 11, 1891.)

ACTION ON CONTRACT—AMENDMENT OF PLEADING  
—QUANTUM MERUIT—EVIDENCE.

1. The plaintiff, who alleges the construction of a building under a written contract with the defendant, and who asks a recovery of the contract price, may subsequently amend the petition so as to claim the actual value of the materials furnished and the work performed upon such terms as the court may deem just.

2. Where the building is erected upon and becomes a part of the realty of the defendant, and, although defective in some respects, is of real and substantial value to the defendant for the purposes intended, the plaintiff may recover from the defendant what the building is reasonably worth to him.

3. The testimony in the case found to be sufficient to sustain the overruling of a demurrer to plaintiff's evidence.

(Syllabus by the Court.)

Error from district court, Wabaunsee county: WILLIAM THOMPSON, Judge.

J. F. Peffer, for plaintiff in error. George G. Cornell, for defendants in error.

JOHNSTON, J. This was an action brought by Boyer & Boyer to recover \$1,030 for furnishing material and constructing a school-house in school-district No. 2 in Wabaunsee county, and to foreclose a mechanic's lien which they had filed against the school district and building. They alleged in their petition, as a first cause of action, that on or about the 20th day of July, 1889, they entered into a written contract with the school-district board to furnish material and erect for the school-district a school-house, and that soon after the making of the contract they commenced the work, which was completed on October 7, 1889. They state that they performed all the condi-

tions of the contract on their part, but that the school-district had failed and refused to pay them the contract price, or any part thereof. It is further alleged that they duly perfected the mechanic's lien to which they were entitled, and they asked for a foreclosure of the same. As a second cause of action it was alleged that before the signing of the written contract set out in the first count of the petition they had entered into an oral contract with the school-district to erect the school-house in the manner and upon the terms set out in the written contract, which oral contract was not reduced to writing until July 31, 1889, and that, prior to the signing of the written contract, work had been commenced, and the foundation of the building nearly completed, and that they were permitted by the school-district to carry on the building to completion, and that the material furnished and the work and labor performed for and upon the building were worth the sum of \$1,030, no part of which had been paid. The defense of the district was a non-performance of the conditions of the contract by the defendants in error. The case was tried by the court without a jury, and, after the evidence of the Boyer brothers had been introduced, a demurrer to the evidence upon each count of the petition was filed by the school-district, and the court sustained the demurrer as to the first count, and overruled it as to the second count. After hearing the evidence of all the parties, the court subsequently rendered judgment against the district for \$739.95, together with interest and costs. Two grounds of error are assigned for a reversal: First, that the court erred in permitting the Boyer brothers to amend their petition during the progress of the trial by setting up the second count, which has been referred to, and which seems to have been pleaded with a view of recovering the value of the materials furnished and the labor performed in case the court should hold that the work had not been done in the exact manner stipulated in the contract, and that they were not entitled to recover the price agreed on in the contract. A reading of the record satisfies us that no injustice was done in this respect. Great latitude is given to the court in the matter of amending pleadings, and it does not appear by the record that the defendant below asked for a continuance, or suffered any prejudice by reason of the amendment. The plaintiffs below were seeking a recovery for the building of the school-house, and an amendment containing facts which authorized the recovery as upon a *quantum meruit* was allowable. If the school-district was taken unawares by the amendment, or was unprepared to meet the new phase of the case, a continuance might have been had upon application to the court. But no such application was made. It is next insisted that the court erred in overruling a demurrer to the evidence offered by Boyer Bros. to sustain the second count in the petition. The testimony tended to show that there was some deviation from the requirements of the contract, but there was evidence offered in be-



half of Boyer Bros. that there had been a substantial compliance with the contract; that they had endeavored in good faith to carry out its conditions; and that the defects were slight and unimportant. It is true that the foundation wall was made of grouting, instead of rubble-work, as the written contract required; but the contractors state that the wall was mostly completed before the written contract was entered into, and the school-district knew the character of wall that was being built; and it is further claimed that it is as substantial and durable as though it had been rubble-work. In our opinion, there was sufficient testimony to warrant the judgment that was given. The building is erected upon the land of the school-district, and there appears to have been an honest attempt to comply with the conditions of the contract. "It is well settled that where one party has entered into a special contract to perform work for another and furnish materials, and the work is done and the materials are furnished, but not in the manner stipulated for in the contract, so that he cannot recover the price agreed on in the contract, yet, if the work and materials are of any value and benefit to the other party, he may recover for the work done and for the materials. This is upon the principle that, if the other party has derived a benefit from the part performed, it would be unjust to allow him to retain that without paying anything." *Barnwell v. Kempton*, 22 Kan. 314; *Duncan v. Baker*, 21 Kan. 99; *Caher v. Hiatt*, Id. 548. The building erected is attached to the realty, and becomes the property of the school-district. It is of substantial value to the district, and may be used for the purposes for which it was built. To allow the school-district to retain the building without paying the contractors the reasonable worth of the same would be an injustice. The court evidently found that, although the school-house was defective in some particulars, it was of real and substantial value to the district for the purposes intended, but because of the defects limited the award to the actual benefits which the district received. The plaintiff in error greatly relies on *Denton v. City of Atchison*, 34 Kan. 438, 8 Pac. Rep. 750, but that case is not apt or controlling. In that case there was no substantial compliance with the provisions of the contract, and the improvements constructed did not attach to the realty of the city, or become its property. Then, again, in making the improvements the city authorities are acting in behalf of the abutting property owners, who are substantially benefited by the improvement, and at whose expense it is made, and are required to pursue closely the direction of the statute, and payment cannot be enforced against the property owner unless the statutory requirements are observed. It is true that there is much conflict of testimony in the record, but on a demurrer to the evidence we must view that of the plaintiffs below in its most favorable light; and, so looking at it, we readily conclude that there was sufficient testimony to overcome the de-

murrer of the school-district. The judgment of the district court will be affirmed. All the justices concurring.

## CITY OF IOLA v. MERRIMAN.

(Supreme Court of Kansas. April 11, 1891.)

## RAILROAD COMPANIES—MUNICIPAL AID.

In 1881 a city of the third class had the power, under certain terms and conditions, and within certain limitations, to subscribe to the capital stock of a railroad company, and to issue its bonds in payment for the stock, although the city may have been a portion of a municipal township, which township had already subscribed for all the stock and issued all the bonds in aid of railroads which it had the power to subscribe for or issue.

(Syllabus by the Court.)

Error from district court, Allen county; L. STILLWELL, Judge.

S. O. Thacher and A. H. Campbell, for plaintiff in error. H. A. Ewing, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Allen county by Charles F. Merriman against the city of Iola, to recover upon certain interest coupons of certain negotiable bonds issued by the city of Iola, to pay for a subscription to the capital stock of the St. Louis, Ft. Scott & Wichita Railroad Company. The bonds and coupons were issued on July 1, 1881. They seem to be regular in form, and are valid, provided the city of Iola had at the time any power to issue them. A recital is contained in each of the bonds, which reads as follows: "This bond is one of a series of fifty-three, each for five hundred dollars, of like tenor and effect, and are issued under and by virtue of an act entitled 'An act to enable counties, townships, and cities to aid in the construction of railroads, and to repeal section eight of chapter thirty-nine (39) of the Laws of 1874, approved February 25, 1876.'" The defendant answered, setting forth as a second defense to the plaintiff's action the following, among other things: "The defendant alleges that it is now, and always has been, a city of the third class and a part of the municipal township of Iola in the county of Allen. \* \* \* And it further avers that said township of Iola, on or about the 11th day of August, A. D. 1880, voted, and thereafter did issue, to said railroad company the full amount of the bonds which it was authorized under the law to issue to any railroad corporation whatever, to-wit, the sum of \$33,500. \* \* \* That the city council of said city of Iola did not at the next city election after the passage by the legislature of the state of Kansas of an act entitled 'An act to amend section four of chapter sixty of the Laws of A. D. 1871, providing for the organization and government of cities of the third class, also, providing for the appointment of assessors for said cities,'—which act is chapter 55, on page 148, of the Laws of 1876,—nor did said city council at any other time submit to the qualified voters of said city of Iola the question whether said city should be and constitute a separate township for all township

purposes, and for voting and issuing bonds and subscribing stock for and in aid of building or constructing railroads." The defendant also alleged in this second defense that, while the township of Iola had within its borders more than \$150,000 worth of real and personal property, and, indeed, more than double that amount, according to the assessed valuation thereof for each of several years prior to the issuing of the bonds and coupons in controversy, yet, according to the various assessments of the property within the city of Iola, the city never had that amount of property within its borders. The plaintiff demurred to this second defense upon the ground that it did not state facts sufficient to constitute any defense to the plaintiff's action, which demurrer was sustained by the court; and the defendant, as plaintiff in error, brings the case to this court for review.

It is claimed that the city of Iola had no legal power or authority to issue the bonds and coupons in controversy—*First*, because no city of the third class has any power to issue bonds in aid of the construction of a railroad; and, *second*, because the city of Iola, which was a city of the third class, formed a part of the township of Iola, and that the township of Iola had already issued all the bonds which it as a township was authorized to issue under the statutes. The statutes under which the present bonds and coupons were issued, to-wit, Laws 1876, c. 107, as amended in 1877; Laws 1877, cc. 142, 144; Gen. St. 1889, par. 1283 et seq.—provide, among other things, that under certain terms and conditions, and within certain limitations, the electors of "any county," "any municipal township," or "any incorporated city," may vote at an election called for the purpose upon "a proposition to subscribe to the capital stock of, or to loan the credit of, such county, township, or city to any railroad company constructing or proposing to construct a railroad through or into such county, township, or city," (section 1,) and "if a majority of the qualified electors voting at such election shall vote for such subscription or loan, the board of county commissioners for and on behalf of such county or township, or the mayor and council for and on behalf of such city, shall order the county or city clerk, as the case may be to make such subscription or loan in the name of such county, township, or city, and shall cause such bonds, with coupons attached, as may be required by the terms of said proposition, to be issued in the name of such county, township, or city, which bonds, when issued for such county or township, shall be signed by the chairman of the board of county commissioners, and attested by the county clerk under the seal of such county, and, when issued for such city, shall be signed by the mayor, and attested by the city clerk under the seal of said city." Section 5, as amended in 1877, Laws 1877, c. 144, § 1; Gen. St. 1889, par. 1289. Indeed, ample power is given by this statute to "any county," "any municipal township," or "any incorporated city," under certain conditions, to subscribe to

the capital stock of "any railroad company," and to issue its bonds in payment therefor, just as the city of Iola, which was and is an "incorporated city" of the third class, did in the present case, and such county, township, or city certainly has such power unless some other statute can be found limiting the same. Counsel for the plaintiff in error refers to section 4 of the third-class city act of 1871, as amended by section 1, c. 55, of the Laws of 1876, as furnishing such a limitation. That section, so far as it is applicable to the question now under consideration, and so far as it is necessary to quote it, reads as follows: "Municipal corporations regulated and governed by this act shall be and remain a part of the corporate limits of the municipal townships in which the same are situated for all township purposes of electing justices of the peace, constables, for the purpose of building bridges, and subscribing stock in aid of constructing railroads. All elections for justices of the peace and constables, and for issuing township bonds for building bridges and railroads, shall be held at such place as shall be prescribed for holding the township elections." This section, so far as we have quoted it, is precisely the same as the section was in 1871, and up to the time when it was amended in 1876. Section 63 of the same third-class city act, which section is still in force, (Gen. St. 1889, par. 988,) reads as follows: "The council shall take all needful steps to protect the interests of the city, present or prospective, in any railroad leading from or towards the same; but they shall not take or subscribe any stock in any railroad unless at least two-thirds of the electors of such city voting at a legal election vote in favor thereof." And under section 35 of the same third-class city act, which section is still in force, (Id., par. 960,) the city had and has the power to issue bonds for the payment of "any and all indebtedness" then existing or which might afterwards be created against the city. Now, it does not follow that because the city of Iola has remained and is a part of the corporate limits of the municipal township of Iola "for all township purposes," or for various "township purposes," including that of "subscribing stock in aid of constructing railroads," "and for issuing township bonds for building bridges and railroads," the city might not, as a city and for itself, also subscribe for stock, and issue its own city bonds in aid of the construction of railroads. When a township subscription for stock is made, the stock will of course be taken in the name of the township, and township bonds will be issued therefor, as is contemplated by the aforesaid section 4 of the third-class city act, and other statutes; and when stock is subscribed for by the city the stock will be taken in the name of the city, and city bonds will be issued therefor, as was done in this present case. Every city, whether of the first, second, or third class, and every township in the state of Kansas, is included within the corporate limits of the county within which such city or township is situated, and is so included for all county purposes, and for the purpose of subscribing for

stock and issuing bonds in aid of the construction of railroads; but still it will not be claimed that because of such fact, and the particular fact that the county may subscribe for stock and issue its bonds therefor in aid of the construction of railroads, that the included city of the first or second class or the included township cannot also subscribe for stock and issue its own bonds for a like purpose: "provided \* \* \* in no case shall the total amount of county, township, and city aid to any railroad company exceed four thousand dollars per mile for each mile of railroad constructed in said county." Laws 1876, c. 107, § 1, as amended by the Laws of 1877, c. 142, § 1, amended in 1887, and \$2,000 instead of \$4,000 prescribed. Laws 1887, c. 183, § 1; Gen. St. 1889, par. 1283. There are various limitations prescribed by the statutes upon the power of counties, townships, and cities to subscribe to the capital stock of railroad companies, and to issue bonds in payment therefor, some as to amounts and some with respect to other matters; but if the city of Iola had the power at all, under chapter 107 of the Laws of 1876, to subscribe for stock, and to issue its bonds in aid of railroads, then it will not be claimed, under the facts of this case as far as they are now disclosed, that such city transcended its powers in making the present subscription and in issuing the present bonds. The order and judgment of the district court will be affirmed. All the justices concurring.

(46 Kan. 32)

FIRST NAT. BANK OF FORT SCOTT v. ELLIOTT.

(Supreme Court of Kansas. March 7, 1891.)

ACTION ON NOTE — PLEADING — SETTING OUT INDORSEMENTS.

Where, in an action by an indorsee of a negotiable promissory note, payable to order, the plaintiff declares on such note by setting out a copy of the same, with all the indorsements, and alleges ownership, and the indorsements are without date, the presumption of the law is that such note was transferred before maturity, and that plaintiff is the *bona fide* holder for value; that the failure of the plaintiff to set out the particular manner in which the note was transferred to it would not entitle the defendant to prove an equitable defense to such note. The setting out of a copy of all the indorsements upon a note, coupled with the allegation of title in the plaintiff, is sufficient, under the Code, to show that the title was transferred by indorsement.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Cowley county; M. G. TROUP, Judge.

Peckham & Henderson, for plaintiff in error. J. F. McMullen, for defendant in error.

GREEN, C. This case was a consolidation of two actions commenced by the First National Bank of Ft. Scott against Charles H. Elliott in the district court of Cowley county upon two notes made by him to the order of the Eureka Bank, and in its possession as indorsee. Each note was dated October 7, 1884—one being for \$1,000, and due in 365 days after date, and another for \$825, due in 540 days after

date. The allegations of the petitions were that the defendant was indebted to the plaintiff upon certain notes, which were set out in the petition in full, with all indorsements thereon. The \$1,000 note contained the following indorsements: "Without recourse. EDWIN TUCKER, Cashier. J. D. HILL." The \$825 note was indorsed as follows: "JOHN BERRY. Without recourse. EDWIN TUCKER, Cashier. J. D. HILL." The plaintiff further alleged that it was the owner and holder of each of the notes, and entitled to the proceeds thereof, and then stated the amount due upon each note. The defendant interposed the defense that, while the notes on their face were made payable to the Eureka Bank, the maker executed and delivered them to John Berry as part payment of the purchase price of a farm; that the notes were not made for the benefit of the bank, or delivered to it, but were in fact made for the benefit of Berry, and delivered to him; that Berry was indebted to the defendant in a sum in excess of the amount due upon the notes; that such indebtedness was a proper offset to the notes in the hands of Berry; and that the plaintiff and its immediate indorser, J. D. Hill, had full knowledge and due notice of all the equities existing between the maker and Berry at the times, respectively, the notes came into the hands of Hill and the plaintiff; that the plaintiff was not the real owner of the notes; and that they were each the property of J. D. Hill. This portion of the defendant's answer was duly verified. A trial was had, and a verdict and judgment rendered for the defendant. The bank brings the case to this court, and the first error assigned is the failure of the court to instruct the jury to find for the plaintiff. It appeared in the progress of the trial, from the evidence of the cashier of the plaintiff, that the notes were discounted and received from J. D. Hill on the 23d day of September, 1885; that the notes were paid for by placing to the credit of Hill, as a depositor of the bank, the sum of \$1,825; that the bank at the time had no knowledge of the business transactions between Elliott and Berry.

The defendant below was permitted, over the objection of the plaintiff, to give evidence in his own behalf of a state of accounts between himself and John Berry, from which it appeared that the latter was indebted to the defendant in a sum greater than the amount due on the two notes sued on. One other witness was called by the defendant, apparently for the purpose of showing that J. D. Hill, plaintiff's immediate indorser, was the owner of the \$1,000 note. Upon this state of facts, the plaintiff in error contends that under the rule laid down in the case of *Mann v. Bank*, 34 Kan. 746, 10 Pac. Rep. 150, this was an insufficient defense. The doctrine stated in that case was this: "Preliminarily we would state that the mere possession of a negotiable instrument, payable to order, and properly indorsed, is *prima facie* evidence that the holder is the owner thereof; that he acquired the same in good faith, for full value, in the usual course of business, before maturity, without notice of any circum-

stances that would impeach its validity, and that he is entitled to recover as against any of the antecedent parties. 1 Daniel, Neg. Inst. § 812; Ecton v. Harlan, 20 Kan. 452; Lyon v. Martin, 81 Kan. 411, 2 Pac. Rep. 790; Rahm v. Manufactory, 16 Kan. 530. Where a maker of such an instrument, so indorsed and held, claims that the holder of the instrument is not a holder for value, it devolves upon the maker to prove the same." The defendant in error insists that under a former decision of this court in the case of Hadden v. Rodkey, 17 Kan. 429, the pleadings in this case permitted him to prove the equitable defenses and set-offs in the answer, claiming that the plaintiff must allege and prove that the notes were transferred by indorsement, if he desired to avoid such equities or defenses as might be pleaded; that the allegation of copies of the indorsements on the notes is not sufficient; the contention being that there should be apt allegations of the manner in which the notes were transferred by indorsement. The petitions set out copies of the notes sued upon and the indorsements, alleging that there were no other indorsements thereon. It was further alleged that the plaintiff was the owner and holder of the notes and entitled to the proceeds. This we think sufficient to show that the notes were transferred by indorsement to the plaintiff. The rule, as we understand, is that, if suit be brought by an indorsee, and the note is payable to order, the plaintiff should allege the indorsements, and state the facts that give him title. It has been held to be unnecessary to allege title through all of the intermediate indorsements; but title by indorsement to himself is sufficient, and this is what the petitions in effect do in this case. Bliss, Code Pl. §§ 232-235; Reeve v. Fraker, 32 Wis. 243. It is elementary that when negotiable paper, payable to order, is indorsed, and delivered to the indorsee, the legal title passes to him, and he may maintain an action thereon. The pleadings show that these notes were indorsed, that the plaintiff was the owner, and there was so much due it upon the obligations. Section 123 of the Code provides that in an action of this kind it is sufficient for a party to give a copy of the instrument, with all the credits and indorsements thereon, and state that there is due him on such instrument, from the adverse party, a specified sum, which he claims, with interest. It would seem that under this section, where the indorsements are alleged, and also title, there need be no express allegation of the manner of the indorsement, by which the notes were transferred to the plaintiff. The defendant could not have been prejudiced or surprised by an omission to expressly allege the particular method or manner of the indorsements by which the title was transferred. It was manifest from the pleadings that such transfers were by indorsement. The notes in question seemed to have been properly indorsed by the payee, and, there being no date, the presumption of law is that they were indorsed before maturity, and were not, therefore, subject to the defenses

claimed by the defendant below. Lyon v. Martin, 81 Kan. 411, 2 Pac. Rep. 790. The same presumption would attach to the intermediate indorsee, Hill, from whom the plaintiff purchased the notes, and the fact that the bank gave him credit for the proceeds of the notes as a depositor would give it such an interest as to entitle it to maintain an action against the maker. There was no competent evidence to show that Hill took the notes subject to the infirmities claimed. The purchaser of a negotiable instrument from a *bona fide* holder acquires as good a title as the innocent holder had, and may recover thereon, although he, too, may have had notice of such infirmities in the note when he took it. Bodley v. Bank, 38 Kan. 59, 16 Pac. Rep. 88. The trial court should have instructed the jury to return a verdict for the plaintiff. We recommend a reversal of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 634)

#### CITY OF TOPEKA V. HUNTOON.

(Supreme Court of Kansas. April 11, 1891.)

#### MUNICIPAL IMPROVEMENTS — BUILDING SEWER — JUDICIAL INTERFERENCE.

1. In the absence of positive proof of fraud, the establishment of a sewer district in a city of the first class, by the mayor and council thereof, is not subject to judicial interference.

2. To disqualify a member of a city council from voting on the passage of an ordinance establishing a sewer district, it must appear that he has a pecuniary interest in the measure adverse to that of the city.

(Syllabus by Simpson, C.)

Commissioners' decision. Error to district court, Shawnee county; JOHN GUTHRIE, Judge.

S. B. Isenbart, for plaintiff in error. Wheat, Chesney & Curtis, for defendant in error.

SIMPSON, C. In the month of August, in the year 1889, a large number of real property owners in the city of Topeka presented to and filed with the clerk of said city a petition requesting the mayor and council to create a certain sewer district, and to build and construct sewers therein. This petition was presented to the council; referred to its committee on ways and means; was considered by the committee; and the city engineer was requested to suggest the proper territory that should constitute the sewer district. The committee and city engineer reported after some months, and finally, on the 27th day of January, 1890, the mayor and council passed an ordinance creating and establishing sewer district No. 14, defining the territory thereof, and providing for a complete sewer system therein, and providing the manner of construction and for the payment thereof. Said ordinance was duly approved and published. On the 27th of February, 1890, three disinterested householders of the city were appointed to value and appraise the real property situate in said sewer district preparatory to a levy of the assessments thereon to pay for the work. On March 27, 1890, de-

tailed estimates were duly prepared and filed by the city engineer, and the city clerk was authorized to advertise for sealed proposals for the building of the sewers. Sealed proposals were received, and the city authorities were about to enter into a contract for the construction of these sewers, when an injunction was granted by the district court of the county. The petition for injunction set forth, among other things, that the person applying therefor, Joel Huntoon, was the owner of real property, all of which was included within said sewer district, and would be subject to taxation for the payment of the costs of constructing said sewers; that various other tracts or lots needed sewers, and ought to have been included in said sewer district in order to relieve the property of the plaintiff, and make his burden lighter; that one Hale Ritchie was a member of the city council, and owned a number of tracts and pieces of land which were not taken into said sewer district; that one E. B. Whaley was a member of the city council, and that his wife owned six or eight lots which were not included in said sewer district; that said Whaley appeared before the ways and means committee, and before said city council, and illegally and fraudulently used his personal and official influence, with intent and for the purpose of inducing the city council to pass the ordinance leaving out of the boundary of said sewer district certain real estate belonging to Hale Ritchie, and to the wife of the said Whaley, and that said property was left out, and needed sewers. In due time an answer was filed and the cause tried, the court making special findings and separate conclusions of law, as follows:

#### CONCLUSIONS OF FACT.

"(1) That several months prior to January 27, 1890, the mayor and councilmen of the city of Topeka, defendant, by resolution directed the city engineer to make surveys, with the view of creating a sewer district in territory situated in the Third and Fifth wards of the city of Topeka, with a main sewer, commencing and connecting with a large main sewer before that time constructed from at or near the intersection of Tenth avenue and Adams street, in the city of Topeka, extending the said main sewer from said connection at Tenth avenue and Adams street, in the city of Topeka; thence westerly through the Fifth and Third wards of the city of Topeka, towards or west of Lane street, in the city of Topeka. That, in obedience to the said direction of the mayor and councilmen of the city of Topeka, the city engineer of the city of Topeka made the necessary topographical surveys, for the purpose of locating said main sewer, and the necessary lateral sewers, for said new sewer district, and a description of the boundaries of said new sewer district, for the use of the mayor and councilmen of the city of Topeka, for the purpose of enabling the mayor and councilmen of the city of Topeka to enact the necessary ordinance for the establishment and creation of said new sewer district, and the said city engineer reported and recommended to the mayor and councilmen of the city

of Topeka that the said new sewer district should be defined and bounded by ordinance substantial, as bounded, defined, and described by the map or profile attached to plaintiff's petition, and marked 'Exhibit B,' and made a part of said petition, including the green, yellow, and blue coloring on said map or profile.

"(2) That long before the passage, approval, and publication of ordinance No. 1093, to-wit, January 27, 1890, hereinafter mentioned, and the passage of the resolution directing the city engineer to make a topographical survey for the proposed sewer district, all that portion or part of the city of Topeka which lay between Adams street and Van Buren street, and north of Tenth avenue, in said city, sewers for public use had been built, constructed, and were maintained by said city in various sewer districts under and in accordance with several and different ordinances of said city, and the lots and blocks in said sewer districts had been before that time assessed and taxed by the mayor and councilmen of the city of Topeka to pay for the building and construction of said several main and lateral sewers in said several districts, and one of such main sewers, in district No. 12, so built and constructed and maintained by said city, commenced at or near the point or place described as the commencing point for the main sewer mentioned and described in ordinance No. 1093, creating sewer district No. 14, and thence running northerly to and discharged or emptied into the Kansas river, in the city of Topeka.

"(3) That for a long time prior to and at the passage, approval, and publication of ordinance No. 1093, and from thence until the present time, Martha Whaley, the wife of one E. B. Whaley, was and is the owner of the following-described real estate, to-wit: Commencing at the south-west corner of lot No. 350, on Monroe street, in the city of Topeka; running thence easterly 150 feet; thence northerly, at right angles with the last-mentioned line, to the north line of the north-east quarter of section 6, township 12, range 16; thence west, along said section line, to the east side of Monroe street; thence southerly, along the east side of Monroe street, to the place of beginning, and the same being a part of said quarter section. Also the following-described real estate: Commencing at a point 225 feet north of the north-west corner of Madison and Eleventh streets, in the city of Topeka, on the west side of Madison street, and running thence westerly, on a line parallel with Eleventh street, 150 feet; thence northerly, to the north line of the north-east quarter of section 6, township 12, range 16; thence east, to the north line of said quarter section, on the west line of Madison street; thence southerly, along the west line of Madison street, to the place of beginning,—the same being a part of said quarter section. That both of said described pieces or parcels of land were where the city engineer made his topographical survey for the mayor and councilmen of the city of Topeka, and within the boundaries of the premises described in conclusion of fact No. 1, and is a part of the premises included within the

bluecoloring on the map marked 'Exhibit B,' and made a part of plaintiff's petition, and that at all times heretofore and hereafter mentioned in these conclusions of fact the said Martha Whaley and her husband, E. B. Whaley, occupied these premises as their homestead.

"(4) That for a long time prior to the passage of said ordinance No. 1093 by the mayor and councilmen of the city of Topeka, and from thence to this time, one Hale Ritchie was and is the owner of the following described real estate in the city of Topeka, to-wit: Lots Nos. 445, 447, 449, 457, 459, 461, 436, 438, 440, 448, on Quincy street, and lots Nos. 434, 436, 446, 448, 450, 460, 462, 464, on Kansas avenue, and lots Nos. 380, 382, 384, 392, 394, 396, 434, 436, 438, 446, 448, 450, 452, 454, 456, on Monroe street, lots Nos. 377, 379, 381, 383, on Madison street, and all of that block of ground lying east of Madison street, south of Eleventh street, west of Jefferson street, and the right of way of the Kansas, Nebraska & Dakota Railway Company, and north of Twelfth street, excepting the alleys in said block; and that the said Hale Ritchie, prior to the passage of said ordinance, resided on said premises with his family, and has ever since continued to reside on said premises, and that all of said premises last above described are within the boundaries of the proposed sewer district surveyed by the said city engineer, or said district described in conclusion of fact No. 1, and within the boundaries of the map attached to plaintiff's petition, and within the territory on said map indicated and marked in blue color.

"(5) That for a long time prior to and at the passage of said ordinance No. 1093, by the mayor and councilmen of the city of Topeka, one John Ritchie, the brother of said Hale Ritchie, was the owner of about thirty-one lots situated on Kansas avenue, Quincy street, Monroe street, Madison street, in the city of Topeka, and these lots are within the boundaries of the map attached to plaintiff's petition, and within those parts or portions of said map colored in blue, and between Thirteenth street and Fourteenth street and Jackson street and the K., N. & D. R. R. That there were at the time of the passage of said ordinance No. 1093 and are on said lots mentioned, to-wit, lots 433 and 435, on Kansas avenue, and which are the first lots south of Thirteenth street, and very close to the proposed main sewer of said district No. 14, two large brick business buildings with cellars or basements underneath the same, which were owned by said John Ritchie, and of the value of twelve thousand dollars, and which two last-mentioned lots and buildings would be greatly benefited by the said main sewer, if built as proposed.

"(6) That for a long time prior to and at the passage of said ordinance No. 1093, and thence hitherto, one John Elliott was and still is one of the councilmen of the city of Topeka, and that the said John Elliott was present at the meeting of the city council of said city at the passage of said ordinance No. 1093, by the mayor and councilmen of said city, he, the said Elliott, being one of the members of the city

council who voted for said ordinance, and during all the time aforesaid the said Elliott was and still is the owner of two lots on Monroe street, in the city of Topeka, fronting east, and between 10th avenue and 11th street, and in the territory colored blue on the map of said proposed district No. 14, as surveyed and proposed by the city engineer, and as defined in conclusion of fact No. 1.

"(7) That for more than one year before and at the time of the passage of said ordinance No. 1093, to-wit, January 27, 1890, by the mayor and councilmen of the city of Topeka, the said E. B. Whaley, the husband of the said Martha Whaley, Hale Ritchie, brother of the said John Ritchie, and John Elliott were members of the city council of the city of Topeka duly qualified and acting as such. That before the passage of said ordinance No. 1093, defining the boundaries of sewer district No. 14, a controversy arose in the city council among the councilmen of the city of Topeka, concerning the boundaries of said sewer district. That some of the said councilmen contended that all of the territory surveyed and defined by the city engineer, in obedience to the instructions and resolutions adopted by the mayor and councilmen of the city of Topeka preliminary and preparatory to the creation by ordinance of the said sewer district No. 14, should and ought to be included within said district, and some of the councilmen contended that, unless the map or plan prepared and made by the city engineer for the use of the mayor and councilmen, preliminary to the passage of an ordinance creating and defining the territory of said sewer district, was changed or modified so as to exclude all of the said territory marked in blue color, as indicated on the map attached to the plaintiff's petition for the boundaries of the said proposed district, they would use their influence to defeat its passage by the mayor and councilmen, and would defeat any ordinance or any other provision for sewers within this district. That said land or territory marked in blue color on said map is largely owned by said Hale Ritchie and John Ritchie, his brother, and the property heretofore described, belonging to Martha Whaley, wife of E. B. Whaley, and the said John Elliott, as a part of the property marked in blue color on said map. That one Benj. M. Curtis was at the time of the passage of said ordinance, and for more than a year before that time had been, a member of the city council of the city of Topeka from the Third ward of said city, and was very desirous of adopting the topographical survey and recommendations of the city engineer of said city, and this included all the territory included in said map marked yellow, blue, and green, as shown on said map, and was desirous that the mayor and councilmen should pass the appropriate and necessary ordinance creating said sewer district, including within its territory all the land and lots surveyed by the city engineer in obedience to the direction of the mayor and councilmen; but the said Curtis and other councilmen, fearing that the owners of the land and lots indicated in blue color on said map would de-

feat said ordinance unless the territory marked in blue color was omitted from said ordinance, consented and agreed with the members of the city council who owned property in the territory marked in blue color on said map that such territory marked in blue color on said map, including the property of the Ritchies, Whaley, and Elliott, should be excluded from said sewer district No. 14, for the purpose and with the design that all of the real estate included and marked on said map in blue color, including the property heretofore described in these conclusions of fact, belonging to Martha Whaley, Hale Ritchie, John Ritchie, and John Elliott, should not be required to pay its proportion of the necessary assessments and burdens to be imposed upon the lots, blocks, or parcels of real estate interested in or benefited by said main sewer in said district No. 14, and for the purpose of compelling the real property indicated on said map in yellow color to pay all the assessments and burdens necessary for the purpose of constructing the main sewer from the junction of Tenth avenue and Adams street, in the city of Topeka, thence west to Lane street, as shown on said map. That thereupon, in pursuance of such agreement and understanding, to-wit, January 27, 1890, at a meeting of the mayor and councilmen regularly had and held, ordinance No. 1093, entitled 'An ordinance creating sewer district No. 14, defining the territory and establishing the boundary thereof, and providing for an entire and complete system of sewerage in said district, providing the manner and means for a special assessment to pay for the construction of the sewer in said district.' That the following members of the council voted for the passage of said ordinance: First ward, Gunn, Myers; Second ward, Earnest; Third ward, Curtis, Elliott; Fourth ward, Lockhard; Fifth ward, Whaley, Ritchie; total, 8. The following councilmen voted against the passage of said ordinance: Second ward, Heery. Councilmen absent, Tillotson, of the Fourth ward. Eight councilmen voted for the passage of said ordinance, and among them were B. M. Curtis and John Elliott from the Third ward, and E. B. Whaley and Hale Ritchie from the Fifth ward. That January 27, 1890, the mayor of the city of Topeka approved said ordinance, and January 30, 1890, the said ordinance was duly published in the official city paper. That, of the members of the city council who voted for said ordinance No. 1093, Whaley, Ritchie, and Elliott were, at the time they voted for said ordinance, peculiarly interested in the passage of said ordinance, inasmuch as it omitted large property interests belonging to said councilmen from the burden of building said main sewer, and without the vote of these three councilmen a majority of all the members of the city council did not vote for the passage of said ordinance.

"(8) That the parcel of land or lots shown on the map or profile marked 'Exhibit B,' and designated or marked in yellow color, is the territory now included in sewer district No. 14, as defined by ordinance No.

1093, and all the territory of land or lots on said map or profile marked in blue color on said map was included in the topographical survey made by the city engineer in obedience to the direction of the mayor and councilmen of the city of Topeka preliminary to the creation of said proposed sewer district No. 14, and were excluded from said district by said ordinance for the purpose of relieving all of the property on said map or profile marked in blue color, including the property belonging to the Whaleys, Ritchies, and Elliott, from paying its just proportion of the assessment necessary for the construction of the said main sewer for district No. 14, and for the purpose of compelling the lots and lands indicated and marked in yellow on said map or profile to pay all the assessments necessary to pay for constructing the main sewer in district No. 14.

"(9) That all of the land and lots shown on said map or profile marked in blue color were excluded from said sewer district No. 14 by the said ordinance for the purpose aforesaid.

"(10) That, after the passage of said ordinance No. 1093, the mayor and councilmen of the city of Topeka caused the city engineer to make another topographical survey of the territory defined and bounded by said ordinance, and prepare a map or profile, with the plans and specifications, for the main and lateral sewers of said district No. 14, and to make and file an estimate for said work, which map, plans, and specifications so prepared by the city engineer, the mayor and councilmen, at a meeting regularly had and held, adopted and approved said plans and estimates of the cost of said work, and caused the city clerk to publish proposals for bids for the construction of said main and lateral sewers. That the city engineer, by his estimates, reported to the mayor and councilmen that said work would cost \$104,173.15. That the red line on said map commencing at the alley between Lincoln and Buchanan streets, running thence east, thence south, thence east, thence north, thence east, thence north to 13th street, to and across the railroad track of the K., N. & D. R. Co. and the A., T. & S. F. R. R. Co. track, and thence northerly to connect with the main sewer of sewer district No. 12 at the intersection of Tenth avenue and Adams street, described in conclusion of fact No. 2, shows and represents the line of the main sewer proposed to be constructed and built for sewer district No. 14.

"(11) That all the territory between 13th and 14th streets and Jackson street and the K., N. & D. R. R., marked in blue color on the map above referred to, is adjoining said main sewer, and should be drained into this main sewer by means of lateral sewers constructed at a comparatively small expense, and is and was, before the passage of said ordinance, chiefly owned by the said Hale Ritchie, and his brother, John Ritchie.

"(12) That it is practicable for the mayor and councilmen of the city of Topeka to create a sewer district for the lots and lands marked in blue color on the map between 10th avenue and 12th street, Jack-



son street, and the K., N. & D. R.R. track, and the sewage could be deposited from lateral sewer-pipes into the main sewer of district No. 14, as shown on the map. This seems to be the only means of carrying off the sewage. If the territory marked on the map in yellow color is compelled to construct the main sewer for district No. 14, and the territory marked in blue color on said map between 10th avenue and 12th street and Quincy street and the railroad track, and the territory marked in blue color on the map between 13th and 14th streets and Jackson street and the railroad track, should be drained into the main sewer by means of small lateral sewers extending from the main sewer of district No. 14, at a comparatively small expense, then it would save and relieve to the owners of the lots and lands in these two territories marked in blue color the expense of constructing a main sewer to carry away to the river the sewage from this property.

"(13) That there are and were when this ordinance was passed about 109 houses on the said lots and lands marked on said map in blue color, and nearly all of these houses were used and occupied as residences, and located on the streets and avenues stated in plaintiff's petition.

"(14) That the mayor and councilmen of the city of Topeka, pursuant to law, appointed appraisers to appraise the real estate without improvement situated in said district 14, as defined by ordinance No. 1093, for the purpose of determining how much each lot or piece or parcel of land should pay for making said improvement, and said appraisers returned their appraisement, under oath, into the office of the city clerk, which appraisement is of the aggregate sum of \$940,414.

"(15) That the plaintiff is the owner of 87 lots in said sewer district No. 14, as defined by ordinance No. 1093, situated on Tyler street, Topeka avenue, Harrison street, Fourteenth street, Van Buren street, Huntoon street, and Jackson street, in the city of Topeka, and the said appraisers so appointed, as aforesaid, for the purpose of appraising all of the real estate within said district, as defined by said ordinance, appraised the 87 lots belonging to plaintiff, without the improvements, at the sum of \$50,700.

"(16) That there are only two houses situated on the said 87 lots belonging to plaintiff.

"(17) That the lots, pieces, and parcels of land situated in the territory marked in blue color on said map between 10th avenue and 12th street and Quincy street and the railroad track, and between 13th and 14th streets and Jackson street and the railroad track, marked on said map in blue color, are of about the same value, without improvements, lot for lot, as the average of all the lots in the territory marked in yellow on said map, and included within district No. 14, as defined in said ordinance No. 1093, without the improvements.

"(18) That, in obedience to the directions of the mayor and councilmen of the city of Topeka, the city engineer has prepared plans and specifications for said

sewer district No. 14, as defined by said ordinance, for the building of said main and lateral sewers for said district, and presented said plans and specifications to the mayor and councilmen, which have been approved by said mayor and councilmen. That the mayor and councilmen of the city of Topeka have caused the city clerk to advertise for sealed proposals for building said main and lateral sewers in said district, and intend to proceed and let the contract for the building of and construction of said main and lateral sewers, as alleged in plaintiff's petition.

"(19) That January 27, 1890, and for more than one year before that time, the city of Topeka had and was divided into five wards, and at all the times hereinbefore stated there were two councilmen elected, acting, and qualified, in each ward, making in all ten acting, elected, and qualified members of the city council of the city of Topeka, and that said city is and was a city of the first class, organized under the laws of this state.

"(20) That Hale Ritchie and John Ritchie were, January 27, 1890, large owners of real property in said sewer district No. 14, as bounded and defined by said ordinance No. 1093."

#### CONCLUSIONS OF LAW.

"(1) Whether or not it is competent for the mayor and councilmen of a city of the first class, by ordinance, to establish a sewer district, with one or more main sewers and lateral sewers, under the law governing such cities, until the city engineer has made and completed a topographical survey of the district to be drained by such system of sewers, and, when such a topographical survey is made, is it incumbent on and the duty of the mayor and councilmen to adopt the survey, with the boundaries indicated by such survey, or reject the survey as a whole, query.

"(2) When a city of the first class is divided into five wards, an ordinance cannot be lawfully passed by the mayor and councilmen unless at least six members of the city council vote for such ordinance, and the vote on the final passage of such ordinance must be taken by yeas and nays, and must be entered on the journal by the city clerk; and when it is shown that in a city of the first class the city is divided into five wards, and that on the passage of an ordinance by the mayor and councilmen for the purpose of creating a sewer district, defining the territory and establishing the boundary thereof, and providing for an entire and complete system of sewerage in said district, providing the manner and means, and for a special assessment to pay for the construction of the sewer in said district, and it is shown that only eight members of the city council voted for said ordinance, and it is further shown that three of the members of the city council who voted for said city ordinance secured to themselves, directly or indirectly, a pecuniary advantage over the owners of real estate included within the boundaries of the proposed sewer district, such members of the city council are disqualified to vote on the passage of such ordinance, and such ordinance does

not pass in the manner required by section 109 of the act entitled 'An act to incorporate and regulate cities of the first class, and to repeal all prior acts relating thereto,' approved March 6, 1881, and the acts of the legislature amendatory thereof.

"(3) That ordinance No. 1093, entitled 'An ordinance creating sewer district number (14) fourteen, defining the territory and establishing the boundary thereof, and providing for an entire and complete system of sewerage in said district, providing the manner and means and for a special assessment to pay for the construction of the sewer in said district,' approved January 29, 1890, considered and tested by the foregoing conclusions of fact, is unreasonable, (1 Dill. Mun. Corp., 3d Ed., § 319,) is oppressive, (Id. § 320,) is partial, (Id. § 322,) is in contravention of common right, (Id. § 259,) and is therefore void in law.

"The plaintiff is entitled to a perpetual injunction, as prayed. It is further ordered, adjudged, and decreed by the court that the defendant, its officers, agents, and servants, be, and they are all of them, enjoined by the injunction of this court from entering into any contract for the construction of the main or lateral sewers, under the ordinance of the mayor and councilmen of the city of Topeka, No. 1093, and from making and collecting assessments for the purpose of paying for said sewer under said ordinance; and the court further finds and decrees the said ordinance to be null and void and of no effect. It is further ordered and adjudged that the plaintiff have and recover his costs paid, laid out, and expended in this action, taxed at \$——."

The trial court decided that the ordinance establishing the sewer district was an unreasonable one, and that the ordinance was not legally passed by reason of the affirmative votes of three councilmen in its favor, who had a pecuniary interest therein.

1. We will first consider the question of the character of the ordinance. The powers of a municipal corporation are divisible into those general in their nature, power to pass ordinances of specified and defined character, and incidental or implied powers. This division is generic, is universally recognized by text-writers and courts of last resort, and has been frequently applied to control the decision of important controversies. Judge Dillon, in his work on Municipal Corporations, (4th Ed.) § 89, says. "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers: *First*, those granted in express words; *second*, those necessarily or fairly implied in or incident to the powers expressly granted; *third*, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable." Among the decisions cited approving this classification of powers are the following: *Cook Co. v. McCrea*, 93 Ill. 236; *City of Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. Rep. 361; *City of Eufrasia v. McNab*, 67 Ala. 588; *Henke v. McCord*, 55 Iowa, 378, 7 N. W. Rep. 623; *Ravenna v. Pennsylvania Co.*, 45 Ohio St.

118, 12 N. E. Rep. 445; *Bell v. City of Platteville*, 71 Wis. 139, 36 N. W. Rep. 831; *Gilman v. City of Milwaukee*, 61 Wis. 588, 21 N. W. Rep. 640; *Charleston v. Reed*, 27 W. Va. 681; *City of Kansas v. Swope*, 79 Mo. 446; *City of Portland v. Schmidt*, 13 Or. 17, 6 Pac. Rep. 221; *Richmond v. McGirr*, 78 Ind. 192. The ordinance in this particular case was passed by the city council in pursuance of section 19, c. 37, Laws 1881, that reads: "The mayor and council shall have power to provide for a system of sewerage and drainage for the city, or any part thereof, and to build and construct sewers or drains by districts or otherwise, as the mayor and council shall designate." The general grant of power is broad enough for all purposes, as expressed in the words, "shall have power to provide for a system of sewerage and drainage for the city, or any part thereof;" and then comes the discretionary power, as expressed in the words that follow, "and to build and construct sewers or drains, by districts or otherwise, as the mayor and council may designate."

It is said in section 328, Dill. Mun. Corp., that "where the legislature in terms confers upon a municipal corporation the power to pass ordinances of a specified or defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed pursuant thereto cannot be impeached as invalid, because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done, cannot be set aside by the courts because they may deem it to be unreasonable, or against sound policy." This section of the text is supported by the cases of *Peoria v. Calhoun*, 29 Ill. 317; *City of St. Paul v. Colter*, 12 Minn. 41, (Gil. 16;) *Brooklyn v. Breslin*, 57 N. Y. 591; *Coal Float v. City of Jeffersonville*, 112 Ind. 15, 13 N. E. Rep. 115; *State v. Belvidere*, 44 N. J. Law, 350. In the case of *State v. Clarke*, 54 Mo. 17, *NAPTON, J.*, says: "It is naked assumption to say that any matter allowed by the legislature is against public policy. The best indications of public policy are to be found in the legislative enactments. Whether the ordinance in question is calculated to promote the object is a question with which the courts have no concern, when the legislative will has been plainly expressed." Power to do an act is often conferred upon municipal corporations in general terms, without being accompanied by any prescribed mode of exercising it. In such cases the common council necessarily have, to a greater or less extent, a discretion as to the manner in which the power shall be used. This discretion, where it is conferred or exists, cannot be judicially interfered with or questioned, except where the power is exceeded, or fraud is imputed and shown, or there is a manifest invasion of private rights. *Railroad Co. v. Evansville*, 15 Ind. 395; *Kelley v. Milwaukee*, 18 Wis. 83; *Slack v. Railroad Co.*, 13 B. Mon. 1; *Bridgeport v. Railroad Co.*, 15 Conn. 475; *Page v. St. Louis*, 20 Mo. 136; *Mayor v. Gill*, 31 Md.

375; *Railway Co. v. Cheyenne*, 113 U. S. 516, 5 Sup. Ct. Rep. 601. Thus, for example, if a city has power to grade streets, the courts will not inquire into the necessity for the exercise of it, or the refusal to exercise it; nor whether a particular grade adopted, or a particular mode of exercising the power, is judicious. *Tee-garden v. City of Racine*, 56 Wis. 545, 14 N. W. Rep. 614; *Sheridan v. Colvin*, 78 Ill. 237; *Hovey v. Mayo*, 43 Me. 322; *Richmond v. McGirr*, 78 Ind. 192.

So, whether we view the delegation of the power contained in this act to the city authorities of Topeka to provide for the construction of sewers, by district or otherwise, as authority to pass an ordinance of a specified or defined character, or whether we determine that it is a general grant of power, with discretion as to the mode of its exercise,—and it must be the one or the other,—it is not subject to judicial control upon the ground that it is unreasonable. As a matter of fact, fairly determined by the express words of the statute, it could not be unreasonable because the city council had adopted a system of sewers; and the section expressly provides "that, when any property has paid its full proportion for general sewers and drains in one district, it shall not be transferred to any other, and made liable for sewers and drains therein." When, in the course of time, the sewerage system of the city shall be complete by districts, the only possible difference it can make to any or all property holders would be the time at which they are taxed for the particular improvement. If they could be excluded from a sewer district in which there was a large population, and left to await the growth and development of a more sparsely settled portion of the city, then sewer taxes would be postponed. We think the trial court erred in its conclusion of law that the ordinance establishing the sewer district was unreasonable.

2. The query of the trial court, whether or not it is competent for the mayor and councilmen of a city of the first class, by ordinance, to establish a sewer district with one or more main sewers and lateral sewers, under the law governing such cities, until the city engineer has made and completed a topographical survey of the districts to be drained by such system of sewers, and, when such a topographical survey is made, is it incumbent on and a duty of the mayor and councilmen to adopt the survey, with the boundaries indicated by such survey, or reject the survey as a whole?—may be answered in the negative, for a variety of very good reasons. *First*. The action in question does not make a topographical survey by the city engineer a condition precedent to the action of the mayor and council. It does not even provide that such a survey shall be made. *Second*. The duties of the city engineer are expressly declared by section 89 of the act to be to superintend the construction of all public works ordered by the mayor and council, make out plans, specifications, and estimates thereof, and to do the surveying and city engineering ordered by the city council. *Third*. It has been repeatedly decided that public powers and trusts

are incapable of delegation, and the power conferred by this act must be exercised by the officers to whom it is delegated by the legislature. 1 Dill. Mun. Corp. § 96. Where the charter gives the city council power to construct sewers of such dimensions as may be prescribed by ordinance, the council cannot, by ordinance, require sewers to be constructed of such dimensions as may be deemed requisite by the city engineer. *St. Louis v. Clemens*, 52 Mo. 133; *Gas-Light Co. v. City of Minneapolis*, 36 Minn. 153, 30 N. W. Rep. 450; *Matthews v. Alexandria*, 68 Mo. 115; *Whyte v. Mayor*, 2 Swan, 364.

3. The city council of the city of Topeka consists of ten members. It takes six affirmative votes to pass an ordinance. This ordinance received eight votes, but it is alleged that three members of the council who voted for its passage owned property within and without said sewer district, and were not legally entitled to vote, and hence, receiving only five disinterested affirmative votes, the ordinance was not legally passed. The material facts respecting the ownership of real property by members of the city council who voted for the passage of the ordinance are these: Hale Ritchie, one of the councilmen from the Fifth ward, who voted for the passage of the ordinance, was the owner of a large number of city lots on Quincy, Monroe, and Madison streets, and on Kansas avenue, and a block lying east of Madison street, south of Eleventh street, west of Jefferson street, and north of Twelfth street. His brother, John Ritchie, owned 31 lots situated on Kansas avenue, Quincy, Monroe, and Madison streets. While there is no special finding of fact by the trial court as to what proportion of the real property of Hale Ritchie and John Ritchie is included within this sewer district, we judge, from an examination of the maps attached to the record as exhibits, that about one-half of the property of each are included in the sewer district. In this state of facts it is difficult to determine whether, if a disqualification exists as to the affirmative vote of Hale Hitchie as a councilman, on the passage of the ordinance, that disqualification is produced by the property taken into the sewer district, or by that left out. To say, in general terms, that a member of a city council cannot vote on the passage of an ordinance providing for the construction of some important public improvement, because he owns real property on the street to be graded, in the sewer district to be established, or in the city, when the improvement is a general one, is at once to disqualify every property owner in the city from belonging to the city council, and committing all the material interests of the city to a class of persons who have no property rights to protect. This would be going too far. Our statutes have provided in paragraph 653, p. 230, Gen. St. 1889: "It shall be unlawful for the mayor, or any member of the council, or any elected or appointed officer or servant of the city, to be a party to or interested pecuniarily in any contract, job, or piece of work which may be let by the city; and any contract in which any such officer shall be

peculiarly interested shall be null and void; and, in case any money shall have been paid on any such contract, it shall be the duty of the city attorney to sue for and recover the amount so paid, in the name of the city, from the parties to such contract, and from the councilman or other officer peculiarly interested in the same, and if any such officer, while in office, shall become peculiarly interested, directly or indirectly, in any contract or agreement in which the city shall be interested, or any question submitted, or proceedings upon which such officer shall be called upon to vote or act officially, with intent to gain, directly or indirectly, pecuniarily, any benefit, profit, or pecuniary advantage, he shall be removed from office, and on conviction shall be deemed guilty of a misdemeanor," etc. This section prohibits a member of the city council from voting on any question submitted, or in any proceeding, with intent to gain, directly or indirectly, pecuniarily, any benefit, profit, or advantage. Assuming that this section applies in letter and spirit to Hale Ritchie in his vote on the ordinance in question, yet we are not able to determine, from the facts recited, that his affirmative vote, cast in favor of the passage of this ordinance, was cast with intent to gain any profit or advantage. If Ritchie was prosecuted under the section above quoted for misdemeanor, or if proceedings had been commenced to remove him from office as a councilman, on the facts presented in this record, could it be pretended for a moment that a guilty intent was shown? The theory of the defendant in error, if applied to the extent claimed, would practically disfranchise every member of the council who owned real property. Section 444, Dill. Mun. Corp. (3d Ed.) and the case of *City of Toronto v. Bowes*, 4 Grant, (U. C.) 504, are cited to sustain the views of the defendant in error. The citation from the admirable work of Judge Dillon is to this effect: "Members of a municipal board are disqualified to vote therein on propositions in which they have a direct pecuniary interest adverse to the municipality they represent." This is the extent to which the text applies. In support of it, the foot-note cites the cases of *Supervisors v. Hall*, 47 Wis. 208, 2 N. W. Rep. 291; *Pickett v. School-Dist.*, 25 Wis. 551; *Coles v. Williamsburgh*, 10 Wend. 659; *Walworth Co. Bank v. Farmers' Loan & Trust Co.*, 16 Wis. 629; *Church v. Vandusen*, 37 Wis. 54; *Steckert v. East Saginaw*, 22 Mich. 104.

The latter case is similar to the one under consideration. It was an injunction to restrain the collection of a special assessment for paving a street. One of the grounds alleged was that two of the aldermen who formed a part of the quorum, when important action was taken, and without whose presence and votes there would have been no quorum, were petitioners for the improvement, and owners of property liable to assessment therefor. The votes of these aldermen, it is claimed, were void, and consequently the action of the council to which their votes were essential was void also. Judge COOLEY, who delivered the opinion of the court,

said: "We think this objection without force. The action in question was legislative in character, and the interest these aldermen had in it was of precisely the same nature with that which every legislator has in a bill he votes for, which is to subject his property, in common with that of his fellow-citizens, to taxation. They were laying down rules which in their operation would affect alike and impartially their own interest and that of all others whose property would be taxed. Such an interest is calculated to make a man careful and solicitous for the public interest, with which his own is inseparably connected, instead of inclining him to vote recklessly or corruptly, when the burdens are to follow which he must share. None of the cases cited on the argument in this connection have any bearing. Those only decide that a man is not permitted to occupy inconsistent positions when his own interest is directly involved; but in no question here voted upon could these aldermen have discriminated between their personal interest and that of the other tax-payers, except in fixing the taxing district; and as on that question, if they voted at all, it was against their apparent interest, and in favor of making a district that included their own property, it is obvious that they did not by their vote place themselves in a position antagonistic to other tax-payers. If the common council acted as commissioners of apportionment in making the assessment upon the property that was to bear the burden, other considerations might be involved; but this charter designates a different tribunal for that purpose, and prescribes great caution to insure impartiality." This comes very close to the action of Ritchie as a councilman. He had a large number of lots included in this sewer district. The other cases cited are to this effect. The case in 47 Wis. and 2 N. W. Rep. applies to two members of a board of county supervisors who voted in favor of a compromise settlement with a defaulting county treasurer, in a case in which they were personally responsible for some of the missing money. In the case in 16 Wis. the general rule of the common law, that members of a legislative or a municipal body are disqualified to vote on propositions in which they have a pecuniary interest adverse to the state or municipality they represent, was applied to an officer of a railroad company. In *Church v. Vandusen* it was applied to the trustees of a church society. In *Pickett v. School-Dist.* it was applied to a school-district officer. In the case in 10 Wend. the same principle was applied to a village trustee. We would apply it in this case against Councilman Ritchie, if it was shown that he had a pecuniary interest in the establishing of this sewer district adverse to the city of Topeka. Viewing it from every stand-point, we cannot say that Ritchie was disqualified by reason of the fact that some of his property was included in and some excluded from the sewer district. His vote made the necessary majority, and the ordinance was legally passed. It is not necessary to comment on the votes of the other councilmen. The property in

cluded in the sewer district is specially benefited, and it is true that other property might have been taken in and received special benefits. This may be said in every case of the establishment of a sewer district; but because the city council, in the exercise of the power and discretion conferred upon it by law, has included some and excluded some, we cannot say, as a matter of law, based upon the exclusion, that the ordinance is void; for, without a clear showing that there has been corrupt and fraudulent action by the councilmen, we cannot review their proceedings in such a matter. Our conclusion is that, upon the facts recited in the record, there has not been a sufficient showing upon which to predicate a judgment either that the ordinance is void, or that Ritchie was disqualified from voting. It is true in this case, as in every other sewer district that may be established, that there are adjoining its boundaries some outlying property that might be benefited by the sewer; and we have no doubt but that the property lying inside the boundaries of this particular sewer will receive benefits from its construction; but, because these results are plain, it does not follow that all property that may be benefited by the construction of sewers should all be embraced within one sewer district. The legislature has left this matter to the control of the mayor and councilmen of the city of Topeka, and in no case would we interfere, except upon clear proof of actual fraud. All questions of public policy, with reference to sewers, have been considered and determined by the legislature of this state, and as long as the proceedings of the city council are in accordance with the express grant of power of the legislature, and the personal conduct of the members thereof, with respect to their official action in such matters, is not fraudulent, we find no warrant of authority to interfere or subject the establishment of sewer districts to judicial interference. Recent opinions of this court filed at the January sitting in the cases of Mayor, etc., v. Price, Mayor, etc., v. Lamphear, and Mayor, etc., v. Burns' Estate, 25 Pac. Rep. 605, will be found to have some bearing on the propositions herein discussed. It is recommended that the judgment of the district court of Shawnee county be reversed, and the cause remanded, with instructions to refuse the order of injunction.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 37)

HAMMERSLOUGH *et al.* v. CITY OF KANSAS CITY *et al.*

(Supreme Court of Kansas. April 11, 1891.)

MUNICIPAL CORPORATIONS — CONTROL OF STREETS — LIMITATIONS.

1. The findings of fact examined, and held sufficient to sustain the first conclusion of law by the trial court, to the effect that Central avenue, Kansas City, Kan., is a street within the limits of said city, and under the control thereof.

2. The findings of fact in this case show that the "assessment" for the improvement of Central

avenue was "ascertained" November 22, 1889. Held, that the 80-days statute of limitations commenced to run at that time, and had fully run long before the plaintiffs commenced their action October 20, 1890, and the action was therefore barred.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Wyandotte county; O. L. MILLER, Judge.

Charles Daniels and Brown, Chapman & Brown, for plaintiffs in error. L. W. Kepfinger, for defendants in error.

STRANG, C. This was an injunction proceeding, begun in the district court of Wyandotte county, October 20, 1890, to restrain the collection of certain special assessments levied against the property of the plaintiffs by the defendants to pay the first installment of the amount assessed against said property for paving and curbing Central avenue in said defendant city, and to declare the entire assessment void. The case was heard by the district court of Wyandotte county, November 17, 1890. The court made special findings of fact and conclusions of law, and rendered a general judgment, dissolving the injunction, and taxing the costs to the plaintiffs, who bring the case here for review. There are a number of errors assigned in this case, and an almost innumerable number of subquestions raised and discussed by counsel for the plaintiffs in their brief, and in the oral argument before the commission. Several of the questions have been decided by this court in opinions recently reported, and are therefore taken out of the domain of disputed questions, and have become the settled law of the state. In the light of these decisions, there is but little to settle in this case.

The first question we desire to notice is raised by the plaintiffs' objection to the first conclusion of law by the trial court. We notice this question first, not simply because it relates to the first conclusion of law in the case, and is the first error assigned, but because it raises a question that should be first settled. It raises the question whether or not Central avenue is a street within the defendant city. If Central avenue is not a street within said city, then the mayor and council of said city did not and could not obtain jurisdiction over the same for paving, or curbing, or for the purpose of other improvements; and if said avenue is not a street of said city, then this case should terminate here, and in favor of the plaintiffs. The conclusion of law referred to reads as follows: "That the exclusive ownership and control of Central avenue is in the city, the parties mentioned in the petition as owning certain parts of said avenue having by their acts dedicated such pieces of land to public use." The plaintiffs allege that this conclusion is erroneous. We do not think so. We think there is sufficient in the findings of fact of the court below, which are unchallenged by the plaintiffs, to fully sustain this conclusion of the court. In July, 1887, there was no street where Central avenue now is. About that time the Interstate Consolidated Rapid Transit Railway Company opened up and graded its

right of way from Mill street to Eighteenth street. Soon after, adjacent property on both sides was platted in additions by the owners along the line of said roadway, and in conformity to its course, and dedications were made to the city and county of sufficient ground on either side of the said right of way to constitute a road-way 80 feet wide, almost continuously, for the entire length of such avenue; and the findings further show that said railway company, the Riverview Land & Improvement Company, by their officers, and the other individuals, who, it is alleged in plaintiffs' petition own portions of said street, in their proper persons, acquiesced in the use and occupation of said avenue as a street by the defendant city. They permitted the city to build sidewalks along said street, and most of them joined in a petition asking the city to build such walks. They also asked the city to extend the water-mains along said street, that they might connect therewith and obtain a supply of water; and again, the most of the parties who it is alleged own part of said street joined in a petition asking the city to extend said water-mains; and all the parties stood by and saw the street curbed and paved by the city, without ever objecting thereto, or making any claim to the ground being so paved. All such parties are stopped now from claiming ownership in the lands constituting said street, and, as the entire length of said street was taken into the city before it was paved, said avenue is a street of, and within the limits of, said defendant city, and as such is within the control of the mayor and council of said city. Such avenue being a street within said city, the mayor and council thereof might obtain jurisdiction over it for the purpose of curbing and paving the same by taking the necessary statutory steps which, under the law, give them jurisdiction over the streets of the city for that purpose. Did the mayor and council take such steps in this case, and obtain jurisdiction over Central avenue for paving purposes? The statute provides that they must pass and publish a declaratory resolution, declaring the necessity for paving the street sought to be paved. Such a declaratory resolution was passed June 25, 1889, and published according to law. August 24th thereafter, ordinance No. 1001 was published, being an ordinance providing for the paving and curbing of Central avenue between Mill street and Eighteenth street. Afterwards the city engineer prepared plans, specifications, and estimates for curbing and paving said avenue. The contracts for said improvement were then let. Appraisers were appointed, and the property deemed liable for the improvements was appraised, and on November 22, 1889, ordinance No. 1150 was passed and published, being "An ordinance apportioning and assessing the costs of paving and curbing Central avenue from Mill street to Eighteenth street upon the property liable for the payment thereof." Attached to this ordinance, and published with it in the official city paper, was a schedule or list of lots assessed, including those of the plaintiffs, for the

purpose of the improvement of said avenue, with amount of the assessment charged against each lot. In May, 1890, the work under the paving contract was complete, and the city engineer accepted the same. In August, 1890, the work on the curbing contract being completed, the city engineer accepted the work under that contract, and made his final report to the city council, which was accepted by that body, and the contractors fully paid for their work so done. In August, 1890, ordinance No. 1651, being "An ordinance levying a tax to create a revenue to pay the maturing principal and accruing interest on internal improvement bonds issued for paving and curbing Central avenue from Mill street to Eighteenth street," was published. It thus appears that all the necessary conditions precedent to obtaining jurisdiction over said avenue for paving and curbing purposes were performed, and the council of said city obtained jurisdiction over said street for such purposes.

This case seems to have been brought under section 253 of the Code; but this court has already determined that section 253 has nothing to do with a case of this kind. In the case of *Lynch v. City of Kansas City*, 45 Kan. —, 24 Pac. Rep. 978, after quoting from the opinion in the case of *City of Topeka v. Gage*, Id. 82, referring to the limitation clause in paragraph 590, Gen. St. 1889, it is stated: "With this broad and liberal interpretation of this statute a conflict inevitably arises between it and section 253 of the Code." And, after referring to paragraph 590, containing the 30-days limitation clause, it is added: "The plain intent of these various provisions is to cause litigation, if any there is to be, to be commenced before the issue of the bonds, so as to avoid any uncertainty about their legality that might afterwards affect their market value. The 30-days limitation within which the assessments that are the basis of the bonds can be attacked is a wise one, is reasonable as to time, and is of unquestionable validity in every respect. To give it force we must hold that it changes the time within which an action of this kind can be instituted under section 253 of the Code, and leaves that section to apply only to illegal taxes and illegal charges. The word 'assessment,' as used in section 253 of the Code, and in paragraph 590, Gen. St. 1889, means the specific amount charged on the property, and not the mere fact of valuation." In the case of *Marshall v. City of Leavenworth*, 45 Kan. —, 24 Pac. Rep. 975, the court held that "the limitation of 30 days within which an action can be brought to defeat or avoid a special assessment or street improvements under section 1, c. 101, Laws 1887, is constitutional and valid, and the time when the assessment is ascertained, and when the limitation commences to run, is when the ordinance levying the assessments, and designating the amount of the assessment levied upon each particular lot or piece of ground, is published, and takes effect." Following the rule so laid down, the 30-days limitation in this case commenced to run December 23, 1889,—almost a year before the case was begun in the district

court. See, also, *Wahlgren v. City of Kansas City*, 42 Kan. 243, 21 Pac. Rep. 1068; *City of Topeka v. Gage*, (Kan.) 24 Pac. Rep. 82; and *Lynch v. Kansas City*, Id. 973, referred to herein. This is not all the laches of the plaintiffs, while it is all that is, perhaps, material; yet, so far as any claim of equity is concerned, we may call attention to the fact that they not only waited until the 30-days statute had run, but they stood by and saw the contracts for paving and curbing said avenue let, saw the work being done thereunder, an ordinance passed and published providing for the issuance of bonds to raise the means to pay for the work, saw the bonds sold, the work under the contracts accepted by the city engineer, his report thereof made to the council of the city, and by them approved, the contractors fully paid, and an ordinance passed and published levying a tax upon the property assessed for the improvement, to meet the maturing principal and accruing interest on said bonds, and then, after all this was done, still waited more than 30 days before commencing their suit. The plaintiffs have lost their rights by waiting too long. There was no reason why, when, on November 22, 1889, ordinance No. 1150 was published, if property owners felt aggrieved by the assessment therein made, they should not have commenced their proceeding to enjoin the city from proceeding further. If, as they now assert, 96 lots that should have been included among the number charged with the improvement of that street were left out of the assessment, that fact was as well known then as now or at the commencement of this suit. This and all other irregularities, short-comings, and defects in the method of performing the work of curbing and paving were absolutely waived when the 30-days statute had run, and they remained unchallenged. The things necessary in this case to give the mayor and council of the defendant city jurisdiction over Central avenue for paving and curbing purposes were the fact that Central avenue was a street within the limits of said city; the passing of the resolution declaring the necessity for the improvement; the making of plans, specifications, and estimates for the work by the city engineer; the appraisal of the property charged with the expense of the improvement; and the passage and publication of the ordinances providing for paving and curbing said avenue, with a specification of the lots charged and the amounts assessed against each lot. This done, the council had jurisdiction of the street for paving and curbing purposes; and, jurisdiction having attached, they could go ahead with the work unchallenged, unless within 30 days from the publication of the ordinance ascertaining the assessment, suit was begun. Having held that Central avenue is a street within the limits of defendant city, and that the council of said city took the necessary statutory steps to obtain jurisdiction over the same for paving and curbing purposes, and the plaintiffs' cause of action on the merits being barred by the express terms of the statute, as well as prior decisions of this court, we will not examine the numerous irregulari-

ties, defects, and short-comings discovered and argued by plaintiffs in their brief. We recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 307)

#### STATE V. CORFIELD.

(*Supreme Court of Kansas.* Dec. 6, 1890.)

##### WHEAT CONSTITUTES FORGERY—INDICTMENT.

An information which charges that the defendant made out, swore to, and presented to the board of county commissioners of a certain county a claim against said county, which was allowed, and a warrant issued to him thereon, when said county did not owe him anything, is not guilty of forgery under section 115 of the crimes act; and an information based upon such facts does not charge the offense of forgery, and it is not error to sustain a motion to quash the same.

(*Syllabus by Strang, C.*)

Commissioners' decision. Appeal from district court. Barton county; J. H. BAILEY, Judge.

L. B. Kellogg, Atty. Gen., J. M. Johnson, J. A. Wilson, and Adv. & Nicholson, for the State. Webb & Webb, for appellee.

STRANG, C. Prosecution for forgery. Information filed in the district court of Kearney county, April 16, 1889. April 18, 1889, change of venue allowed, and case sent to Barton county, Kan. March 10, 1890, motion to quash sustained and defendant discharged, to which ruling sustaining such motion to quash an order discharging the defendant, the state of Kansas excepted, and appeals to this court.

The sole question to be determined here is whether or not the information charges the offense of forgery under our statutes. The information reads as follows: "I, J. A. Wilson, the undersigned, county attorney of said county, in the name, by the authority and on behalf of the state of Kansas, come now here and give the court to understand and be informed that on the 1st day of October, A. D. 1888, in said county of Kearney and state of Kansas, one [H. A. W. Corfield] did then and there unlawfully, feloniously, and fraudulently falsely make and forge and issue to him, and did willingly aid and assist in falsely making and forging, a certain county order and warrant of the county of Kearney in the state of Kansas, issued and purporting to have been issued under the authority of the said county of Kearney, and purporting to have been issued by virtue of the laws of the state of Kansas, providing for the allowance and payment of claims against counties in said state of Kansas, the substance, purport, and effect of which said false and forged county order and warrant is as follows; that is to say: 'No. 474. \$1,000.00. County Clerk's Office. Lakin, Kansas, Oct. 1st, 1888. Treasurer Kearney County, Kansas: Pay to H. A. W. Corfield, — or bearer, the sum of one thousand — and — 00 dollars, for mileage & Ex. for Co., as commissioner, out of any money in the treasury not otherwise appropriated. By order of the



board of county commissioners. W. J. PRICE, Chairman. J. B. WATERMAN, Clerk.' Which said county order and warrant was sealed with the seal of said county, and was of the value of \$1,000; a more particular description of which is to said county attorney now unknown, the said false and forged county order and warrant being destroyed, (or in the possession of some person to said county attorney unknown;) which said county order and warrant was falsely made, and is a forgery, in this: that said county of Kearney did not owe said [H. A. W. Corfield] said sum of \$1,000, nor any part thereof, which said defendant well knew at the time he so made and caused and procured said county order and warrant to be so made and issued to him; and that said defendant then and there well knew said county order and warrant to be false and fraudulent, and that he so made and caused and procured said county order and warrant to be so made and issued to him, the said [H. A. W. Corfield,] with intent to cheat and defraud said county of Kearney, which was then and there an organized county of the state of Kansas, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Kansas. Second count: And I, the said J. A. Wilson, county attorney as aforesaid, give the court to further understand and be informed that on the 1st day of October, 1888, in said county of Kearney in the state of Kansas, the said H. A. W. Corfield, did then and there unlawfully, feloniously, and fraudulently falsely make and forge, and cause and procure to be falsely made, forged, and issued to him, and did willingly aid and assist in falsely making and forging, a certain county order and warrant of the county of Kearney in the state of Kansas, issued and purporting to have been issued under the authority of said county of Kearney, and purporting to have been issued by virtue of the laws of the state of Kansas, providing for the allowance and payment of claims against counties in said state of Kansas, the substance and effect of which said false and forged county order and warrant is as follows, that is to say: 'No. 475. \$380.00. County Clerk's Office. Lakin, Kansas, Oct. 1st, 1888. Treasurer Kearney County, Kansas: Pay to H. A. W. Corfield — or bearer, the sum of three hundred eighty — and — 00 dollars, for 4 trips to Topeka for county out of any money in the treasury not otherwise appropriated. By order of the board of county commissioners. W. J. PRICE, Chairman. J. H. WATERMAN, Clerk.' Which said county order and warrant was sealed with the seal of said county, and was of the value of \$380; a more particular description of which is to said county attorney now unknown, the said false and forged county order and warrant being destroyed, or in the possession of some person to said county attorney unknown, which said county order and warrant was falsely made, and is a forgery, in this: that said county of Kearney did not owe said H. A. W. Corfield said sum of \$380, nor any part thereof, which said defendant well knew at the time he so

made and caused and procured said county order and warrant to be so made and issued to him, and that said defendant then and there well knew said county order and warrant to be false and fraudulent, and that he so made and caused and procured said county order and warrant to be so made and issued to him, the said H. A. W. Corfield, with intent to cheat and defraud said county of Kearney, which was then and there an organized county of the state of Kansas, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Kansas. J. A. WILSON, County Attorney."

The prosecution is under section 115 of the crimes act, which, so far as it is material or pertinent, reads as follows: "Every person who shall falsely make, alter, forge, counterfeit, print, or photograph, or cause or procure to be falsely made, altered, forged, counterfeited, printed, or photographed, \* \* \* any county warrant or order, \* \* \* shall, on conviction, be adjudged guilty of forgery in the first degree." This section is a copy of section 115 of the crimes act of 1868, as amended by the legislature of 1876. The original section in the statutes of 1868, so far as it is material to this case, reads as follows: "Every person who shall forge, counterfeit, or falsely alter, or cause or procure to be forged, counterfeited, or falsely altered, any warrant \* \* \* of the state of Kansas, \* \* \* shall, on conviction, be adjudged guilty of forgery in the first degree." Comparing this section with original section 115 of the Gen. St. of 1868, we find that the legislature of 1876, in amending said section, so far as such amendments are pertinent to this case, added the word "make" to the operative words of the section, and extended the effect of the statute to county warrants and orders. The operative words of the old section are "forge, counterfeit, or falsely alter, or cause or procure to be forged, counterfeited, or falsely altered;" while in the new or amended section they are "falsely make, alter, forge, counterfeit, print, or photograph, or cause or procure to be falsely made, altered, forged, counterfeited, printed, or photographed." The word "falsely" and the procurement clause are found in both sections. The portion of the section to be construed is the first part thereof, containing the operative words, it being conceded that the present section extends the operation of the statute to county warrants and orders. In the old statute the word "falsely" follows all the operative words of the section except the word "alter," which alone it modifies, while in the amended section it precedes and modifies them all. By such change, does the phraseology obtain any new or other significance from that which it had in the original section so far as it went? We are unable to discover any. As it now stands, the word "falsely" modifies the words "forge and counterfeit," as well as the words "make and alter." Does the word "falsely" possess any meaning different, when it modifies the word "make" in this section, from that which it possesses when

it modifies the words "forge and counterfeit?" Can we say that the word "falsely," when it modifies the words "make and alter," in the present section, means "fraudulently," and that it means something else when it modifies the very next word in the same sentence, to-wit, "forge?" We think not. We see no reason for giving the words "falsely," "make," and "falsely forge," as found in our statute, any other or different meaning from that which they possess in the ordinary forms of indictment for forgery or counterfeiting, or in the text-books. If the word "false" were eliminated from the section, and it read "every person who shall make, or cause or procure to be made, any county warrant or order, with intent to defraud the county," or if the language was "every person who shall falsely procure to be made any county warrant or order, with intent to defraud the county," we could better understand the contention of the appellant; since in the one case the defendant might be guilty of procuring the warrant to issue, and the information would be good; and in the other we could say the word "falsely" meant "fraudulently," and hold the charge good because the defendant fraudulently procured the warrant to issue. It seems to us that the position of the appellant is based upon a misapprehension of the statute, since it is claimed that the defendant is guilty of the offense of forgery, although it is conceded that he did not make the warrant set out in the information, but that, on the contrary, the warrant was made by the chairman of the board of county commissioners, and attested by the county clerk, upon a claim regularly presented to and allowed by the county board. In other words, it is insisted that the defendant is guilty of forgery, though he did not make the warrant, and the warrant itself is genuine,—that is, was not forged, but made by the parties by whom it purports to have been made,—simply because the county did not owe him anything when the warrant was issued. That because the defendant fraudulently presented a claim to the board of county commissioners, which was allowed, and a warrant issued thereon, he is guilty of forgery. The language of the statute is "falsely make, or cause or procure to be falsely made." The defendant did not make the warrant, and the warrant was not falsely made by any person or authority; hence the defendant did not cause or procure the warrant to be falsely made, and his conduct, therefore, did not amount to forgery. It is intimated by the state in its brief that the defendant cannot be punished at all unless for forgery under this statute. That is wholly immaterial, so far as the question presented to this court is concerned. We hardly think, however, that if the defendant made out and swore to a fictitious claim against the county of Kearney, and presented the same to the county board, and procured its allowance by them, and then procured a warrant to issue therefor, our statutes are so barren of remedies as to furnish none in such a case. We think the motion to quash was properly sustained. It is therefore recommended that the judg-

ment of the district court thereon be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

ON REHEARING.

(April 11, 1891.)

PER CURIAM. We are satisfied with the law declared in the former opinion handed down. See *Mann v. People*, 15 Hun, 155, and the numerous decisions cited therein; the same case in 75 N. Y. 484. In that case it was said: "A county officer, who without authority has executed in his own name, as the official representative of the county, an instrument purporting in its body to be the contract or obligation of the county, cannot be convicted of forgery." *State v. Willson*, 28 Minn. 52, 9 N. W. Rep. 28, *State v. Young*, 46 N. H. 266. We have examined *Ex parte Hibbs*, 26 Fed. Rep. 421; *Luttrell v. State*, 85 Tenn. 232, 1 S. W. Rep. 886; also all the other cases cited on the part of the state. So far as these cases conflict, if in any way they do conflict, with the former opinion, we are not inclined to follow them. The motion for a rehearing will be overruled.

(38 Cal. 602)

PEOPLE v. DEEGAN. (No. 20,764.)

(*Supreme Court of California*. April 18, 1891.)

CROSS-EXAMINATION OF WITNESS—MISCONDUCT OF JURY—DRUNKEN JUROR.

1. Where, in a trial for larceny, a witness for the prosecution testifies to having seen defendant on the night of the stealing, but says nothing about any conversation with defendant, it is inadmissible for defendant to cross-examine him in respect to a conversation had at that time.

2. A conviction will not be reversed because it appears from affidavits that one of the jurors drank intoxicating liquor during the trial, and that during a recess of court he was intoxicated, when counter-affidavits by the other jurors, and the officer in charge of the jury, show that the juror was rational and sober at all times while hearing the trial and deliberating on the verdict.

3. If during the trial a juror appears to be intoxicated in court, defendant should object to his serving before the jury retire. *De Haven, J.*, dissenting.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

*Hinds & Merriam* and *A. J. Burns*, for appellant. *W. D. Tupper* and *H. H. Welsh*, for the People.

FOOTE, C. The defendant was convicted by a jury of the crime of larceny, the theft of a calf. From the judgment rendered in the premises, and an order denying him a new trial, he appeals. The evidence upon which he was tried is mainly circumstantial, but we see no reason to declare, as the defendant contends we should, that the jury were not warranted in returning the verdict of guilty.

In the progress of the trial a witness for the prosecution, Mr. Zeilor, testified that he saw the defendant and those claimed to have been with him, on the night of the alleged stealing, at Selma, in Fresno county, between 8 and 9 o'clock in the evening. Then, upon cross-examination by defendant's counsel, the witness said he had no

conversation with them. When his memory was refreshed by a further question, he was about to state what he had said to them, and presumably what they said to him, when the district attorney objected, on the ground that the testimony sought to be elicited was not in cross-examination of any thing brought out by him in his examination in chief. The court sustained the objection, and the defendant excepted, and assigns this ruling of the court as prejudicial error. If the people, for the purpose of criminating the defendant, had asked for this conversation, it would have been admissible, and then the defendant could have cross-examined the witness in relation to the matter. This was not done, and as the defendant's conversations could not be introduced by him in chief, for the reason that it is not permissible for a man charged with crime thus beforehand to manufacture evidence for himself, so it could not be admissible in cross-examination, if brought out by the defendant for the first time. Besides, what appears to have been said, and which it was the evident purpose of defendant's counsel to bring before the jury, is testified to by defendant afterwards. So that no prejudicial error was committed as to the matter.

The last and most important ground upon which the appellant bases his contention for a reversal of the judgment and order is that one of the jurors was guilty of the misconduct of drinking intoxicating liquors during the progress of the trial, and to such an extent as to disqualify him for the performance of his duty in such capacity. The affidavit of the juror himself, seeking to impeach his verdict, is not admissible. *People v. Gray*, 61 Cal. 183. There were other affidavits introduced on the part of the defendant which went to show that during the recess of the court, from 12 to 2 o'clock on the day when the verdict was rendered, the juror in question was intoxicated in a saloon in Fresno; that he had been during that week under the influence of intoxicating liquors, and that on the day of the verdict, during recess of court, as heretofore stated, he came home greatly under the influence of such liquor, stupid and irrational; that he went to sleep, and was awakened by the deputy-sheriff, and taken back to court in a condition not fitting him for the service of a juror; that he drank a tumbler full of whisky, and was intoxicated during the recess above mentioned; that the juror was drunk in a saloon between the hours of 12 and 2 on the day in question.

There is no doubt of the fact that the juror drank the intoxicating liquor during the recess. But the affidavits for the people, mainly by the fellow-jurors of the one charged with misconduct sufficient to vitiate the verdict, are to the effect that at no time during the trial did they perceive that the juror was intoxicated in any degree, but that, on the contrary, he was sober, intelligent, and perfectly able to consider evidence, and exercise judgment in deliberating thereon; and that on the day of the rendition of the verdict, after they had retired to consider it, the juror Wade discussed in a reasonable and sen-

sible way the different facts as shown by the testimony in the case, and in every way indicated that he was thoroughly able and in a condition to perform his duty as a juror. The affidavit of Deputy-Sheriff Pickett shows that he saw the juror Wade come into the court-house where the trial was had with George Z. Moore, another deputy-sheriff, at half past 2 o'clock of the day of the verdict; that he has known the juror for about 20 years; that he particularly observed him from that time until about 5 o'clock P. M. while on the jury, and that there was nothing in his appearance and actions to indicate intoxication; that he was placed in charge of the jury at 5 P. M., and remained in charge of them until about 5:30 P. M., until they arrived at a verdict, when he returned with them to the court-room; that he met the juror in question about 15 minutes after the verdict had been returned, and had a conversation with him, and that he then appeared thoroughly sober. Deputy-Sheriff Moore swore that during all the days of this trial, 18th, 19th, and 20th of June, 1890, he was in the court-room, and observed the juror Wade; that he appeared to be thoroughly sober and intelligent, and in a condition to perform his duties as juror; that he has known Wade personally about 10 years; that on the 20th of June, 1890, at about 2:15 o'clock P. M., he went to Wade's house, and entering it saw Mrs. Hill, and asked where Wade was, to which she replied, "There he is; just wake him up;" that he did wake him, and that they proceeded to the court-house, a distance of a quarter of a mile, together; that during that walk he talked with Wade, and he was sober and intelligent, and did not appear in any way under the influence of intoxicating liquors; that they reached the court-house about 2:30 o'clock P. M.; that he remained there in the court-room some time before the case was submitted to the jury, and observed no action or appearance on the part of Wade indicating that he was drunk or intoxicated.

It thus appears that the court was justified in believing that while sitting as juror in the box, or considering the verdict, Wade was sober, intelligent, and in a fit condition to understand and deliberate upon the evidence, apply the instructions of the court, and form an express and fair opinion as to what the verdict should be. There is no doubt that he did drink intoxicating liquors out of court, and that at the recess at least he was for a time under its influence. The question, then, is whether as a matter of law, the verdict in which he concurred, and which he assisted in making, was vitiated by his drinking and its effect upon him outside of the court, when not sitting as a juror. We cannot say that it was. If, while in his capacity of juror, he was sober, heard the evidence, understood and appreciated it, and the instructions of the court and argument of counsel, and was then able intelligently to understand, deliberate, and determine what should be the verdict with his fellow-jurors, we are unable to perceive that the verdict was arrived at accompanied by misconduct on the part of the juror.

while performing his duty. He was guilty of drinking more than he ought when out of court, but does not seem ever to have been under its influence while sitting or deliberating as a juror. At those times his mind was clear, and no misconduct is shown to have occurred. We do not think that there is anything opposed to this in the case of *People v. Gray*, 61 Cal. 164, or *People v. Lee Chuck*, 78 Cal. 318, 20 Pac. Rep. 719. If, as the defendant seems to think, the juror was palpably intoxicated in court, and he or his counsel perceived it, objection should have been made before the jury was permitted to retire. *Ipswitch v. Fernandez*, 84 Cal. 639, 24 Pac. Rep. 298. But, as we have seen, the trial judge was justified under all the evidence before him in believing the juror sober during the performance of his duty as a juror on the trial, and while deliberating upon the verdict. For these reasons we advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

DE HAVEN, J., (*concurring*.) I concur in the judgment. The affidavits as to the condition of the juror Wade, on the afternoon when the case was submitted to the jury for decision, were conflicting; and the judge who presided at the trial, and must have personally observed the juror at the time referred to, was in a far better position than we to determine the truth of the matter, and that he did not believe the juror to have been under the influence of liquor, as charged, is implied from the order denying appellant's motion for a new trial. I do not, however, give my assent to that part of the foregoing opinion which seems to intimate that, if the juror was in the condition claimed by defendant, the objection now urged was waived because not made before the retirement of the jury. Whatever may be the rule in civil cases, in which it may be said, in a general sense, only the parties thereto are interested in the verdict, the principle of waiver of the right to object to misconduct, which in judgment of law disqualifies a juror for the performance of his duties as such, has no application to a criminal trial for a felony. In such a case the constitution guaranties to a defendant the right to a trial by 12 competent jurors, and his express consent to be tried by a less number will not bind him. *People v. O'Neil*, 48 Cal. 257. And there must be this number of competent jurors throughout the trial. The people of the state, equally with the defendant, are interested in having this constitutional right secured in every case, and it is of infinitely more importance to the people than to the defendant that no conviction for a grave offense shall be had, except as the result of a trial which commands the respect of those who witness it or are informed of the manner in which it is conducted. No juror is, in judgment of law, competent to sit during the trial who is not in a condition to

intelligently receive the evidence, the arguments of counsel, and the charge of the court; and, while it may be true that intoxication does not affect all men alike,—some retaining their judgment and ability to weigh and deliberate upon the effect of evidence, and to understand an argument, or the instructions of the court,—still the law takes no account of these exceptions, and holds no person competent to sit as a juror while in a state of intoxication. And I am of the opinion that, if a juror is in court intoxicated to such a degree as to be plainly noticeable, the defendant is not required to bring himself into antagonism with such juror by entering any formal protest or objection to proceeding with the trial while the juror is in such condition. This would present a case affecting not only a substantial right of the defendant, but also the dignity and decorum of the court itself, and should be disposed of by the court of its own motion, and that, too, so as to preserve the rights of the defendant.

83 Cal. 422

PEOPLE V. GORDON. (No. 20,737.)

(Supreme Court of California. March 24, 1891.)

ASSAULT WITH INTENT TO KILL—INSTRUCTIONS—MATTERS OF FACT.

1. On trial for assault with intent to murder it is error for the court to charge: "Upon a trial for an assault to commit murder, the assault and the intent being proved, the burden of proving circumstances of mitigation, justification, or excuse therefor devolves upon accused, unless the proof upon the part of the prosecution tends to show that the crime committed only amounted to an assault with a deadly weapon with intent to inflict \* \* \* bodily injury, \* \* \* or that defendant was justified or excused," as such instruction is contradictory and meaningless.

2. Where, in such case, there is a conflict in the evidence as to how the difficulty started, it is error for the court to charge that the prosecuting witness testified, in substance, "that defendant came up and addressed him in a sharp tone, and immediately made a demonstration to draw a pistol on him. \* \* \* Other witnesses corroborated in whole or in part that portion of the prosecutor's statement of the transaction after the conflict had commenced,"—since such charge is one as to matters of fact, which is prohibited by the constitution of the state.

Department 1. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

H. V. Morehouse and Hiram D. Tuttle, for appellant. S. G. Tompkins, G. W. Her-rington, and W. H. H. Hart, Atty. Gen., for the People.

GAROUTTE, J. This is an action charging the defendant with an assault with a deadly weapon upon the person of one Charles H. Potter, with intent to kill and murder said Potter. The defendant was convicted of an assault with a deadly weapon, and fined \$2,500, and, in default of the payment thereof it was ordered that he be imprisoned in the county jail of Santa Clara county at the rate of one day for each \$4 of said fine, and not exceeding in the aggregate 625 days. This appeal is from the judgment and the order denying defendant's motion for a new trial.

Among the grounds relied upon by defendant's counsel to support this appeal,

it is claimed the court misdirected the jury as to the law of the case. The court gave the jury the following instruction: "Upon a trial for an assault to commit murder, the assault and the intent being proved, the burden of proving circumstances of mitigation, justification, or excuse therefor devolves upon the accused, unless the proof upon the part of the prosecution tends to show that the crime committed only amounted to an assault with a deadly weapon with intent to inflict upon the person of the prosecuting witness a great bodily injury, or of a simple assault, or that the defendant was justified or excused." The learned judge of the lower court has attempted by the foregoing instruction to apply the principle found in section 1105 of the Penal Code as to the shifting of the burden of proof in cases of homicide to the present case,—a charge of assault with intent to commit murder. Such an application of that section of the Code cannot be made, for it only treats of cases of homicide. *People v. Cheong Foon Ark*, 61 Cal. 527; *People v. Rodrigo*, 69 Cal. 605, 11 Pac. Rep. 481; *People v. Mize*, 80 Cal. 45, 22 Pac. Rep. 80; *Com. v. McKie*, 1 Gray, 61. This principle of the shifting of the burden of proof in cases of homicide is purely a creation of the statute, and must be limited to the words of the statute. It is based upon the theory that certain presumptions shall take the place of evidence, and was not intended to change the rule of evidence. But, aside from any authority upon the question, it does not appear that the burden of proof could possibly shift at any stage of the proceedings, or under any state of circumstances in a case similar to the one under discussion. The presumptions which follow from the act of killing in a case of homicide, and which are impliedly recognized by section 1105, are inapplicable to, and have no relationship with, the offense of assault with intent to commit murder; and this is fully exemplified by a cursory examination of the instruction heretofore quoted, for such an examination proves the instruction to be misleading, contradictory, and practically meaningless. The language of the instruction is: "The assault and the intent being proved, the burden of proving circumstances of justification, excuse," etc., "rests upon the accused, unless," etc. If the assault and the intent to commit the murder are proven, the offense is made out perfect and complete in every portion, and the foregoing instruction can only be correct in the sense that when the prosecution has proven the defendant guilty it behooves him to do something in his own behalf, or suffer the consequences of his proven guilt. The serious vice in the instruction then follows. "Unless the proof on the part of the prosecution tends to show that the crime committed only amounted to an assault with a deadly weapon with intent to inflict upon the person of the prosecuting witness a great bodily injury, or of a simple assault, or that the defendant was justified or excused." This proviso or exception never could exist in connection with the previous assumption that the guilt of the de-

fendant of the crime of assault with intent to commit murder had already been established by the evidence of the prosecution, and it has no signification whatever when taken in connection with the former part of the instruction. If the defendant had been convicted of an assault with intent to commit murder, he would have been entitled to a new trial by reason of error in the foregoing instruction, but, having been found guilty of the crime of "assault with a deadly weapon" only, he is acquitted of the higher offense, to which the instruction alone is pointed, and consequently is acquitted of the intent to murder, and necessarily was not prejudiced thereby. *People v. Swift*, 66 Cal. 349, 5 Pac. Rep. 505; *People v. O'Neal*, 67 Cal. 378, 7 Pac. Rep. 790; *People v. Boling*, 83 Cal. 380, 23 Pac. Rep. 421.

The court gave the following instruction to the jury: "The prosecutor, Potter, has testified in substance that at the time in question he was sitting in front of the Lamolle House, in a chair on the sidewalk, unarmed. That the defendant came up, and addressed him in a sharp tone, and immediately made a demonstration to draw a pistol upon him. That he, Potter, thereupon sprang up from his chair, and grappled with the defendant, and struck him in the face. \* \* \* Other witnesses corroborated in whole or in part that portion of the prosecutor's statement of the transaction after the conflict had commenced." All the testimony of the prosecuting witness, Potter, as to these matters is as follows: "Examination in chief: I was seated in a chair in front of the Lamolle House, on Santa Clara street, near San Pedro street. I was seated looking east, and thinking about something. I had been there about twelve or fifteen minutes, when some one came up and addressed me as, 'Ah, there!' or 'Hullo, there!' I looked quick, and H. L. Gordon, the defendant, was standing about two feet from me. As I jumped around in this way, he started for his overcoat pocket with his right hand. I immediately jumped up and grabbed him. \* \* \* I saw him make a motion for his side coat pocket, and I immediately grabbed his hand. Cross-examination: The first time I saw him was when he was standing in front of me at the Lamolle House. I first saw defendant when he got in front of me on the sidewalk, about three or four feet from me. \* \* \* When he came up he said: 'There!' or 'Ah, there!' or 'Hullo, there!' I don't know which, but I heard the word 'there,' which was significant. When he spoke to me I had my legs crossed, and I looked round, and he immediately attempted to step back, and started his right hand for the side of his overcoat pocket. I raised up and grabbed him. \* \* \* I grabbed him with my left hand on his right wrist as he had his hand in his pocket. \* \* \* He was trying to get his pistol out of his pocket. He had his right hand in his pocket. \* \* \* The first time I saw Gordon he was endeavoring to get his pistol in his hand." It appears by the record that there was a wide difference between the testimony of the prosecuting witness

and the defendant as to the matters which occurred at the immediate inception of the difficulty between those parties; and, as the defendant in this case insisted at the trial that the shooting was done in self-defense, it was a matter of vital importance to the jury to know who began the affray, and this was essentially and solely the province of the jury to determine from the testimony of all the witnesses. While section 19, art. 6, of the constitution allows judges to state the testimony to the jury, yet this principle has always been strictly enforced, and necessarily so, for that judges must not charge juries with respect to matters of fact is a constitutional prohibition which has been jealously guarded and rigidly upheld from the earliest judicial history of the state. In the case of *People v. Williams*, 17 Cal. 147, Justice BALDWIN used the following language, which is as trite now as when used in that early case: "The experience of every lawyer shows the readiness with which a jury frequently catch at the intimations of the court, and the great deference which jurors pay to the opinions and suggestions of the presiding judge, especially in a closely-balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the court. A word, a look, or a tone may sometimes in such cases be of great or even of controlling influence. A judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts." As we have seen, in this case the judge undertook to state to the jury the substance of the prosecuting witness' testimony, which is a very dangerous thing to do, for it is essentially the province of the jury to decide what the substance of the prosecuting witness' testimony was. Selecting what constitutes the substance of a witness' testimony is to a greater or less extent a matter of opinion, and the jurors and the judge may have held widely different views as to what the substance of the prosecuting witness' testimony really was in this case. In the instruction under consideration the court states that the witness Potter testified: "That the defendant came up and addressed him in a sharp tone, and immediately made a demonstration to draw a pistol upon him." This goes to the very gist of the main inquiry in the case, and, while the foregoing may be in a certain sense and to a limited extent the substance of what the witness said happened at the commencement of the trouble, yet the witness in his testimony says that "some one came up to me, and addressed me as 'Ah, there!' or 'Hullo, there!'" Now some one is not necessarily the defendant; and it appears nowhere in the testimony of the witness that he was addressed in a sharp tone of voice. Now, this is significant, for if the remark was made in a "sharp tone" it might indicate anger, animosity, and ill will towards the witness, and it was for the jury to decide whether the tone of defendant's voice was sharp or not. Again, the court makes the witness say, "and immediately made a demonstration to draw a pistol upon him." Now, the witness really did say:

"As I jumped around in this way, he started for his overcoat pocket with his right hand;" and surely it is for the jury, and the jury alone, to determine the full meaning of these words, as actually used by the witness. And if in other portions of the witness' testimony he made statements contradictory to those just quoted, or which more fully coincided with the views of his testimony as expressed by the court in his charge to the jury, then it is pre-eminently the duty of the jury to say from all his statements what is the substance of his testimony as to what did occur at the moment when these two parties met. At the conclusion of this instruction to the jury the court used this language: "Other witnesses corroborated in whole or in part that portion of the prosecutor's statement of the transaction, after the conflict had commenced." It appears the parties came to blows, were separated, and then the shooting followed. This is the very moment of time at which the crime was committed, if committed at all; and for the court to tell the jury that the testimony of the witness Potter as to these important matters is corroborated by other witnesses surely prejudiced the rights of the defendant to his great disadvantage, and violated that constitutional prohibition that juries must not be charged as to matters of fact. Upon an examination of the other points relied upon by appellant, we find no error. For the foregoing reason let the judgment be reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; PATERSON, J.

(88 Cal. 450)

WINSLOW v. GOHRANSEN. (No. 13,114.)

(*Supreme Court of California*. March 26, 1891.)

APPEAL—JUDGMENT ROLL—FINDINGS—PRESUMPTIONS.

Where, in ejectment, the court recites that, having heard the proofs of the parties in support of the issues, it finds the facts as alleged in the complaint, and defendant appeals on the judgment roll alone, the judgment will not be reversed because there were no findings on the issues raised by the answer, as in the absence of a statement or bill of exceptions preserving the evidence, it will not be presumed that evidence was offered in support of the issues upon which there were no findings.

Department 1. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

*Wm. L. Gill*, (A. S. Kittredge, of counsel.) for appellant. *S. O. Houghton*, for respondent.

HARRISON, J. The appeal in this case is direct from the judgment upon the judgment roll alone. The appellant seeks its reversal upon the ground that the court below did not make findings upon all the issues in the case. The complaint is in the ordinary form of a complaint in ejectment. The answer denies its several allegations, alleges title in the defendant, pleads the statute of limitations, and sets up an equitable defense. The court found only the facts which were alleged in the complaint, and rendered judgment in fa-

vor of the plaintiff. In *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. Rep. 1098, it was held that "a failure to find upon some issue, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal, unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue." Appellant seeks to distinguish the present case from *Himmelman v. Henry* by the fact that it is recited in the findings herein that "the court proceeded to hear said cause upon the issues made by the complaint and the answer of the defendant thereto; and the court, having heard the proofs of the parties in support of the issues last aforesaid and the arguments of counsel, makes the findings of fact and conclusions of law;" and he contends that this recital is a sufficient compliance with the rule laid down in *Himmelman v. Henry*. If we should concede that this statement in the findings is sufficient to authorize us to assume that evidence was received upon the issues presented by the answer, it would not follow that the failure to make a finding upon such issues was error available to the defendant upon this appeal. The opinion of the court in *Himmelman v. Henry*, that a judgment would not be reversed for failure to find upon an issue, "unless it was shown that evidence was submitted in relation to such issue," necessarily implied that the evidence so shown must be sufficient to authorize such a finding as would "have the effect of invalidating a judgment fully supported by the findings made." Such a finding would not be authorized if the evidence introduced was insufficient to sustain the allegations presenting the issues, any more than it would if there was no evidence introduced in reference thereto. In either case the finding of the court could only be against the allegation, and consequently would not "invalidate" the judgment rendered in accordance with the other findings; and, inasmuch as the failure to make such finding would not affect the substantial rights of the appellant, the judgment ought not to be reversed. Code Civil Proc. § 475. The appellant is not prejudiced unless the court shall fail to make such findings in his behalf as will countervail its other findings; and, as error in the court below is not to be presumed, but must be shown by him, it is incumbent on him to produce before this court the evidence that was presented to that court, in order that we may determine whether any error was committed in failing to make such findings. If the omitted findings must have been adverse to the appellant, their omission is not error sufficient to authorize the reversal of the judgment. *Hutchings v. Castle*, 48 Cal. 156. The issues upon which the court made no finding in the present case were issues tendered by the answer, and it was incumbent on the defendant to introduce evidence in their support. There is no presumption that such evidence was introduced, and, unless the defendant did introduce evidence which, unless controverted, would sustain his allegations, the court was not required to make any find-

ings thereon. It is not enough for him to show merely that evidence was introduced, but it must also be shown that the evidence which was introduced was sufficient to support his allegations. The recital by the court that it "heard the proofs of the parties in support of the issues" does not imply that any particular proof was heard, nor does it have reference to proof upon any particular issue. It certainly does not imply that the proofs which it heard were sufficient to sustain the allegations of the answer. In *Himmelman v. Henry* it was recited in the findings that "the court, having heard the allegations and proofs of the respective parties, finds as matters of fact as follows." This recital was not deemed sufficient in that case to justify the presumption that any evidence was offered upon the issues on which no finding was made, and we do not perceive any substantial distinction between the recital in that case and in the one before us. The judgment appealed from is affirmed.

WE CONCUR: DE HAVEN, J.; GAROUTTE, J.

88 Cal. 480

ERLANGER v. DANIELSON. (No. 14,058.)

(*Supreme Court of California*. March 28, 1891.)

APPEAL-BOND—DISMISSAL.

Under Code Civil Proc. Cal. §§ 946, 962, providing that when appellant is an administrator, acting in another's right, or appeals from a judgment in proceedings had upon the estate, he need file no bond, an administrator who appeals from an order revoking his letters is not relieved from giving an appeal-bond, as such appeal is a personal matter, and not one in which the estate is interested.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Justin Jacobs, for appellant. C. G. Lamberson, for respondent.

TEMPLE, C. J. H. Danielson died intestate and unmarried, leaving two brothers in this state. March 13, 1890, the appellant, who was not a relative of the decedent, filed a petition asking for letters, and at the same time the written consent of Theodore Danielson, a brother of deceased, to his appointment. March 24, 1890, Theodore Danielson filed a petition asking for letters for himself. April 7, 1890, the court appointed both petitioners administrators, and both qualified. April 29, 1890, William Danielson, another brother of the decedent, who had been temporarily absent from the state, filed a petition asking that Erlanger's appointment be revoked, and that he be appointed in his stead. July 9, 1890, the court, after due notice, made an order revoking the letters to Erlanger, and appointed William Danielson. In making this order the court assumed to be acting under section 1383, Code Civil Proc. From these orders Erlanger appeals. July 16, 1890, the notice of appeal was served and filed. No undertaking on appeal was filed, but according to a statement in the transcript an order was made September 15, 1890, dispensing with security on appeal. Such order is supposed to be authorized by section 946,



Code Civil Proc. It is also contended that no bond was required under section 965, Id. We cannot agree with this contention. Plainly, on this appeal the appellant is not acting in another's right in the sense of section 946, Id., and we think it equally evident that section 965 has no application to this case. This is not a proceeding upon the estate of which he was administrator within the purview of that section. In the first place, he was not administrator. Whatever effect his appeal, when perfected, would have upon the order removing him, it was in full force until then. It follows that when he filed his notice he was not such officer and then had no administrator's bond. Suppose the contrary were held, and the order removing him was affirmed. How could his sureties be held for costs incurred after his duties as administrator had ceased? But the section has reference to matters in which the estate is interested. This is his personal matter. The undertaking of his sureties is that he shall faithfully perform the duties of his office. How can he be said to be discharging official duty in appealing from an order relieving him from such duty? It is true, the legislature has the power to provide for obligations not mentioned in the bond, or entirely outside of its apparent scope, and one becoming surety after the law has been enacted will be bound accordingly, for he will be presumed to know of the law; but this is a harsh rule, and the legislature will not be presumed to have intended such consequence unless the intent is clear. Here the intendments are all the other way. We think the appeal should be dismissed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal is dismissed.

88 Cal. 495

IRVINE *et al.* v. DAVY *et al.* (No. 13,188.)  
(*Supreme Court of California.* March 30, 1891.)

SETTING ASIDE DEFAULT—PLEADING.

Filing an answer after a default has been entered does not affect the default.

Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM WALLACE, Judge.

Moses G. Cobb, for appellants. W. C. Belcher and J. W. Mastick, for respondents.

SHARPSTEIN, J. The demurrers to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, were properly overruled. The default of the defendants for failing to answer the complaint, within the time allowed by law for answering, was properly entered. The filing of an answer after the default had been entered did not affect the default. The motion to set aside said default was properly denied, no ground appearing for setting said default aside. Judgment affirmed.

We concur: MCFARLAND, J.; DE HAVEN, J.

FULTON v. BRANNAN *et al.* (No. 13,603.)  
(*Supreme Court of California.* March 26, 1891.)  
PUBLIC LANDS—SWAMP—SUITABLE FOR CULTIVATION.

Const. Cal. art. 17, § 3, providing that state lands which are "suitable for cultivation" shall be granted only to actual settlers, and in quantities not exceeding 320 acres to each settler, applies to swamp lands granted to the state by Act Cong. Sept. 28, 1850, when such lands are "suitable for cultivation," and can be reclaimed and cultivated by an actual settler.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Freeman & Bates, for appellant. Chas. Lamberson, for respondent.

TEMPLE, C. This is a contest for the purchase of land from the state, instituted in the land-office. The court awarded the land to plaintiff, and defendant appeals. The land belongs to the class designated "swamp land," title to which was acquired by the state under act of congress approved September 28, 1850. The plaintiff was an actual settler upon the land, and the defendant was not. Under the finding of the court that the land in controversy was suitable for cultivation, this became the turning point in the case; the court holding that section 3, art. 17, of the state constitution was applicable. Whether it applies to swamp land at all is the only question of importance in this appeal. That the state had a clearly-defined policy upon the subject generally is quite evident from the section in question and the preceding. They are as follows: "Sec. 2. The holding of large tracts of land, uncultivated and unimproved, by individuals or corporations, is against the public interest, and should be discouraged by all means not inconsistent with the rights of private property. Sec. 3. Lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law." The policy of the state is here declared to be against selling any lands suitable for cultivation in tracts in extent exceeding 320 acres, or to other than actual settlers; and this policy is greatly emphasized by the preceding section, which plainly declares that the holding of large tracts, uncultivated, is against the public interests, and should be discouraged by all means consistent with private rights. In view of such declarations, it must be manifest that it was intended that all land within this state should, so far as governmental action could accomplish it without violating private rights, be held in small tracts, and constitute homes for its owners. No narrow construction of the only words in the section open to construction—"suitable for cultivation"—should limit the operation of this policy. The effect should be rather to extend than to restrict; for the policy is plainly that the section should include all, so far as possible. The constitution classifies all lands as suitable or not suitable for cultivation. For the purposes of this section, neither the legis-

lature nor the courts can classify them otherwise; and it must follow that whether a particular tract belongs to one class or to the other must always be a question of fact. The courts cannot exclude any other class of lands from the effects of this limitation or prohibition, except, in fact, unsuitable for cultivation; nor can the courts declare any class, as a class, unsuitable for cultivation, unless it knows judicially that no tract of the class in extent amounting to 320 acres is suitable for cultivation. Nothing less than this would justify such a judicial rule. Now, this court is presumed to know, whatever intelligent man does know, that swamp lands are liable to be reclaimed by natural causes, and that since the congressional swamp-land act, called the "Arkansas Act," many thousands of acres of these lands have been so reclaimed, and had been when this constitutional provision was adopted. There are now pending in this court several cases in which the court has found as a fact that the lands in question had been so reclaimed at the time of the several applications to purchase. These lands, when reclaimed, are often the most fertile we have, and entirely adapted to habitation. Section 3 was construed in *Manley v. Cunningham*, 72 Cal. 236, 13 Pac. Rep. 622, "to provide that the public lands should be held and disposed of, so far as possible, to those who will live upon and cultivate them; that they should be used to encourage the immigration of industrious people who will utilize and improve the lands, and, by building up homes and engaging in husbandry, add permanently to the wealth and prosperity of the state. The phrase 'suitable for cultivation' includes all lands ready for occupation, and which by ordinary farming processes are fit for agricultural purposes." If this decision is to stand as expressive of the law of this state, all swamp lands which at the time application was made for their purchase were fit for human habitation, and by ordinary farming processes can be made suitable for cultivation, can be sold only to actual settlers, and in quantities not exceeding 320 acres. As already stated, the only language in section 3 which is open to interpretation is the phrase "suitable for cultivation." In *Manley v. Cunningham*, supra, the phrase is construed as a similar expression by the secretary of the interior in a letter of instruction to Commissioner McFarland: "All timber lands are unfit for cultivation in their natural condition; but, if they may be reclaimed by ordinary farming process, they are not, in my opinion, within the purposes of the act." In this case it is found that the lands have already been reclaimed by natural causes, and the facts show that the land is as nearly fit for human habitation as wild, unimproved lands can well be.

It is claimed that the state is morally bound not to assert that these lands are suitable for cultivation, or perhaps is estopped from so doing, because it received them under the Arkansas act, which only granted such lands as were "swamp and overflowed, and made unfit thereby

for cultivation." Counsel says: "The duty of examining the public lands, and determining what parts thereof were swamp and overflowed, was confided to the officers of the land department of the United States; and their decision upon this subject, being the decision of a court of special jurisdiction upon a subject unquestionably within the limits of that jurisdiction, is binding upon all persons, and conclusively establishes that the lands are of the class to which such officers have found them to belong. With respect to each tract of land now before this court, the proper officers have made due investigation, and have determined that it vested in the state under the statute of 1850. This determination was therefore a decision not only that it was 'made thereby unfit for cultivation;' for, under the statute, it was not granted to the state unless 'unfit for cultivation.' When the present constitution was formed and adopted, the state was entitled to various classes of lands, the chief of which were school and swamp lands. The lands of the first class were partly suitable for cultivation and partly not; but the lands of the latter class could not, unless obtained in defiance of law, be otherwise than 'unfit for cultivation.'" That is, because the officers of the United States, in a proceeding to which the state was not a party and was not represented, acting under rules made by themselves, determined that on the 28th of September, 1850, these lands were swamp and overflowed, and therefore segregated them as such to the state, therefore the state cannot be understood as intending to include them in this section, although every member of the convention knew as a fact that millions of acres had at that time been reclaimed by natural causes. The test, applied under the Arkansas act, to determine whether lands passed to the state, has always been their condition on the 28th of September, 1850. The very existence of such a test implies that it was well known that their condition as to being swamp and overflowed, and thereby rendered unsuitable for cultivation, was liable to change. The rulings of the land department of the United States have recognized the fact that some of the lands have been in fact reclaimed before the survey segregating them to the state. Commissioner McFarland said: "A survey made in California in February, 1880, as of all swamp land when part had become dry from natural causes, it appearing that it was all swamp in 1850, was properly so designated by the survey." 1 Dec. Dep. Int. 324-330. And, as stated above, the members of the convention, and the people when they adopted it, must be held to have known of such natural reclamation. That some of these lands might be suitable for settlement was recognized by the statutes of the United States and of this state prior to the constitutional amendment. By Act Cong. March 5, 1885, provision was made for pre-emption of homestead locations upon these lands. As to the state, see sections 3442, 3443, Pol. Code. If one proposing to purchase from the state may be supposed to be concerned as to how the

state shall discharge the obligation, if any, imposed upon it to reclaim these lands, such apprehension may well be set at rest by the fact that a fund has been provided, available for that purpose, made up of the proceeds of the sale of the lands, and by this very section 3, which aims to place them, so far as possible, in the hands of actual settlers, who must reclaim them as a means of getting a livelihood.

So far the argument has proceeded upon the assumption that lands which are in fact swamp lands or subject to overflow, so that they cannot be cultivated until reclaimed, are also to be considered unsuitable for cultivation, within the meaning of section 3, now under consideration. But this proposition cannot be admitted. We see no reason why the rule laid down in *Manley v. Cunningham* should not be universal in its application. The matter should be looked at from the point of view of an intending settler. If the land is of such a character that such person is likely to be willing to settle upon it in its present condition, and to undertake its reclamation for the purposes of agriculture, and can do so successfully, with such outlay as the circumstances would justify, it should be held to be suitable for cultivation, within the meaning of this section. The drainage of land so as to render it fit for the plow is an ordinary farming process, much more so than clearing land for timber, or grubbing up trees and brush. The latter is mostly confined to new land; the former is a perpetual subject of interest in agriculture. Probably, there are few farms in this state, thoroughly cultivated, some portion of which has not been drained; and the drains must be constantly looked after. The state is in no way bound to apply, as between herself and purchasers, the test found in the Arkansas act. There it is used for a purpose altogether different, and evidently, also, with a very different meaning. The primary purpose seems to have been to enable the state of Arkansas to control the margins of streams for the erection of levees. The meaning of the phrase there used undoubtedly is, "not suitable for cultivation until reclaimed." It is not used in that general sense by which lands would be classed by settlers, or by the land-officers under another law making the fact of suitability material in the discharge of official duties. This we have already shown. All such laws, as well as the section of the constitution, must be understood as applying to wild and unimproved lands, which are known not to be fit for cultivation generally until something is done to reclaim them. The section must be construed as intending this. Are the lands suitable for cultivation in the sense in which portions of the unreclaimed public domain in its wild condition can generally be said to be suitable for cultivation? The necessity for reclamation is taken for granted in the constitution. The contrary doctrine would almost amount to a judicial repeal of the provision, and would sound strange before the declared policy that the holding of lands in large tracts and without culti-

vation is against the public interests, and stranger still in the face of the many cases already argued here, and now pending for decision, in which the lower court had found the fact of the suitability and present inhabitance. The debates in the constitutional convention show that it was there understood that the provision in question would include swamp and overflowed lands, and that the lands mainly regarded as unsuitable for cultivation were grazing lands, which it was said must be held in larger tracts than 320 acres to be utilized profitably. We can think, at present, of only three cases in which swamp lands can be truly said to be unsuitable for cultivation, within the meaning of this section: *First*, where the lands cannot be made fit for cultivation; *second*, where, although they can be so reclaimed, it cannot be done without co-operation of others, unless by an expenditure greater than can reasonably be expected from a settler upon a tract of 320 acres,—this would be a case for a reclamation district; and, *third*, where the lands are not fit for human habitation until reclaimed; for of course it is necessary, in order to comply with this section, that the settlement be made before the purchaser can acquire any rights in the land. We understand this conclusion to be in entire accord with the decision in *Manley v. Cunningham*. It is claimed that this conclusion is at variance with the case of *McIntyre v. Sherwood*, 82 Cal. 134, 22 Pac. Rep. 937. The question was not presented there as here. There seems to have been no issue upon the subject in the court below, and it was not found as a fact that the land was suitable for cultivation. Probably, it was not very fully argued; but we do not care to draw nice distinctions. If there be anything in that really inconsistent with this opinion, it ought to be overruled. We advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

83 Cal. 519  
*McNEE v. LYNCH*, (WARNER *et al.*, Intervenor.)  
(No. 13,944.)

(Supreme Court of California. March 31, 1891.)

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

*Chas. E. Wilson* and *T. M. McNamara*, for appellant. *N. O. Bradley* and *G. E. Lawrence*, for respondent. *W. B. Wallace*, for intervenors.

TEMPLE, C. On the merits, this case is on all fours with the case of *Fulton v. Brannan*, ante 506, (just decided by this court, March 26, 1891.) A further question is raised as to the right of the intervenors to be heard as such. The bill of exceptions only shows the action of the court on a motion to strike out the petitions of intervention, or some portions of them. There was no error in refusing to strike out the petition of Warner. Cutler's petition shows no right to intervene. It amounted simply to a request to be permitted, as *amicus curiae*, to show that neither party to the contest was qualified to purchase. The duty is cast upon the court, in such cases, to

inquire whether either party is entitled to purchase, and, if neither is so entitled, to adjudge accordingly. In such circumstances we think it would be no abuse of discretion to allow an *amicus curiae* to produce evidence to enlighten the court. The intervenors take nothing by the judgment, and, as the bill of exceptions does not show what occurred at the trial, we do not know that either of them appeared or took any part whatever therein. So far as we can know, the plaintiff has not been injured. Judgment should be affirmed.

We concur: VANCLIFF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

88 Cal. 497

NATIONAL BANK OF D. O. MILLS & CO. v. UNION INS. CO. OF SAN FRANCISCO. (No. 18,722.)

(Supreme Court of California. March 31, 1891.)

INSURANCE—WARRANTIES—INSURABLE INTEREST.

1. Although Civil Code Cal. § 2607, provides that "a statement in a policy of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof," yet, where it appears from the whole policy that such an expression was not intended as a warranty, it will not be held to be such; and where the policy recites that "it is understood and agreed that the within described premises have been leased by \* \* \*," and it turns out that the premises were not then so leased, though they had previously been, the policy is not avoided, it appearing that there was no intentional misstatement by the assured.

2. Where the loss is payable to the mortgagee of the property, and occurs after sale under foreclosure, but before the time for redemption has elapsed, the mortgagee is entitled to recover the loss, as the foreclosure is no extinguishment of his debt until the deed has been made and the time for redemption has expired.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

*Sidney V. Smith and Smith, Wright & Pomeroy*, for appellant. *Denson & Outman*, for respondent.

FOOTE, C. On the 27th day of December, 1886, the appellant, a fire insurance company, issued to the Johnston Brandy & Wine Manufacturing Company a policy of insurance against loss or damage by fire, upon certain property therein mentioned, to the amount of \$3,000. On the face of this policy was attached the following indorsement: "Loss (if any) payable to National Bank of D. O. Mills & Co. as herein provided. It is hereby agreed that this policy, as to the interests of the mortgagee or trustee only therein, shall not be invalidated by any act or negligence of the mortgagor or owner of the property insured, nor by occupation of the premises for purposes more hazardous than are permitted by the terms of this policy, nor by any change in title or possession of the property insured: provided, however, that whenever the said mortgagee or trustee shall become aware of any act or negligence of the mortgagor or owner which would, except as to such mortgagee or trustee, invalidate this policy, or of any occupation of the premises for purposes more hazardous than are permitted by the terms of this policy, or of any change

in title or possession of the property insured, he will at once notify this company thereof; and provided, also, that he will on demand pay to this company the additional premium charged by this company on account of any increased risk for the entire term of this policy; and failure to so notify this company, or to so pay said additional premium, shall avoid this contract." It further appears that there was an indorsement made thereon that on the 2d of March, 1887, the National Bank of D. O. Mills & Co. had notified the insurance company that it as mortgagee had instituted a suit for foreclosure on the property embraced in the policy, and that the same had been accepted by that company without prejudice to the policy. On the 25th of May, 1887, the same insurance company issued a policy of insurance of the same character and to the same parties, and the loss made payable in the same way and upon like conditions, for the sum of \$2,000. It appears that the property insured was destroyed by two successive fires in the month of September, (about the 3d and 20th, in the year 1887,) and that the value of the building and other property burned at said times was fully equal to the amount of the insurance. The National Bank of D. O. Mills & Co., to whom the loss was made payable, and who held a mortgage for \$6,000 on this property, brought this action to recover for the loss, interest, and costs, and obtained judgment as prayed for; from which, and an order denying a new trial, this appeal is taken.

The appellant urges in support of its contention that the first finding of the trial court, "that all and singular the averments of the complaint are true;" and the second finding, "that all and singular the matters and things stated in defendant's amended answer and the general averments, and both of the general and special defenses therein set forth, are untrue, excepting," etc.,—are unsupported by the evidence. The point made in this behalf is that at the time of the issuing of the policy dated the 25th of May, 1887, it was made an express warranty therein by the insured that the premises were then leased to Messrs. Walden & Co., when, in fact, they were not so leased, and that therefore, by its terms, the policy was void for such misrepresentation. Conceding that the statement in the policy, if taken by itself, and without reference to other portions of that statement, viz., "it is understood and agreed that the within described premises have been leased by Messrs. Walden & Co.," is an express warranty, under section 2607 of the Civil Code, which reads, "A statement in a policy, of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof," nevertheless if, taking the entire policy in all its terms and language, it can be perceived that such was not the intention of the parties, such an expression will not be held to be an express warranty; and, where there is any doubt as to the construction to be given to language in such a matter, "the court should lean against that construction which imposes upon the assured the obli-

gation of a warranty." National Bank v. Insurance Co., 95 U. S. 679.

In another part of this policy there occurs this clause: "Fraud, false swearing, misrepresentation, or concealment of a material fact by the insured, whether in the application for this policy, proofs of loss, or otherwise, shall render this policy void." Thus it seems that it is the intentional misstatement or concealment of a material fact which rendered the policy void, and not the mere fact that a statement therein as to the material matter is untrue. The evidence in this case shows that there was no intentional misstatement as to the leasing of the property to Walden & Co. These parties did have a verbal lease of the premises up to the 30th of April, 1887, and this fact, and the further fact that the language of the policy is "have been" leased, goes far to create the impression that, as the lease had been so recent, the Johnston Brandy & Wine Manufacturing Co., having that in mind, might have been of the impression that these parties still had a lease, or perhaps meant to say that they had had a lease. This view of the matter in hand seems to be in accord with previous adjudications of the appellate court. In *Wheaton v. Insurance Co.*, 76 Cal. 419, 18 Pac. Rep. 758, a somewhat similar question was involved, and it was contended that the statement of the insured, in his application as to the value of the property, was an express warranty. The alleged warranty was in this language: "Special reference being made to the assured's application and survey No. 261,707, which is his warranty, and a part hereof." In another part of the policy there was this clause: "If any false representation is made by the assured of the condition, situation, or occupancy of the property, or any overvaluation, or any misrepresentation whatever, either in a written application or otherwise, this policy shall become void." The appellate court said, (page 422, 76 Cal., and page 761, 18 Pac. Rep.): "In *Helbing v. Insurance Co.*, 54 Cal., 156, it was held that a provision in a policy of insurance that the application shall be considered a warranty, and, if the property insured is overvalued in it, the policy shall be void, applies only where the statements as to value are intentionally false; that the question of fraud is one of fact; that although, where the discrepancy between the statement in the application and the actual value of the property is so great as to convey the conviction of fraud to the reasonable mind, the jury may and ought to find fraud, yet, where the discrepancy is not very considerable, the jury may find the application not to have been fraudulent, even in the absence of explanatory evidence. \* \* \* Moreover, the language of the provision in the policy here sued on, that if any false representation is made by the assured, etc., the policy shall become void, when read as a whole, very clearly shows that a willful misrepresentation as to the value of the property, or one made with such gross and reckless carelessness as in the law would be treated as willful, was in the contemplation of the

parties. If so, the previous clause does not make the valuation a warranty. Even when the statements in the application are declared to be warranties, they will not be regarded as such if qualified by other stipulations, which afford a fair inference that the parties themselves did not so intend them." Page 423, 76 Cal., and page 762, 18 Pac. Rep. By the findings it has been determined by the trial court as a fact that the assured did not intentionally misrepresent any fact to exist material to the risk which did not exist, and, as heretofore stated, we think the findings on this point are sustained by the evidence.

The appellant claims also that the policy of the 27th of December, 1886, was void as to the Johnston Brandy & Wine Manufacturing Co., because the lessees, Walden & Co., were warranted to be the tenants then, and in possession, and that when these tenants abandoned the possession of the premises, without notice given by the assured to the company, the policy became void. This statement of the existence of the lease to Walden & Co., if it stated such existence, was not a warranty in either of the policies, as we have seen, and the change of possession, if it took place without notice, did not concern the plaintiff here; for it was not to be affected by any act of this kind, unless notice was brought home to it of such change of possession, and it further failed to notify the company. The evidence is sufficient to show that the plaintiff had no knowledge of any change in the possession of the property from Walden & Co., back to the Johnston Brandy & Wine Manufacturing Co., nor that the premises were vacated or unoccupied, even conceding that such was the fact, under a proper interpretation of the language of the policies on these points. If it had no such knowledge, it was not bound to communicate it, and was protected by the indorsement on the policy. It follows, therefore, that unless the plaintiff here has lost its right by reason of something which is shown by the evidence to have transpired before the loss, by which the rights of the plaintiff under the terms of the indorsement on the policies are affected, there was no error committed in the rendition of the judgment and the refusal to grant a new trial.

In this connection the appellant contends "that the interest of a mortgagee in insured property is measured by the amount of his mortgage debt at the time of the loss, and if at such time his debt is extinguished, either wholly or in part, his interest as a mortgagee is also extinguished either entirely or *pro tanto*;" and that "the mortgage debt" of the plaintiff "having been *pro tanto* extinguished to the extent of \$6,000, by reason of the foreclosure sale and the application of the proceeds to the mortgage indebtedness, the mortgage clause operated as a protection to the plaintiff only to the extent that its indebtedness remained unpaid after the sale." It is true that the plaintiff proceeded to foreclose the mortgage, and that of this intention the defendant had notice, and that the property was bought in at

sheriff's sale for the plaintiff, a credit of \$6,000 made upon the judgment, and a certificate of purchase issued. But when the fire occurred the deed had not been executed, and the legal title had not been passed, the time for redemption not having elapsed. It is not pretended that there was any payment of money on the judgment. The bid of the plaintiff was credited on the judgment, and a receipt given to balance the sheriff's account of the foreclosure sale. But there would never have been any actual payment of money received by the plaintiff unless it had been paid in upon the redemption of the property, or it had upon the failure of redemption received a deed. In fact, the plaintiff never got a deed until after the loss had occurred, no redemption having taken place.

In this connection the argument by the appellant is that the legal effect of the foreclosure was to pay the plaintiff's debt *pro tanto*, and to that extent to extinguish its interest as a mortgagee in the insured property. It has been held by the appellate court of this state that the foreclosure of a mortgage embraces the sale of the property, and the execution of the sheriff's deed, as well as the decree of the court ordering the sale. A mortgage cannot be said to be foreclosed, even in the sense of our Code, until the mortgagor's right of redemption is cut off. *Goldtree v. McAllister*, 86 Cal. 105, 24 Pac. Rep. 801. Tested by this rule, since the time for redemption had not elapsed, when the foreclosure took place, and loss occurred, and no deed had been made to the mortgagee, there had been no foreclosure of the mortgage. And so far as the question of payment of the mortgage debt is concerned, as bearing upon the matter of the extinguishment *pro tanto* of the insurable interest of the mortgagee, it was held in *Bragg v. Insurance Co.*, 25 N. H. 298, that where, in a policy such as this, the insurance is effected on the property of one person, and the loss made payable to the mortgagee, another person, that even upon a foreclosure, where the property is sold and a deed made to the mortgagee, there is not such an alienation of the title as to forfeit the right to recover on the policy; for if the mortgagee thus acquires an additional interest in the property, it is a potential reason why he would be more interested in protecting the property insured; and such a change of title, although within the language of the proviso against change of title or sale or transfer, is not within its spirit and purpose, and will not vitiate the policy; and the instance of a case where the title becomes absolute in a mortgage by foreclosure is cited by Mr. May in his work on Insurance, to illustrate this principle. May, Ins. § 275. To much the same effect is it held in *Heaton v. Insurance Co.*, 7 R. I. 508. Unless the right of redemption has been extinguished, there is no payment *pro tanto* by the mortgagor at the sale. *West v. Chamberlin*, 8 Pick. 338. Where no deed has passed, as we have seen, the foreclosure is incomplete, and no payment has been made. If the deed had been made when the fire occurred, and the right of

redemption had been cut off, there would have been a payment made by the bid. But even then, under the authorities, it seems as if there would have been no change of title or extinguishment of interest which would have affected the policy. For these reasons we advise that the judgment and order be affirmed.

We concur: BELCHER, C.; VANCLIFF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

BEATTY, C. J., being disqualified, did not participate in the above opinion.

88 Cal. 590

DYER v. BRADY. (No. 13,165.)

SAME v MARTIN. (No. 13,166.)

(Supreme Court of California. April 4, 1891.)

APPEAL—BOND—DISMISSAL—NOTICE OF MOTION.

1. An undertaking on appeal, which incorrectly recites the date of the order from which the appeal was taken as being December 11th instead of December 8th, is sufficient if it correctly describes the appeal and order in all other respects.

2. Under Cal. Sup. Ct. Rule 13, requiring that a notice of motion to dismiss an appeal for failure to file a transcript in accordance with the rules of the court shall specify the objections to the transcript, an appeal will not be dismissed because of appellant's failure to number the folios of the transcript, as required by the rules, if the notice of motion to dismiss does not specify the objection.

In bank. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

*Campbell & Wright*, for appellant. *Pillsbury & Blanding*, for respondent.

BEATTY, C. J. In each of these cases respondent moves to dismiss the appeal on two grounds: *First*, that no undertaking on appeal has been filed; *second*, that no transcript of the record has been filed, as required by the rules of this court, and that the time for such filing has expired. The point of the first objection is that, whereas the order appealed from was made on December 8th, and was so correctly described in the notice of appeal, the undertaking on appeal recites that an appeal has been taken from an order made December 11th. But since there was but one order and one appeal, both correctly described in the recital in the undertaking in all other respects except the date of the order, there can be no question that the sureties would be bound in case of a dismissal of the appeal or affirmation of the order, and therefore the undertaking is sufficient. *Swasey v. Adair*, 83 Cal. 136, 23 Pac. Rep. 284. The point of the second objection is that the folios of the transcript (which was on file when the notice to dismiss was served) are not numbered, as required by our rule. But this was an objection that should have been distinctly specified in the notice of motion to dismiss, in order to give the appellant an opportunity to amend the defect. It was not so specified in the notice, and therefore cannot be regarded. Rule 13. For our own convenience in examining the record we might still require the appellant to

number the folios of the transcript on file, but, as it is extremely brief, such an order seems unnecessary. Motions denied.

We concur: DE HAVEN, J.; MCFARLAND, J.; HARRISON, J.; SHARPSTEIN, J.; GAROUTTE, J.

88 Cal. 591

BUCHANAN v. NAGLE et al. (No. 13,705.

(Supreme Court of California. April 4, 1891.

SWAMP LANDS—SEGREGATION—RIGHT OF ENTRY.

The swamp lands granted to the state by Act Cong. Sept. 28, 1850, are not subject to application for purchase until they have been segregated to the state by a United States survey, and an application filed prior to such segregation confers no rights on the applicant, though it is subsequently approved, and a certificate of purchase issued after segregation.

In bank. Appeal from superior court, Fresno county; WILLIAM W. CROSS, Judge. *Gurber, Boalt & Bishop* and *Chas. G. Lambertson*, for appellants. *Freeman & Bates*, for respondent.

MCFARLAND, J. This is an action to determine a contest arising in the state land-office as to the right to purchase from the state a certain section of swamp and overflowed land in Tulare county. Judgment went for plaintiff, and defendant appeals from the judgment and from an order denying a new trial.

The court below found, among other things, that the land in controversy was not segregated by the United States to the state until October 14, 1884; that defendant Nagle's application was made on December 14, 1883, and filed in the state land-office on April 1, 1884,—all before the segregation; and that, as the land was not subject to application before segregation, no rights attached by reason of the application, nor by reason of the subsequent approval and certificate of purchase made after the segregation, but based on said application. Counsel for appellant argue very fully and ably that there is nothing to prevent the filing of an application to purchase swamp land before segregation; but the contrary was held in *Garfield v. Wilson*, 74 Cal. 175, 15 Pac. Rep. 620, and in the recent case of *Wren v. Mangan*, ante, 100, (No. 13,424, decided since the present case was submitted.) Counsel attack the correctness of the conclusion stated in *Garfield v. Wilson*; but we are satisfied with that conclusion and with its approval in *Wren v. Mangan*. We do not see that the question involved is at all changed by the adoption of the theory that the act of September 28, 1850, was a grant *in present* to the state of the swamp lands within her territory; for, that being so, the state has still the power to provide how they may pass into private ownership; and she has made no provision for an application to purchase before segregation. Indeed, the provisions of the Code on the subject clearly contemplate

that no steps towards a purchase are to be taken, and no advantage or preference to be gained by an application, prior to such segregation. It is difficult to see how the requirements of the Code with respect to applications to purchase could ordinarily be complied with at all before the approval of the United States survey, which constitutes the segregation. For instance, section 3443, Pol Code, which establishes the method of making an application to purchase swamp land, provides for an affidavit of the applicant in which, among other things, he must describe the land which he desires to purchase, and must swear that "he knows the land applied for, and the exterior boundaries thereof." But can an applicant swear to such knowledge—or have it—prior to the survey and segregation by the United States? In the case at bar the applicant undertook to make application for land described as a certain section 9; but how could he have known where section 9 was, or "the exterior boundaries thereof," before there had been an approved survey of even the township in which said section was supposed to lie? The lines of townships are "created" by the United States survey, and have no existence before it. *Robinson v. Forrest*, 29 Cal. 318; *Middleton v. Low*, 30 Cal. 596. Section 3445, Pol. Code, is in accord with the doctrine heretofore declared by this court. It refers to the application described in section 3443, and evidently assumes that it applies only to segregated land, and provides that where lands have been segregated by the authority of the United States, but "have not been sectionized by the same authority," an applicant to purchase said lands may have them sectionized by the county surveyor. But there is nowhere any provision for an application before segregation; and such an application is out of harmony with the clear intent of the legislature; and we are satisfied with the former decisions that the approval of the United States survey constitutes the segregation. We are also satisfied that in this case there was no such segregation of the land in contest until October 14, 1884. It is also urged strenuously by counsel for respondent that appellant's application was void because it appears, and is found by the court, that appellant had never been upon, and had never seen, the land applied for; that, therefore, his statement in his affidavit that he "knows of his own knowledge that there are no settlers thereon" is necessarily untrue; and that the things required by section 3443 must not only be in the affidavit, but must be true. But it is not necessary here to determine this somewhat important question, because, for the reasons above given, the judgment must be affirmed. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; PATERSON, J.; HARRISON, J.; GAROUTTE, J.



88 Cal. 632

## STONY HILL TURNPIKE ROAD CO. v. BOARD OF SUPERVISORS OF PLACER COUNTY. (No. 14,044.)

(Supreme Court of California. April 28, 1891.)

## TOLL-ROADS—DUTY OF COMMISSIONERS TO FIX RATES.

Civil Code Cal. § 514, provides that "wagon road corporations \* \* \* may take such tolls only \* \* \* as are fixed by the supervisors of the proper county through which the road passes." *Held*, that the board of supervisors had no authority arbitrarily to refuse to fix such rates for a corporation which had been in operation over 12 years.

In bank. Appeal from superior court, Placer county; B. F. MYERS, Judge.

*Mandamus* by Stony Hill Turnpike Road Company against the board of supervisors of Placer county, to compel the fixing of toll-rates. Civil Code, Cal. § 514, provides that "wagon road corporations \* \* \* may take such tolls only \* \* \* as are fixed by the board of supervisors of the proper county through which the road passes."

F. P. Tuttle, for appellant. Hale & Craig and J. E. Prewitt, for respondent.

GAROUTTE, J. This is an appeal from an order granting a writ of mandate. The findings are in consonance with the allegations of plaintiff's petition for the writ, and, in effect, are as follows: The plaintiff was a corporation duly organized December 26, 1877, under the provisions of the laws of this state providing for the construction of toll-roads, and its period of existence was fixed in its articles of incorporation at the term of 25 years. That plaintiff, about said time, constructed a toll-road in Placer county, Cal., commonly known as the "Stony Hill Turnpike," and ever since has been, and now is, the sole and exclusive owner and in the possession thereof, using the same as a toll-road, and collecting tolls therefrom; that the board of supervisors of Placer county, from time to time, fixed its rates of toll, and the 18th day of January, 1888, was the last time said board established said rates; that plaintiff demanded of said board, on April 27, 1889, that it fix and re-establish said rates of toll, but said board refused, and still refuses, so to do; that on January 11, 1890, said board rescinded the said order of January 18, 1888, and no other order has been made since said last-mentioned date. That plaintiff has no speedy, plain, and adequate remedy at law, and that the defendants are the duly elected, qualified, and acting board of supervisors of Placer county. We are at a loss to see upon what authority or theory the appellant refused to establish the rates of toll upon plaintiff's toll-road. Plaintiff's property is worthless unless tolls can be collected, but tolls cannot be collected unless the board of supervisors fix the rates. Section 514, Civil Code. It certainly cannot be contended that the board of supervisors, as prescribed by the provisions of the Political Code, (section 2770 et seq.) can advise, assist, and authorize a corporation to build and construct a toll-road, perchance at great expense, and then have the legal right arbitrarily to refuse to fix rates of toll, and thus practically confiscate the corporation's property. The case of *People v. Davidson*, 79 Cal. 170, 21 Pac. Rep. 538, is a different character of action, and under an entirely different state of facts, and is not applicable nor authority in a case where a corporation has been organized under the provisions of our codes for the construction of toll-roads, and has in good faith, as appears by the record in this case, proceeded with the construction thereof. The case of *Weaverville, etc., Road Co. v. Board of Sup's of Trinity Co.*, 64 Cal. 69, is conclusive of this case, if authority were necessary, but under the facts here disclosed it was clearly the duty of the board of supervisors, upon the application of the plaintiff, to establish rates of toll for its toll-road. Let the judgment be affirmed.

We concur: SHARPSTEIN, J.; PATERSON, J.; HARRISON, J.; MCFARLAND, J.; DE HAVEN, J.

88 Cal. 634

## VOLCANO CANYON ROAD CO. v. BOARD OF SUPERVISORS OF PLACER COUNTY. (No. 14,083.)

(Supreme Court of California. April 28, 1891.)

## TOLL-ROADS—DUTY OF COMMISSIONERS TO FIX RATES—MANDAMUS.

1. Civil Code Cal. § 514, provides that "wagon road corporations \* \* \* may take such tolls only \* \* \* as are fixed by the board of supervisors of the proper county through which the road passes." *Held*, that the board of supervisors had no authority arbitrarily to refuse to fix such rates for a corporation which had been operating a toll-road for 15 years.

2. On *mandamus* by a toll-road company to compel the board of county supervisors to fix its rates of toll, the board cannot raise any question as to whether plaintiff was lawfully incorporated, or whether it is the owner, and entitled to the possession, of the toll-road, when it has held possession for 15 years.

Commissioners' decision. In bank. Appeal from superior court, Placer county; B. F. MYERS, Judge.

*Mandamus* by Volcano Canyon Road Company against the board of supervisors of Placer county, to compel the fixing of toll rates. Civil Code Cal. § 514, provides that "wagon road corporations \* \* \* may take such tolls only \* \* \* as are fixed by the board of supervisors of the proper county through which the road passes."

F. P. Tuttle, for appellant. W. H. Bullock and J. E. Prewitt, for respondent.

BELCHER, C. The plaintiff is a corporation duly organized under the laws of this state, and for more than 15 years has been, and now is, the owner and in possession of that certain toll-road situate in Placer county, known as the "Volcano Canyon Toll-Road." During all the time of its ownership of the road up to October 14, 1889, the plaintiff collected tolls from persons passing over the same, under orders made from time to time by the board of supervisors of the county, fixing the rates of such tolls. The last order fixing the rates of tolls for the road was made on January 13, 1888, and this order was rescinded and set aside by the board on October 14, 1889. The plaintiff afterwards demanded that the board again fix the

rates of toll to be by it collected for travel over its road, but the board then and there refused, and still refuses, to comply with the demand. The plaintiff then commenced this proceeding to obtain a writ of mandate compelling the defendant board to fix rates of toll for its road. After trial the court below found the facts to be as above stated, and rendered judgment granting the writ. From that judgment this appeal is prosecuted on the judgment roll.

We think that the judgment entered was proper. The case is not materially different from that of *Stony Hill Turnpike Road Co. v. Board of Supervisors of Placer Co.*, ante, 513, (just decided.) The questions attempted to be raised as to whether the plaintiff was ever lawfully incorporated, and as to whether it had ever been or was the owner, and entitled to the possession, of the toll-road, of which it had had actual possession for more than 15 years, were matters which could not be inquired into by the board of supervisors on an application to fix its rates of toll, or in a proceeding by *mandamus* to compel the board to fix rates. *Weaverville, etc., R. Co. v. Board of Supervisors*, 64 Cal. 60.

It is true that the right to collect tolls on a toll-road is a franchise, and that tolls can only be collected after the board of supervisors has fixed the rates; but a board of supervisors has no authority to arbitrarily refuse to fix rates, and thereby destroy the value of the toll-road property. We advise that the judgment be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

88 Cal. 609

YORE *et al.* v. BANKERS' & MERCHANTS' MUT. LIFE ASS'N OF UNITED STATES.  
(No. 14,057.)

(*Supreme Court of California*. April 18, 1891.)  
INSURANCE—LOCI CONTRACTUS—JURISDICTION—VENUE.

Where an application is for a policy to be payable in accordance with the terms of a future will, and, pending that, to stand in favor of the lawful heirs, and in the policy as issued and forwarded to the agent who took the application the legal heirs are to be the beneficiaries, the contract is not consummated until it is accepted by the insured, and suit can be brought thereon, under Const. Cal. § 16, only in the county where the application was made and accepted, as the place of the contract, and not in the county where the policy was issued.

In bank. Appeal from superior court, Yuba county; PHILLIP W. KEYSER, Judge. *Mastick, Belcher & Mastick and Forbes & Dinsmore*, for appellants. *Haggin & Van Ness*, (George C. Gorham, Jr., of counsel,) for appellee.

DE HAVEN, J. Appeal from an order changing the place of trial. The action is one to recover the amount named in a policy of insurance, issued by the defendant, a corporation, on the life of one Peter Yore, and was brought in the superior court of Yuba county. The defendant

is a corporation formed and existing under the laws of the state of California, and its principal place of business is in the city and county of San Francisco. By section 16, art. 12, of the constitution of this state, plaintiffs are entitled to bring this action either in the county where the contract was made or in the county where the principal place of business of the defendant corporation is situated, and the only question for determination here is as to the place where the contract sued upon was made; the appellants claiming that it was made in the county of Yuba, while the respondent insists that it was made in the city and county of San Francisco. The motion was heard upon affidavits. It appears from the affidavits filed on behalf of respondent that the deceased, Peter Yore, made application in writing to the agent of respondent at Marysville, in Yuba county, for a life insurance policy, and said application was forwarded by said agent to San Francisco, and upon its receipt the officers of said respondent issued and caused the policy sued upon to be mailed to the agent of the company at Marysville, with instructions to deliver it to said Yore.

1. It is claimed by the respondent that upon this state of facts the contract was, in judgment of law, made in San Francisco, and this would be so, if the policy issued was in exact accordance with the terms proposed in the application. May, Ins. §§ 50, 66. A policy which in its terms is different from the application is not a completed contract, and, until accepted by the insured, is no more than a proposal to contract upon the terms stated in it. *Insurance Co. v. Young*, 23 Wall. 85; *May Ins. § 50; Insurance Co. v. Carrington*, 3 Conn. 357. It appears to us, from the affidavits used upon the hearing of this motion in the court below, that the policy as issued was not an unqualified acceptance of the terms embodied in the application of the deceased, Yore. The application itself is not set out, but its terms sufficiently appear from the letter forwarding it to San Francisco, which letter is made a part of one of the affidavits filed by respondent. In this letter the defendant's agent writes: "You will observe, by answer to question 6 he desires to dispose of proceeds of the policy by future will, pending which he desires to have it stand in favor of lawful heirs. I presume policy can be so written." The expression of such a "desire" in an application is to be construed as a proposal for insurance in accordance with the expressed wish of the applicant. *Insurance Co. v. Carrington*, 3 Conn. 363. The policy as issued is "payable to legal heirs or to order of —, county of —, state of —, if then living; otherwise to —." The substance of Yore's application, as appears from the above letter, was for a policy which should be payable to such person or persons as he might appoint by will, and, if no such appointment should be made, then to his legal heirs; but under the policy issued the legal heirs are to be the beneficiaries. The difference between such a policy and the one applied for is very apparent. Mr. Bliss, in his

work on Life Insurance, in discussing the question as to who is entitled to claim the proceeds of a life insurance policy, says: "When a policy designates a person to whom the insurance money is to be paid, the person who procures the insurance, and who continues to pay the premiums, has no authority by will or deed to change the designation or title to the moneys. He is under no obligation to continue to pay the premiums, unless he has covenanted so to do; but, if he does so, the person originally designated in the policy will derive the benefit." Bliss, Ins. § 337; see, also, Id. §§ 317, 318; May, Ins. § 392; Wilburn v. Wilburn, 83 Ind. 56; Drake v. Stone, 58 Ala. 133. In the case of Harley v. Helst, 86 Ind. 204, the court say: "It is further said that to deny to the husband, who has paid the premiums, the right to dispose of the policy to his own use, after the death of the wife, imposes upon him a hardship and a wrong. A sufficient answer to this is that, if he wishes to retain to himself the control and ownership of the policy in such case, he may so provide in the policy." There are some cases, however, which seem to hold that one who procures a policy of insurance upon his life for the benefit of another, and pays the premiums thereon, may dispose of it by will or otherwise, to the exclusion of the beneficiary named in the policy. Clark v. Durand, 12 Wis. 224; Kerman v. Howard, 23 Wis. 108. And in the later case of Foster v. Gile, 50 Wis. 603, 7 N. W. Rep. 555, and 8 N. W. Rep. 217, the court say the beneficiary named may be changed with the consent of the company issuing the policy.

It makes no difference, in the decision of this case, which of these conflicting views is adopted as a correct statement of the law relating to the respective rights of the insured and the beneficiary named in a policy of life insurance. If the section above quoted from Bliss on Life Insurance states the true rule of law on the subject it is clear there was no completed contract of insurance in this case until the policy as issued by respondent was accepted by the applicant; and we think the same conclusion must be reached if it should be assumed that the contrary doctrine announced in the above-cited decisions of the supreme court of Wisconsin is the correct one. The conclusion as to the formation of the contract must be the same, because the applicant had an undoubted right to propose to make a contract in the very terms which he selected, and thus to apply, as he did, for a policy which would give him, in express terms, the power to say by his will to whom its proceeds should be paid, thus excluding all future controversy as to his right to do so; and, having asked for one so written, he was under no obligation to accept a policy which omitted such express terms of contract, and which left his right to dispose of the money to be paid thereunder, if he retained such right at all, to be simply implied by law. It is immaterial what his reasons were for making the application in the form he did, or why he desired a policy expressly reserving to himself, as a part of his contract with re-

spondent, the right to say by his will to whom should be paid the amount for which he was insuring his life. It is enough that he thought such a provision was of sufficient importance to form a part of the express terms of the policy, and an acceptance of this term of the application, unless he consented to accept a policy in the form issued, was indispensable to the formation of a contract. "Until the terms of the agreement have received the assent of both parties the negotiation is open, and imposes no obligation on either." Ellason v. Henshaw, 4 Wheat. 225. "An acceptance, to be good, must of course be such as to conclude an agreement or contract between the parties. And to do this it must in every respect meet and correspond with the offer; neither falling within, nor going beyond the terms proposed, but exactly meeting them at all points, and closing with them just as they are stated." Potts v. Whitehead, 20 N. J. Eq. 55. It follows that there was no binding contract in this case until Yore assented to the terms given in the policy by accepting the same; and, as this act of acceptance occurred in Yuba county, the contract must be considered as having been made there. May, Ins. § 66.

2. The letter of defendant's agent, transmitting the policy, saying: "Mr. Yore can dispose of the insurance in his will proportionately as he chooses,"—cannot be deemed any part of the contract itself, and was not intended as anything more than an expression of the writer's opinion of Yore's legal right to do so. Order reversed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; HARRISON, J.

DISS v. LONG et al. (No. 13,739.)

(Supreme Court of California. April 18, 1891.)

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge. Garber, Roalt & Bishop, for appellant. Lambertson & Taylor, for appellee.

PER CURIAM. On the authority of Buchanan v. Nagle, ante, 512, (No. 13,705,) and Fulton v. Brannan ante, 506, (No. 13,603,) the judgment and order appealed from are affirmed.

88 Cal. 543

CAVANAUGH v. CASSELMAN. (No. 13,958.)

(Supreme Court of California. April 2, 1891.)

STATUTE OF FRAUDS—MEMORANDUM—CONTRACT.

1. A written memorandum of a contract, whereby defendant agrees to sell plaintiff certain real and personal property, which names the parties and price, and gives a complete description of the property, and is signed by the defendant, who is the party to be charged, is not insufficient because it is not also signed by the plaintiff.

2. Nor will the fact that the instrument is expressed on its face to be *inter partes*, and yet is only signed by the party to be charged, render it insufficient as being merely an inchoate agreement, incapable of enforcement, in the absence of any showing that it was to be signed by the other party before it became operative.

3. Where in execution of such a contract a

deed to a portion only of the land described is tendered, and it is accepted under protest and as a part performance only, it cannot be contended that the contract is merged in the deed, since the obligation cannot be satisfied by the conveyance of a part of the land.

4. Evidence of witnesses pointing out to the court and defining the property in controversy, which was imperfectly described in the contract, was properly admitted to enable the court to determine whether defendant's conveyance and bill of sale were a full compliance with his agreement.

In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

*Chauncey Dunn and Taylor & Holl*, for appellant. *Grove L. Johnson*, for respondent.

HARRISON, J. The plaintiff brought this action to recover damages from the defendant for the non-fulfillment of the following contract: "This indenture, made and entered into this 16th day of May, 1888, by and between Ezra Casselman, of the county of Sacramento, party of the first part, and W. B. Cavanaugh, of the city of Sacramento, party of the second part, witnesseth: The party of the first part hereby agrees to sell to the party of the second part, and the party of the second part hereby agrees to buy from the party of the first part, the following described premises belonging to the party of the first part, to-wit. [Description of land and certain personal property.] The price to be paid hereunder is \$24,000, of which \$1,000 have already been paid at the signing of this agreement, \$8,000 shall be paid on the 15th day of October, 1888, and the balance of \$15,000 shall be paid on that date by the execution unto the party of the first part by the party of the second part of a mortgage upon said premises, payable five years from that date. \* \* \* Upon the payment on said 15th day of October, 1888, of said sum of \$8,000, and the execution of the mortgage herein provided for, the party of the first part will make, execute, and deliver unto the party of the second part a good and sufficient deed of all said real estate and improvements, conveying the same to the party of the second part free and clear from all incumbrances, and will also make, execute, and deliver unto the party of the second part a good and sufficient bill of sale of all the personal property hereinbefore referred to. This agreement is binding upon the heirs, administrators, and assigns of the parties hereto. In witness whereof the parties hereto have hereunto set their hands this 16th day of May, 1888. EZRA CASSELMAN. ANNIE CASSELMAN." The cause was tried by the court without a jury, and in its decision the court finds that the parties entered into the contract on the 16th day of May, 1888, and that the plaintiff at that time paid to the defendant \$1,000 in pursuance thereof, and that on the 15th day of October, 1888, he paid to the defendant the further sum of \$8,000, and executed to him the mortgage for \$15,000 provided for in the contract, and that on that day the defendant made to the plaintiff a deed for a part of the land described in said agreement which ex-

pressly excluded from its operation a portion that was included within the boundaries and description given in the contract, and also that the defendant did not deliver to the plaintiff all of the personal property specified in the contract. The court found that the value of the omitted land and of the personal property not delivered to the plaintiff was \$625, and gave judgment for that amount in favor of the plaintiff. The court further found: "That on said 15th day of October, 1888, when plaintiff and defendant met to carry out said executory contract of May 16th, the defendant tendered to plaintiff the deed mentioned in finding 2, and also a bill of sale purporting to be in accordance with the terms of said contract; but the plaintiff then discovered that said deed did not include all the land described in said contract, but expressly excluded the said Garvey tract. \* \* \* That plaintiff then refused to accept said deed and bill of sale, or either of them, in execution of said contract, because they did not convey the property last above described, and plaintiff then tendered to defendant to be executed by defendant a deed and bill of sale prepared by plaintiff, which conformed to the terms of said contract, and offered on his part to perform fully said agreement; but the defendant refused to execute said last-mentioned deed and bill of sale, or either of them, and refused to give plaintiff any deed or bill of sale other than those he [defendant] had tendered as above stated. That plaintiff had arranged to lease the premises so contracted for to third parties from said 15th day of October, and desired to get possession thereof without delay; and he finally informed defendant that he would accept said deed and bill of sale tendered by defendant, under protest, and only in part satisfaction of said contract, to the extent to which they complied therewith, and should at once sue defendant for damages for his failure to comply with said contract in the particulars above set forth; and the defendant then delivered the said deed and bill of sale to the plaintiff with a full understanding that they were not accepted as a full performance of said contract, but that plaintiff reserved the right to sue defendant for said breach. That plaintiff did so accept said deed and bill of sale in part satisfaction as aforesaid, and thereafter, on the 17th day of said October, he commenced this action." At the trial the plaintiff offered in evidence the contract of May 16, 1888, to which the defendant objected, upon the ground "that it showed upon its face that it had never been executed by the plaintiff, and that therefore it never was a perfect agreement, but was only an attempted agreement which was never consummated;" and also upon the further ground "that if it ever was an agreement, it had become merged in a subsequent agreement in the nature of a deed and of a bill of sale, and that it had been entirely superseded by such deed and bill of sale." The court overruled the objections, and allowed the instrument to be read in evidence. When the plaintiff rested the defendant moved for a nonsuit upon substantially the same grounds, which

was denied. The ruling of the court with reference to this contract is presented by the appellant as the principal ground for a reversal of the judgment.

1. It was not necessary that the plaintiff should himself sign the agreement of May 16, 1888, in order to enable him to enforce it against the defendant. The statute of frauds requires the contract, or some note or memorandum thereof, to be in writing, but it need be subscribed only by the party to be charged. *Reed, St. Frauds, § 359*. This principle was established in this state in the case of *Vassault v. Edwards, 43 Cal. 458*. See, also, *Worrall v. Munn, 5 N. Y. 246*; *Justice v. Lang, 42 N. Y. 493*. The "writing" in question is sufficient to satisfy the statute. It sufficiently names the parties and the price, and gives a complete description of the property. It is also subscribed by the defendant, who is the party to be charged.

2. It is also claimed by the appellant that, inasmuch as the instrument in question purports in terms to be executed by the plaintiff, it is until such execution only an inchoate agreement, and not capable of enforcement by either party. It is competent for parties to insert such conditions in their contracts as they desire, and to make contracts that shall be operative only upon the happening of some event, but when the terms of the instrument are in themselves clear, it is necessary that the conditions upon which only it is claimed that the instrument is to have effect should be equally clear. It is not the rule that a contract which on its face purports to be *inter partes* must invariably be executed by all whose names appear in the instrument before it shall be binding upon any. One reason why it is held in many of the cases that an agreement which is not to be operative upon one until it has been signed by another is that such signing is the consideration upon which the first signer agrees to be bound; but when a sufficient consideration for the agreement on the part of the first signer is shown to authorize its enforcement, he cannot be released therefrom unless he shall show clearly that there were other considerations for his signing the agreement than those named in the instrument. *Bishop, in his treatise on Contracts, § 348*, says: "If by parol stipulation, or, *a fortiori*, if by the writing itself, the contract was not to be deemed complete until other signatures should be added, it without such addition will not bind those who have signed it; but if nothing of this appears, the parties signing will be holden, though even on the face of it the signatures of others were contemplated by the draughtsman." See, also, in support of this principle, *Parker v. Bradley, 2 Hill. 584*; *Scott v. Whipple, 5 Greenl. 336*; *Dillon v. Anderson, 43 N. Y. 231*; *Low Angeles v. Mellus, 59 Cal. 444*; *People v. Stacy, 74 Cal. 373, 16 Pac. Rep. 192*. In *Chouteau v. Suydam, 21 N. Y. 181*. It is said: "It is very well settled that where a bond, a deed, or other written instrument is executed by a portion only of those who appear in the body of the instrument as parties, the question whether those who have executed it are bound de-

pends upon the circumstances under which the instrument was delivered. Those circumstances are open to proof by parol, and if it appears that at the time of the delivery by any party whose signature is affixed anything was said indicating that such party did not intend to be bound unless other parties also signed, the delivery will be considered as not absolute, but in escrow merely; \* \* \* but it rests upon the party who has signed and delivered the instrument to establish that the delivery was intended to be in escrow."

In the present case no attempt was made on the part of the defendant to show that at the time the instrument was delivered by him to the plaintiff there was any agreement or understanding on his part that it was to be signed by the plaintiff before it became operative. It is true that in his answer he alleges that he would not have signed the agreement with the plaintiff unless the plaintiff also signed the same, and that such was the understanding and agreement between them at the time it was signed; but at the trial there was no testimony offered in support of this averment, and the court does not find that any such statement or agreement was made, the finding being that the plaintiff and defendant did enter into the contract on the 16th day of May, 1888, and "that plaintiff inadvertently omitted to sign said contract, but that he always considered himself and intended to be bound thereby." The agreement was prepared by the direction and in the presence of both parties on the 16th of May, 1888. It was at that time signed by the defendant, who received from the plaintiff the sum of \$1,000 as part consideration for its execution, and who then delivered it to the plaintiff. The plaintiff accepted the same from the defendant, and caused it to be recorded in the office of the county recorder. These acts made a contract binding upon both parties, even without the signature of the plaintiff. Necessarily the oral negotiations between the parties preceded the formulation of their agreement into the written instrument. When the terms of their agreement were reduced to writing, the contract became definite, and, in the absence of the statute of frauds, became binding upon both parties. *Dutch v. Mead, 36 N. Y. Super. Ct. 427*. The signature of the vendor was all that was required to satisfy the statute of frauds. The delivery of this instrument, and its acceptance by the vendee, made the contract binding upon him also. The execution of the agreement by the vendor, and its delivery to the vendee, created an obligation upon the vendor which was a consideration sufficient to make the verbal agreement on the part of the vendee to pay the purchase price of the land binding upon him also. *Vassault v. Edwards, 43 Cal. 464*; *Reed, St. Frauds, § 391*; *McDonald v. Huff, 77 Cal. 279, 19 Pac. Rep. 499*; *Lowber v. Connit, 36 Wis. 183*; *Manufacturing Co. v. Morse, 48 Vt. 322*; *Reuss v. Pickaley, L. R. 1 Exch. 352*; *Grove v. Hodges, 55 Pa. St. 504*. In *Grove v. Hodges* the agreement, as executed, was binding upon the vendor only. It was delivered to and accepted by the vendee, and its validity was

assailed upon the ground that it was not executed by the vendor. The court, however, held it valid, saying: "If Irwin accepted the grant, he accepted it with its expressed conditions, and the contract became binding upon him to precisely the same extent as it would have been binding if he had personally signed and sealed the instrument. The mode of enforcing his obligations is different, but the duty is the same. It is assuredly plain law that if a party who has not put his name to a written contract accepts it when signed by the other party, it binds him the same as if he had signed it. The legal principle that contracts must be mutual, that they must bind both parties or neither, does not mean that in every case each party must have the same remedy for a breach by the other. Covenant may lie against one when only *assumpsit* can be maintained against the other. Nor does the principle mean that when a contract is written each party must sign it. The engagement of one may be in writing, and that of the other rest in parole even when the contract is wholly executory."

3. The contention of the defendant that the contract was merged in the deed is also untenable. The plaintiff by the execution of the contract of May 16th had a valid obligation against the defendant for the conveyance of a tract of land. That obligation could not be satisfied by the conveyance of a part of the tract any more than would the payment of a money obligation be satisfied by the payment of a part thereof. Whether the conveyance of a part was made with or without controversy between the parties is immaterial. Unless it was accepted in satisfaction of the agreement, the unexecuted part of the original agreement remained in full force. An agreement for the conveyance of 100 acres of land, except by an agreement between the parties, cannot be satisfied by a conveyance of 50 acres. Civil Code, §§ 1477, 1524.

4. There was no error in admitting in evidence the testimony of the witnesses objected to. Their testimony was for the purpose of pointing out to the court and defining the property which was the subject of negotiation between the parties, and which was imperfectly described in the contract, in order that the court might determine whether the defendant, by the conveyance and bill of sale which he had executed, had fully complied with his agreement. Code Civil Proc. § 1860. The judgment and order denying a new trial are affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.; PATERSON, J.; SHARPSTEIN, J.

(88 Cal. 522)

DUNSMOOR v. FURSTENFELDT *et al.* (No. 13,917.)

(Supreme Court of California. April 1, 1891.)

GARNISHMENT—MONEY IN CUSTODY OF THE COURT.

Though money belonging to an estate in bankruptcy, in the hands of the clerk of the court as a master in chancery, to be held pending the settlement of the respective rights of the creditors by litigation, is in the custody of the court, and cannot be reached by garnishment, yet,

where an order of distribution has been made, the rights of the respective creditors become in effect a debt due to each of them by the clerk, and a creditor of one of the creditors may levy upon it by garnishment.

Commissioners' decision. Department 1. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

*Wilson & Bulla and George A. Rankin*, for appellant. *V. Montgomery and F. O. Daniel*, for respondents.

VANCLIEF, C. The plaintiff (clerk of the superior court) brought this action to compel the defendants, Furstenfeldt and Geinger, to interplead as to their respective adverse claims to be paid a sum of money in the possession and custody of the plaintiff, which he was willing and ready to pay to the one to whom the court should determine it was due. The court adjudged that Furstenfeldt was entitled to the money, and Geinger brings this appeal from the judgment upon the judgment roll, and contends that, upon the facts found, the judgment should have been in his favor. The material facts found are substantially as follows: (1) In January, 1888, Peter Eschelbach made an assignment of his property to one Lewis, for the benefit of his creditors. (2) Thereafter, Sichler, one of the creditors of the insolvent, brought an action in the superior court of Los Angeles county against Lewis, the assignee, to compel him to account to the creditors. (3) In this action against the assignee he was ordered by the court (April 11, 1889) to deposit with the clerk thereof, Dunsmoor, (plaintiff herein,) about \$8,000, to be held pending the litigation as to the proper distribution thereof among the creditors; and thereupon the said sum was so deposited by the assignee. (4) On the same day (April 11, 1889) the court ordered a distribution of said sum among the creditors, one of whom was Antone Miller, to whom the court ordered the clerk (plaintiff herein) to pay from said money the sum of \$305.32. (5) On July 8, 1889, Miller assigned all his right and title to the last-mentioned sum, then in the custody of the clerk, to the defendant Furstenfeldt, who, on the following 9th day of July, demanded it of the clerk, but the clerk then refused, and ever since has refused, to pay the same to Furstenfeldt. (6) On the 6th day of April, 1889, the defendant Geinger obtained a judgment in the superior court of San Francisco against Antone Miller for the sum of \$1,319, upon which execution was issued to the sheriff of Los Angeles county on June 18, 1889, and was duly served by copy and garnishment upon Dunsmoor, the plaintiff, and upon Lewis, the assignee of the insolvent, on June 20, 1889. (7) Dunsmoor, on June 21, 1889, answered to the garnishment notice that he held, subject to the order of the court, \$305.32, which had been distributed, by order of the court, in the case of Sichler v. Lewis, to Antone Miller, as above stated. (8) On July 1, 1889, defendant Geinger demanded of Dunsmoor said sum of \$305.32, which the latter refused to pay, and which he still holds in his custody, subject to the judgment of the court in this action,

as alleged in his complaint herein. (9) Thereafter the defendant Furstenfeldt petitioned the superior court of Los Angeles county for an order commanding Dunsmoor to pay to him said sum of \$305.32, on the ground that it had been assigned to him by Antone Miller, to whom it had been ordered to be paid in the case of *Sichler v. Lewis, Assignee*; but the court, after "due hearing," denied his petition "upon the ground that said court had no further control or jurisdiction over said sum of money by reason of the order of distribution previously made by said court." Whether Geinger had notice of this petition is not stated; nor does it appear that he participated in the hearing. It will be seen that the garnishment by virtue of Geinger's execution was 13 days prior to the assignment by Miller to Furstenfeldt, and, therefore, if the money (\$305.32) in the hands of Dunsmoor, or a debt from Dunsmoor to Miller for the same sum of money growing out of the transactions, was subject to the garnishment, the judgment should have been in favor of the appellant; otherwise, the judgment in favor of Furstenfeldt should be affirmed. Section 544 of the Code of Civil Procedure provides that "all persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant, at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be \* \* \* liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged, or any judgment recovered by him be satisfied." Respondent contends (1) that no part of the money in the possession of Dunsmoor belonged to the defendant Miller; (2) that the money, of which Dunsmoor acquired the possession by the order of the court, was, at the time of the service of the writ, in the custody of the law, and therefore not subject to garnishment; and (3) that Dunsmoor owed no debt to Miller.

1. We think it must be conceded that the \$8,000, while in the custody of Dunsmoor, did not belong to the creditors of the insolvent. Lewis, the assignee of the insolvent, held it in trust for those creditors, to be distributed among them ratably in payment of their several demands against the insolvent. In his hands, no one of the creditors could have lawfully claimed any part of the money as his individual personal property; nor could all the creditors jointly have so claimed all the money, as it was not a special deposit by or for them. *Wade, Attachm.* §§ 329, 407. The transfer of the money from the assignee to Dunsmoor in obedience to the order of the court gave the creditors no more title to it than they had before.

2. Whether the money was ordered to be delivered to Dunsmoor in his official capacity as clerk of the court, or as a receiver or master in chancery, he held it for the same purposes (though not by the same title) for which it had been held by the assignee, and for no other purpose. For such purposes, and until they were accomplished, no doubt the money was in the

custody of the law, in the ordinary sense of the term; but, so far as the court was concerned, such purposes were fully accomplished by the final decree in the case of *Sichler v. Lewis, Assignee*, determining the share of the money to which each creditor was entitled, and ordering Dunsmoor (as clerk or receiver) to pay to each creditor a specific certain sum from the fund. That was the end of the judicial proceedings in the case of *Sichler v. Lewis*. The execution of the decree by paying the money to the creditors was all that remained to be done. The only reason assigned by the authorities for the rule prohibiting the attachment of property in the custody of the law is that such attachment would generally delay and embarrass judicial and other official proceedings in the administration of such property; and that this is a sufficient reason for the rule, as applied to all judicial proceedings in regard to such property, is generally admitted; and to this extent the weight of authority admits no exception to the rule. But, according to a great preponderance of the modern cases, there are some exceptions to the rule as applied to property in the custody of purely executive officers, based upon the maxim that the rule should not be applied "when the reason of the rule ceases." (*Civil Code*, §§ 3509, 3510. After speaking of the rule and the exceptions thereto in Maryland, Mr. Wade, in his work on Attachment, (section 424,) says: "It is elsewhere held, and, as it appears, with considerable unanimity, that when defendant has a right to a certain distributive share of the fund in the hands of a receiver, master in chancery, or trustee of court, the officer may be effectually garnished by a creditor of the party so entitled, after the court has ordered it to be paid. \* \* \* The authorities seem to concur in holding receivers and similar officers liable to garnishment when they have in their hands a definite sum to which the defendant or judgment debtor is clearly entitled, and the officer has nothing more to do with the fund than to pay it over. Some of them may go beyond, but none, so far as they have been examined, fall short of, this conclusion." See, also, *Freem. Ex'ns*, § 129; *Gaither v. Ballew*, 69 Amer. Dec. 764. In speaking of assignees in bankruptcy and insolvency, and after admitting that the property in their hands is not subject to garnishment before an order of distribution, the same author (section 423) says: "It is another matter when, in the course of the administration of his duties, the assignee has in his hands a sum due one of the creditors, and a creditor of such creditor seeks to charge him as garnishee in respect thereto. In such case the exemption could be maintained, if at all, only on the ground of the official capacity in which the money of the defendant was held. It is no longer the property of the assignee. In case of his refusal to pay it over to the party entitled thereto, the latter could maintain an action for it. It is not apparent how, in such case, the assignee would occupy ground more favorable to his exemption than would a sheriff in possession of a surplus due an execu-



tion defendant." As to sheriffs, see section 421, same author. In cases of garnishment of executors and administrators in respect to the property of legatees and heirs the exception to the rule of exemption applies after an order of distribution of the property has been made whereby the share or portion of the defendant in attachment is rendered definite and certain. Wade, Attachm. §§ 425, 426; Freem. Ex'ns, § 131; Estate of Nerac, 35 Cal. 392. I think the case at bar comes fairly within the exception to the rule that property in the custody of the law is not subject to garnishment.

3. Having conceded that no part of the money in the hands of Dunsmoor—that is, no particular coins or bank-bills—could be said to be the personal property of Miller, a delivery of which to himself he was entitled to demand of Dunsmoor, it remains to answer the objection that "Dunsmoor owed no debt to Miller." If, as contended and conceded, no particular money in Dunsmoor's hands belonged to Miller, and Dunsmoor might have paid Miller the sum ordered by the court to be paid him in any lawful money, it would seem to follow that Dunsmoor owed Miller \$305.32; and, surely, what Dunsmoor owed Miller was a debt, (Rodman v. Munson, 13 Barb. 197,) the payment of which Miller could have enforced. Indeed, it was a debt in the strict legal sense,—a judgment,—a debt of record. Burrill, Law Dict. For a full exposition of the word "debt," as used in law, and particularly in statutes, see Insurance Co. v. Meeker, 37 N. J. Law, 300, and authorities there cited. Any kind of obligation of one man to pay money to another is a debt. "A debt signifies what one owes. There is always some obligation that it shall be paid; but the manner in which" \* \* \* It is to be paid, or the means of coercing payment, do not enter into the definition." Rodman v. Munson, 13 Barb. 197. Perhaps Miller might have coerced payment by motion in the same court that ordered the payment. If not, he certainly could have recovered the debt by action upon the judgment rendered in the case of Sichler v. Lewis. I think the judgment should be reversed, and that the lower court should be directed to render judgment on the findings of fact in favor of appellant.

We concur: FOOTE, C.; TEMPLE, O.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to render judgment on the findings of fact in favor of the appellant.

88 Cal. 430

RUGGLES *et al.* v. BOARD OF TRUSTEES OF CITY OF WOODLAND. (No. 14,396.)

(Supreme Court of California. March 24, 1891.)

OFFICERS OF MUNICIPAL CORPORATIONS—TENURE OF OFFICE—MANDAMUS.

1. By general Municipal Incorporation Act Cal. March 13, 1883, § 4, it is provided that officers chosen at a special election to be held within two weeks after the vote in favor of re-organization shall hold their respective offices

only until the next general municipal elections. By section 752, it is provided that all elective officers of cities of the fifth class shall be chosen at a general municipal election to be held therein in each odd-numbered year; the marshal, assessor, etc., to hold office for two years, and the trustees for four years; but there is a further proviso that the first board of trustees elected under the provision of this act shall so classify themselves by lot that three of their number shall go out of office at the expiration of two years, and two at the expiration of four years. *Held*, the elective officers, except members of the board of trustees, are to hold office for two years, and they for four years, and that an election must be held every two years.

2. A *mandamus* will lie to compel the board of trustees to provide for such election.

In bank. Petition for *mandamus*.

A. C. Ruggles and J. H. Magoffey, for petitioner. Charles W. Thomas, City Atty., for respondent.

BEATTY, C. J. *Mandamus* to compel the respondents to call and provide for the holding of an election of city officers. Prior to May 6, 1890, the city of Woodland, in Yolo county, was a municipal corporation under a special charter. On that date a proposition to reorganize as a city of the fifth class, under the general incorporation act, approved March 13, 1883, was duly submitted to the electors of said city, and approved by a majority vote. Thereafter, on June 16, 1890, at a special election held in obedience to the provisions of section 4 of said act, the respondents, and other city officers enumerated in section 751, —*i. e.*, the officers of a city of the fifth class, —were duly elected, and have ever since been acting as such. The petitioners, who are citizens, tax-payers, and electors of said city, have demanded that the respondents call a general city election, to be held on the second Monday of April, 1891, for the choice of successors to themselves, and the other officers enumerated in section 751; but the respondents, on March 9, 1891, by formal resolution entered upon their minutes refused to call such election, whereupon this proceeding was commenced. It is proper to say that this refusal of the respondents to call an election for the choice of their successors does not appear to have been inspired by any wish to prolong their own tenure of office beyond the term fixed by law, but only by the desire to secure an authoritative construction of two apparently conflicting provisions of the statute, in order that the city may proceed regularly and lawfully under its new charter. By section 4 of the act referred to it is provided that the officers chosen at the special election to be held within two weeks after the vote in favor of re-organization is declared, shall hold their respective offices "only until the next general municipal election to be held in such city and county, city, or town, and until their successors are elected and qualified." By section 752 of said act it is provided that all the elective officers of cities of the fifth class shall be chosen at a general municipal election to be held therein on the second Monday in April in each odd-numbered year. The marshal, assessor, etc., are to hold their offices for two years from and after the Monday following the day of their election, and the

members of the board of trustees are to hold for four years from and after the same date, and until their successors are elected and qualified. So far all the provisions of the statutes are perfectly consistent, and unqualifiedly support the contention of petitioners that an election must be held on the second Monday of April of this year. But section 752 contains a proviso that the first board of trustees "elected under the provisions of this act shall at their first meeting so classify themselves by lot as that three of their number shall go out of office at the expiration of two years, and two at the expiration of four years." It cannot be denied that the respondents are embraced by the terms of this proviso, for unquestionably they are the first board of trustees elected under the provisions of this act. But, if the proviso is construed literally, it is directly in conflict with the provision of section 4, that the trustees elected at the first (the special) election are to hold only till the next general municipal election, and until their successors are elected and qualified. To reconcile this conflict, and to render the various provisions of the act sensible and coherent, it is necessary in place of the words "this act," in the proviso, to read "this section," or "this chapter;" and this accords with the evident intention of the legislature, which was that all the elective officers of the city should be chosen at the same time, and enter upon their respective offices at the same time. As to all other officers, except members of the boards of trustees, education, etc., there is no doubt that they must be elected on the second Monday of April of the odd-numbered years, and hold their respective offices for two years from the following Monday. We think it clear that the trustees (except those drawing the short term after the first general election, and those elected provisionally at the special election) are to hold four years from the same date. From these views it follows that a peremptory writ should issue as prayed.

So ordered.

We concur: DE HAVEN, J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; GAROUTTE, J.; HARRISON, J.

88 Cal. 582

SMITH *et al.* v. OLMSTEAD *et al.* (No. 18, 125.)

(Supreme Court of California. April 8, 1891.)

DESCENT AND DISTRIBUTION—CHILDREN OMITTED FROM WILLS—RIGHTS.

Under Civil Code Cal. § 1306, providing that, where any testator omits to make provision for any of his children, and the will does not show that such omission was intentional, such child succeeds to such portion of the estate as he would have received if the testator had died intestate, the estate descends to him at once, and he becomes vested with such interest, subject only to a sale for the payment of debts; and where a will gives to the testator's wife all his property, with absolute power to sell any and all of it without application to or approval by the court, but omits to make provision for a child, a sale under such power will not convey a valid title, as against the right of the child.

Affirming 23 Pac. Rep. 1148.

On rehearing.

DE HAVEN, J. This is an action for the purpose of determining conflicting claims to real property. The record shows that one Z. B. Smith, now deceased, in his lifetime made his last will, by which, after directing the payment of his debts, he in terms gave to his wife all of his property, with "absolute power to sell any or all of said real and personal property, at public or private sale, with or without advertisement, and without application to any court, and without approval or authority of any court whatever." In a subsequent clause the wife was also named as executrix of the will. She duly qualified as such, and sold to the defendants the property described in the complaint. Such sale was made without any previous order therefor, but was afterwards confirmed by the court in which the administration of her deceased husband's estate was pending. The land was community property. The record does not show that the sale was necessary for any of the reasons stated in section 1536 of the Code of Civil Procedure; that is, in order "to pay the allowance of the family, or of the debts outstanding against the decedent, or the debts, expenses, or charges of administration, or legacies." The plaintiffs are minor children of the said Z. B. Smith, deceased, and are not provided for in said will; nor does the will show that the omission to provide for them was intentional. There has never been any distribution of this property, and the administration of the estate of said Smith is still pending. The judgment of the court below was in favor of plaintiffs, and the defendants appeal. This judgment was affirmed by Department 1 of this court, on January 25, 1890, (22 Pac. Rep. 1148,) but a rehearing was granted, and the case is now before the court in bank for determination.

The question for decision is whether, upon the facts as here stated, the power of sale contained in the will is so far operative against the plaintiffs that a sale made under it, and confirmed by the court, transferred to the defendants the title to the land in controversy. To determine this, a brief reference to the plain language of the law, relating to wills, and the right to succession of property of a decedent in the absence of a will disposing of it, is necessary. By section 1307 of the Civil Code it is provided that where a testator omits to provide in his will for any of his children, unless it appears that such omission was intentional, such child "must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto, as provided in the preceding section." That is, "the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate." Civil Code, § 1306.

We are unable to construe these sections otherwise than as declaring that the pretermitted child succeeds immediately, by operation of law, to the same portion of the testator's real property as if no will had been made; that as to such portion the testator is to be regarded as dying intestate, and its succession is directed by law, and not by the will. And, as a nec-

essary legal consequence of this construction, it would follow that very provision in the will, directly or indirectly attempting to dispose of such portion of the estate, except for the discharge of the decedent's debts, or other charges accruing in due course of administration, is inoperative as against such child. As to the rights of a pretermitted child, under these sections, this court has heretofore held: "In other words, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate." *Estate of Wardell*, 57 Cal. 489. Sections 16 and 17 of the act concerning wills, (Hit. Gen. Laws, p. 1086,) and section 1 of the statute of descents and distributions, (Id. p. 323,) are substantially the same as the provisions of our Civil Code relating to the same subjects; and this court, in *Pearson v. Pearson*, 46 Cal. 609, basing its decision on these statutes, held, explicitly, that the pretermitted child takes the same share in the estate, and holds by the same title, as though the testator had died intestate.

Now, in the case of a person dying intestate, his estate descends and vests immediately in his heirs, subject only to the payment of the debts of decedent, the expenses of administration, and the family allowance. This is not only clear from sections 1383, 1384, 1386, and 1402 of the Civil Code, but was so expressly held by this court in *Brenham v. Story*, 39 Cal. 188, under statutes substantially the same, the court saying: "Upon the death of the ancestor, the heir becomes vested at once with the full property, subject to the liens we have mentioned; and, subject to these liens and the temporary right of possession of the administrator, he may at once sell and dispose of the property, and has the same right to judge for himself of the relative advantages of selling or holding that any other owner has." The respondents in this case were, immediately upon the death of their father, clothed by operation of law with such a title to the property in controversy, and, this being its nature and extent, it is clear that such title was not divested by the sale made by the executrix of their father's will, under the circumstances disclosed by the record in this case. A title to property, which is so full and complete that its possessor has "the same right to judge for himself of the relative advantages of selling or holding that any other owner has," cannot co-exist with the right of another to transfer such property at discretion, and the power exercised by the executrix in this case being inconsistent with the title which the law vested in the respondents upon the death of the father, cannot be upheld. These views are in harmony with the decisions of other states where statutes relating to wills and right of succession are similar to our own. See *Northrop v. Marquam*, 16 Or. 173, 18 Pac. Rep. 449; *Smith v. Robertson*, 89 N. Y. 558. But it is urged by appellant that these cases are not in point, because in neither of the states in which the decisions were made was there a statute similar to section 1561 of the Code of Civil Procedure, which provides that when "authority is

given in the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine," but that "no title passes unless the sale be confirmed by the court." And it is claimed that the sale here, having been confirmed by the court, is valid under that section. But we think it is manifest that in determining the question whether, in judgment of law, authority to sell has in fact been given to an executor, the section can have no application. It is equally clear that the authority to sell therein referred to must be held to include only such a one as is operative and binding upon the person against whom it is asserted; and unless such an authority can be found in the will, when such will is read and construed with reference to the law which determines its meaning and legal effect, it must be held that it does not exist; and in that case there is nothing upon which this section of the Code can act. The case of *Coates v. Hughes*, 3 Bin. 498, cited and relied on by appellants, is not in conflict with the views we have announced. The power under consideration there was confined to a sale for the payment of the debts of the testator, and it appeared that there was a necessity for the sale for such purpose, and the court held, and we think rightly, that such a power was operative. The reason why, in such a case, the power of sale would be operative, is apparent. The child who succeeds to the estate of his ancestor, by inheritance, takes it subject to the payment of the debts of such ancestor, and his right of succession is in no wise affected by a provision in a will which goes no further than to authorize what the law would in any event direct to be done, if necessary to discharge such lien. In such a case the executor is only clothed with the ordinary powers incident to the administration of the estate; in fact, the precise power which the law gives an administrator of the estate of an intestate. The order of confirmation imparted no validity to the sale in this case; it only adjudicates that the power contained in the will had been followed, and that the sale was for a fair price. We are satisfied with the conclusion reached in department 1. Judgment affirmed.

WE CONCUR: GAROUTTE, J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

HARRISON, J. I concur in the order affirming the judgment, both for the reasons expressed in the opinion of Mr. Justice DE HAVEN, and also upon the following considerations: Section 1402 of the Civil Code provides that "upon the death of the husband one-half of the community property goes to the surviving wife, and the other half \* \* \* goes to his descendants, \* \* \* subject to his debts, the family allowance, and expenses of administration." These are the "purposes of administration" referred to in section 1384, Civil Code, and are also the objects for which the court is authorized under section 1536, Code Civil Proc., to direct a

sale of the property of the decedent. The right of the children and the right of the surviving wife to the community property exist by virtue of the same section of the Code, and are declared in identical words, and, inasmuch as it is the settled rule that the right of the surviving wife to her half of the community property vests in her immediately upon the death of the husband, (Estate of Silvey, 42 Cal. 210,) it must also be held that the right of the children to their half of the same property vests in them at the same time. In *King v. Lagrange*, 50 Cal. 328, it was held that a power of sale in the will did not authorize a conveyance by the executor of the wife's share of the community property, and that a conveyance by the executor, under such power, of the real estate of the deceased, did not have the effect to transfer the interest of the wife as the survivor of the community. It is true that the conveyance in that case was only of the "right, title, and interest" of the decedent in the property, but the decision in the case does not turn upon this distinction, and in reality such a distinction does not exist. At the date of the conveyance, the testator, being dead, had, of course, no "right, title, or interest" in the property; and the conveyance by the executor under the power contained in the will, being like a conveyance under any other power of attorney, (*Larco v. Casaneuava*, 30 Cal. 581,) would necessarily be limited to such right, title, and interest as existed in his constituent at the date of his death, the point of time when the authority of the executor came into existence. If a conveyance under a power of sale given in the will is inoperative to transfer the interest of the wife, it must be equally inoperative to transfer the interest of the children. In accordance with the principles established by the decision in *King v. Lagrange*, it is the usual, if not the invariable, custom of conveyancers in this state, when community property of a decedent is sold by the executor under a power given by the will, to require a release or conveyance of the same property from the surviving wife. This rule or custom was followed in the present case, since it appears from the record that the purchaser took a deed of the land in question from the surviving wife individually as well as in her representative capacity.

86 Cal. 1.

LAST CHANCE WATER-DITCH CO. v. HEILBRON *et al.* (No. 13,161.)

(Supreme Court of California. Sept. 12, 1890.)

WATER-RIGHTS—APPROPRIATION—PLEADING—FINDINGS—*RES JUDICATA*.

1. In an action by the appropriator of the waters of a river to enjoin riparian proprietors from interfering with its rights, evidence as to the width and depth of the appropriator's ditch is insufficient to show its carrying capacity, in the absence of any evidence as to the velocity of the water or the grade of the ditch.

2. Where the complaint states that the water was appropriated "in pursuance of notice duly given and made," a finding that the appropriator is entitled to water in 12 times the amount claimed in the notice cannot be sustained, as it is in conflict with and in excess of the allegations of the complaint.

3. A finding that the appropriator for five years, during the low-water season, diverted a stated quantity of water peaceably, openly, notoriously, continuously, and adversely to the riparian proprietors and their grantors, is not supported by evidence which shows that for the first two years the appropriator's ditch drew no water during the low-water period, and that for the succeeding years, by wrongfully entering on the riparian owners' land, without their knowledge, and diverting the water therefrom, the appropriator succeeded in shortening the time in which its ditch ran dry to four months in each year.

4. Repeated and long-continued incursions on the riparian owners' land by the appropriator, for the purpose of diverting the water into the latter's ditch, give it no prescriptive rights, where the riparian owners restored the water to its natural channel as often as they discovered the diversion.

5. At a point above the appropriator's ditch a slough connects with and receives the waters of the river in question, carrying them over the riparian owners' land. To prevent this the appropriator constructed a dam at the head of the slough, and deepened the river bed, cutting off the water from the riparian owners' land. *Held*, that a judgment obtained by the riparian owners, preventing the maintenance of the dam at the head of the slough, and restraining the appropriator from interfering with or preventing the free flow of the water "into or down the channel" of the slough, was a determination that the appropriator had no right to interfere with the natural flow of the water, not only at the head of the slough, but through its entire channel, and that this question could not again be litigated in a subsequent action by the appropriator against the riparian owners for diverting the water of the river through the slough.

6. The fact that the riparian owners made no objection to the use of the water by the appropriator during seasons of abundance, when it naturally flowed down the river, gives the appropriator no prescriptive right to change the course of the flow in seasons of scarcity for the purpose of continuing the supply.

7. Where a director of the corporation which appropriated the water has testified, on his direct examination, that the corporation had used the water without interruption, it is error to exclude a question asked on cross-examination as to whether or not he had received notice from his agent that the diversion of the water had been interrupted.

In bank. Appeal from superior court, Tulare county.

*Brown & Daggett*, for appellants.

*N. O. Bradley, W. S. Goodfellow, and N. J. Atwell*, for respondent, cited the following cases on the question of *res judicata*: *Gilbert v. Thompson*, 9 Cush. 348; *Eastman v. Cooper*, 15 Pick. 276; *McDonald v. Mining Co.*, 15 Cal. 147; *Fulton v. Hanlow*, 20 Cal. 486; *Flandreau v. Downey*, 23 Cal. 358; *Mitchell v. Insley*, (Kan.) 7 Pac. Rep. 203; *Perry v. Dickerson*, 85 N. Y. 347; *Kerr v. Hays*, 35 N. Y. 338; *Crandall v. Woods*, 8 Cal. 144; *Water Co. v. Crary*, 25 Cal. 509; *Davis v. Gale*, 32 Cal. 35; *Gould, Waters, & 385*.

*Fox, J.* This is an action for injunction to restrain the defendants from turning away from Cole slough or from King's river the waters which in their natural flow would run down to the plaintiff's ditch, and for damages. The case was tried before the court without the intervention of a jury, findings filed, and judgment rendered in favor of plaintiff, enjoining and restraining the defendants from

damming up the southerly branch or channel of Cole slough, or from diverting or turning away from said southerly branch or channel any of the waters which in their natural flow would run down to or into said southerly channel or branch, and from in any manner obstructing or interfering with the free flow of the water into or down the said southerly branch or channel of Cole slough, or through the Dutch John cut. Motion for new trial was made and denied, and defendants appeal from the judgment and from the order denying said motion.

Plaintiff is a corporation, having no riparian rights, so far as shown in this case, but claiming the right, as appropriator, to take water from King's river, at the head of its ditch, to the amount of 14,400 cubic inches per second, under a 4-inch pressure, for purposes of irrigation. The head of plaintiff's ditch is located on and near the S. W. corner of section 26, township 17 S., range 21 E., Mt. Diablo meridian, and takes the water from and to be used exclusively on the southerly side of King's river. The defendants are riparian proprietors, in possession of the Rancho Laguna de Tache, containing about 48,800 acres of land, situate wholly on the northerly side of King's river, bordering upon and bounded by the river for the distance of about 80 miles, covering the land on the northerly side of said river for the entire distance here under consideration, and extending above and below the points herein mentioned. King's river flows, so far as its course here comes under observation, in a general course from north-east to south-west, but by a somewhat crooked and tortuous channel. It enters township 17 S., range 22 E., at the N. E. corner of section 1. At about the center of the S.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of the section it takes a sudden turn, and runs nearly due south about two miles, and from thence runs by a winding channel to a point in the N.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 25, township 17 S., range 21 E., where it is intercepted from the north by what is known as "Dutch John Cut." From here it runs by a winding course to a point in the S. W.  $\frac{1}{4}$  of section 26 in the same township, where it is intercepted on the south side by plaintiff's ditch. From this point it runs by a nearly direct line to the north-west corner of said section 26, where it is intercepted from the north by what is called "Reynold's Slough," and from thence runs a nearly west course, so far as it is necessary to trace it for the purposes of this case. At the point of the first bend above mentioned, on section 1, township 17 S., range 22 E., Cole slough connects with and receives water from the river on the north side. This is shown to be a natural water-course, cut out by the high waters many years prior to the incorporation of plaintiff. It runs a general course from north-east to south-west, through the rancho Laguna de Tache, and wholly on said rancho, to a point on the N. E.  $\frac{1}{4}$  of section 23, township 17 S., range 21 E., where its waters enter into what is called "Reynold's Slough," above mentioned, and through it find their way to King's river at a point one mile below the head

of plaintiff's ditch, and by a course some miles shorter than that of the channel of the river. Cole slough, at its upper or northerly end, is divided into two channels for a distance of about two miles, or a little over; it then unites and flows in a single channel for about the same distance, when it is again divided into two channels, one called the "north channel" (sometimes called "Waggoner's Slough") and the other the "south channel." The north channel is much the shortest, running by the most direct route, and consequently has the most rapid current. The south channel bends down very much to the south, and runs within a few hundred yards of the bank of the river, at a point known as "Dutch John Cut." From there it turns again rapidly to the north, and reunites with the north channel about one-fourth of a mile above the point where the waters flow into Reynold's slough. Dutch John cut is not, and never was, a natural water-course. At the point where it connects with the south channel of Cole slough there was a natural depression in the ground, over which the waters would flow at seasons of high water, but the river bank opposite consisted of a high ridge, which prevented them from running into the river. The consequence was that they spread out over the alluvial lands to the westward, and formed a lagoon on what would otherwise be valuable meadow land. To obviate this a tenant on the grant, in 1868 or 1869, called "Dutch John," made a cut through the high river bank to drain off this water. This cut was gradually enlarged by the action of the water, and in later years was still further deepened and enlarged by the plaintiff so as to carry the waters of the south branch of Cole slough into the river above the head of its ditch. It also is located entirely upon defendants' land. It is shown that as early as 1868, by natural processes, the channel of King's river, at the head of Cole slough, had become so filled with sand, and Cole slough had become so enlarged and deepened, that during the dry season little, if any, water ran down the channel of the river, but all the water during the dry season found its way down Cole slough and only found its way to the river again through Reynold's slough, at a point one mile below where the plaintiff subsequently connected its ditch with the river. During the season of high water, which does not exactly correspond to the rainy season, but is the season of melting snows, large bodies of water ran down both channels. It further appears that the defendants and their predecessors have, and for many years past have had, upon said rancho large numbers of cattle dependent upon the waters of Cole slough for water to drink, and also have under cultivation some 4,000 acres of said rancho planted to alfalfa and other crops requiring irrigation, and even before the incorporation of plaintiff had commenced to appropriate and divert the waters of Cole slough for purposes of distribution upon the ranch for the use of their cattle, and for the irrigation of parts thereof, by means of a ditch connecting with said slough at its junction with Reynold's slough; that as

early as 1881 this ditch had been so enlarged and extended that it was 45 feet wide on the bottom, 4 feet deep, and was, with its distributing branches, 75 miles in length; that as early as 1871 the head of the south channel of Cole slough had become, from natural causes, partially filled with sand, so that at low water most of the water would run down the north channel, and the defendant's predecessors in that year built a dam of brush and sand to further facilitate the turning of the water into the northern and shorter channel, and to prevent it from going down towards Dutch John cut. The plaintiff was incorporated in October, 1873. It alleges in its complaint that on or about the 1st day of May, 1874, it, "under and in pursuance of notice prior to that time duly given and made, appropriated and acquired the right to divert, appropriate, and use, of the waters of King's river, \* \* \* fourteen thousand four hundred cubic inches per second, under a four-inch pressure, of the water thereof, and still has the right to so divert, appropriate, and use said amount of the waters of said stream."

1. The first point made by defendants (appellants here) is that the evidence is insufficient to support the findings. The court finds that in 1874 plaintiff constructed a large water-ditch, connecting with King's river at a point below Dutch John cut, 24 feet wide on the bottom, and about 30 feet wide on the top, and about 4 feet deep, and has and had a capacity to carry 100 cubic feet of water per second; that in the spring of 1875 plaintiff appropriated and diverted from said King's river 100 cubic feet of water per second, and for a period of more than five years thereafter plaintiff appropriated and diverted from said river into its said ditch said quantity of water, publicly, openly, peaceably, continuously, notoriously, uninterruptedly, and adversely to the defendants and the whole world, under claim of right, and with the knowledge and acquiescence of the defendants and their grantors, and, except when prevented by the defendants, as hereinafter found, the plaintiff, ever since the spring of 1875, has appropriated and diverted from said river, into its said ditch, said quantity of water, and thereby the plaintiff acquired and still has the right to divert and use the waters of said river to the extent aforesaid, and said water has been used for irrigation.

This finding is entirely unsupported by the evidence in several particulars. There is to our minds no evidence whatever to show what the carrying capacity of this ditch was or is. That depends, not only upon the width and depth of the ditch, but also upon the velocity of the flow, and we are unable to find any evidence upon the subject of the velocity of this flow. It is true that one or two witnesses say they think it would carry about a hundred cubic feet per second, but it is perfectly apparent from their testimony that the only reason they have for this opinion is that in their judgment a cross-section of the ditch one foot in width would contain about a hundred cubic feet. No test of velocity is ever made, and no proof of grade is made to enable one to

calculate the average velocity of the flow. Again, this finding is in direct conflict with and in excess of the allegations of the complaint. According to the complaint the appropriation made by plaintiff was made "in pursuance of notice duly given and made." If this means anything it means that it was done in pursuance of notice given as required by the provisions of the Civil Code. Those provisions require that the appropriator shall state in the notice the extent of the appropriation, giving the number of inches, under a four-inch pressure, and the place of intended use, which notice must be posted at the point of intended diversion. Section 1415. This is the first step in the act of appropriation, and the complaint shows that the appropriation was made in pursuance of this step duly taken. The extent of the appropriation, as set forth in the complaint, according to the notice, and as afterwards actually made, and as plaintiff now claims the right to make it, was and is 14,400 cubic inches per second. And yet the court finds that the extent of appropriation and diversion actually made, and which plaintiff is now entitled to make, was and is 100 cubic feet per second, 12 times the amount claimed in the complaint; and it enjoins the defendants from doing any act or thing that shall interfere with the right of plaintiff to divert the quantity which plaintiff is so found to be entitled to divert.

Nor is there any evidence to support the finding that this appropriation and diversion was made continuously, uninterruptedly, or adversely to the defendants or their grantors. On the contrary, the evidence without conflict shows that during most of the years since 1875, during the stage of low water in the river, there were periods of several weeks at a time when there was no water in plaintiff's ditch, and it is not shown that this did not occur for some portion of the time during every year. The only years in which it is not affirmatively shown that the ditch was dry a part of the year are the two last ones, during which time it is shown that plaintiff succeeded in getting water for a longer period than usual by entering upon the lands of defendants and turning the waters of the north channel of Cole slough down the south channel, and thence through Dutch John cut into the river; but even then it is not affirmatively shown that a continuous flow of water in the ditch was secured. And so far as relates to water that was taken from the river by first diverting it from the north channel of Cole slough and turning it into the river through the south channel and Dutch John cut, the finding that it was done with the knowledge and acquiescence of defendants and their grantors is in direct conflict with all the evidence upon the subject. The court then finds that prior to 1868 all the waters of King's river flowed down the old or main channel of the river; that ever since 1868, during the period of low water in each year, all the waters of the river have flowed down Cole slough; that since 1874 a large portion of the waters thereof have flowed down the southerly branch

of Cole slough into Dutch John cut, and thence into the river above the head of plaintiff's ditch, and that ever since 1875 plaintiff has obtained its supply of water through said channel of Cole slough and Dutch John cut, and for more than five years after the spring of 1875 plaintiff appropriated and diverted into said ditch through said channel of Cole slough and Dutch John cut, during the low-water season, the said quantity of water claimed by plaintiff, peaceably, openly, notoriously, continuously, uninterruptedly, and adversely to the defendants and the whole world, under a claim of right, and with the knowledge and acquiescence of the defendants and their grantors, and, except when prevented by the defendants, as hereinafter found, the plaintiff, ever since the spring of the year 1875, during the low-water season, has appropriated and diverted from said King's river, through said channels of Cole slough and Dutch John cut, into its said ditch, its said quantity of water, which has been used for irrigation. This finding is unsupported by the evidence in this: The evidence given on the part of plaintiff shows, without any substantial conflict, that since 1877 plaintiff's ditch has drawn no water from King's river during the period of low water (which the court has found in another place to be from about the middle of August until the rainy season sets in, in the month of December in each year;) but by annual or biennial incursion made without right upon the lands of defendants, and the making of dams across the north channel of Cole slough, and scraping out the south channel and the channel of Dutch John cut, the plaintiff has succeeded, since 1877, in getting water a little later in the summer, and a little earlier in the following winter or spring, than it did get it in 1875 and 1876, or would have gotten it if such incursions had not been made and such work had not been done. Even by these methods, however, which were entirely unauthorized and without right, but which for some 9 or 10 years were not successfully carried to an extent which interfered with the supply of defendants, there were some four months in each year during which, according to the uncontradicted testimony of directors of plaintiff, no water flowed through the ditch of plaintiff. And the proof is uncontradicted that these incursions were made and these trespasses committed without the knowledge or acquiescence of defendants, except on the occasion, during a season of extreme low water unusually early, when a conference was had, and defendants consented that plaintiff might construct a certain kind of dam in the north channel, upon certain prescribed conditions, which would still leave a supply for defendants; but it is shown that the condition was not complied with, and the dam then constructed by plaintiff was immediately torn out by its own men, at the command of defendants, and no dam was ever afterwards constructed on the north channel, nor any work done on the south channel, with the consent of defendants.

The court also finds that Dutch John

cut is now, and has been since 1875, a natural water-course, through which the waters of King's river and Cole slough have at all times flowed into plaintiff's ditch, as hereinbefore found. The evidence is insufficient to support this finding. Dutch John cut was a small, artificial cut, made as hereinbefore stated. In 1877, and annually thereafter, according to the uncontradicted testimony of plaintiff's own witnesses, plaintiff entered upon and enlarged it, and cut it deeper, for the purpose of turning the waters of Cole slough through it at a lower stage of water than it otherwise would have flowed through. The dam built in 1871, to turn the waters in the north channel, (referred to in our general statement of the facts,) was swept away by the first succeeding freshet, and before the organization of plaintiff, and at the time of plaintiff's appropriation there was no unnatural interruption to the flow down either channel. The court finds that on the 10th day of January, 1887, the defendants, against the will and without the consent of plaintiff, constructed a dam in and across the head of the southerly branch of Cole slough, and by means thereof turned away the waters which had been accustomed to flow from King's river through the said Cole slough, and through the said southerly branch and Dutch John cut back into King's river above the head of plaintiff's ditch, and through plaintiff's said ditch, and that the effect thereof was to deprive plaintiff's ditch of such water at the season of the year when all the waters of King's river flow down said Cole slough, and have thence hitherto diverted and turned away from plaintiff the said waters; and also that neither the defendants nor their predecessors have ever kept or maintained any dam across the said south channel of said slough, except as hereinbefore stated. There is some evidence to support these findings, but the findings do not state the whole truth, as shown by the evidence upon which they are based. The evidence shows that the plaintiff, with one or two exceptions, made annual incursions, from 1877 to 1887, upon the premises of defendants, and changed the natural condition of both channels of Cole slough, near the upper junction thereof, by scraping the sand and earth out of the south channel and placing it in the north channel. As soon as the supply of water in the north channel ran low by reason thereof, and the attention of defendants was thus attracted to the fact, they would go up to the junction, and, finding what had been done, would move the sand back again out of the north channel into the south one, and thus restore the channels practically to their natural condition. Sometimes the sand would thus be moved back and forth twice in the same year. And this kind of scrambling effort to change the course of the water at its lowest stages on the one side, and to preserve it on the other, was kept up until 1887. In that year the plaintiff again repeated the process of scraping out the south channel, and built a brush and earth dam across the north channel, and, this fact becoming known to defendants, they moved the



whole thing over into the south channel, and thereafter did maintain a dam across the south channel to a sufficient extent to prevent water flowing down said south channel at all stages of water when it would not have flowed down there if both channels had been left in their natural condition, or as the elements would have left them if undisturbed. And it is for this act that the present action is brought, or, in other words, to enjoin the defendants from protecting themselves against the trespasses and wrongs of the plaintiff. Nothing in plaintiff's notice or act of appropriation authorized it to go, or justified it in going, upon the lands of defendants, and interfering with or altering the waterways situate thereon, for the purpose of increasing the flow of King's river at the head of their ditch, or of extending or prolonging the period thereof; and the evidence fails to show that the defendants, after the appropriation by plaintiff, interfered with or altered the channels, even upon their own land, so as to diminish that flow or shorten the period thereof; or that they interfered with said channels at all, except to restore them, from time to time, as near as practicable, to the condition that they would have been in had it not been for the changes wrongfully made therein by the plaintiff. It is also apparent from the evidence that the plaintiff knew when it made its appropriation what to expect as to quantity and continuance of flow; that the appropriation was made, and the ditch constructed, with reference to the use of, and with the intent to use, the water only at the periods of high and medium flow, with no expectation of using it at periods of low water. The ditch itself was constructed purposely and intentionally so as to let a stream some 150 feet wide and 14 inches deep run past the head of the ditch before any could be taken out, and this with a full knowledge that the channel of the river carried no water during the low stages, and that at extremely low water none ran in the south channel of Cole slough. The evidence tends to show that since then such changes have been made or have occurred in the bed of the river at that point as to enable the plaintiff to take the water so long as any comes to the head of the ditch; but this was not the original intention. No doubt, so far as any claim of these defendants is concerned, the plaintiff is entitled to take water from the bed of the river, at the head of its ditch, to the full extent of its appropriation, whenever the water comes there, from whatever source it may come, and reach the river-bed at that point; but this gives the plaintiff no right to enter upon private property, and tap other streams, for the purpose of securing water for its ditch, or of augmenting the flow of the river at the head thereof. And it is unnecessary for us in this case to discuss the measure of defendants' rights in the waters which naturally flow over and across their own lands. To those waters, while on the lands of defendants, the plaintiff is a stranger. It is only when the defendants prevent the water from running back into the river at or above the head of plain-

tiff's ditch, by an interference with the course of nature,—not simply by interrupting or stopping the trespasses of plaintiff,—that the plaintiff can complain; and the evidence does not justify the conclusion that there has been any such interference. The incursions of plaintiff upon defendants' land, for the purpose of obstructing the flow of water in the north channel and increasing the flow in the south channel of Cole slough, were never assented to by defendants, but as often as discovered the work of plaintiff in that behalf was undone by defendants. However long, therefore, those incursions may have continued, or however frequently they may have been repeated, they did not secure to plaintiff any prescriptive right in the water secured thereby. *Hanson v. McCue*, 42 Cal. 310; *Ditch Co. v. Crane*, 80 Cal. 131, 22 Pac. Rep. 76.

2. The next point made by appellants is that the plaintiff is estopped, by matter of record, from claiming or diverting any of the waters of Cole slough, or interfering with the free flow thereof. This point, we think, is well taken. It appears that in 1885 the plaintiff, evidently dissatisfied with the result of its efforts to augment its supply by diverting the water from the north to the south channel, went up to the head of Cole slough, and scraped out and deepened the bed of the river, and constructed a dam so as to divert the flow of the water from the head of Cole slough. Thereupon these defendants commenced an action against the plaintiff, filing a complaint in which they set up the fact of their ownership and possession of the rancho Laguna de Tache; that Cole slough ran for its entire length over and across said rancho; of their use of the waters of Cole slough for their cattle, and their appropriation and diversion thereof by means of ditches at the lower end thereof for the irrigation of their lands as hereinbefore set forth; of the action of defendant therein (this plaintiff) in deepening the channel of the river and obstructing the flow of the water down the channel of Cole slough, and to and through the head-gate and canal of plaintiffs, (these defendants,) and prayed an injunction forever restraining the defendant (this plaintiff) from entering upon the channel of King's river, or the channel of Cole slough, and from in any manner interfering with the channel of said river or of said Cole slough, or from in any manner interfering with the flow of water from the channel of said river into and through the channel of said Cole slough. In this action such proceedings were subsequently had as that on May 3, 1886, judgment was duly given and made forever enjoining and restraining the defendant (this plaintiff) "from digging out, enlarging, or lowering the channel of King's river at and immediately below the head of Cole slough, and from erecting or maintaining any dam or other obstruction in or across the channel of said Cole slough at or near its head; and from doing any act or thing which shall interfere with or in any manner prevent the free flow of water into or down the channel of said Cole slough." This judgment has become final. Respondent insists that this

judgment does not work an estoppel in this case, for the reason, as it claims, that the trespasses then complained of and enjoined were those, and those only, at the head of Cole slough. We do not so read either the complaint or the judgment in that case. The *locus in quo* was a mere incident of the cause of action or the relief sought. The substantive wrong complained of was the prevention of the water from flowing into and down the channel of Cole slough, and into the head of the ditch of plaintiffs in that case. The judgment restrained not only the acts at the place complained of, but any act which would have the effect of preventing the water from flowing into or down the channel of said Cole slough. The injunction, therefore, ran, not alone as to the head, but as to the entire length, of Cole slough, and in doing so it did not exceed the relief warranted by the allegations and the prayer of the complaint. The effect of the judgment in the present case is to restrain and enjoin these defendants (the plaintiffs in the former case) from interfering with such trespasses of the plaintiff herein (defendant in the former case) as are committed in violation of the former injunction, and are intended to and do defeat its purpose. In other words, the effect of this judgment is to enable the plaintiff to deprive the defendants of the fruits of the former judgment, rendered in their favor, and still remaining in full force. The right to have the water flow, according to the course of nature, through the channels of Cole slough, from end to end, not only might have been, but, as we read it, was, within the purview of that former action, both in respect to matters of claim and defense, and was there adjudicated and determined. That determination is *res judicata* as between these parties. *Coburn v. Goodall*, 72 Cal. 508, 14 Pac. Rep. 190; *Freem. Judgm.* § 249, and cases cited. Finding, as we do, that the question of this right was involved and passed upon in the former case between the same parties, the authorities cited by respondent are not in point.

3. Appellants assign as errors of law the rulings of the court in overruling defendants' objections to nine different questions propounded to witnesses by plaintiff. We do not deem it necessary to take these questions up in detail. The evidence elicited by the responses to them was incompetent to prove any fact in issue, or to show that plaintiff had acquired a prescriptive right to enter upon the lands of defendants, or upon any of the channels of Cole slough, for the purpose of interfering with the free and natural flow of the waters through the same, and its admission was therefore erroneous. The fact that plaintiff committed annual trespasses upon the rancho, or upon the channels of Cole slough, gave it no prescriptive right to continue such trespasses. The mere use of the water during seasons of abundance, when it naturally flowed down the south channel of Cole slough and Dutch John cut, without objection on the part of defendants, gave to plaintiff no prescriptive right to change the course of the flow in seasons of scarcity for the purpose of continuing its supply. Anaheim

Water Co. v. Semi-Tropic Water Co., 64 Cal. 185.

The court also erred in sustaining an objection to the question put by the defendants, upon cross-examination, to the witness Ayers. The question was: "As a director of the company, you understood and learned by your agents that the diversion of water had been interrupted, didn't you?" Plaintiff had sought to prove by the witness, on his direct examination, that it (plaintiff) had used the water through the south channel of Cole slough and Dutch John cut without interruption. The question was pertinent, and clearly within the line of cross-examination, and, if answered in the affirmative, would have charged the plaintiff with knowledge of such interruption, which was the purpose of the question.

Respondent makes a separate point, as follows: "Plaintiff has acquired the right, by adverse enjoyment and use for the period of five years, to divert one hundred cubic feet of water per second from King's river." The contest in this case is not so much as to the quantity which plaintiff has the right to divert from King's river as it is to the question of plaintiff's right to augment the quantity in King's river by diverting from Cole slough at a time when the water is so low that it would not naturally flow into King's river therefrom. For this reason it is not necessary for us to say more than we have already done on the question of quantity. The quotations which counsel makes from the testimony of his witnesses sustain us in what we have said on that subject, and they do not sustain the plaintiff in its claim of right to augment the flow in King's river by an unnatural diversion of the waters of Cole slough. Holding, as we do, that the evidence falls to show that the defendants have obstructed or diverted, or intend to obstruct, divert, or turn aside, the waters which in their natural flow would flow through Cole slough into King's river at or above the head of plaintiff's ditch, or have done, or intend to do, anything more than to prevent such natural flow being changed or diverted by the act of plaintiff, and that plaintiff has been and is estopped from changing, or claiming the right to change, the natural flow thereof, it follows that the judgment and order appealed from must be reversed. So ordered.

McFARLAND, SHARPSTEIN, and THORNTON, JJ., concur.

PATERSON, J. I concur on the second ground discussed by Mr. Justice Fox, viz., that the record in *Heilbron v. The Last Chance Water-Ditch Co.* established an estoppel in favor of the defendants and against the plaintiff herein.

WORKS, J. I concur in the judgment.

Rehearing denied.

(% Cal. 70)

*In re VINICH.* (No. 20,743.)

(*Supreme Court of California.* Sept. 19, 1890.)

ARREST—IN CIVIL ACTION IN JUSTICE'S COURT—AFFIDAVIT.

1. Under Code Civil Proc. Cal. §§ 861, 862, which permit the arrest of defendant in an action

on contract, express or implied, brought before a justice of the peace, when plaintiff makes an affidavit that defendant is about to depart from the state with intent to defraud creditors, or that he has been guilty of fraud in contracting the debt, or that he has removed or disposed of his property with intent to defraud creditors, an affidavit for arrest, which shows that an action has been begun for the recovery of an "alleged" indebtedness owing by defendant, but which contains no averment that such indebtedness or cause of action exists, is fatally defective.

3. The affidavit should also set forth the facts constituting the fraud on defendant's part, and allegations on "information and belief" are not sufficient in an action in justice's court.

In chambers. On *habeas corpus*.

*E. S. Pillsbury* and *L. F. Smith*, for petitioner. *J. Edwards Marks*, opposed.

Fox, J. The prisoner is restrained of his liberty on an order of arrest issued in a civil action by a justice of the peace in Santa Cruz county. It is conceded that the action is for the recovery of moneys claimed to be due upon open account for supplies furnished to defendant while engaged in the restaurant business in Santa Cruz. The constitution provides: "No person shall be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud." Article I, § 15. The only provisions of the statute pertaining to arrest in civil actions in justice's court, or applicable in such cases, are those found in sections 861 to 865 of the Code of Civil Procedure. Under these, before an order of arrest can be made by the justice in an action for the recovery of debt, it must be proved to the satisfaction of the justice that there is a cause of action arising upon contract, express or implied; and either that the defendant is about to depart from the state with intent to defraud creditors, or that he has been guilty of fraud in contracting the debt or incurring the obligation, or that he has removed, concealed, or disposed of his property, or is about to do so, with intent to defraud his creditors. This proof may be made by the affidavit of himself or some other person. That it be made is jurisdictional, and without it there is no jurisdiction to issue such an order. The affidavit in this case shows that an action has been begun for the recovery of an "alleged" indebtedness, but there is no averment in the affidavit that such indebtedness or any cause of action exists. This defect is fundamental, and, whatever else may be averred, it leaves the court without jurisdiction to make the order of arrest.

The affidavit is also defective in several other important particulars. It alleges fraud, but fails to state the facts constituting the fraud; also removal and concealment of defendant's money, and a pretended sale of the balance of his property. These allegations are upon information and belief,—a form of averment which does not constitute proof, and is not authorized by law in this class of proceedings in justices' courts. In the superior court some of the facts may be alleged on information and belief, the party being required to state the source and character of his information, and that he believes it to be true. The judge of the superior court may then judge of and determine the sufficiency of the ground of belief. But the legislature has deemed personal liberty too sacred to allow a party to go into an inferior court and get an order of arrest on anything less than proof, and "information and belief" is not proof. Besides, a "pretended sale" is no sale, and does not prove that a party has sold his property with intent to defraud his creditors or otherwise. There is an averment that the defendant is about to depart from the state, with intent to defraud his creditors, but this also is made upon information and belief. I have pointed out these defects that they may be avoided in like cases, but the fundamental one is the want of any showing that there is a cause of action. For this, if for no other, the prisoner must be discharged. So ordered.

(88 Cal. 636)

CHADBOURNE *et al.* v. STOCKTON SAVINGS & LOAN SOC. (No. 13,947.)

(Supreme Court of California. April 28, 1901.)

SPECIFIC PERFORMANCE—SUFFICIENCY OF COMPLAINT.

1. A complaint for specific performance, which alleges that defendant executed a contract wherein it offered to convey lands at a certain price, and to keep the offer open for two years, provided plaintiff would insure the property for defendant's benefit, is insufficient, when it fails to allege that plaintiff did insure the property.

2. Where the contract provided that its offer should be kept open for two years, provided a certain yearly rental should be paid as specified in a certain lease, the complaint, drawn nearly a year after such rental is due, which fails to allege payment thereof, is insufficient.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; JOSEPH H. BUDD, Judge.

*James H. Budd* and *Baldwin & Campbell*, for appellant. *Joshua B. Webster* and *L. W. Elliott*, for respondents.

FITZGERALD, C. Appeal from a judgment of the superior court of San Joaquin county, and from an order refusing a new trial. This is an action to compel the specific performance of an alleged contract in writing for the conveyance of land. The so-called "contract," which is annexed to the complaint as an exhibit, is made a part thereof, and is in the words and figures following, to-wit: "The Stockton Savings and Loan Society, a corporation, does hereby offer to sell to Wm. Hart, or his assigns, all that certain piece or parcel of land situate and being in the county of San Joaquin, state of California, and known as the north half of section thirty-two, (32,) township four (4) north, range six (6) east, Mount Diablo meridian, for the sum of sixteen thousand six hundred and eighty-eight (\$16,688) dollars in gold coin of the United States of America, said sale to be made subject to the foregoing lease. The Stockton Savings and Loan Society agrees to account for all rents received by virtue of the foregoing lease of said premises after this date, and prior to August 16, 1889, provided this offer is accepted upon said terms. The Stockton Savings and Loan Society agrees to keep this offer open until August 13, 1889: provided, however, that the rental for the first year, ending August 16, 1888, shall be

paid as specified in foregoing lease, and, if not then accepted, this offer shall be withdrawn and considered as of no effect. Time is of the essence of this agreement; and the said William Hart, in consideration of the above offer to sell, agrees to keep the buildings on said land insured for at least six hundred dollars, and will assign to said Stockton Savings and Loan Society the policies of said insurance. Dated August 17, 1887." Defendant demurred to the complaint, upon the ground, among others, "that it does not state facts sufficient to constitute a cause of action." The demurrer was overruled by the court below, and, upon the case being tried, judgment was rendered in favor of plaintiffs, from which judgment and the order refusing a new trial defendant appeals.

The demurrer should have been sustained: *First*. Because the complaint does not show that Hart, or any one claiming under him, ever did anything in pursuance of said instrument, which was but a mere proposal to sell, and of which time was expressly made the essence, except the tender of payment, demand for deed, and offer to perform by plaintiffs on the 15th day of August, 1889, which was within two days of two years after the date of the execution of the said offer to sell, and more than 12 months after said Hart's alleged interest in said property had been sold at an execution sale by the sheriff of San Joaquin county. *Second*. Because we deem it essential, in order to entitle plaintiffs to maintain this action, that the complaint should allege performance, or offer to perform, or excuse non-performance, within a reasonable time after the making of the said offer to sell. As there is no allegation in the complaint showing that the agreement of Hart to keep the buildings insured and to assign to the defendant the policies of insurance, as provided by the terms of said instrument, which was the only consideration of the offer to sell, was ever performed or excused, we advise that the judgment and order be reversed, with directions to the court below to sustain the demurrer.

We concur: BELCHER, C.; VANCLIEF, C.

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment and order are reversed, with directions to the court below to sustain the demurrer.

(38 Cal. 221)

**PEOPLE V. AHERN.** (No. 20,446.)<sup>1</sup>

(*Supreme Court of California.* April 27, 1891.)

Department 1. Appeal from superior court, city and county of San Francisco; D. J. TOOHEY, Judge.

**PER CURIAM.** The transcript in this case was filed on June 16, 1888, and, no briefs having been filed on either side, it was ordered submitted for decision on February 12, 1891. It is ordered that the judgment and order appealed from be affirmed.

(38 Cal. 624)

*Ex parte* SOTO. (No. 20,833.)

(*Supreme Court of California.* April 24, 1891.)

**FINE AND IMPRISONMENT—RECORDER'S COURT.**

1. A recorder's court is a police court, within Pen. Code Cal. § 1446, providing that in jus-

<sup>1</sup>Rehearing granted.

ties' and police courts "a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, in proportion of one day's imprisonment for every dollar of the fine."

2. Under said section the court has discretion to direct imprisonment until the fine be satisfied at the rate of one day for two dollars of the fine. *De HAVEN, HARRISON, and GAROUTTE, JJ., dissenting.*

3. Directing imprisonment until the fine be satisfied, at the rate of one day for two dollars of the fine, does not render the judgment void, and therefore authorize the discharge of the prisoner on *habeas corpus*. *GAROUTTE, J., dissenting.*

**Habeas corpus.**

*Waterman & Broughton*, for petitioner.  
*W. A. Bell and Edwin Meserve*, for respondent.

**BEATTY, C. J.** The petitioner was convicted in the recorder's court of the city of Pomona, upon a charge of violating a city ordinance, and sentenced to pay a fine of \$150, and in default of such payment to be imprisoned in the city jail in the proportion of one day's imprisonment for each \$2 of the unpaid portion of said fine. The punishment prescribed by the city ordinance under which the petitioner was convicted is a fine not exceeding \$300, or imprisonment not exceeding three months, or both such fine and imprisonment; and it is claimed that a judgment imposing a fine only cannot be enforced by imprisonment, because the ordinance does not authorize imprisonment for that purpose. But it is not necessary that such authority should be found in the ordinance, if section 1446 of the Penal Code applies to cases tried in the recorder's courts of the fifth class. By that section it is provided that "a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, in proportion of one day's imprisonment for every dollar of the fine." It is contended, however, that since this provision only applies to proceedings in justices' and police courts, it confers no authority upon a recorder's court. But a recorder's court is none the less a police court because it happens to have been called by another name. The character of a court is determined, not by its name, but by the nature of its jurisdiction and functions, in which respect the recorder's courts of cities organized under the general municipal corporations act cannot be distinguished from other police courts.

Another ground upon which petitioner insists that his imprisonment is unlawful is that if it be conceded that the recorder's court of Pomona is a police court, and therefore authorized by section 1446 of the Penal Code to enforce payment of a fine by the alternative of imprisonment, this judgment is void as to the imprisonment which is prescribed, because, by the statute, the imprisonment must be at the rate of one day for every dollar of the fine, while this judgment only requires him to be imprisoned at the rate of one day for every two dollars of the fine. In support of this contention he cites the case of *Ex parte Bernert*, 62 Cal. 524, in which it was held that a sentence to pay a fine of \$20, and in default of payment to be imprisoned 10 days, was void, because the law in ques-

tion prescribed a fine of not less than \$100, and allowed imprisonment only as an alternative for non-payment of the fine. The reasoning of the court was that since there could be no imprisonment except as an alternative of non-payment of the fine, and since the fine was less than the minimum prescribed by the statute, the imprisonment was necessarily unlawful. Upon the same reasoning it would seem to follow that, if this petitioner has been allowed to discharge his fine by a shorter term of imprisonment than the law warrants, he cannot be imprisoned at all. But we think there is sufficient difference between the terms of the law applicable to this case and those of the statute construed in *Ex parte Bernert* to enable us to escape a consequence which, upon common-sense views, appears so absurd.

Section 1446 of the Penal Code does not imperatively require that the direction for imprisonment in case of non-payment of a fine shall be at the rate or in the proportion of one day for one dollar. It is in terms permissive,—the discretion of the magistrate is absolute whether or not to impose any imprisonment whatever,—and it can lead to no possible harm to hold that the law merely prescribes a maximum rate of imprisonment, leaving the magistrate full discretion to fix any rate within that maximum that seems to be just. It is certainly true, as argued by petitioner that, if this discretion exists, the magistrate may allow a fine to be discharged by imprisonment at the rate of \$10 a day or \$100 a day. But this does not seem to us to amount to a *reductio ad absurdum*. If the legislature deemed it wise to allow a police judge in his discretion to wholly omit the alternative of imprisonment, there seems to be no reason to assume an unwillingness to grant him the smaller discretionary power to vary the rate at which the fine may be discharged by that means. That such power has been conferred on the superior court by the express terms of section 1205 of the Penal Code is conceded, and this proves that the mere fact that it is a power capable of abuse by arbitrary or capricious exercise is no proof of its non-existence. It is no doubt true that the legislature might be supposed to have been willing to confide more to the discretion of the superior court than to inferior judicial officers, and it may be argued that the difference in the terms of the two sections referred to is proof of such disposition. But it is difficult to reconcile this assumption with the fact above stated, that the power conferred upon police judges to omit the alternative of imprisonment altogether is really more extensive and absolute than the power supposed to have been withheld. Certainly it is a power quite as capable of being abused to the detriment of the public, and as a means of unjust discrimination in favor of individuals. The difference in the terms of two sections of the Code would, it is true, ordinarily require a difference of construction, but the subject of these provisions is such as to demand a construction which will give them a harmonious, rather than a discordant, operation. If

there is no reason to suppose the legislature less willing to confer a discretion upon police courts than upon the superior court, as to the rate of imprisonment required to satisfy a fine, there is still less reason for supposing an intention to subject petty offenders to a harsher and more burdensome rule than is applied to more serious offenders. If one who has justly incurred a fine of \$5,000 may, in the discretion of a superior judge, be allowed to satisfy such fine by undergoing imprisonment for 50 days, or even less, why should one who has justly incurred a penalty of only \$100 be compelled, if imprisoned at all, to stay in jail twice as long? We find it less difficult to construe the two sections of the Code in the same sense than to ascribe to the legislature an intention not merely to permit, but in a measure to compel such gross inconsistency. But, aside from all this, it has lately been decided here that there can be no imprisonment in satisfaction of a fine for a term longer than the maximum term of imprisonment prescribed as a penalty, or part of the penalty of the offense. *Ex parte Erdmann*, ante, 372, filed April 2, 1891. This being so, petitioner could not have been imprisoned in satisfaction of his fine of \$150 longer than 90 days, and therefore a sentence in the alternative, to imprisonment at the rate of one day for one dollar, would have been void as to 60 days. Can it be said that the recorder's court was compelled to pronounce a judgment that would have been void? Surely not. If the case referred to was correctly decided, section 1446 cannot mean what petitioner contends it means. It must be subject to a construction which will admit in many cases, and which in his case demanded, a sentence of imprisonment for the satisfaction of the fine at a rate greater than one dollar a day. There is no excess of jurisdiction. The prisoner is remanded, and writ discharged.

We concur: PATERSON, J.; MCFARLAND, J.

DE HAVEN, J. I concur in the judgment. Under section 1446 of the Penal Code, the court, after determining that its judgment of the fine should be satisfied by imprisonment, ought to have directed that the petitioner "be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for every dollar of the fine." This is the language of the statute, and, as it is definite and clear, there is no reason for placing upon it any other construction. The judgment under which the petitioner is imprisoned is not in this form, and is for this reason erroneous. But there is a wide difference between a judgment in which there is error which would be corrected on appeal and one that is void in the extreme sense; and it is only in this latter class that the court is authorized to discharge upon *habeas corpus* a defendant imprisoned thereunder. In my opinion, the judgment here assailed is not absolutely void. The court had jurisdiction of the subject-matter of the action and of the person of the petitioner.

Its judgment that he pay the fine imposed was authorized by law, and it also had the right to direct imprisonment for the satisfaction of the fine and its judgment in this respect is not wholly unauthorized; it is within and not in excess of the authority given it by the statute; and while, as we have seen, it committed an error, such error was in favor of the petitioner, and its judgment was not wholly void. The distinction between such a judgment and one entirely without warrant of law, and therefore void, is obvious.

HARRISON, J. I concur in the above opinion.

GAROUTTE, J. I dissent. In the case of *Ex parte Bernert*, 62 Cal. 524, where the judgment of the court was that "the defendant pay a fine of twenty dollars, and the minimum fine recognized by law for the offense charged was one hundred dollars," this court said: "The judgment of the police court in the case before us is certainly void, because it is not one which includes any judgment which that court has jurisdiction to render in such a case." And the judgment in this case under which the petitioner is held in custody is certainly void, because it is one which the court had no authority in law to render. The judgment consists of two distinct portions: *First*, that the defendant pay a fine; *second*, that, in default in the payment of the fine, he be imprisoned at the rate of one day for each two dollars of the fine. These portions of the judgment are of equal gravity, and equally require sound law upon which to stand. I thought this court went too far in its construction of section 1446 of the Penal Code in *Ex parte Erdmann*, and now the construction placed upon this section in the foregoing opinion would render it unrecognizable by the legislature that created it, and cannot be supported by any well-settled principles of statutory construction. Whatever power the recorder had to imprison for the non-payment of the fine he got by virtue of this section of the Penal Code, and his power is measured by the section. The section is not mandatory in requiring him to render a judgment of imprisonment in case of default in the payment of the fine,—that is discretionary with the recorder; but when he exercises that discretion, as in this case, it is mandatory that he exercise it in the terms and in the manner fixed by the section. If petitioner can be imprisoned at the rate of \$2 for each day of imprisonment, he can be imprisoned at the rate of \$100 for each day of imprisonment, and the statute thus practically annulled. The section provides that the judgment shall be in the proportion of one day's imprisonment for every dollar of the fine. If the recorder has the discretion to disturb that proportion, by making the judgment one day for each two dollars of the fine, we see no reason why his discretion does not equally extend to the right of making the judgment two days for each one dollar of the fine. This court cannot by a decision, or by a line of decisions, repeal a

statute, and the result of the construction given this section, in effect, is to repeal it, and create a new section in lieu thereof, providing that a judgment that a defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for as many dollars of the fine as the recorder in his discretion may deem proper. *Ex parte Baldwin*, 60 Cal. 435, supports the foregoing views. It would seem that the judgment is not simply erroneous, but void. Conceding the court had jurisdiction of the offense charged and the defendant, it had no jurisdiction to render such a judgment; it was a judgment not authorized by law and therefore void.

88 Cal. 302  
*In re BAUQUIER'S ESTATE.* (No. 14,080.)  
(*Supreme Court of California.* April 8, 1891.)

PROBATE PROCEEDINGS—DENIAL OF NEW TRIAL—  
RIGHT OF APPEAL.

1. The provision in Code Civil Proc. Cal. § 963, subd. 2, authorizing an appeal to be taken to the supreme court from a superior court "from an order granting or refusing a new trial," embraces such orders made in probate proceedings, as well as those made in civil actions.

2. Where legatees file written opposition to the issue of letters testamentary to the person named as executrix in a will, setting forth therein certain facts, which they allege render her incompetent to receive the appointment, and she files a written answer denying such facts, and on the issues thus presented an extended trial is had, in which many witnesses are called, the weight and credibility of whose testimony the court is called upon to determine, this presents issues of fact, which the court, after deciding, is authorized to re-examine on a motion for a new trial, with a right of appeal from its order thereon.

*Affirming ante*, 178.

On rehearing.

PER CURIAM. A rehearing is asked in this case upon the ground that the court, in deciding that the order denying a new trial is an appealable order, disregarded its former decisions upon the same point. In *Estate of Wiard*, 83 Cal. 619, 24 Pac. Rep. 45, the court used the following language: "Subdivision 3, § 963, Code Civil Proc., enumerates all the cases in which an appeal may be taken to this court from the superior court in probate proceedings; and an order refusing to vacate a decree of distribution and settlement of final account is not one of them." In this case, after the entry of a decree of distribution, the contestant gave notice of her intention to move the court "to vacate and set aside the decree of distribution, and for a new trial in the matter of said petition for distribution." The motion, when brought on for hearing, was denied, and an appeal was taken from that order, but the record brought here did not contain any statement of the case or bill of exceptions to enable this court to pass upon that portion of the order denying the motion for a new trial, and the appeal was dismissed. In support of what is said above in dismissing the appeal, the court cited *Estate of Calahan*, 60 Cal. 232, and *Estate of Lutz*, 67 Cal. 457, 8 Pac. Rep. 39. In *Estate of Calahan* an order had been

made in 1875 purporting to settle the final account of the executor, and discharge him from his trust. In 1880, upon a petition therefor, the superior court made an order vacating the order made in 1875, and an appeal therefrom was dismissed by this court upon the ground that such order was not appealable. In *Estate of Lutz* an order settling the final account of the executor and distributing the estate was made in 1881, and a petition filed in 1884 to vacate that order was denied by the superior court. An appeal from this order was dismissed by this court upon the ground that it was not an appealable order. In each of the foregoing cases the court was simply called upon to determine whether an order vacating or refusing to vacate a decree of distribution is an appealable order, and its language must be construed in connection with the matter which it decided. Taken literally, the language of the court in each of those cases would imply that an appeal does not lie from an order made in probate proceedings granting or refusing a new trial; but, as such construction is in direct conflict with the expressed language of the statute, it must be disregarded. Prior to 1890, section 969, Code Civil Proc., provided that "an appeal may be taken to the supreme court from a judgment or order of the probate court. \* \* \* (8) Granting or overruling a motion for new trial." In 1890 the legislature, in order to adapt the provisions of the Code to the constitution, which had given to the superior court the jurisdiction previously exercised by the district and probate courts, repealed section 969, and added subdivision 3 to section 963, Code Civil Proc., in which are contained the provisions of section 969, excepting subdivision 8. The provision in subdivision 2, § 963, Id., which authorizes an appeal to be taken to the supreme court from a superior court "from an order granting or refusing a new trial," embraces all such orders, whether made in probate proceedings or in civil actions. In all cases in which the superior court, when sitting as a court of probate, is authorized to entertain a motion for a new trial, an appeal will lie from its order thereon. Section 1714, Id., provides: "The provisions of pt. 2 of this Code relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title." Section 656, Id., defines a new trial to be "a re-examination of an issue of fact in the same court after a trial and decision by a jury or court or by referees." And section 588, Id., declares the manner in which issues of fact arise upon the pleadings. It would be impracticable to enumerate the cases in which a motion for a new trial is appropriate in probate proceedings, but it may be stated generally that whenever the action of the court which is invoked is dependent upon the existence of certain extrinsic facts which are presented to it for determination in the form of pleadings, and are to be decided by it in conformity with the preponderance of the evidence offered thereon, an issue of fact arises which, after its decision, may be

re-examined by the court upon a motion for a new trial. Under this rule a motion for a new trial was permissible in the present case. The respondents filed a written opposition to the appointment of the appellant as executrix, setting forth therein certain facts, which they alleged rendered her incompetent to receive the appointment. To this she filed a written answer, denying the facts which were alleged as rendering her incompetent, and upon the issues thus presented an extended trial was had before the court, in which many witnesses were called, the weight and credibility of whose testimony the court was called upon to determine. This presented issues of fact which the court, after deciding, was authorized to re-examine upon a motion for a new trial, and, as we have above stated, its order upon such motion is appealable. Appeals from orders made upon motions for new trial in probate matters were entertained by this court in *Estate of Learned*, 70 Cal. 140, 11 Pac. Rep. 587; *Estate of Brisswalter*, 72 Cal. 107, 13 Pac. Rep. 164; and *Estate of Doyle*, 73 Cal. 564, 15 Pac. Rep. 125.

Rehearing denied.

(2 Wash. St. 353)

MURRY v. FAY et al., Commissioners.

(Supreme Court of Washington. April 29, 1891.)

COUNTY BONDS—POWER TO ISSUE—CONSTRUCTION OF STATUTES.

Act Wash. March 21, 1890, § 1, empowers counties through their commissioners to contract indebtedness for general county purposes in any manner, when they deem it advisable, not exceeding an amount, together with the existing indebtedness, of 1½ per cent. of the taxable property in the county. Section 2 provides that such counties may contract indebtedness in excess of 1½ per cent., but not 5 per cent., on the assent of three-fifths of the voters of the county being given thereto at a general or special election. Section 3, which authorizes the issuance of bonds, concludes: "Then the board of county commissioners of such county is authorized and empowered to issue its negotiable bonds in the name of the county for the purposes for which such election was held." The only election mentioned in said section which in terms is required to authorize the board to issue bonds is where such issue is for the purpose of procuring money (not to fund existing indebtedness) for strictly county purposes. Prior to the passage of the act there was no provision for funding county indebtedness contracted after January 1, 1888, and one of the objects of the statute was to provide for the funding of such indebtedness at a lower rate of interest than was then being paid. Held, that it was the intention to provide for funding existing county indebtedness without the expense and delay of a submission of the question to the vote of the people.

Case certified from superior court, Pierce county.

Albert E. Joab, for plaintiff. W. H. Snell, for defendants.

ANDERS, C. J. This was an action brought by plaintiff, who is a resident and tax-payer of Pierce county, in this state, against the defendants, who are county commissioners of said county, to restrain said commissioners from issuing the negotiable bonds of the county to the amount of \$200,000 for the purpose of funding the outstanding county indebtedness without first submitting the question of issuance



to the voters of the county. It is substantially alleged in the complaint that the indebtedness proposed to be funded by the issuance of said funding bonds, together with the existing indebtedness of said county, will not exceed the sum of 1½ per centum of the taxable property of said county, as ascertained by the last assessment thereof for state and county purposes; that the defendants, the county commissioners of said county, intend and are now about to issue said bonds in accordance with the terms of previous resolutions of the board, (which are set forth in the complaint,) and that they have not complied with the precedent conditions and requirements of the act of the legislature of the state approved March 21, 1890, entitled "An act authorizing and empowering the organized counties of the state of Washington to contract indebtedness, to issue bonds for funding the same, and declaring an emergency," in this: that the said commissioners have not submitted to the voters of said county, at an election held under the provisions of the act of the legislature above referred to, the question of issuing bonds to procure money for strictly county purposes, nor have three-fifths of the voters of the said county assented thereto; and that the defendants passed said resolution and propose to issue said bonds without first submitting said question of the issuance of said bonds to the voters of said county. It is also set up in the complaint that if the said commissioners are allowed and permitted to so issue said bonds, without having first complied with the conditions of the said act of the legislature, the same will be illegal and void, and the plaintiff and all tax-payers of said county will suffer great, unnecessary, and unjust costs and damages. To this complaint a general demurrer was interposed, which the court sustained, and caused a judgment to be entered *pro forma* dismissing the action. The judge who tried the case below, being of the opinion that the cause involved the determination of the proper construction of the statutes of this state in relation to the issuance of bonds by the several counties of the state, and that it was desirable to have the opinion of the supreme court upon said question, ordered and directed the proceedings to be brought to this court for determination of the following questions: (1) Can the board of county commissioners issue bonds of the county for the funding of outstanding warrants without a vote of the people of the county, where the amount of the existing indebtedness of said county is less than one and one-half per centum of the taxable property of said county, as ascertained by the last assessment for state and county purposes? (2) Can the board of county commissioners issue the bonds of said county for county purposes, without being authorized by the vote of the people of said county, where the amount of said bonds, together with the outstanding indebtedness of said county, does not exceed one and one-half per centum of the taxable property of said county, as ascertained by the last assessment for state and county purposes?

The first section of the funding bond act of March 21, 1890, empowers each and every organized county in this state, by and through its board of county commissioners, to contract indebtedness for general county purposes, in any manner, when they deem it advisable, not exceeding an amount, together with the existing indebtedness of such county, of 1½ per centum of the taxable property in such county, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness. Laws 1889-90, p. 37. Section 2 of the act provides that such counties may contract indebtedness for strictly county purposes in excess of the amount named in the preceding section, (1,) but not exceeding in amount, together with existing indebtedness, 5 per centum of the taxable property, to be ascertained as provided in section 1, whenever three-fifths of the voters of the county assent thereto, at a general or special election to be held for that purpose, consistent with the general election laws. Neither of these sections make any provision for issuing bonds of the county to pay or fund indebtedness contracted as therein specified. That authority is conferred by the third section only. And it would be clear beyond a doubt that the legislature by that section intended to empower the county commissioners to issue bonds to pay or fund existing county indebtedness within the limits prescribed in section 1, without submitting the question to the vote of the people, were it not for the words, at the close of the section, "then the board of county commissioners of such county is authorized and empowered to issue its negotiable bonds in the name of the county for the purposes for which such election was held." The words "such election" would seem, however, to refer to the election mentioned in a preceding part of the section, which must be held whenever the board of commissioners shall submit to the voters of the county the question of issuing bonds to procure money (not to fund existing indebtedness) for strictly county purposes. That is the only election mentioned which, in terms, is required to authorize the board of commissioners to issue county bonds. But the expression, "for the purpose for which such election was held," when read in connection with the first clause of the section, renders the meaning ambiguous, and we must therefore ascertain the intention of the legislature by the application of authorized rules of construction. One of these rules is that, if a literal interpretation of any part of a statute would be contrary to the evident meaning of the act taken as a whole, it should be rejected; and the best way to discover the meaning when expressions are rendered ambiguous by their connection with other clauses is to consider the object of the law and the causes which led to its enactment. *Heydenfeldt v. Mining Co.*, 93 U. S. 638; *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 662. Another rule is that "a thing within the intention is as much within the statute as if it were within the letter; and a thing with-

in the letter is not within the statute if contrary to the intention of it." *People v. Insurance Co.*, 15 Johns. 381; *Insurance Co. v. Gridley*, 100 U. S. 615. Before the passage of this act no provision had been made for funding county indebtedness contracted after January 1, 1888. Many of the counties were paying 10 per cent. interest per annum upon their outstanding warrants; and one of the objects of the statute was to provide for funding such indebtedness at a lower rate of interest, and thus relieve the tax-payer of a portion of his burdens. And from these circumstances, and from the history of this legislation, we are convinced that the legislature intended, as did the framers and promoters of the act, to provide for funding existing county indebtedness, lawfully incurred, without the expense and delay incident to submitting the question of issuing bonds to a vote of the people. This intention will be clearly expressed, and all parts of section 3 be made to harmonize with each other, by rejecting the words last above quoted, as not being applicable to cases of indebtedness incurred, as in this instance, under the provisions of section 1 of the act. No other construction of the statute will relieve it from ambiguity, or express what we believe to be its intention. The first question propounded by the court below is therefore answered in the affirmative. The majority of the court being of the opinion that the second question is not involved in the case now before us, it will not now be decided. The cause will be remanded to the court below, with instructions to enter final judgment for defendants.

STILES, HOYT, and DUNBAR, JJ., concur.  
SCOTT, J., did not sit at the hearing.

(1 Wash. St. 330)

SKAGIT RAILWAY & LUMBER CO. v. COLE.  
(Supreme Court of Washington. Oct. 27, 1890.)

APPEAL—RECORD AND BRIEFS—TIME OF FILING—COURT RULES.

1. Code Wash. T. 460, which requires causes to be filed on appeal 15 days before the first day of the next succeeding term of the supreme court, is nullified by Const. Wash. art. 4, § 2, which provides that the supreme court shall always be open for the transaction of business, except on non-judicial days; thus abolishing terms.

2. Where a motion filed by appellee to affirm a judgment on the ground that appellant has failed to file its brief as soon as the rules of the court require is not called up until a later session, the fact that appellant has not yet filed his brief cannot be urged as an additional reason for granting the motion. The matter must be determined by its *status* at the time the motion was made.

3. The judgment will not be affirmed on account of appellant's failure to file its brief within the 30 days required by rules 6 and 9 of the supreme court, where such failure is due to a disagreement between him and his attorney, and the refusal of the latter to act.

4. Rules 6 and 9 further provide that the transcript shall be prepared within 30 days after the notice of appeal, and that it shall remain on file in the office of the clerk of the superior court until all the briefs are filed in the supreme court. In the absence of any evidence to the contrary, it will be presumed that the transcript was prepared within the required time, although the certificate of the clerk of the su-

perior court was not affixed until nearly a month later; there being no rule requiring such certificate to be attached at the time of making the transcript.

5. Where appellant, in direct violation of rule 4 of the supreme court, has failed to index and number the pages of a voluminous record, he will be compelled, as a *sine qua non* of further proceedings, to pay appellee \$50 within 12 days, and properly prepare the record within 25 days.

Appeal from superior court, Skagit county.

Action by the Skagit Railway & Lumber Company, a corporation, etc., against H. D. Cole. Plaintiff appeals.

J. C. Haines, for appellant. Ronald & Piles, for appellee.

SCOTT, J. Appellee moves to affirm the judgment for the following reasons: That the appellant failed to cause a transcript to be prepared, and also failed to file its brief within the required time; and he alleges the same was due to the negligence of appellant. Judgment was rendered in the court below December 19, 1889, and on the same day appellant gave notice of appeal to this court under the act passed in 1883. Although the motion purports to be based solely upon the rules of this court, counsel for appellee in his argument cites us to section 460 of the Code, which required causes to be filed 15 days before the first day of the next succeeding term, etc.; and also to the case of *Haas v. Gaddis*, 23 Pac. Rep. 1011, decided by us, regarding the same. Since that case was appealed our constitution has been adopted, which provides that the supreme court shall always be open for the transaction of business, except on non-judicial days. Consequently there are no terms of the supreme court in the sense in which they were formerly held, but only a division of our sittings into sessions, to facilitate the orderly arrangement and dispatch of business for the convenience of all concerned; and the authority cited no longer applies. This being so, we can look only to our rules for guidance in this matter.

It appears by the record that the statement of facts was settled March 12, 1890, and the cause was filed in this court on May 16th following. Prior thereto, on May 9th, appellee filed his motion aforesaid. Rules 6 and 9 of this court, which went into effect March 17th last, are the only ones bearing upon this subject. The motion was not called up for hearing by either party until the present session, and now appellee, as an additional reason for granting it, calls our attention to the fact that appellant has not as yet filed a brief, nor made any application to be allowed to file one until this hearing. We are all of the opinion that the motion must be determined by the *status* of the case at the time the motion was filed; and as a matter of practice we think appellant could well await the hearing, and make its application at such time for permission to file its brief, based upon such a showing by way of excuse for the failure to file within time as it could make. The statute (Sess. Laws of 1889-90, p. 323, § 12,) authorizes this court to make such rules as shall be deemed most conducive to the due administration of justice, except as

otherwise provided by law; and, as at said time there was no law particularly specifying the course of procedure in these matters, rules 6 and 9 were accordingly duly authorized, and doubtless could have been adopted in the absence of any express power conferred by the legislature. The same have not been abrogated by statute or otherwise, but, if anything, have been confirmed by subsequent legislation. See the act to be found at page 333 of the same Session Laws, especially section 7. Section 2 of this act, however, makes some changes in the giving of the notice of appeal, and section 3 in effect requires the transcript to be certified when made. As to these matters rule 6 should now be read in the light of those sections in cases appealed since June 26th last, the act having gone into effect June 27th. Rule 9 contains the following provision: "In cases appealed to this court since the last term of the supreme court of Washington Territory, and in which no transcripts or briefs have been filed, parties shall have the time fixed by rule six in which to cause transcripts to be prepared, and in which to serve and file briefs." This would extend the time for filing appellant's brief in this case 30 days from March 17th,—the time when the rules went into effect. The appellee would have 20 days thereafter within which to file his brief, and the appellant 10 days more to file a reply brief, making in all 60 days from March 17th. Rule 6 further provides that the transcript shall remain on file in the office of the clerk of the superior court until all the briefs are filed. No briefs having been filed in the superior court clerk's office, said clerk sent the record to this court, and it was filed here on the last day within which to file briefs. It was sent somewhat in advance of the time prescribed by rule 6, as in this instance it should have remained on file in the lower court for the full period of 60 days after March 17th. Where no bill of exceptions or statement of facts is settled, the time would be 10 days less, and, except as to those cases where the clause in rule 9, quoted, applies, the time would run from the giving of the notice of appeal, or the settlement of a bill of exceptions or a statement of facts in those cases where the same are settled. As to the time of the preparation of the transcript, at which the motion is directed, no proof has been submitted to us. The only law in force at that time relating thereto is found in section 1, p. 59, of the Session Laws of 1883, which, in effect, required the clerk to make the transcript within a reasonable time after the giving of the notice of appeal, and to cause the same to be filed with the clerk of the supreme court within the time allowed by law. As said in *Haas v. Gaddis*, section 460 of the Code is the only place where the time of filing was prescribed, and that is not applicable to this case, owing to the fact that terms had previously been abolished.

This court has at all times recognized the uncertainty of the state of the practice existing during the period of transition from a territorial to a state government, and, owing to the consequent em-

barrassment attorneys and litigants were placed under, has been as lenient in each particular case as the circumstances thereof would permit, and also had the same in view when the rules of practice referred to were adopted, notably the clause mentioned of rule 9. It is evidently within the purview of the laws relating to the practice, and is also the opinion of the court, that technical omissions or imperfections in the procedure should not be allowed to defeat the ends of justice, or prevent a hearing upon the merits; yet a due regard must be had to the requirements of the statutes and rules, and flagrant or willful violations should not be allowed to go unnoticed. Under the 1883 act the statement could have been settled at any time within a reasonable time after judgment, upon giving 10 days' notice thereof, said act only having required notice of such settlement to have been given within 30 days after the rendition of judgment, and not prescribing the time within which settlement should be made. Under the law as it now exists (see section 4, p. 334, Sess. Laws 1889-90) the time of settlement is fixed and limited, and can only be extended by the superior court or judge for sufficient reason, or by consent of parties. This law was not in force when this appeal was taken. No point is made in the motion, however, that the statement was not settled within a reasonable time, and we allude to these matters only to aid in arriving at an understanding of the practice. The rule requires the transcript to be prepared within 30 days after the giving of the notice of appeal, but does not require it to be filed in this court until after the time for filing briefs has expired. We must presume in this case, in the absence of any showing to the contrary, that the transcript was prepared within the time allowed by rule 6, as aided by rule 9 in this instance,—that is, within 30 days after March 17th. The clerk's certificate thereto, made May 13th, is not any evidence of the time when the transcript was actually prepared, as at that time he could make and append his certificate any time before the cause should be transmitted to this court, rule 6 only relating to the time of making the transcript; and no rule or statute then in force fixed the particular time when the certificate should be made. We should be loth to affirm the judgment, however, or to dismiss an appeal, for that reason, even if it did appear that the transcript was not prepared within the 30 days allowed therefor, where no delay was occasioned thereby; and certainly would not do so where a sufficient reason is shown for the failure. In fact the only reason appearing to us for requiring the transcript to be prepared in advance of the settlement of the statement of facts or the time allowed therefor is to promote the dispatch of such business, and for the convenience of the court below and the parties in settling the statement or bill of exceptions, and of the parties in preparing briefs. Section 3 of the act last cited requires the superior court clerk to make and certify the transcript as soon as may be in the due course of business, after the notice of appeal is given or filed, but does not otherwise fix

the time; and the same section requires such clerk to cause the transcript to be filed with the clerk of the supreme court within the time provided by law. There is no statute prescribing the time within which the transcript must be filed in this court, and reference must still be had to rule 6 to determine the time within which the transcript should be prepared and subsequently filed here.

As to the failure of appellant to file a brief, and by way of excuse therefor, it makes a showing by its present attorney that the failure was due to a disagreement between appellant and one of its former attorneys, who seems to have had at that time personal supervision of the case, and to the refusal of said attorney to act in the premises, which, without giving the details thereof, we deem a sufficient showing. The motion to affirm is therefore denied.

To determine this matter we have been required to examine a voluminous record, which, in direct violation of rule 4 of this court, is not indexed, and its pages are not designated by numbers. These omissions have seriously inconvenienced the court, and, unless supplied, will further embarrass us and the appellee upon the final hearing. As a condition precedent to any further proceedings in the cause by appellant we shall require it to pay to appellee \$50 within 12 days from this time, after which payment, and within said time, appellant may serve and file its brief. Appellee shall have 8 days thereafter within which to serve and file his brief, and appellant 5 days more to serve and file a reply brief. Appellant shall also within 25 days herefrom prepare a proper index to said record, and cause its pages to be numbered.

ANDERS, C. J., and HOYT and STILES, JJ., concur.

*FERRY et al. v. KING COUNTY et al.*

(Supreme Court of Washington. April 6, 1891.)

COUNTY TREASURER—ACTION ON BOND—REFEREE—ACCOUNTS.

1. In an action on the bond of a county treasurer, which is referred, a finding by the referee that, owing to mistakes made by such treasurer, the county auditor, and the board of county commissioners in the settlement of his accounts, he failed to pay over a part of the money received by him, is sufficient to warrant judgment against him and his sureties for such amount.

2. As the judicial power of the territory of Washington was by its organic act vested in a supreme court, district and probate courts, and justices of the peace, the board of county commissioners has no judicial power, and in settling the treasurer's accounts it acts in a ministerial capacity, so that its decisions are not binding on the county.

3. It is within the discretion of the court to deny defendants' demand, under Code Wash. § 93, for a copy of the items of the account mentioned in the complaint, such accounts being public accounts, which it does not appear were not equally accessible to defendants as to plaintiff.

Error to district court, King county.

*Burke & Haines*, for plaintiffs in error.

*Ronald & Piles* and *W. S. Bush*, for defendants in error.

ANDERS, C. J. This was an action by defendant in error King county against George D. Hill and his sureties upon his official bond as county treasurer of said county, to recover a specified sum of money alleged to have been received by said Hill, as such treasurer, for the use of said county, during his official term of two years, commencing on the first Monday in January, 1881, but which he failed to account for to the proper authorities, or to pay over to his successor in office, as required by law. The cause was tried by a referee, who, having heard the testimony, reported the same, together with his findings of fact and conclusions of law, to the court. The referee found, in substance, that the said George D. Hill was the duly-elected, qualified, and acting treasurer of the county of King for the term of two years from and after the second Monday of January, 1881; that he, as principal, with the other defendants as his sureties, duly executed the bond set forth in the complaint; that he attended before the board of county commissioners of said county with his books and vouchers, and made settlement of his accounts with said board, as required by law, for and during his said term of office, and received the credits in his several accounts mentioned in the answers of the defendants in this action; that during his term of office as such county treasurer, and while acting as such, he had and received, for the use of said county of King, divers large sums of money, amounting in the aggregate to the sum of \$190,297.02; that he did not account to the proper authorities for all the money so received by him; that of the money so received by him for the use of said county he did not account to the proper authorities for, and did not pay over to his successor in office, the sum of \$12,472.16, and that said failure to account for and to pay over to his successor in office said last-named sum was occasioned by, and was the result of, mistakes and errors on the part of said Hill and the county auditor of said King county in the book accounts kept by them, respectively, and of mistakes and errors on the part of the board of county commissioners of said county in the settlements had by them with said Hill on account of the money so by him received as treasurer for the use of said county. The said report of the referee also specifies the particular accounts in which the said mistakes and errors occurred, but which it is not necessary here to enumerate. And as a conclusion of law deduced from the facts set forth the referee found that the plaintiff, the county of King, was entitled to a judgment against the defendants for the sum of \$12,472.16, with interest thereon from the — day of January, 1883, at the rate of 10 per cent. per annum, together with the costs and disbursements of the action. The defendants filed a motion to set aside the report of the referee, and for a new trial, which motion was denied by the court. Judgment was thereupon entered for the plaintiff in accordance with the referee's report, to reverse

which defendants have brought the cause to this court by writ of error.

Eleven different errors, alleged to have been committed by the court below, are assigned by plaintiffs in error as grounds for reversal of the judgment. The first 10 specifications of error refer almost exclusively to the rulings of the court in settling the pleadings in the case. They are not discussed in the brief of counsel for plaintiffs in error, and therefore might properly be treated as waived; but we have nevertheless examined the record touching these objections, and are unable to perceive any substantial error therein. The eleventh assignment is that the court erred in denying the motion of defendants to set aside the report of the referee, and to grant a new trial. Our statute provides that upon a motion to set aside the report of a referee the conclusions thereof shall be deemed and considered as a verdict of the jury, (see Code, § 256;) and in no case will such report be set aside except for reasons which would make it the clear duty of the trial judge to set aside a verdict, and order a new trial. There is neither a bill of exceptions, nor the evidence given before the referee, in the record in this case, and we can therefore only consider the legal effect of the facts found by the referee. And we must assume, in the absence of the evidence, not only that the facts found are true, but also that the evidence warranted the findings. *Gardiner v. Schwab*, 110 N. Y. 650, 17 N. E. Rep. 732. We are of the opinion that the facts found fully justify the conclusions of law arrived at by the referee, and we cannot say that the court erred in refusing to set aside his report. But the learned counsel for the plaintiffs in error contends that the settlement of the accounts of the treasurer, Hill, with the board of county commissioners is conclusive between the parties; that the board of commissioners, in making such settlement, acted in a judicial capacity; and that their decision cannot be collaterally attacked. But we think the position of counsel is clearly untenable. The judicial power of the late territory of Washington was vested by the organic act in a supreme court, district courts, probate courts, and justices of the peace. See section 1907, Rev. St. U. S. It follows, therefore, that boards of county commissioners could not have been clothed with judicial powers or functions, even by an act of the legislature, and much less could they exercise such functions in the absence of legislative enactment. The power exercised by the board of county commissioners in making settlements with the treasurer of their county is of a purely ministerial character, and such settlements do not partake of the nature of judicial decisions, and are not binding upon the county. The commissioners and the treasurer are alike agents of the county, and the acts or omissions of one agent in the discharge of duties imposed by law can in no way affect the obligations of the other to the common principal. *Board v. Otis*, 62 N. Y. 92; *Mayor, etc., v. Stout*, (N. J.) 18 Atl. Rep. 943; *Hunt v. State*, 93 Ind. 311. It was the duty of the defendant Hill to properly account for all moneys received as county

treasurer, and to pay over to his successor in office, at the expiration of his official term, all money belonging to the county then in his hands; and there was no law authorizing the county commissioners to absolve him from the performance of that duty. *Dillon v. Spokane Co.*, 3 Wash. T. 498, 17 Pac. Rep. 889. His settlement with the county commissioners was only *prima facie* evidence of the correctness of his accounts, and cannot be pleaded as an estoppel. 3 Wash. T. 500, 17 Pac. Rep. 890; *Jefferson Co. v. Jones*, 19 Wis. 61; *Nolley v. Callaway Co. Ct.*, 11 Mo. 457; *Board v. Otis*, *supra*. It is further contended by plaintiffs in error that it was error on the part of the court to admit in evidence, over defendants' objection, the particular items of the accounts mentioned in the complaint, for the reason that the plaintiffs had failed to furnish a copy of the same to defendants within 10 days after demand thereof in writing, as provided by law. The Code provides that it shall not be necessary for a party to set forth in a pleading a copy of the instrument in writing, or the items of an account therein alleged; but unless he file a verified copy thereof with such pleadings, and serve the same on the adverse party, he shall, within 10 days after a demand thereof in writing, deliver to the adverse party a copy of such instrument of writing, or the items of account, verified by his own oath or that of his agent or attorney, or be precluded from giving evidence thereof; and the court may in all cases order a bill of particulars of the claim of either party to be furnished. Code Wash. § 93. This action is upon an instrument in writing, and not upon an account; and the plaintiffs, having set forth a copy of the bond in the complaint, which was duly verified, substantially complied with the provisions of the statute in that particular. The execution of the bond was not denied by the defendants, and the breaches of its conditions were set out in the complaint. The accounts alleged to be incorrect were public accounts, and were kept by the defendant Hill, and it does not appear that they were not equally as accessible to defendants as to plaintiffs. The object of a bill of particulars or the items of an account is to apprise the defendant of the nature and extent of the cause of action in order that he may plead with greater certainty. *Watterman v. Mattair*, 5 Fla. 213. See, also, *Boone*, Code Pl. § 125. And if the defendant himself has the means of obtaining such information, there is no reason for ordering the plaintiff to furnish it to him. Whether a bill of particulars should or should not be ordered in a particular case is a matter resting largely in the discretion of the trial court. *People v. Gibbs*, 93 N. Y. 470. The court below refused to order the plaintiffs to furnish a bill of particulars; and in the absence of anything indicating that the defendants were prejudiced thereby, we would not feel justified in disturbing its ruling. Since the trial of this cause in the court below the defendants George D. Hill and D. M. Hyde have died, and their respective personal representatives have been substituted, and the action continued in accordance with the

provisions of the statute. Perceiving no error in the record, the judgment of the court below is affirmed.

SCOTT, DUNBAR, and STILES, JJ., concur.  
HOTT, J., did not sit at the hearing.

(2 Wash. St. 344)

*FERRY et al. v. KING COUNTY et al.*

(*Supreme Court of Washington.* April 8, 1891.)

Error to superior court, King county.

Thomas Burke and J. C. Haines, for plaintiffs  
in error. Ronald & Piles and W. S. Bush, for  
defendants in error.

ANDERS, C. J. This action involves precisely the same questions presented in the case of *Ferry v. King Co.*, ante, 537. The two causes were submitted together upon the printed briefs of counsel; and for the reasons given in the opinion in the former case, herewith filed, the judgment of the lower court is affirmed.

STILES, DUNBAR, and SCOTT, JJ., concur.

HOTT, J., did not sit at the hearing.

(2 Wash. St. 236)

*EISENBACH et al. v. HATFIELD.*

(*Supreme Court of Washington.* March 12, 1891.)

RIPIARIAN RIGHTS—TIDE-LAND—WHARVES, DOCKS,  
ETC.—ACCRETION.

1. The title to land over which the tide ebbs and flows is in the state, and a riparian owner can claim no easement in it, nor impose any servitude upon it, without the consent of the legislature.

2. Under Const. Wash. art. 15, providing that the legislature shall provide for the appointment of a commission to establish harbor lines in the navigable waters of all harbors in the state, within or in front of the corporate limits of a city, or within a mile thereof, and shall provide for the leasing of the right to build and maintain wharves, docks, and other structures, a riparian proprietor on the shore of the sea, so situated, has no authority, as such, to extend wharves in front of his land below high-water mark.

3. Nor can the riparian proprietor's right to accretions, not yet in existence, give him any rights in the land below high-tide mark, as against the state.

4. A riparian proprietor cannot sue to enjoin the erection and maintenance of structures on tidal land by persons who erected the same, and were in use and possession for commerce, trade, or business prior to the passage of Act Wash. March 26, 1890, which provides (section 11) that the owners of any lands fronting on the Pacific ocean, or any bay, harbor, etc., shall have the right, for 60 days after final appraisement of tide-lands, to purchase such as are in front of the lands owned by them: "provided, that if valuable improvements, in actual use for commerce, trade, or business have been made upon said tide-lands, \* \* \* the owners of such improvements shall have the exclusive right to purchase the land so improved for the period aforesaid."

STILES, J., dissenting.

Appeal from superior court, Pierce county.

This is a suit for an injunction. After the complaint was filed, and a temporary order issued, plaintiff filed an amended complaint, which alleged, in substance, that he was the owner of certain upland bordering and abutting upon the high-water mark of Puget sound; that by reason of such ownership he was entitled to certain littoral rights in and to the shore opposite his lands, and that the appellants

were occupying the shore opposite his land, and erecting structures and improvements thereon. Defendants filed an answer disclaiming any right or title to any land above high-water mark, and alleging that the land occupied by them is part of the shore of Puget sound, and that valuable improvements, in actual use for commerce, trade, and business, had been made upon said lands long prior to the passage of the tide-lands act of March 26, 1890, and that said improvements were on March 26, 1890, and prior thereto, in actual use for commerce, trade, and business, and that the defendants are the owners of, and in possession of, such improvements; and alleging the purpose of the appellants to erect on said shore conveniences for shipping, and that the plaintiff would have the right, in common with all other persons, and upon the same terms, to use such conveniences when erected; and denying that the plaintiff had been denied access from his lands to the navigable waters of Puget sound for any purposes of commerce or navigation; and denying that the appellee has desired access or egress from the waters of Puget sound for any purpose of commerce or navigation; and alleging that the harbor lines have not been fixed opposite said lands, and that the lands have not been disposed of by the state of Washington; and denying that the appellants have wrongfully or unlawfully obstructed plaintiff's access to the navigable waters of Puget sound. To this answer plaintiff demurred, on the ground that the same did not state facts sufficient to constitute a cause of action, and this demurrer was sustained. Defendants declined to answer further, and a final decree of perpetual injunction was made.

*Calkins & Shackelford*, for appellants.  
*Doolittle, Pritchard, Stevens & Crosscup*, for appellee.

ANDERS, C. J. In this case this court is called upon for the first time to determine the rights of littoral proprietors of lands abutting upon the shore of an arm of the sea in which the tide ebbs and flows; and, while it is scarcely necessary to look beyond our own constitution and laws for authority to guide us to a conclusion, still, owing to the importance of the questions both to individuals and the public, and the magnitude of the interests involved, we have examined the numerous authorities cited by the learned counsel for the respective parties in the elaborate briefs which they have filed, in order that we might familiarize ourselves with the decisions of other courts upon the subject, and with the reasons upon which their decisions are based. We shall not attempt, however, to review all of the decisions in detail, for that would be impracticable, if it were desirable, but will only refer to a few of the cases especially alluded to by counsel.

In this state the common law is our rule of decision in the settlement of questions requiring judicial determination, when not specially provided for by statute. And it seems to be generally conceded that at common law the title to the soil under water was vested in the crown. The own-

ership of the soil was regarded as a *jus privatum*, and could be conveyed to individuals, subject only to the public right of navigation and fishing, which public right was under the absolute control of parliament. In this country we have the highest authority in support of the doctrine that the state has succeeded to all the rights of both king and parliament, and hence is the absolute owner of all navigable waters, and the soil under them, within its territorial limits.

This question was thoroughly discussed by the supreme court of the United States in the case of *Martin v. Waddell*, 16 Pet. 367. That was an action of ejectment for land under the waters of Raritan bay in New Jersey, over which the tide ebbed and flowed. The land in controversy was included in a large tract which was granted by the king of Great Britain to the Duke of York, and subsequently became vested in the proprietors of East Jersey, who afterwards surrendered to the crown all their governmental powers, but retained all their rights of private property. One of the parties to the action, as the grantee of the state of New Jersey, under a law of the state, claimed the exclusive right to take oysters in the place granted, and the other claimed the same right by virtue of his title from the proprietors. The right of the crown to make the grant to the Duke of York, which not only included the tide-land, and also the waters and soil under the waters, as well as the power of the state to convey the same, were questions thus brought directly before the court for determination; and it was held that the king, as the representative of the nation, had an unquestionable right to make the grant to the Duke of York, with all the prerogatives and powers of government therein contained. In discussing the question as to whether, since *Magna Charta*, the king had power to grant land covered by navigable waters to an individual, so as to give him an exclusive right of fishing within the limits of the grant, Mr. Chief Justice TANEN said: "And we the more willingly forbear to express an opinion on this subject because it has ceased to be of much interest in the United States; for, when the Revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights surrendered by the constitution to the general government. A grant made by their authority must therefore manifestly be tried and determined by different principles from those which apply to the grants of the British crown." The natural and logical conclusion of the court was that the grant by the state conferred upon its grantee the exclusive right to take oysters within the territory covered by the grant.

The question of the ownership of lands under tide-water was again raised in the same court in the case of *Pollard's Lessee v. Hagan*, 8 How. 212, which was ejectment for a lot of land in the city of Mobile, in Alabama, which lay below high-water mark, and which had been granted to

plaintiff by congress. After approving the decision in the case of *Martin v. Waddell*, Mr. Justice McKINLEY, in the course of his opinion, says: "Then to Alabama belong the navigable waters, and the soil under them, in controversy in this case, subject to the rights surrendered by the constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge those rights." The court further says that, "by the preceding course of reasoning, we have arrived at these general conclusions: *First*, the shores of navigable waters, and the soils under them, were not granted by the constitution of the United States, but were reserved to the states, respectively; *second*, the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states; *third*, the right of the United States to public lands, and the power of congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the lands in controversy in this case."

Again, in the case of *Weber v. Commissioners*, 18 Wall. 57, it was held that to the state of California, upon her admission into the Union, passed the absolute property in, and dominion over, all soils under tide-water within her limits, with the consequent right to dispose of the title to any part thereof in such manner as the state might deem proper, subject to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations and among the several states, the regulation of which was vested in the general government. Opinion of Mr. Justice FIELD, at page 65.

The court went still further in the case of *McCready v. Virginia*, 94 U. S. 391, and there held that not only the soil under tide-waters in the state, but the waters themselves, and the fish in the waters, so far as they are capable of ownership, belonged to the state, and that the legislature had the constitutional right to pass a law prohibiting any person, not a citizen of the state, from fishing in such waters. And in *Willson v. Marsh Co.*, 2 Pet. 245, the court sustained an act of the legislature of Delaware authorizing the damming up of a navigable stream for the benefit of adjoining lands.

The case of *Hoboken v. Railroad Co.*, 124 U. S. 656, 8 Sup. Ct. Rep. 643, was an action of ejectment for land occupied by the railroad company along the margin of the Hudson river. Plaintiff claimed by dedication of the street to the water by the original proprietor of the land, as evidenced by the "Loss" map. Defendant claimed by virtue of a grant from the state. Mr. Justice MATTHEWS, speaking for the court, said: "The nature of the title in the state to lands under tide-water was thoroughly considered by the court of errors and appeals of New Jersey in the case of *Stevens v. Railroad Co.*, 34 N. J. Law. 532. It was there declared (page 549) 'that all navigable waters within the territorial limits of the state, and the soil under such waters, belonged in actual propriety to



the public; that the riparian owner, by common law, has no peculiar right in this public domain as incident of his estate; and that the privileges he possesses by the local custom, or by force of the wharf act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature. The result is that there is no legal obstacle to a grant by the legislature to the defendant of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high-water mark.' It was therefore held in that case that it was competent for the legislative power of the state to grant to a stranger lands constituting the shore of a navigable river under tide-water, below the high-water mark, to be occupied and used with structures and improvements in such a manner as to cut off the access of a riparian owner from his land to the water, and without making compensation to him for such loss." And again: "Our conclusion, therefore, is that the grants from the state of New Jersey, under which the defendant claims, respectively, are a complete bar to the recovery sought against them in these suits." And finally: "Under those grants they have and hold the rightful and exclusive possession of the premises in controversy against the adverse claims of the plaintiff to any easement or right of way upon, and over them, by virtue of the original dedication of the streets, to high-water mark on the Loss map."

The foregoing decisions of the highest judicial tribunal of the United States, without other or further authority, would seem to settle, beyond controversy, the question of title to the tide-lands of this state, and to leave no doubt whatever that they belong to the state in actual propriety, and that the state has full power to dispose of the same, subject to no restrictions, save those imposed upon the legislature by the constitution of the state and the constitution of the United States; and, if this be true, it necessarily follows that no individual can have any legal right whatever to claim any easement in, or to impose any servitude upon, the tide-waters within the limits of the state, without the consent of the legislature.

But, in order that there might be no doubt upon this vexed question, the constitution of the state has spoken upon the subject. Section 1, art. 17, of that instrument, declares that "the state of Washington asserts its ownership to the beds and shores of all navigable waters in the state, up to and including the line of ordinary high tide, in the waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state." And so zealous were the people of the state in guarding their rights in these lands that they inserted a proviso in the constitution to the effect that no law of Washington Territory, granting shore or tide lands to any person, company, or any municipal or pri-

vate corporation, should be deemed valid. Const. art. 17, § 2.

Appellee contends, however, that whatever may be the title of the state to the soil under tide-water, he, by virtue of his contiguity to the water, has certain rights in the shore beyond those of the general public, and which are peculiar to himself, among which are a right to a wharf out opposite to his upland, a right of ferriage, a right of unobstructed access to the navigable water in front of him, and a further right to accretions that may hereafter be formed, and that all of these rights are property, and are "vested rights." And in support of this contention the learned counsel for appellee have cited many authorities, among which are *Dutton v. Strong*, 1 Black, 23; *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Yates v. Milwaukee*, 10 Wall. 497.

But, before proceeding further, it may be proper here to observe that riparian rights in the several states are settled by the respective states for themselves. See *St. Louis v. Myers*, 113 U. S. 568, 5 Sup. Ct. Rep. 640; *Barney v. Keokuk*, 94 U. S. 324; *Willson v. Marsh Co.*, 2 Pet. 245.

In *Dutton v. Strong*, cited by appellee as an authority in favor of his right to wharf out against his premises, the facts before the court were as follows: The defendant in the court below had constructed a landing or bridge pier in front of his premises, extending to the navigable waters of the lake. Plaintiff's vessel was moored to this pier in a storm, and, by force of the gale, was about to pull down and destroy defendant's structure, when he, after requesting the master of the vessel to detach the same, but who refused to do so, cut the hawser, whereby the ship was set adrift and sunk. Plaintiff sued for the resulting damage. The court held that the defendant had a right to erect the pier where it was, and to protect the same by cutting the vessel's fastenings, even although it was thereby exposed to destruction. Speaking of the origin of riparian rights in this country, Mr. Justice CLIFFORD said: "Our ancestors when they immigrated here undoubtedly brought the common law with them, as a part of their inheritance: but they soon found it indispensable, in order to secure these conveniences, to sanction the appropriation of the soil, between high and low water, to the accomplishment of these objects. Different states adopted different regulations upon the subject, and in some the right of the riparian proprietor rests upon immemorial usage. No reason is perceived why the same general principle should not be applicable to the lakes, although these waters are not affected by the ebb and flow of the tide." We have no doubt of the correctness of that decision, and this court would undoubtedly follow it in a similar case.

The case of *Railroad Co. v. Schurmeir* involved the title to land on the Mississippi river at St. Paul. Schurmeir's premises were bounded by high-water mark of the river, but the land in front had been filled in and built upon, down to extreme low-water mark; and it was held that he had a right, as riparian proprietor, to the re-

claimed land, as against the railroad company. And, at page 289, Mr. Justice CLIFFORD said: "Although such riparian proprietors are limited to the stream, still they also have the same right to construct suitable landings and wharves, for the convenience of commerce and navigation, as is accorded riparian proprietors bordering on navigable waters affected by the ebb and flow of the tide." But it will be remembered that the same learned judge said in *Dutton v. Strong* that different states adopted different regulations upon the subject; and no doubt the decision of the case was in no way in conflict with the "regulations" of Minnesota.

The question before the court in *Yates v. Milwaukee* was as to the validity of an ordinance of the city of Milwaukee declaring a wharf belonging to Yates a nuisance; and it was remarked by Mr. Justice MILLER, in speaking generally of riparian rights on navigable streams, that, whether the title of such owner extended beyond the dry land or not, he has the right of access to the navigable part of the river, and to make a landing, wharf, or pier for his own use, or that of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever they may be, and that it is a valuable right and property, and a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation.

But if the court in these cases really intended to say that the same rule applied to the shore of the sea, or the arms of the sea, and that a riparian proprietor has a right, as against the state, to erect wharves extending below high-water mark, we cannot see how these can be reconciled with other decisions of the court, especially with that of *Hoboken v. Railroad Co.*, supra. But it would seem, however, that the court in the later case of *Weber v. Commissioners* did make a distinction between tidal and non-tidal waters; for in that case Mr. Justice FIELD, after approving the doctrine laid down in *Yates v. Milwaukee*, says: "Nor is it necessary to controvert the proposition that in several of the states, by general legislation or immemorial usage, the proprietor whose land is bounded by the shore of the sea, or of an arm of the sea, possesses a similar right to erect a wharf or pier in front of his land, extending into the waters to the point where they are navigable. In the absence of such legislation or usage, however, the common-law rule would govern the rights of the proprietor, at least in those states where the common law obtains. By that law, the title to the shore of the sea, and of the arms of the sea and under tide waters, is, in England, in the king; in this country, in the state. Any erection thereon, without license, is therefore deemed an encroachment upon the property of the sovereign, or, as it is termed, in the language of the law, a 'purpresture,' which he may remove at pleasure, whether it tend to obstruct navigation or otherwise." We think the

above is a correct statement of the law applicable to riparian rights on tide waters, and that it is fully supported by the authorities. *Gould, Waters*, § 167, and cases cited; *Com. v. Alger*, 7 Cush. 53; *Dana v. Wharf Co.*, 31 Cal. 118; *Martin v. O'Brien*, 34 Miss. 21. And in this connection it must not be forgotten that in the case of *Dutton v. Strong*, *Railroad Co. v. Schurmeir*, and *Yates v. Milwaukee*, as well as that of *Case v. Toftus*, 39 Fed. Rep. 730, also cited by counsel, the respective riparian proprietors had already erected their improvements, presumably with the license of the state, and therefore had vested rights of property which it was proper to recognize and protect. This seems to have been the view of Mr. Gould, for, in a note to section 149 of his work on *Waters*, in which he quotes from the opinion of the court in the case of *Yates v. Milwaukee*, he uses this language: "In this case the wharf which it was attempted to condemn as a nuisance was actually built."

In *Ravenswood v. Flemings*, 22 W. Va. 52, which is a well-considered case, it was held, under a law of that state, that a riparian proprietor on a navigable river had no right to build a wharf, ferry, or bulk-head, below high-water mark, without the consent of the town council, and that he might be prevented from so doing by injunction. And in *Com. v. Alger*, supra, the court, in a most learned and elaborate opinion by Chief Justice SHAW, sustained an indictment against the defendant for extending a wharf beyond the harbor line in the city of Boston, on his own land; and, further, that the statute establishing harbor lines, and taking away the rights of proprietors of flats in the harbor beyond the lines, to build wharves thereon, even when they would be no injury to navigation, and providing for no compensation to such proprietor, was not unconstitutional, as taking private property for public uses without compensation.

We think the authorities abundantly show that a riparian proprietor on the shore of the sea, or its arms, has no rights, as against the state or its grantees, to extend wharves in front of his land below high-water mark.

But, if this were not so, we would still be constrained to hold that appellee has no such rights; for the constitution of the state, which is the supreme law of the land, expressly declares that the legislature shall provide for the appointment of a commission, whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors of the state, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof, upon either side; and, further, that the legislature shall provide general laws for the leasing of the right to build wharves, docks, and other structures, upon certain designated areas, or the legislature may provide by general laws for the building and maintaining, upon such area, wharves, docks, and other structures. Const. art. 15. Nor can the right to wharf out be claimed under the act of the territorial legislature authorizing bank owners to build wharves in front of their premises.

That act was but a license, at most, and, until availed of, was revocable, and the constitution and subsequent laws have abrogated the law.

But appellee claims that he has a vested right to future accretions to his land, and cites as authority to sustain his position the case of *County of St. Clair v. Livingston*, 23 Wall. 46. And the court in that case does say that the riparian right of future accretions is a vested right. But we are unable to see how one can have a present vested right to that which does not exist, and which may never have an existence. It seems to us that the more reasonable doctrine is announced in the case of *Taylor v. Underhill*, 40 Cal. 471, in which case the court says: "The plaintiff, as a riparian owner, has also a right to accretions to his land, and it is said the claim of defendant will be a cloud upon his title to such accretions, but, as yet, there is no such property, and there may never be. He cannot ask the court to interfere in advance to prevent a cloud being cast upon his title to that which may never have an existence."

The case of *Railway Co. v. Renwick*, 102 U. S. 180, cited by appellee, was an action for damages by a riparian proprietor on account of the building of a railroad along the Mississippi river in front of his premises. The court held that the plaintiff could recover, but placed its decision upon a statute of Iowa (1874) providing for compensation to riparian owners in such cases. Previous to this statute it was held in the case of *McManus v. Carmichael*, 3 Iowa, 1, after an exhaustive review of the authorities, that the title of riparian owners extended only to high-water mark; and in the case of *Tomlin v. Railroad Co.*, 32 Iowa, 109, the court held that "the doctrine deducible from adjudged cases is that, by the rules of the common law, the owner of land along the shore of a navigable river is entitled to no right, either in the shore or waters, as an incident of his ownership, except the contingent ones of alluvion and dereliction. Hence he is not entitled to damages for an improvement made along the banks of such river, by authority of the state, the effect of which is to deprive him of free access to the stream."

The same question was before the court of appeals of New York in the case of *Gould v. Railroad Co.*, 6 N. Y. 522, and was decided the same way. In that case the court said: "The banks of the Hudson river, between high and low water mark, belong to the people, and the riparian proprietor has no better right to the use of it than any other person. If he build on it or erect a wharf there, it would be a purpresture, which the legislature might direct to be removed, or to be seized for the use of the public; or the legislature might authorize an erection in front thereof, as in case of Smith's wharf, on the Thames." And in *Stevens v. Railroad Co.*, 34 N. J. Law, 532, it was held that, although an owner of land adjacent to navigable water is more conveniently situated for the enjoyment of the public easement than others, he has, by virtue of common law, no more or greater rights

than the rest of the community. In *Langdon v. Mayor*, 93 N. Y. 155, it was said that the legislature of the state, where not restrained by constitutional inhibitions, could authorize a boom to be placed across the Hudson river for private use, and that the right of the state to grant the navigable waters, except as restrained by constitutional checks, is as absolute as its rights to grant the dry land which it owns, and that the state holds the public domain as absolute owner, and not as a trustee, except as it is organized and possesses all its powers and property for the public benefit. See, also, *Wood, Nuis.* (2d Ed.) 538, and notes.

Many decisions of the various state courts have been cited by appellee as sustaining a contrary doctrine to that of the above cases, but we find, upon examination, that they are mostly (especially those referring to riparian rights in tide-waters) based either upon statutes or local customs, and are therefore not precedents binding upon us. Our attention is also called to the English cases of *Buckleuch v. Board of Works*, L. R. 5 H. L. 418, and *Lyon v. Fishmongers' Co.*, 17 Moak, Eng. R. 51, only the latter of which, however, we have had an opportunity to examine; and in that case the principal question involved was the construction of an act of parliament which distinctly recognized riparian rights in the owner, and which provided (section 179) that "none of the powers by this act conferred, or anything in this act contained, shall extend to take away, alter, or abridge any right, claim, privilege, franchise, exemption or immunity, to which any owner or occupier of any lands, tenements, or hereditaments on the banks of the river, including the banks thereof, or of any aits or islands in the river, are now by law entitled, nor to take away or abridge any legal right of ferry, but the same shall remain and continue in full force and effect as if this act had never been made." The statute is a very broad and comprehensive one; and, as it was not questioned but that Lyons' wharf was erected and used where it was in accordance with the law, the owner was entitled to the "privilege" of continuing to use it, as against the Fishmongers' Company, "as if the act had never been made." Indeed, it was conceded in argument that he had a right of access from the river to the front of his wharf, but it was contended that he had no such right as to the side next Winckworth's Hole, which was merely an inlet from the river. The court held otherwise; and its conclusion was evidently in accordance with the provisions of the act in question, although at variance with the earlier common-law doctrine, as laid down by Lord Mansfield in *Rex v. Smith*, 2 Doug. 442, in which that eminent jurist held that the king might authorize the erection of a structure in front of defendant's premises, between high and low water mark, in the river Thames, even though the defendant was thereby cut off from the use of his wharf.

The result of our investigation of the authorities leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the state have no spe-

cial or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the state to deal with its own property as it may deem best for the public good. If the state cannot exercise its constitutional right to erect wharves and other structures upon its public waters in aid of navigation without the consent of adjoining owners, it is obviously deficient in the powers of self-development, which every government is supposed to possess,—a proposition to which we cannot assent. See *Galveston v. Menard*, 23 Tex. 349. Nor do we think this view in any way conflicts with the constitution of the state, but, on the contrary, we believe it is in strict harmony with it, when all its parts are construed together. We cannot think that the building by the state or its grantees of wharves, upon shores of navigable waters, would constitute either a taking or damaging of private property for public use, in contemplation of the constitution. See *Com. v. Alger*, supra.

The next question to be considered is, by what right, if any, do appellants occupy the shore in front of appellee's premises? And in considering this question it must be remembered that the demurrer in this case admits that they have thereon valuable improvements in actual use for commerce, trade, and business, and that said improvements were on said lands on March 26, 1890, the date of the passage of the tide-land act; that said lands are within one mile of the corporate limits of the city of Tacoma; that the harbor lines have not been fixed opposite to said lands; and that the same have not been disposed of by the state. Appellee has never erected any improvements on the shore, but claims that the appellants are trespassers, and that, as against them, he is entitled to relief by injunction. On the other hand, appellants claim to be rightfully in possession of the disputed lands by authority of the act of the legislature above mentioned. Section 11 of this act provides that "the owner or owners of any lands abutting, or fronting upon, or bounded by, the shore of the Pacific ocean, or of any bay, harbor, sound, inlet, lake, or water-course, shall have the right for sixty (60) days following the filing of the final appraisal of the tide-lands to purchase all or any part of the tide-lands in front of the lands so owned: provided, that if valuable improvements, in actual use for commerce, trade, or business, have been made upon said tide-lands, by any person, association, or corporation, the owner or owners of such improvements shall have the exclusive right to purchase the land so improved for the period aforesaid: \* \* \* provided, that nothing in this act shall be so construed as to apply to any improvements made after the passage of this act." We think, by a fair construction of this statute, that appellants are rightfully in possession of the disputed premises, and have a right to maintain their improvements as they were on March 26, 1890, but that they have no right to enlarge their erections prior to such time as they may be authorized to purchase the lands from the state. For the foregoing

reasons the judgment of the court below is reversed, and the cause remanded for further proceedings in accordance with this opinion. So ordered.

HOYT, SCOTT, and DUNBAR, JJ., concur.

STILES, J., (*dissenting*.) The plaintiff in the superior court, the appellee here, alleged ownership of lots 15, 16, and 17, in blocks 1 and 2, in Wallace's addition to the city of Tacoma; that his lots had a water frontage on Puget sound, a navigable arm of the sea, for a distance of more than 150 feet; that defendants had, about May 1, 1890, taken exclusive possession of the shore in front of his lots, including all the area between high and low water marks, and had placed certain obstructions in the way of his access to the water, and were threatening to increase the obstructions, and refused him any access to the water from his land, or to permit him to enjoy any of his riparian rights. The prayer of the complaint was for a mandatory injunction to secure the removal of the obstructions. The answer admitted plaintiff's ownership to high-water mark, but denied his right of access and all other riparian rights; admitted taking possession of the shore; claimed improvements in actual use for commerce, trade, and business on March 26, 1890, and prior thereto, and the right to purchase the land improved under the act of that date; and alleged the distance between high and low water marks to be not exceeding 250 feet, and from high water to water of the depth of 5 fathoms to be 400 feet. The court below sustained a demurrer to the answer, and the opinion of this court has reversed the ruling.

I think the demurrer should have been sustained—*First*, for the reason that the allegations of the answer, intended to show improvements March 26, 1890, were not the statements of any fact, but conclusions of law; and, *secondly*, on the main question, because the law of the case is different from that announced by the court in its decision. This is the first instance in the recorded history of English or American law where private persons, for private ends, have been sustained by a court in taking and maintaining permanent possession of the shore of an arm of the sea, or of any navigable water, to the exclusion of the owner of the bank from passing over it to the water; and if the act of March 26, 1890, has the effect ascribed to it, it is the first act of an English or American legislature, not excepting those of New York and New Jersey, which has ever done so much. The public right in navigable waters, and to the soils underlying them, have been freely regulated and disposed of by both parliament and the legislatures; but both have held sacred the rights admitted to exist in connection with the lands bordering the waters, whether with or without constitutional rules against taking private property without compensation. These rights have been regulated in divers ways proper to their locality, according to the complicated necessities of crowded harbors or the unfrequented shores of remote waters; but while it is true that a few courts

have theoretically denied, many have actually upheld them, and no other legislature has ever ignored them. Even the act of the legislature of New York, in 1840, which gave rise to the case of *Gould v. Railroad Co.*, 6 N. Y. 548, made the most ample provision for draw-bridges, so as to continue navigation in bays and streams cut off by the railroads, and for the extension of wharves and docks across the tracks to the river beyond; all of which was in obedience to the settled policy of the state, inaugurated in 1786, which prohibited the sale of any shore lands to other than riparian owners. *Rumsey v. Railroad Co.*, 114 N. Y. 423, 21 N. E. Rep. 1066. Of the other old states, every one, from the Massachusetts colony, in 1641, down to New Jersey, in 1848 and 1869, has similar provisions to those of New York, and a similar policy. Of the younger states, while some have no provisions by statute on the subject, every one which has a statute yields to the shore-owner the right to wharf, and in the great majority of the others the courts have held such a right to exist whenever the question has been presented. I know this argument proves nothing in the face of the claim that it is for every state to settle for itself, through its legislature, what its policy in this regard will be. I adduce it merely by way of offering a reason why this court should be slow to conclude that the effect of the act of 1890 was, and was intended to be, what it has now been decided to be.

We are not a new people. As an organized community we date from 1858. True, the sovereignty was withheld until 1889; but, upon the faith of a policy adopted and placed among the statutes of the territory in 1854, lands were acquired upon the shores of our navigable waters, and improvements made at great cost by private persons,—improvements which had a large share in making it possible for Washington to become a state, but which the principle of the court's decision would render it possible for the very next legislature to sweep out of existence or confiscate without compensation. This was a territorial statute, it is true; but the territory was competent to frame, and did frame, policies in a hundred other particulars between which and this I can see no distinction. If Massachusetts, in 1641, when a mere colony of Great Britain, could absolutely grant away the soil beneath the waters, so as to bind her when she became a state, as well as the state of Maine and New Hampshire; and if the provincial governor of New York could, in 1689, grant to the city of New York the fee of the shore between high and low water marks, whereon are now based some of the most valuable titles in that city and in the world,—it would seem to be no great violation of common sense to say that the territory of Washington could lawfully legislate to the extent of the act of 1854. And who has ever questioned the title to shore lands under the Massachusetts ordinance, or under the Dongan charter of 1689?

But it is said that the constitution, or the act of 1890, or both together, have repealed the act of 1854. Let us see. In the

schedule of the constitution, (article 27, § 2,) in obedience to the last clause of section 24 of the enabling act, it was provided that all laws in force in the territory, not repugnant to the constitution, should remain in force until they expired by limitation or were repealed by the legislature; and then there was a proviso "that this section shall not be so construed as to validate any act of the legislature of Washington Territory granting shore or tide lands to any person, company, or any municipal or private corporation." What effect does that proviso have on any such act? It prevents the constitution from "validating" it. If the act was a valid law, it continued so; if it was invalid, it continued the same. Everybody knows that the proviso was aimed at a single case where the legislature of the territory did once attempt to grant shorelands to a railroad company; and it was merely to prevent that act from gathering force from the constitution, so as to render that valid which it was suspected had become or had always been invalid, that the proviso was enacted. The grant was believed to have been a fraud, and dead in law, and the proviso was to prevent its being galvanized into life. But the act of 1854 (Code, § 3271) was not a grant of lands in any sense. This court has said it was "but a license, at most;" and, while I do not agree that the right to wharf out was dependent upon the act, the court's statement is good law, to the effect that it was not a grant of tide or shore lands, and therefore was not covered by the proviso in question. But mark the difference when the constitution touches shorelands covered by patents of the United States, taken and paid for in good faith by settlers. Article 17 treats of tide-lands, and in its second section the state expressly disclaims all title to such patented lands, unless the United States shall set aside the patents as fraudulent. Now, under the case of *Pollard's Lessee v. Hagan*, 8 How. 229, these patents, so far as the tide-lands were concerned, were absolutely void, and the lands would have belonged to the state, but for the constitutional waiver made by the people of the state, in their high sense of fairness and justice.

The only other provision on the subject in the constitution is in section 1 of article 17, where the state's ownership of the beds and shores of all the navigable waters in the state to ordinary high-water mark is asserted. But it did not require any such assertion to vest those lands in the state; for by an unbroken line of decisions, from far back of *Pollard's Lessee v. Hagan*, the courts have held that this ownership is in the state, thrust upon it as sovereign, in trust for its own people and those of the nation, for purposes of commerce and navigation as natural highways. It is idle to say that this assertion in the constitution conferred or strengthened the actual title of the state, and this could not, therefore, have been its purpose. But there was a valid purpose to subserve by this assertion, and that was to put it beyond question that in this state the sovereignty assumed was to high-water mark, and not

merely to low-water mark. The United States, in all its grants, has conceded that the fast land stops at high-water mark; but in some of the states, as Massachusetts, Rhode Island, Illinois, and Minnesota, the title of the shore-owner has been conceded to extend to low-water, or a certain distance below high-water mark. This concession was by legislation in some states, and by the decisions of courts in others. *Meyers v. St. Louis*, 8 Mo. App. 266. I hold that it was to place Washington in the rank of the greater number of states which stop the title of the shore-owner at high water that the constitutional assertion of ownership was made, and for no other purpose, since no other purpose could be subserved by it. But mark, again, the care with which this assertion of ownership was coupled with the proviso, "that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state." Under the view the court takes of these constitutional provisions, what vested right could there be to which the proviso would apply? It could not have reference to any wharf property erected under the act of 1854, since the court says that act was a mere license; and a mere license is revocable at the pleasure of the licensor, and creates no vested right. *Kivett v. McKeithan*, 90 N. C. 106; *Johnson v. Skillman*, 29 Minn. 95, 12 N. W. Rep. 149; *St. Louis Stock-Yards v. Wiggins Ferry Co.*, 112 Ill. 384; *Cobb v. Fisher*, 121 Mass. 169. So the court holds that the right to future accretions is not a vested right, citing *Taylor v. Underhill*, 40 Cal. 471, although that was merely the refusal of the court to declare a void certificate of purchase from the state a cloud upon plaintiff's right. This leaves nothing whatever for the constitutional provision to act upon, and the language under the court's interpretation is mere sound without any substance whatever.

The article (15) on harbors and tide-waters is nothing more than a limitation upon the legislature prohibiting it forever from disposing of the sea or river beds beyond certain lines in front of incorporated towns. Such lines exist in all important harbors, and are drawn to preserve the public right of navigation. Usually their location is changed from time to time as circumstances require, and it was a change of this kind, fully authorized by the state, that produced the case of *Yates v. Milwaukee*, 10 Wall. 497. The court seems to construe section 2 of this article as though there were never to be any wharves here except "upon certain designated areas," and that construction is quite harmonious with the views taken of the constitutional scheme as a whole; but, if anything else were necessary to convince one that the whole construction is wrong, this would supply it. Certainly no equally absurd scheme could be contrived, unless some one were to propose that, until the state builds its wharves, all ships must be anchored at the harbor line,—cargo and passengers to get ashore as best they can.

Turning now to the act of March 26, 1890,

the first thing that attracts attention, as having a bearing on the matter under discussion, is that, for some reason, the law gives the pre-emptive right to buy tide-lands, with certain exceptions, not to the public at large, but to the upland owner; and therein, I maintain, is fashioned the general policy of the state on this subject, which is to enlarge the right conceded to be in upland owners by the act of 1854, and is exactly in harmony with the legislation of every other state in the Union which has lands of this character and laws upon the subject. I say this is the policy, because it is not going outside of proper bounds to further say that, of all the shores of navigable waters within the state of Washington, not one ten-thousandth part will be free from this pre-emptive right of shore-owners or their grantees, under section 12 of the act. This section 12 has some striking language in it, which, to my mind, further shows the policy. Under it, when an abutting owner has attempted to convey tide-lands in front of his uplands, or littoral rights therein, his grantee may purchase the tide-lands to the extent of the tract or rights (littoral rights) so conveyed. Now, what are the "littoral rights" which the upland owner could so convey? Are they what the constitution speaks of as "vested" rights? The mere license under the act of 1854 was not one of them, because a license is personal to the licensee and cannot be conveyed. 13 Amer. & Eng. Enc. Law, 645. What "littoral" right could an upland owner attempt to convey, but his right to wharf out, by way of severance? I confess inability to imagine any other; and if there is no other, and this one has no existence, then the statute has nothing to act upon. But suppose it was the wharf license that was meant, section 12 says nothing about an executed license as the one to be confirmed; and, if this be the littoral right intended, then the legislature did not look upon the act of 1854 as repealed by the constitution. Furthermore, it is hard to see what good the state's deed to the shore-owner's grantee will do for him, whether the littoral right be natural or statutory, if the harbor line area is to be a wall between him and deep water. The state would be driving a hard bargain, indeed, with any such plan of operations, and is not to be suspected of such a scheme. But the most important thing about this section 12 is the legislative admission contained in it that the "land" and the "littoral right" are two so distinct and severable things that they may absolutely belong to different persons by deeds from the state. This is exactly what the doctrine of riparian access and wharfage is, and the justice of the provision made is apparent.

Lastly, touching the proviso of the eleventh section: "That if valuable improvements, in actual use for commerce, trade, or business, have been made upon said tide-lands by any person, association, or corporation, the owner or owners of such improvements shall have the exclusive right to purchase the land so improved: provided, that nothing in this act shall be so construed [as] to apply to any im-

provements made after the passage of this act." Here, again, the care of the legislature to preserve the right of the upland owner to acquire these lands is manifested most broadly; for, subsequent to the passage of the act no enlargement of the improvements can be made, and the court in its decision so holds. And it is also to be noted that, whereas, the upland owner may acquire all of the tidelands in front of his upland, the improver has the pre-emptive right to nothing but the "land so improved;" so that in this case the appellants' purchase would be limited to the exterior line of their actual works on the 26th day of March, 1890, and the appellee could acquire all in front of them to the harbor line. Now, it was settled in *Weber v. Commissioners* that a purchaser of tide lands from the state was entitled to none of the rights of a riparian owner. 18 Wall. 57. Upon what consideration, then, was this pre-emptive right conferred upon "improvers?" The act itself furnishes the answer. By section 12, where the upland owner has, by his deed, for a consideration, conveyed his rights away, his grantee will be protected; yet there may be another class who have merit equally as strong as the grantee under a deed. Where the owner of the fee of land has stood by for years, while an adverse claimant under color of title has made valuable improvements, the improvements offset the damages for withholding, *pro tanto*, (Code, § 541;) and, if the inaction of the owner continues beyond the term of our statute of limitations, the very title is presumed to have passed to the adverse party. An easement, however, of the nature of which the upland owner's rights, both by nature and by statute, largely partake, is much more easily lost. It is lost if the holder of the right does, or permits to be done, any act inconsistent with the future enjoyment of the right. 6 Amer. & Eng. Enc. Law, 147. Therefore, if an upland owner has, in any case, remained passive, while another has in good faith placed erections in the waters in front of him, which have not been abandoned, but are in customary use, the equitable policy of section 12 requires that an estoppel be sustained against the denial of the upland owner that he has conveyed to his permissive improver. The courts, which have often restrained intrusions of this kind, when objected to promptly, would have supported such an estoppel; why, then, should not the legislature recognize it?

But I maintain that the statute did not and could not deprive the upland owner of his full right to move promptly in the courts for the removal of any obstruction to his access to the water, where it was placed there against his will, and under threats of force and violence, as the fact is admitted to be in this case, and that whenever such a state of facts exists any title derived from the state must be held in trust for the upland owner. Such cases are precisely within the principles of *Atherton v. Fowler*, 96 U. S. 513, and numerous other cases, where force, fraud, and the misconduct of officers have transferred lands patented by the United States to

their rightful owners. Emphasis is laid upon the construction by the last paragraph of the section, where it is provided that nothing in the act shall apply to improvements made after the date of its passage; showing the legislative intention to discourage all scrambling possessions or claims not founded upon the upland owner's deed. Conceding, however, that the act was intended to apply to such a claim as the one at bar, it cannot be regarded in any other light than as showing the intention to make improvements alone the basis for the state's parting with its legal title, leaving the holders of adverse equities to resort to the courts for their enforcement. *U. S. v. Schurz*, 102 U. S. 378. And here the importance attached to a pleading of the facts in the answer appears. None of the material averments of the complaint were denied; for the allegations therein of the plaintiff's various rights were not material. If by nature the plaintiff had the rights claimed, it was not necessary to plead them, and the statute gave him the exclusive right to purchase. The answer was a confession and avoidance in the nature of a plea in bar. But the rules of equity pleading require that a plea in bar shall state the facts upon which the avoidance is claimed, so that the plaintiff may demur to the sufficiency of the facts as constituting a defense. *Goodrich v. Pendleton*, 3 Johns. Ch. 385; *McCloskey v. Barr*, 38 Fed. Rep. 165; *Pumpelly v. Green Bay Co.*, 13 Wall. 175; *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. Rep. 534. This answer alleged that valuable improvements in actual use for commerce, trade, and business had been made upon said lands long prior to the 26th day of March, 1890, and that said improvements were on March 26, 1890, in actual use for commerce, trade, and business, and that the defendants were the owners of, and in possession of, such improvements. These allegations are all but legal conclusions. *Poorman v. Mills*, 35 Cal. 118; *McCloskey v. Barr*, *supra*. The decision says the demurrer admits the truth of these allegations. But a demurrer admits the truth of such facts only as are well pleaded, and not of mere conclusions of law. Of what could these improvements consist that would bring the defendants within the statute? It is clear that there were no docks, piers, wharves, or other conveniences of shipping, because it is declared, in the sixth paragraph, to be the intention of the defendants to erect and maintain such structures in the future. This court says they may not enlarge their present improvements; and their right to wharf out is precluded by the decision in *Weber v. Commissioners*, and by the fact that either the upland owner or some one else may buy the area in front of them to the harbor line. I conclude, therefore, that there is nothing in the constitution or the statute which is hostile to the doctrine of riparian access and the right to wharf; that, if it is denied tentatively by section 1, art. 17, the proviso leaves it to the courts to say, whether, under the law, such rights exist; and that upon the pleadings the judgment should have been sustained.



The court has found that upon authority a riparian proprietor on the shore of the sea or its arms, has no rights, as against the state or its grantees, to continued access to the water, or to extend wharves in front of his land below high-water mark. In the language of Mr. Lewis, in his work on Eminent Domain, (page 83,) it has done so "by a narrow and technical course of reasoning, based upon the fact that the title to the soil is in the state or public;" and has not, as I conceive, accepted the great weight of authority both in England and America. To my mind, in reaching its conclusion, it has completely ignored the prime common source of the state's title, and of the riparian claim to access, which is that the navigable waters are natural public highways. Yet, as compared with this matter of substance, all questions of reclamation, of accretion, and reliction, of fishery and seaweed, pale and fade into insignificance. It is as highways that the sovereignties of the world, and particularly our own, have any jurisdiction over the navigable waters, differing in any respect from their jurisdiction over the fast land, and their different jurisdiction is of precisely the same character as the jurisdiction over highways upon the land. Under the constitution of the United States, congress has the power to regulate commerce between the states and with foreign nations; but, while under this power it has never yet undertaken to dictate concerning the manner of construction of any land highway not undertaken by itself, it has gone upon the water highways, both tide and fresh, and assumed the broadest control, deepening channels, chauging harbors, building dikes, and regulating the building of bridges, in all of which it has been sustained by the supreme court of the United States, solely because the waters are natural highways. But it is at this point that the opponents of the riparian right of access make their strong stand, and where the forces of the parties for and against meet in final conflict; and that the court did not see fit to allude to this phase of the question is greatly to be regretted. For the real question involved here is not whether the owner of upland bordering upon the sea has any adverse claim to the soil under the water, as against the state, but whether, being upon his own fast land, he can step therefrom upon the public highway, and there, as a member of the public, enjoy the public right of passage.

In the case at bar, the appellants, possessing themselves of the exact line which borders the land and the highway, say to the land-owner: "You can reach the water by yonder street, or, if you will wait until we have built a wharf here, you can pass over it at the same rate of toll as any other person. In the mean time you cannot pass at all." The appellants, however, in order to sustain their own position, are forced to maintain the very doctrine they fight against,—that of the right of access. They oppose the upland owner's access, but, having planted themselves in the highway, they propose to build wharves and maintain access themselves. By their improvements they propose to

turn the shallows into land, and then will claim that access to the water is necessary to its enjoyment. But here is land formed by nature, that since time was had no other outlet than over the sea, put there by nature as a highway. The land passed from the sovereign owner, by right of discovery the United States, by solemn patent, to the appellee, who is now told that the highway he relied upon is forever closed, without his consent and without any compensation for his loss. Has he been damaged? "Actually; oh, yes," will be admitted by his bitterest opponent; "but not in law, because the title to the land beneath this water is in the state." But wherein does the nature of the state's title to soil under navigable waters differ from that of its title to soil of a land highway? No writer or court that I have been able to consult points out the distinction, if there be one, except the subjection of the state's title in the submerged soil to the constitutional powers of congress. If the purpose to be subserved by the state's holding the two titles are identical, then, viz., the perpetuation of highways, it seems extremely difficult to argue on any secure or even plausible ground that the owner of land abutting on the sea has not the same right of access to and continuance of his highway as his neighbor who abuts upon a land highway. Certainly it is not necessary to argue what the rights of an abutter on a road or street are. The state, or its hand-maidens, the county, township, or municipal corporation, regulate and improve the way, but they cannot destroy it, or injure the abutter's direct access to it from every part of his frontage, without compensation. A late writer on this subject says: "'Once a highway, always a highway,' is an old maxim of the common law, to which we have often referred, and so far as concerns the rights of abutters, or others occupying a similar position, who have lawfully and in good faith invested or obtained property interests, in the just expectation of the continued existence of the highway, the maxim still holds good. Not even the legislature can take away such rights without compensation." Elliot, Roads & S. p. 658.

To illustrate this by more explicit authority: It has long been settled that running a street railroad is a proper public use of a street, when built so as not to interfere unnecessarily with the public right to travel over it; and that the mere erection of such a structure on the surface of the street does not entitle an abutting owner to compensation, even when the fee of the street is in him. But in some large cities it became necessary to have elevated railroads to carry on the traffic. These were authorized by the legislature of New York, with no provision for compensating abutters; and in a very recent case, where an elevated railroad had been built in front of his premises on Pearl street, an abutting owner sued the railroad company for damages. *Abendroth v. Railroad Co.*, (N. Y.) 25 N. E. Rep. 496. The court of appeals in its decision said: "The term 'abutting owner' will be used in this judgment to denote a person hav-

ing land bounded on the side by a public street, and having no title or estate in its bed or soil, and no interests or private rights in the street, except such as are incident to lots so situated. \* \* \* There is no finding that the plaintiff, or any one of his predecessors, ever had any title to or estate in the land whereupon this street is maintained, or any interest except that of an abutting owner." The court then recalls numerous cases where abutting owners, both in city and country, in England and America, had been allowed special damages for obstructions in highways not opposite their land, and not authorized by legislative enactment, as well as several late cases in that state where the same principle had been upheld, where the obstruction was by legislative authority. Speaking of these last cases, it says: "The judgments for damages which have been recovered and sustained against the elevated railroads do not and cannot rest on the ground that the roads are public nuisances, for they were constructed pursuant to statute; and besides, as before stated, a public nuisance does not create a private cause of action, unless a private right exists and is specially injured by it. The only remaining ground upon which they can and do stand is that, by the common law, the plaintiffs had private rights in the streets before the roads were built or authorized to be built. \* \* \* The constitution of this state provides: 'Nor shall private property be taken for public use without just compensation.' It is settled by *Story's Case*, 90 N. Y. 122, and *Lahr v. Railway Co.*, 104 N. Y. 268, 10 N. E. Rep. 528, that such rights as this plaintiff has in Pearl street are private property, within the meaning of the constitutional provision quoted. \* \* \* It follows that the authority conferred by the legislature to construct the road is not a defense to the action." As will be seen, from the decision, so far as the public generally was concerned, no matter how great was the nuisance in the street, it could remain, because the legislature authorized it.

And, while I am so near the subject, I will here refer to the case of *Hoboken v. Railroad Co.*, 124 U. S. 656, 8 Sup. Ct. Rep. 648, relied on by the court to sustain its decision; for the student of that case, it seems to me, must see that the only matter there in issue and decided was whether the state of New Jersey, as the superior of the city of Hoboken, could wholly destroy the public right of passage over filled-up lands at the end of a street, beyond the end of the street as originally dedicated. No private citizen was complaining, and the court says, on page 698, 124 U. S., and page 656, 8 Sup. Ct. Rep.: "The right insisted upon in these actions by the city of Hoboken is the public right, and not the right of individual citizens claiming by virtue of conveyances of lots abutting on streets made by Stevens or his successors to the title. The public right represented by the plaintiff is subordinate to the state, and subject to its control. The state may release the obligation to the public, may discharge the land of the burden of the easement, and extinguish the public right to its enjoyment. Whatever it may

do in that behalf conclusively binds the local authorities, when, as in the present cases, the right of action asserted are based exclusively on the public right." And it might have added that the legislature of New Jersey could have altogether destroyed the corporation of Hoboken, but it could not touch the right of a single lot-owner, corporation or no corporation, to pass from his lot to the street, and thence abroad. The difficulty which the court finds in harmonizing *Yates v. Milwaukee* and the other leading cases in the United States supreme court with *Hoboken v. Railroad Co.*, vanishes entirely when the right of the state to incumber a public highway, or to destroy it altogether, so far as the public right is concerned, is studied in connection with a case like that of *Abendroth* and the other New York elevated railroad cases, and the same principles are applied to both.

And now, the right to wharf is derived by strict analogy from the abutter's right in connection with a land highway; for no one questions the right of an abutter, where the improved road-way covers but a narrow strip in the middle of the way, to build for himself a convenient means to reach the traveled track over the intervening land; and so, on the water-way, the navigable part of the water is the actual way, to which the wharf is the reasonable means of access. And, as the right of access to the road pertains to every portion of the abutter's front, so the right to wharf belongs to all the riparian owner's front. I know it is said, in response to this, that the abutter cannot charge a toll to any member of the public who goes upon his side-way. Granted; but there is no question here of charging wharfage, which must be always reasonable, and is always under the public control. *Transportation Co. v. Parkersburg*, 107 U. S. 699, 2 Sup. Ct. Rep. 732. It was strongly intimated in *Yates v. Milwaukee* that, whenever the water-way was made navigable up to the line of the upland owner's land, he could then no longer maintain his right to project his wharf. But, except in very contracted waters, the cheaper and more practical way is to build out the wharves, instead of deepening the water. The deprivation of these private rights by the state, for its own public purposes, is the taking of property, whether on land or water, and must be compensated. Why, at this day, are these rights denied? I think this is the reason: Sometimes it happens that it is not necessary, for purposes of navigation, that the water-way should be as wide as nature has made it. Moreover, the waters have washed down the banks, and made shoals and flats, which can be filled up and made fast land, valuable for building, and even farming, purposes. The self-interest of upland owners has led them, in some instances, backed by their lawful riparian rights, to claim substantially the whole beneficial use of the entire area from the high-water mark to the point of navigability, by which means, and the non-assertion of the state's rights, they have filled up the flats, excluded the water, and made land of the whole. In some states, as Rhode Island and Minnesota, this has

been conceded to them as a right, and the public has received nothing for its complaisance. This is not justice. The protest against such a monopoly has, as is often the case in such matters, overflowed its proper bounds, and gone to the extent of denying all riparian rights. But there is a middle course, which is the right one in my judgment, and which the courts ought to pursue, as leading to the law of these cases. I regret that the decision here adopted follows one of the extremes, and not the middle course.

I now come to consider the cases cited by the court as requiring its conclusion. Theoretically that is not "land" which is beneath navigable water; from the high-water mark all beyond is water. Grants of land stop at the margin, no matter how shallow or extensive may be the shoals beyond. Yet, although we do not endow the state as an ordinary landlord, we say that the title to the sea and river bottoms is in it. The state holds upland upon the same terms and with the same rights as a private citizen. We enforce this rule, even upon the federal government, in all but the matter of taxation and the right of eminent domain. There was a time when it was thought that the land beneath navigable waters belonged to the United States; but the supreme court in *Pollard's Lessee v. Hagan* awarded it to the several states. Yet in that great case (3 How. 229) the court said that Alabama held these submerged lands as a part of her sovereignty and jurisdiction, not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions; and that, "although the territorial limits of Alabama have extended her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the constitution of the United States, and the laws which shall be made in pursuance thereof." And it is worthy of note that the eminent counsel, who successfully presented that case for the defendant, said: "A right to the shore between high and low water mark is a sovereign right, not a proprietary one. Rivers do not pass by grant, but are an attribute of sovereignty. The right passes in a peculiar manner; it is held in trust for every individual proprietor in the state or the United States, and requires a trustee of great dignity. Rivers must be kept open; they are not land which may be sold. *Martin v. Waddell*." I think there is a popular idea that *Pollard's Lessee v. Hagan* in some way involved the question of riparian rights. On the contrary, it was a contest between a patentee of tide-flats from the United States, who was not an upland owner, and a squatter on the tide-flats, who had no license whatever from the state of Alabama. The same repute is true of *Martin v. Waddell*, 16 Pet. 367. But the case was this: The titles to nearly or quite all the land in New Jersey came from the grantees of the Duke of York, to whom Charles II., in 1664, in consideration of the annual payment of forty beaver skins, gave a charter bestowing upon his royal brother the sovereignty and proprietorship of all the lands, bays, waters, rivers,

soils, fisheries, etc., within a vast area. The duke immediately parceled out his domain, under grants equally generous in their terms with that of the king to himself, and under one of these the proprietors of East Jersey became vested with all his rights in the lands and waters about Raritan bay. In 1702 the proprietors surrendered to Queen Anne the sovereignty only, and, by the Revolution, New Jersey became an independent state. The royal grants, however, were respected, and New Jersey had no public lands. The proprietors continued to make grants of lands to colonists, and in a few instances attempted to convey exclusive rights of fishing to individuals in certain defined areas of Raritan bay. In 1821 one Arnold, the possessor of such a fishery, sued one Mundy for trespass in entering the limits of his fishery and taking away oysters. The case was appealed on a judgment for defendant, and is reported in 6 N. J. Law, 1. The ground of the decision was that, although the king of England could by his royal charter grant to a subject an indisputable title to any or all of the fast land, he could not and did not grant one inch of the soil beneath the waters to the Duke of York, because it belonged to the sovereignty, which was held in trust for the common public, and was returned to Queen Anne, to be devolved in turn upon the state of New Jersey. After stating some of the dispositions which the state might make of these soils, the court said: "The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right [of fishery.] It would be a grievance which never could be long borne by a free people." In 1824 a statute of New Jersey gave to riparian owners the right to drive stakes in the waters of the bay, in front of their lands, to which to fasten nets, they not interfering with the navigation or any fishery. *Waddell* drove stakes accordingly, within the lines of a several fishery theretofore granted by the proprietors, and *Martin*, the grantee of the fishery, brought ejectment. The cause resulted as did *Arnold v. Mundy*, and reached the supreme court of the United States in 1842, where it was affirmed. The question here was, as in all cases of ejectment, upon the strength of plaintiff's title, and had no bearing whatever upon any riparian rights of the defendant; nor did the fact that the defendant had a license from the state cut any figure in the decision, and the result would have been the same without it. The court said: "From the opinion expressed in *Blundell v. Catterall*, 5 Barn. & Ald. 287, and in *Duke of Somerset v. Fogwell*, 5 Barn. & C. 883, the question whether since *Magna Charta* the king could grant to a subject a portion of the soil covered by the navigable waters of the kingdom so as to give him an immediate and exclusive right of fishery, either of shell fish or floating fish, within the limits of his grant, must be regarded as settled in England against the right of the king." The case of *Willson v. Marsh Co.*, 2 Pet.

245, decided in 1829, merely held that, in the absence of congressional legislation, the state of Delaware could authorize the damming of an inconsiderable, sluggish creek, for the purpose of facilitating the owners of its marshy shores in reclaiming them, so that the health of the community could be bettered; and that a citizen of another state could not complain of the obstruction. *McCready v. Virginia*, 94 U. S. 391, (1876,) decided that a state held the tide-waters, and the fish in them, for its own people, and not for the people of another state; and that a statute prohibiting the citizens of any other state from taking the fish was "in effect, nothing more than the regulation of the use by the people of their common property," and therefore no denial of the constitutional right that the citizens of each state have to all the immunities and privileges of citizens of the several states. *Barney v. Keokuk*, 94 U. S. 324, confirmed the claim of the state of Iowa to the title of the Mississippi to high-water mark; but, as the main point in the case, held that one who has dedicated a street parallel to navigable water cuts himself off from riparian ownership, and yields to the public, in this instance the city of Keokuk, the right to wharf out as an incident of the public use of the street. Barney's contention was that, as owner of the land to the middle of the river, his dedication only extended to the water's edge, and that the filling beyond that line was a trespass on his land. It will be seen from the opinion of the court here that its decision is based mainly upon these United States supreme court cases. It is worthy of remark that they have not been so interpreted in any but a very small minority of the states; and the supreme court itself has never in a single instance based its ruling in a case, where the riparian right of wharfage was in issue, upon any state statute or ascertained custom or usage. In its most clearly cut decision (*Yates v. Milwaukee*) no such interpretation was allowed to interfere with its declaration of a riparian right of wharfage in *Yates*, although he was contending, not only against the city of Milwaukee, but against the state of Wisconsin, which had chartered the city, to regulate the wharves on her water front, and herself to build and maintain such aids to navigation at the ends of streets. In *Weber v. Commissioners*, 18 Wall. 57, notwithstanding the language quoted by the court in its opinion, Judge FIELD distinctly and broadly announced the adherence of the supreme court to the doctrine of *Yates v. Milwaukee*, and showed that *Weber* was not a riparian owner. It is worth remembering at this point that San Francisco was the successor of a Mexican pueblo, and that the municipal corporation was the owner of all the land to high-water mark; so that when the state of California fixed the harbor line, and surrendered the tide-lands within it to the city, it was making the surrender to a riparian owner. *Hart v. Burnett*, 15 Cal. 530.

Inasmuch as the cases above noted are chiefly relied upon to overcome the force of *Dutton v. Strong*, *Yates v. Milwaukee*, and *Railroad Co. v. Schurmeir*, and as

none of them involved the matter here in issue, I will briefly allude to these three cases, which it is agreed do touch the point. It is urged that there was a difference between the fresh-water rules and the salt-water rules; or that the upland owner had already built his wharf, presumably under state license; or that there was some unmentioned statute on which the court was relying, etc. But, if any such elements did enter into the consideration of those cases, the published decisions, from syllabus to signatures, including briefs of counsel, fail to note the fact. Their declarations are broad and general, and, if we may rely on anything in judicial decisions, we ought to be able to do so here. Each of the cases was quoted in the succeeding ones, and all have been cited often and again by the supreme court, and by almost every federal and state court. *Yates v. Milwaukee* is the leader, and that was a case in which the state's authority was indirectly, but very materially, in question. So in *Railroad Co. v. Schurmeir* the defendant had the state's title to the land over which the plaintiff claimed to exercise his right of access. Since those decisions there is, I believe, not a single case in the federal or state Reports where the principles therein laid down are doubted or departed from. On the contrary, they have been often cited always to the effect contended for here, and to the frequent overruling of contrary holdings. It is the same with the law-writers who have embraced this subject in their works, with a single exception. I mention this, not as arguing that numbers make the law, but to show that the profession has not understood those decisions to have been pronounced with any of the qualifications and reservations insinuated here; and I conclude with the proposition, taken from these cases, and never denied by the supreme court of the United States, that a riparian owner on the sea-shore has a natural right of access, and a right to construct a landing, wharf, or pier, for his own use, or for the use of the public, which is a vested right, or appurtenance to his land, under the common law of real property as it exists in the United States, without any reference to statutory license or customary usage. In support of this position I cite *Ang. Tide-Waters*, 24 et seq. 224 et seq.; *Cooley, Const. Lim.* (5th Ed.) p. 675, note 1; *Ang. Water-Courses*, (7th Ed.) 732; 3 *Washb. Real Prop.* (5th Ed.) 445; *Gould, Waters*, §§ 148-154; *Lewis, Em. Dom.* §§ 77-83; *Dill. Mun. Corp.* (4th Ed.) § 106; *Washb. Easem.* (4th Ed.) 324; *Houck Rivers*, §§ 280, 281; 6 *Amer. & Eng. Enc. Law*, 558; 28 *Myer's Fed. Dec. tit. "Riparian and Littoral Proprietors;"* 3 *Kent Comm.* (13th Ed.) p. 413 note; *Kerr, Inj.* pp. 264, 265. Mr. Wood, in his *Law of Nuisances* is, I believe, the only modern text-book writer who maintains the opposite ground. But this author does not attempt to misconstrue *Yates v. Milwaukee*, or find excuses for this ruling. On the contrary, he attacks it boldly, characterizing the language of it as "mere dictum," and declares the principle established by it as "wholly unsustained by any authority." We are no accustomed to thus lightly treat decision

of that great court, but the attack thus made is admirable for its audacity. *Lyon v. Fishmongers' Co.*, 17 Moak. Eng. R. 51, is also explained away by this court as never before. Mr. Wood found no explanation. He quotes at length from the opinions of Lords CAIRNS, CHELMSFORD, and SELBORNE, and then says: "Thus it will be seen that there is considerable conflict upon the question discussed in the note, but, while we believe that the doctrines advanced in this case are utterly fallacious, and unsustained in principle as they are upon authority, it will not be profitable to pursue the matter further; but, as it is the business of an author to give the law as he finds it, I have felt constrained to give the leading portions of the opinions of the lords justices in the case, that the question may be fairly presented." I take it that the author "gives the law as he finds it" when he quotes the opinion of the two highest courts of the civilized world, although he personally does not agree with the correctness of their decision.

The court assumes that, inasmuch as many of the states have long had statutes regulating the riparian owner's exercise of his right of wharfage, and in many instances enlarging it, therefore his right rests entirely upon the statute of his state. I do not see why it should be so regarded, since we constantly find what has always been the law enacted into statutory form; and we might as consistently say that the state's title to the tide and shore lands is dependent solely upon article 17 of the constitution. It is sufficient to say that the courts of the states alluded to have not taken any such position, and I shall now cite some cases showing this to be the fact. One of the oldest of these statutes is that of Maryland, in 1745; but in *Railroad Co. v. Chase*, 43 Md. 23, the court said: "These riparian rights, [of accretion and wharfage,] founded on the common law, are property, and are valuable; and, while they must be enjoyed in due subjection to the rights of the public, they cannot be arbitrarily or capriciously destroyed or impaired. They are rights of which, once vested, the owner can only be deprived in accordance with the law of the land, and, if necessary that they be taken for public use, upon due compensation;" citing *Yates v. Milwaukee*. In New York, although for many years the courts have been handicapped by *Gould v. Railroad Co.*, as a settled rule of property, in *Mayor, etc., v. Hart*, 95 N. Y. 443, the court said: "But it shocks every notion of justice and right to say that the riparian owner upon navigable water has no equities by reason of that ownership. It is a doctrine which is repudiated by the entire legislation of our state. Granting, as has been held, that the riparian owner has no legal or equitable right enforceable as such against the public right, it is nevertheless true that out of his situation upon the banks, and the convenience and benefit of the water front, he suffers peculiar damage and individual injury when cut off by public use. \* \* \* And whenever and wherever the state has granted to the city of New York exterior lands, under water,

it has accompanied the grant with preemptive rights to the adjacent owners. It is idle to say that all this has been done of pure grace, and without any equity in the shutters. There was reason for doing it, and justice in the act." If stronger language was needed to show that the New York court of appeals would now overturn *Gould v. Railroad Co.*, if it could, it is to be found in *Rumsey v. Railroad Co.*, 114 N. Y. 423, 21 N. E. Rep. 1066, and 25 N. E. Rep. 1080. Rhode Island has always maintained the doctrine contended for without reference to any statute. *Providence Steam-Engine Co. v. Providence, etc.*, S. S. Co., 12 R. I. 348; *Clark v. Peckham*, 10 R. I. 35. Connecticut in like manner. *Simons v. French*, 25 Conn. 346; *State v. Sargent*, 45 Conn. 358. This case contains an eminently fair discussion of the powers of the state. In New Jersey the courts maintained the rule until *Stevens v. Railroad Co.*, 34 N. J. Law, 532, (see *Keyport, etc., Co. v. Farmers' Transp. Co.*, 18 N. J. Eq. 516; *Gough v. Bell*, 22 N. J. Law, 441; *Bell v. Gough*, 23 N. J. Law, 624,) when in a long discussion, not in anywise necessary to the decision of the case, the court announced that riparian owners had no rights which could be injured by the state, but at the same time sustained a judgment for injuries of precisely the character discussed, in all essential parts. The decision on the main point, for which the case is celebrated, was based on the English case of *Duke of Buccleuch v. Board of Works*, L. R. 5 Exch. 221, which was reversed afterwards in the house of lords, (L. R. 5 H. L. 418,) and still further overthrown by *Lyon v. Fishmongers' Co.*, 17 Moak. Eng. R. 51, on the very point relied on. The legislature of New Jersey immediately amended the wrong done by this decision by its act of 1869. *Fishing Co. v. Carter*, 61 Pa. St. 21, says: "The state can grant authority to make such erections [of structures below high water] either to the riparian owner or to others, so long as the riparian owner is not thereby deprived of access to and the use of the river as a public highway, which is implied, if not expressed, in the grant to him of the land bounded on the stream." In North Carolina, *Bond v. Wool*, 12 S. E. Rep. 281, is the latest of several cases on this subject, and there the court said: "In the absence of any special legislation on the subject, a littoral proprietor and a riparian owner, as is universally conceded, have a qualified property in the water frontage belonging by nature to their land; the chief advantage growing out of the appurtenant estate in the submerged land being the right of access over an extension of their water fronts to navigable water, and the right to construct wharves, piers, or landings, subject to such general rules and regulations as the legislature, in the exercise of its powers, may prescribe for the protection of the public rights in rivers or navigable water."

It will be said that the phrase, "in the absence of any special legislation on the subject," means, "unless there be special legislation otherwise;" but it is not so. The sense is, "without any legislation to that effect," and the decision shows it.

Bond v. Wool is supported by decisions in other states, old and new, in numerous cases, of which I mention one or more in each, viz.: In Michigan: Rice v. Riddiman, 10 Mich. 125; Lincoln v. Davis, 53 Mich. 375, 19 N. W. Rep. 103. In Indiana: Bainbridge v. Sherlock, 29 Ind. 364. In Wisconsin: Delaplaine v. Railroad Co., 42 Wis. 214. In Minnesota: Brishbine v. Railroad Co., 23 Minn. 114. In Missouri: Meyers v. St. Louis, 8 Mo. App. 266, affirmed, 82 Mo. 367. In Illinois: Railroad Co. v. Stein, 75 Ill. 41. In Kentucky: Thurman v. Morrison, 14 B. Mon. 236. In Ohio: Hickok v. Hine, 23 Ohio St. 523. In Arkansas: Organ v. Railroad Co., 11 S. W. Rep. 103, and cases cited. In California: Shirley v. Bishop, 67 Cal. 543, 8 Pac. Rep. 82. In Oregon: Wilson v. Welch, 12 Or. 353, 7 Pac. Rep. 341; Parker v. Packing Co., 17 Or. 510, 21 Pac. Rep. 822.

Of these states, at least Missouri, Kentucky, Arkansas, North Carolina, California, and Oregon stop the upland title at high-water mark. Cases to the same undoubted effect in the United States courts are: Bowman v. Wathen, (Ind.) 2 McLean, 376; Packet Co. v. Atlee, (Iowa,) 2 Dill. 479, affirmed, 21 Wall. 389; State v. Railway Co., 33 Fed. Rep. 730; Hollingsworth v. Parish of Texas, 17 Fed. Rep. 113; Rutz v. St. Louis, (Mo.) 3 McCrary, 261; Transportation Co. v. Parkersburg, 107 U. S. 699, 2 Sup. Ct. Rep. 732; Potomac Steam-Boat Co. v. Upper Potomac Steam-Boat Co., 109 U. S. 672, 3 Sup. Ct. Rep. 445. In Van Dusen v. Mayor, 17 Fed. Rep. 317, decided in 1883, the facts were precisely those of the case at bar, and after considering all of the cases, both English, state, and federal, the court holds that the New York elevated railroad cases are decisive of the law in that state, since there is no difference between the principles applying to the land-way and the water-way; and, further, that in view of Yates v. Milwaukee, Lyon v. Fishmongers' Co., and other like cases, Gould v. Railroad Co., 6 N. Y. 523; Stevens v. Railroad Co., 34 N. J. Law, 532; Lansing v. Smith, 4 Wend. 9; and Furman v. Mayor, etc., 10 N. Y. 567,—are no longer to be regarded as controlling. There the lessee of the riparian owner sought an injunction to prevent the city of New York, which was the owner of the land between high and low water, from filling up the flat and obstructing the way, and was held to be entitled to the relief asked.

This court, I think, misreads the case of Lyon v. Fishmongers' Co., when it gives importance to the term "privilege," as though the rights sustained in Lyon were a concession of statute or usage merely. On the contrary, each of the lords who delivered an opinion was pronouncedly clear that the right was by nature. Said Lord SELBORNE: "The right of a riparian proprietor, so far as they relate to any natural stream, exist *jure nature*, because his land has, by nature, the advantage of being washed by the stream; and, if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow the course of nature in every part of the same stream. . . . Even if it could be shown

that the riparian rights of the proprietor of land on the bank of a tidal navigable river are not similar to those of a proprietor above the flow of the tide, I should be of the opinion that he had a right to the river frontage belonging by nature to his land, although the only practical advantage of it might consist in the access thereby afforded him to the water, and the right of navigation common to him with the rest of the public. Such a right of access is his only, and is his by virtue and in respect of his riparian property; it is wholly distinct from the public right of navigation." No other state court has interpreted this case, and the opinions of the judges to mean anything but what they say; and a very high English authority, the Encyclopedia Britannica, cites the case in the concluding words of its article on riparian laws in this way: "It should be noticed that rights of the public may be subject to private rights. Where the river is navigable, although the right of navigation is common to the subject of the realm, it may be connected with a right to exclusive access to riparian land, the invasion of which may form the ground for legal proceedings by the riparian proprietor." Says Judge Dillon, in his Municipal Corporations, § 106: "By the common law the riparian owner has the right to establish a wharf on his own soil, this being a lawful use of the land. The right is judicially recognized in this country, and riparian owners on ocean, lake, or navigable rivers have, in virtue of their proprietorship, and without special legislative authority, the right to erect wharves, quays, piers, and landing places on the shore, if these conform to the regulations of the state for the protection of the public, and do not become a nuisance by obstructing the paramount right of navigation. This right has been exercised by the owners of the adjacent land from the first settlement of the country."

The idea of "purpresture" furnishes forth a great difficulty in the mind of the court. There is a short and comprehensive history of that portentous institution in People v. Davidson, 30 Cal. 379, from which it appears to be not much more than an ancient prerogative ghost, whose original substance has been completely emasculated by the later law. Suffice it to say that whether the doctrine of purpresture, as applied to wharves extended by riparian owners, has any force in this country or not, it never, in its palmyest days, had the effect of permitting the king to shut off the riparian owner of land from access to the sea by an obstruction of any kind placed in the highway, which is the real ultimate point in issue in this case.

In conclusion, I recur to the act of 1854, to remark that if that act is to be taken as now repealed, and if riparian owners have not the natural right of access and wharfage, then there is not, in the state of Washington, any authority under which the slightest convenience can be erected or maintained in aid of navigation, excepting in front of incorporated towns; and all the accumulations of labor and wealth, already expended by private enterprise in building up a commerce second to none in

present importance and future promise, are laid at the mercy of a public policy which has not seen its equal since men began to "go down in ships." For what? To maintain an idea of "legal title" and royal sovereignty, which has been repudiated for generations, and which now at this day says to the common people of Washington: "The shores of your great inland sea, and of your hundred rivers, are walled in by the state until such time as, after survey, appraisement, contests, slow legislative proceedings, and what not, the speculator on your necessities shall have loaded himself with tide-land patents, and fattened with your fees for crossing his 'land.'" The simple logger may not roll the hard-won product of his toil down the slope of his land, and into the water, because some shrewd watcher of the land-office has bought the shore while his back was turned. This is making the waters a public highway with a vengeance. But the illustration is just, because it refers to the very use made every day of our shores in hundreds of places without wharves, docks, or piers, and where there is no question of purpresture, but only the right of access is availed of. It involves the principle of the case in homely, practical form. Conceiving that no such conclusions were necessarily involved in the constitution or the statute, I dissent from the idea that any such policy was intended to be adopted, even though it were lawful to do so.

**PIERCE et al. v. KENNEDY et al.**

(*Supreme Court of Washington*. March 13, 1891.)

**RIPARIAN RIGHTS—TIDE-LANDS—REMEDY FOR  
TRESPASS THEREON.**

A riparian owner of land bordering on tide-waters cannot maintain ejectment against persons who have taken possession of, and erected buildings on, the land below high-tide mark, the title and power of disposal of which has been reserved to the state of Washington by the constitution. The remedy, if any, is in equity.

Appeal from superior court, Pierce county.

*Calkins & Shackelford*, for appellants.  
*Bullard & Norris*, for appellees.

ANDERS, C. J. The facts in this case are substantially the same as those presented in the case of *Eisenbach v. Hatfield*, ante, 539, and by agreement of counsel the two cases were argued and submitted together; and, for the reasons given in the opinion filed in that case, the judgment of the court below should be reversed. But there is an additional reason why appellees cannot prevail in this action. They alleged in their complaint, substantially, that they were the owners of certain lots in the city of Tacoma, bordering upon the waters of Puget sound; that appellants, at a certain time mentioned in the complaint, willfully, maliciously, and unlawfully, and without their consent, took possession of the same, erected buildings thereon, and occupy the same; that they demanded possession of said premises from appellants, who refused, and still refuse, to deliver the same to plaintiffs, to their damage in the sum of \$1,000; and

praying for possession of the said premises, and for \$500, as attorney's fees, to be taxed as costs, and for further relief. Appellants, defendants below, filed an answer denying the allegations of the complaint, and setting up, as an affirmative defense to the action, that they were occupying the shore between high and low water mark opposite part of the premises described, and that the part of the said shore so occupied by them is within one mile of the corporate limits of the city of Tacoma, and that the title to said shore between high and low water mark is vested in the state of Washington, and by the constitution of said state is reserved from sale, and that the state has power and right to dispose of the possession of said land, and that the plaintiffs have acquired no right to the possession thereof, by lease or otherwise, from the state. Plaintiffs interposed a general demurrer to this answer, which was sustained by the court, and judgment rendered thereon for plaintiffs, from which judgment defendants appeal. We are of the opinion that, upon the pleadings in this case, judgment should have been rendered for defendants. The remedy, if any, of plaintiffs, was in equity, and not by an action in the nature of ejectment. The judgment of the court below must be reversed, and the cause remanded, with instructions to dismiss the action; and it is so ordered. Costs to appellants.

HOYT, DUNBAR, and SCOTT, JJ., concur.

STILES, J. I concur in the result in this case for the special reasons stated in the foregoing opinion.

**MACKEY v. MACKEY.**

(*Supreme Court of Colorado*. April 10, 1891.)

**LOST NOTES—NEW TRIAL—NEWLY-DISCOVERED  
EVIDENCE.**

1. In an action on a note given in payment, among other things, of an antecedent note, the jury having found that its delivery was not, as contended by defendant, conditional on the surrender of the antecedent note, and it being proven that such prior note had not been indorsed, there was no error in refusing to compel the execution of a bond of indemnity against the original note as a condition to recovery on the new note.

2. Newly-discovered evidence, tending to raise a doubt as to the accuracy of plaintiff's testimony that at the time of the giving of the new note he had the old note in his possession, furnishes no ground for a new trial, as it does not tend to support the defense that the delivery of the new note was conditional on the surrender of the old note.

Commissioners' decision. Appeal from district court, Gilpin county.

*Patterson & Thomas*, for appellant.  
*Ed. Hurlbut*, for appellee.

BISSELL, C. In January, 1887, James Mackey brought this action against Richard Mackey, to recover upon a promissory note, which was substantially a promise by Richard to pay James \$5,000 90 days after the 11th of June, 1883. The defendant admitted the execution of the note, and set up as a defense that it was in settlement of the dealings between the



parties, and was intended to pay an antecedent promissory note, as well as other obligations. The only controversy was as to the amount of the original note,—which was either, according to defendant's admissions \$3,000 or \$3,500, and, according to the plaintiff's contention, \$4,000,—and as to the delivery of the paper. The defendant conceded that, if it was the latter amount, the note which was sued on was for the right sum; but he averred and sought to prove that the delivery was a conditional one, and only to be effective upon the production and surrender of the original paper. This controversy was submitted to the jury upon proper instructions given by the court, and they rendered a verdict for the plaintiff for the note and interest. It is not seriously contended that there was no testimony to support the verdict, nor is error assigned upon that ground; but the appellant's contention is that his motion for a new trial should have been sustained. This motion for a new trial was based upon the usual grounds that the verdict was contrary to the law, and unsupported by the testimony, and upon the further ground of newly-discovered evidence, set out in the two affidavits filed in support of the motion. In this court the only part of the motion which is seriously urged as a basis of attack upon the court's ruling is that which relates to the newly-discovered testimony. The record abundantly justifies the action of the court. The only defense offered was that of non-delivery of the paper sued on. The court properly instructed the jury upon this question, and upon the testimony the jury found this fact against the defendant. Under these circumstances, the judgment entered upon the verdict must be sustained, unless the newly-discovered testimony would tend to produce a different result. Viewed in that light, it would evidently be without force. The plaintiff proved that at the time of the execution and delivery of the note sued on it was agreed that he should destroy the original note, so that the defendant could not thereafter be disturbed by suit brought upon it. It appeared that the original instrument was payable to his order; that he had never indorsed it; and that it had remained in his possession, except for a short time, when it was left with another for safe-keeping. This custodian and her husband testified to the possession of the note, and its subsequent surrender to James Mackey. The plaintiff fixed the time of this deposit as prior to the giving of the note in suit. His testimony on that matter was sought to be set out in the affidavits. According to them the plaintiff testified that the deposit had been made at the time of a visit to a place called "Perigo," which was in 1884, and, consequently, after the date of settlement. It is argued that, if these affidavits be true, the note could not have been in the possession of plaintiff at the time that the settlement was made, and, therefore, that the note could not have been destroyed, as he testifies. The affidavits do not in any manner seem to shake the case as made by the plaintiff. In the first place,

it does not appear by the record that he testified to the delivery of the note to Mrs. Murphey at the time he went to Perigo with Fallon in 1884. The deposit of the note with Mrs. Murphey, and its return by her, is settled by the testimony of the plaintiff and that of Mrs. Murphey and her husband. Its destruction unindorsed by the plaintiff is not directly disputed, nor is his positive testimony upon this subject at all shaken by anything contained in the record or appearing in the affidavits. The utmost that can be claimed for the new proof is that it tends to raise a doubt as to the accuracy of his statement concerning the destruction of the paper. This, however, in no manner tends to support the defense of the non-delivery or conditional delivery of the promise upon which the suit was brought. On this issue the jury found against the defendant, and the plaintiff had a right to recover, even though the original note had not been destroyed.

The only bearing which this matter can have on the case will be disposed of in the consideration of the other error urged, which is that the court erred in refusing to compel the plaintiff to execute a bond of indemnity against the original note. It is not easy to discover the basis of this contention. It is well settled that an action at law cannot be maintained upon a lost negotiable instrument in the absence of statutory authority. The remedy of the owner of lost paper is in equity, which will only render judgment on the bill on condition that an adequate bond be filed to protect the maker against any subsequent action brought on the instrument. The rule and the doctrine grow out of the essential characteristics of negotiable paper. Under the law-merchant the holder of negotiable paper receiving it before maturity is entitled to receive its proceeds. It would therefore follow that, should the claimant of a lost negotiable instrument be permitted to sue, recover, and collect the amount of the promise, such recovery would be no bar to an action by the holder innocently receiving it before maturity. The whole doctrine controlling the right of action on such instruments springs from this principle. But there are many exceptions to the enforcement of the doctrine. In the first place, even though the instrument might have been payable to order, if it remained unindorsed no right of action can ever pass to any holder of it, and upon proof of this fact a recovery at law without a bond of indemnity is always permitted. 2 Daniel, Neg. Inst. §§ 1481, 1484; Rowley v. Ball, 3 Cow. 303; Bank v. Tillman, 12 Ala. 215; Hough v. Barton, 20 Vt. 455; Aborn v. Bosworth, 1 R. I. 401. Had the suit been brought on the lost instrument itself, the rendition of judgment without the execution of a bond of indemnity could easily have been sustained, for it was clearly established by uncontroverted testimony that the original note had never been indorsed by the payee, to whose order it was drawn. But no such question necessarily arises in this case. The action was not brought upon a lost instrument; it was brought on a note

which was produced in evidence, and on which the judgment was rendered. In what manner the law governing actions on lost instruments could be so far made applicable to this litigation as to require the court to compel the plaintiff to execute a bond of indemnity is not plain to be seen. Did the case require such an unusual extension of the rule, the answer is that there is nothing in the law governing actions on lost instruments calling upon the plaintiff to execute a bond of indemnity before his recovery. The case furnishes three answers to the suggestion: The original note was voluntarily destroyed, and such voluntary destruction would deprive the plaintiff of any right of action on the original instrument; the note had never been indorsed, and no holder of it could acquire a right of action thereon, save subject to the defense of the payment of the recovery in this action; and, lastly, no condition of surrender or destruction was attached to the delivery of this note, according to the verdict of the jury as rendered. This verdict was abundantly sustained by the testimony, and the plaintiff's right of recovery is fully supported by the record. No available error has been assigned by the appellant. The judgment of the court below should be affirmed.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment of the court below is affirmed.

#### SOLIS CIGAR CO. v. POZO *et al.*

(Supreme Court of Colorado. April 13, 1891.)

TRADE-MARKS—INFRINGEMENT—RIGHTS OF ASSIGNEE—DECEIVING THE PUBLIC.

1. A trade-mark, consisting of the picture of a tobacco plant and the words "Fabrica Tobaccos," which together had been in common use in the tobacco business, with the words "El Cavo" above, and beneath the words "De R. Solis," "Habana," "Copyrighted," "R. Solis, Manufacturer, Denver," is not infringed by a label having a similar picture, the words "Fabrico Tobaccos" on either side of the picture, the words "El Cavo," and beneath the words "De Pozo & Suarez," "Habana," and "Pozo & Suarez, Manufacturers, Denver, Colo.," since, taken as a whole, they are not so similar that a purchaser using ordinary care and caution would likely mistake the one for the other.

2. After adoption of the original label by R. Solis, the Solis Manufacturing Company was incorporated, and R. Solis, who became its manager and largest stockholder, turned over to it his whole business, good-will, and trade, and, although there was no formal transfer of the trade-mark, the corporation continued its use. Held, that the corporation would not be denied relief against a third person on account of the condition of the title.

3. The presence of the word "Copyrighted" on a label, when in fact it had not been copyrighted, was not such a misrepresentation as would prevent the owner's receiving protection.

4. The use of the word "Habana" on a label, when in fact the cigars on which the label appeared were merely Havana filler, is such a deceit on the public that equity will furnish no relief against an infringement.

Commissioners' decision. Appeal from superior court of Denver.

In January, 1887, the Solis Cigar Company filed their bill against Pozo & Suarez, seeking to restrain them from interfering with a trade-mark which the company claimed to own, and to recover damages. It appears that several years prior to the alleged infringement R. Solis had been a manufacturer of cigars in Denver, and had adopted the brand to which the company claim title. The corporation was organized after the adoption of the brand. Mr. Solis became a large stockholder in it, turned over to the corporation his whole business, good-will, and trade, and became the manager of it. It sufficiently appeared that the company succeeded to whatever rights Solis had, and, while he made no formal transfer of his trade-marks, he turned over to the company all his rights of that description. The two brands, so far as they can be described without pictures, are as follows: The Solis brand was a picture of a tobacco plant, with a foreground of land, a background of water, with sky in the distance, and flowers on the stem projecting above the leaves. On the top of the label were the words, in capitals, "EL CABIO." A little over one-third of the way down, and on either side of the picture, were the words, in capitals, "FABRICA TOBACCOS," and below and underneath those "DE R. SOLIS." Resting on the ground was the word, in capitals, "HABANA," and below that, in smaller type, the word "Copyrighted." At the bottom of the label were the words "R. Solis, Manufacturer, Denver." The type in which this label was printed was clear cut, with fancy lines and terminals to various of the letters, as in E, L, and C, etc.; the cross, for instance, on the middle stem of the E was an upright line, terminating in a scroll at either end. These were the characteristics of the type used on that label. The other label was a picture of a tobacco plant, topped with three flowers, instead of seven, which were on the first brand, but without a visible stem. The plant rested on the ground, with some growing plants underneath, but there was no water in the background, nor any sky. It was simply the plant on a blue background, which was the prevailing color of the El Cavo brand. On either side of the flowers were the words "EL CAVIO," and on either side of the plant, arranged as in the other brand, were the words "FABRICO TOBACCOS," and beneath them "DE POZO & SUAREZ." Below the plant was the word "HABANA," in capitals; and at the bottom of the entire label were the words "Pozo & Suarez, Manufacturers, Denver, Colo." The type of the two brands was totally dissimilar; that of the El Cavo brand being fanciful, and the other plain and unornamental.

It appeared in evidence that the plaintiff had made large sales of cigars in boxes with its brand on. Proof was offered of some sales of cigars under the brand complained of as an infringement; but there was no proof of any sales of the one for the other, nor that any purchaser was deceived by the resemblance in the labels. The case was equally silent as to any interference with the plaintiff's trade growing

out of the use of the label by the defendants. The intention of the defendants to pirate the plaintiff's brand was shown, but upon the question of the difference in the quality of the two brands of cigars there was a conflict of testimony. The cigars which were sold under the plaintiff's brand, according to his own testimony, were made of what is known to the trade as "Havana filler, seed binder, and Sumatra wrapper." The only portion of the cigar which was made of the Havana tobacco was the filler. The binder was of domestic production, and the wrapper was of tobacco imported from the island of Sumatra. This seems to have been a matter well understood by the trade, for the cigars were not sold to the wholesale dealers as cigars made wholly of Havana tobacco, but were sold as seed Havana cigars. According to the evidence, the trade never labels domestic cigars, or cigars made partially of domestic tobacco, as seed Havana, but labels all cigars, both those made of Havana filler, seed binder, and Sumatra wrapper, and those made entirely of Havana tobacco—filler, binder, and wrapper—as Havana cigars, preserving the distinction in their dealings with each other by calling the first "Seed Havana," and the last "Clear Havana." From the labels the public cannot determine whether the cigar is made wholly of Havana tobacco, grown on the island of Cuba, or is a mixture of imported and domestic tobacco; nor do the labels signify to what extent Cuban tobacco is used in the manufacture. The words "Fabrica Tabacos" and "De R. Solis," are simply the application of the use of the Spanish language in the brand, and mean the manufactured tobacco of R. Solis. The words "El Cavo" have a direct significance, and mean either a small door, or a little window in a door. The words "El Cavo" have no recognized significance, although there was some testimony which indicated that they meant a sort of a little apple tree growing in the Asturias. On this point, however, the testimony was not satisfactory. Upon the conclusion of the testimony the bill was dismissed, and a decree entered accordingly. This is assigned as error, and the plaintiff appeals.

*W. S. Decker and A. B. McKinley, for appellant.*

*BISSELL, C., (after stating the facts as above.)* The right which a manufacturer has in a trade-mark is everywhere recognized as property. The mark may consist of a name, or a device, or a peculiar arrangement of words, or such words with some device of greater or less novelty, which have been applied to a manufacture to designate the goods as made by a particular person. When a manufacturer has thus distinguished the goods he makes by a peculiar device, so that they may be known in the market as his, he thereby acquires the right to whatever profits may result from his superior skill, knowledge, or honesty of process; and this right may not be impaired by any piratical use of the devices which serve to mark them, and lead the public to think that they are his. The legal right to the use of the

trade-mark springs from its usefulness to point out the original ownership of the article to which it is affixed, or to give notice to the public who is the producer. From this right the power of legal protection is derived. The first difficulty which arises here is to determine the question of infringement. Exact similarity is not necessary. To insist on that would be to permit most wrong-doers to evade responsibility. Colorable imitations are as much the subject of legal redress as the more exact and perfect similitudes. What is necessary in all cases is a similarity which will operate to convey a false impression to the ordinary purchaser, and serve to deceive and mislead him. The rule is grounded as much on the notion that the public is to be protected as on the theory that the inventor may have the exclusive benefit of the reputation acquired by the thing which he has produced. For this reason it is always essential to show that the imitation is of a character to escape the ordinary care and caution used in the purchase of the articles protected. The case made is not brought within the limits of this rule. It is difficult to declare the legal extent of the plaintiff's right. The words "Fabrica Tabacos" are words of common use in the tobacco trade, and have been, for many years, in Spanish-speaking communities, applied to all known manufactured products of the plant. Alone they could not be the subject of a trade-mark. *Gilman v. Hunnewell*, 122 Mass. 139. Had these words, or the picture, been novel, and used in combination without more, some basis might be found for the claim that they made a trade-mark. But the picture of the plant, in connection with these or similar words, has been for many years used to designate the manufactured article. The two alone would not, under the testimony, serve the purpose. To all this was added the cabalistic words "El Cavo" and the name "De R. Solis." As a whole, there was produced that which would constitute a trade-mark according to accurate legal definition. When, however, the whole was looked at, there was no room for the deception of the purchaser by the use of the piratical design—the *El Cavo* brand. Doubtless it was designed and selected without the honesty of purpose which usually animates all fair business competition. It seems to have been chosen to gain some possible advantage; but it does not come up to the necessities of the rule. "El Cavo" alone, were the words "El Cavo" all of the device, might have infringed. Had the words, with the picture, together, constituted the trade-mark, then the infringement might have been complete; but it took the words, the picture, and the words "Fabrica Tabacos" and "De R. Solis," to make the brand. In that complained of there were the words "El Cavo," the picture of the tobacco plant, and the words "Fabrica Tabacos De Pozo & Suarez." In either case, the whole taken together constituted the device. It is unnecessary to discuss the lack of similarity in the pictures; for, while one was artistic and pretty, with its land, water, and sky, and the

other was a pictorial failure, and nothing but a naked plant of poor design and in-artistic finish, there was enough resemblance to deceive. To each, however, is attached the name of the manufacturer in bold type. If the purchaser was looking for the "El Cabello de Solís," he would not be misled by the "El Cabello de Pozo & Suarez." It is agreed by all the authorities that the court will not restrain a defendant from using a label on the ground that it infringes the plaintiff's device, unless the trade-mark, taken as a whole,—words, pictures, lines, and devices,—are so similar that the purchaser, using the ordinary care and caution which may be expected of the purchasing public, would likely mistake the one for the other. This cannot, on the case as made, be held to be likely to occur. No purchases of one for the other were shown, nor was any proof of that sort offered. It did not appear that any trade had been lost, nor that any customer, retail or wholesale, had been misled. While in this class of cases actual damage need not be shown in order to recover for the piracy, yet it is a strong circumstance to influence the court on a bill for an injunction, filed before the right has been established by an action at law, especially where the infringement is more speculative than absolute. There was a clear failure of the strong proof which courts of equity require before they grant injunctive relief. *McLean v. Fleming*, 96 U. S. 245; *Blackwell v. Wright*, 73 N. C. 310; *Popham v. Cole*, 66 N. Y. 69; *Gilman v. Hunnewell*, supra.

On the trial of the case the court denied the injunction, and placed the decision on the principle that, to entitle a complainant to the protection afforded by the exercise of equitable powers, the device which served to inform the public must be honest, not only in its suggestions of place of manufacture, and persons producing, but in the statements of the composition and material of the product. The rule was accurately stated, and the only question is as to the applicability of the doctrine. It was manifest that the original trade-mark had been adopted by R. Solís. He had devised and applied it to the El Cabello brand of cigars. The Solís Company, however, by transfer and succession came into the right to use the brand. After the organization of the company, by the consent and procurement of the original owner, who was the largest individual stockholder of the concern, they continued the use of the mark. It is true that there was no formal transfer of the right, but the circumstances clearly manifest the intention of the parties, and the case becomes one of a continuing trade-mark in the possession of a corporation which succeeded to all the rights, good-will, and trade of the former owner. In such a case the corporation would be treated as the equitable owner. At any rate, the respondent could not be heard to complain, and the plaintiff would not be denied relief on that ground.

The other branch of the question—deceit of the public—is not so free from difficulty. If it be conceded that the trade-mark tended to deceive the public in any material particular, the relief must be de-

nied. Below the picture of the tobacco plant it will be remembered were the words "Habana," "Copyrighted." They were words of definite meaning to the trade, and probably of equally certain significance to the public. They were not, however, as is clear from the evidence, of the same import to each class. The word "Copyrighted" meant the same to everybody. It implied that the protection of the statute applicable to such matters had been secured. This was probably believed to be true, but was without foundation. The misrepresentation, however, was unimportant. It did not tend to deceive the public in respect to any of those matters with which the law concerns itself. The public might buy with the same reliance on all the representations as to the place of production and ownership whether the marks were protected by the statute or guarded only by the appropriation and user of its owner. This element would neither be considered nor depended on by the purchaser, whether he was in or out of the trade. With regard to the word "Habana," the case is not so easy of settlement. This was expressive of a quality, and an absolute representation of the material of which the cigars were made. Some sorts of deception may be practiced without loss of right to the legal protection usually given this species of property. It is possible for the proof to show that the public received an erroneous impression, which would not of itself, be sufficient to destroy the validity of the trade-mark. Neither need the deception be of such a character as to work a positive injury to the purchasers to deprive the user of his exclusive privilege. In the first case it must not concern any of the essential particulars which the trade-mark protects, and in the latter it must not be absolutely false as to any of its leading elements. *Britannia Co. v. Parker*, 39 Conn. 450; *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. Rep. 436. That the representation made by the trade-mark as to the materials of which the cigars were made are of the sort which the law says must appear to be absolutely truthful, where its protection is sought, there can be no question. They are of what is by all the authorities recognized as the substance of the device. Such words are used to lead the public to believe that the articles sold possesses certain qualities known to belong to such material. They are used to influence the public to buy because of the public taste for such things. It seems clear that under the proof this case is brought within the full scope and application of this principle. The word "Habana" must be taken as a part of the mark which the plaintiff wants protected. It is on a conspicuous part of the label. It is in large, bold-faced type, to catch the eye of the purchaser. It is evidently designed to attract his attention. Like the other words, it is Spanish, and commonly used in the country where that sort of tobacco is grown. The whole purpose of the manufacturer was evidently to lead the public to believe that the cigar was made of that tobacco which is so much sought after and pre-

ferred by the smoking public. Yet it was not wholly true. The plaintiff admitted that the cigars sold under that brand were made of Havana filler, seed binder, and Sumatra wrapper. Nothing but the filler came legitimately within the definition of Havana tobacco. It clearly appeared that there was a broad distinction made in the trade between seed, seed Havana, and clear Havana cigars. One was made wholly of domestic tobacco; one of domestic and imported Cuban and Sumatra tobaccos; the third of tobacco wholly grown in Cuba. Only the last was sold as clear Havana, and that was always sold by the use of the word "clear" joined to Havana. It is evident that custom would not permit the trade to be deceived. Strict honesty was observed in all dealings with wholesale purchasers, but little attention was given to the opinions of the purchasing public. They were neither expected to know, nor was it desirable that they should learn. The maker was wholly indifferent to the impression which they might receive. Such a course is in contravention of the principles observed by courts of equity in the administration of this branch of the law. These courts have adopted rules which are founded in honesty and good sense, and which are designed to rebuke fraud, and encourage fair dealings with the public. Judged by these rules, as they have been communicated and applied, this case had no standing in court, and the bill was properly dismissed. The judgment should be affirmed.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

#### HALEY v. ELLIOTT.

(*Supreme Court of Colorado.* March 13, 1891.)

RECORD ON APPEAL—COLLECTION OF TAXES—PROCESS.

1. In replevin of a team of horses from a tax-sale, the abstract on appeal omitted the tax schedule, exemplifications of the assessment roll, bill of sale from the treasurer, and the exhibits produced in the trial court. *Held*, that the record did not set forth sufficient facts to a full understanding of the questions presented for decision, as required by statute.

2. A warrant to collect taxes is not a "process," within the meaning of the provision of the constitution relative to judicial proceedings, and it is not essential to its validity that it shall run in the name of the people.

Commissioners' decision. Appeal from Larimer county court.

W. T. Hughes, for appellant. J. M. Breeze, D. E. Parks, and H. B. Johnson, for appellee.

RICHMOND, C. This was an action of replevin instituted by Haley as plaintiff in the justice's court, subsequently appealed to the county court of Larimer county, where judgment was rendered against the plaintiff, to reverse which he prosecutes this appeal. The appeal was perfected under the act of 1885. The undisputed facts are that plaintiff was the owner of two

horses, and that on or about November 30, 1886, L. H. Breeze, the then county treasurer of Routt county, seized the horses for an alleged tax due said county, and sold the same at a tax-sale, the defendant becoming the purchaser. Thereafter plaintiff instituted this suit in replevin to recover the horses, claiming that no tax was due from him to the county; that his property was never valued or assessed; that there was no meeting of the board of equalization; that the tax proceedings and sale were void; and that no title passed to defendant as purchaser at the tax-sale. The contention of appellant is that, he having proved ownership, it was the duty of the defendant to establish title as purchaser, by showing that the tax was due, and that all of the proceedings in the assessment, levy, and sale were regular and valid. The cause was tried in the court below, and it appears that several exhibits, numbered from 1 to 5, were introduced on the part of defendant, and, in addition thereto, a bill of sale, executed in due form by the treasurer of said county to him, as purchaser, was also introduced. Upon the testimony and exhibits the court below found for the defendant, and entered judgment against plaintiff for costs. Whether this finding and conclusion of the court were correct or not it is absolutely impossible for us to determine from the abstract and record in this case, the appellant having failed to submit in his abstract the exhibits produced in the court below. The act under which this appeal was prosecuted provides that the cause shall be submitted to the supreme court upon printed abstracts of the record, setting forth so much thereof as may be necessary to a full understanding of the question presented for decision, and no more. The act further provides for additional and amended abstracts in case the parties differ as to the correctness or sufficiency of those supplied. But one abstract is filed, and that by the appellant, and it does not contain enough to enable us to say whether or not the defendant below failed to show title as purchaser at the tax-sale, conceding it was his duty to do so. The tax schedule, exemplifications of the assessment roll, bill of sale from the treasurer, and other papers are omitted from the abstract, which we think it was the duty of the appellant to submit. It is not incumbent upon this court to look beyond the abstract of record for the purpose of determining the controversy, nor are we at liberty to do so. The statute required that sufficient shall be submitted to enable the court to fully understand and determine the question presented for its decision. *Hurd v. McClellan*, 13 Colo. 7, 21 Pac. Rep. 903. But fairness to appellant's counsel probably requires that we should notice, regardless of the imperfect abstract, one point urged for reversal. The abstract contains a copy of the tax-warrant under which the property in question was levied upon and sold. This warrant did not run in the name of the people, and counsel insists that it was for this reason void, and the sale thereunder was therefore a nullity. The listing, valuation, and tax levy have been likened to a judgment;

and the "warrant to collect" has been spoken of as somewhat analogous to an execution. But we do not think counsel's present objection well taken. The constitutional provision upon which he relies is found alone in the judiciary article of that instrument; and, in our judgment, the word "process" is there used solely with reference to judicial processes, *i. e.*, processes issued in ordinary judicial actions, proceedings, or prosecutions. *Tweed v. Metcalf*, 4 Mich. 579; *Wisner v. Davenport*, 5 Mich. 501. The appeal should be dismissed, without prejudice.

BISSELL and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the appeal is dismissed, without prejudice.

McPHERSON v. PACIFIC BRIDGE Co.

(Supreme Court of Oregon. April 14, 1891.)

NEGLIGENCE—PLEADING—DEFECTIVE MACHINERY—NONSUIT.

1. In an action for negligence, a general allegation of negligence does not charge any fact.  
2. In an action for negligence, where it is alleged defective machinery was used, proof of the use of a "team" instead of machinery does not tend to support the plaintiff's allegation. A "team" is not a machine.

3. When it appears from the evidence on the part of the plaintiff that the injury which the plaintiff received was the result of an accident, or that it occurred through his own carelessness and inattention to his duties, no recovery can be had, and nonsuit in such case ought to be allowed.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

This is an action to recover damages for alleged negligence. The complaint, among other things, after alleging that the defendant is a corporation, and the plaintiff was in its employ about the 2d day of October, 1890, proceeds as follows: "That while he was so engaged in the erection of said tank through the negligence and carelessness of said defendant, and through the use of defective machinery by defendant, which defect in the machinery so used was unknown to this plaintiff, the said timbers employed in the erection of said tank fell upon this plaintiff, and seriously and severely hurt and injured him about the legs and arms and shoulders, causing him to become unconscious, and, as a consequence thereof he has been confined in bed in a hospital for a period of more than three weeks," etc. Issue was taken upon all the facts alleged, and upon a trial before a jury the plaintiff had a verdict for \$1,000. The defendant moved for a new trial, and, as a condition for overruling said motion, the court required the plaintiff to remit \$500, which was done, and then a judgment was entered for the plaintiff for \$500, from which this appeal is taken. After the plaintiff had rested his case in the court below the defendant moved for a nonsuit, which being overruled, an exception was taken. The other facts appear in the opinion.

R. Mallory, for appellant. N. D. Simon, for respondent.

STRAHAN, C. J., (after stating the facts as above.) The particular structure upon which the plaintiff was working at the time of the injury complained of was the frame necessary to support a water-tank. This is the plaintiff's statement at the trial of the injury, and how it occurred: "When we got the bent together, when we got everything ready to raise it, the engine did not come along in time. There was a team there that was used to haul sand, and he [Martin, the foreman] said we would hook that team on it, and raise it with them. He did hook the team on it, and started to raise it up, and they could not raise it, and he told us all to come and give the team a lift. There were five of us, and we came, and gave the team a lift to raise it up. We got it raised two or three feet, and it came back on us; and then he said for a couple of us to go and get a couple of shores, and put under it, and hold it up. So two men got sticks, and put under it, and they raised it so they could help with the shores, and they put them under, and caught it. The team hauled it a piece, and then they would catch it with the shores. The team hauled it a piece further, and got it quite a ways up, and it stopped again. And he said, 'Some one go and get a long shore.' I went and got a stick 2x8, 16 feet long, and they raised it; and I caught it the first time, and held it, and they started again. The next time they started the team it come back, and I did not catch it, and the shores were too far, and it tipped over on me." The plaintiff's counsel claims, in effect, on the argument in this court, that a general allegation of negligence and carelessness was sufficient; but that contention cannot be sustained. Such allegation does not charge a fact. *Woodward v. Navigation Co.*, 18 Or. 289, 22 Pac. Rep. 1076. This leaves nothing upon which a recovery could be predicated but the charge for defective machinery. What particular machinery was used, or in what the alleged defects consisted, is not alleged; but conceding, as the defendant made no objection on the ground of this uncertainty, that he ought not to be permitted to raise it, now, for the first time, the question of fact arises necessarily on the motion for a nonsuit, and this brings us to the main question in this case. On the argument here the only defective machinery claimed to be in the case was the team hitched to the end of the rope, and used for the purpose of lifting the bent. The court instructed the jury that, as the team performed the office of a machine, it was to be regarded as one; and the respondent's counsel contended that, if this team was unable to lift the bent by hauling at the rope, the allegation of the use of defective machinery was made out. We are unable to concur in this view. A "team" is in no sense "machinery," any more than a man would be hauling at the same rope; but without placing our decision on this question alone, we have carefully viewed all the evidence offered by the plaintiff, and, giving full effect to every inference which might be drawn from it, it is not shown that the defendant was negligent. So far as appears, due

care was used about the work by the defendant, and the injury which the plaintiff received was either the result of an accident, for which no one is responsible, or his own carelessness and inattention in failing to have his shore in proper position to receive the bent when the horses stopped pulling. If the shore which plaintiff held had been in proper position, then there can be no doubt the bent would have rested upon it, and the injury would not have occurred. For this unfortunate circumstance it is certain the defendant is not responsible. It violated no duty it owed to plaintiff. We have not thought it necessary to consider or decide the other question argued by the appellant's counsel, which is that the defendant was not doing the work when the injury occurred, and that the plaintiff was not employed by it at the time, for the reason that the other questions are decisive of the case. The judgment must be reversed, and the cause remanded to the court below, with directions to allow the defendant's motion for a nonsuit.

#### STOKES v. BROWN *et al.*

(Supreme Court of Oregon. April 14, 1891.)

##### VARIANCE—WHEN MATERIAL—PROOF.

1. No variance between the allegations and proof is material unless the adverse party is misled to his prejudice in maintaining his action or defense on the merits.

2. Whenever a party claims to be misled, that fact shall be proved to the satisfaction of the court, and unless he does so the court may either direct the fact to be found according to the evidence, or order an immediate amendment without costs.

3. When the allegation is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a variance, but a failure of proof.

(Syllabus by the Court.)

Appeal from circuit court, Clatsop county; FRANK J. TAYLOR, Judge.

C. W. Fulton, for appellants. F. D. Win-ton, for respondent.

BEAN, J. This is a suit to enforce specific performance of a contract to convey real estate. The complaint was filed on the 31st of December, 1889; and on the ——— day of ———, 1890, the issues being joined, the cause was referred for the purpose of taking testimony. The complaint avers that on the 21st day of August, 1889, the defendants, for and in consideration of the sum of \$100, executed and delivered to plaintiff their agreement in writing, wherein they covenanted and agreed to sell and convey to plaintiff block 23 in the town of Willamport upon the payment to them by plaintiff of the sum of \$200 within 90 days thereafter; that on November 16, 1889, plaintiff tendered to defendants the sum of \$200, and demanded the conveyance of said land in accordance with said contract, but they refused to accept the money or make the conveyance. The answer denies that the contract was made on the 21st day of August, 1889, or upon any other date or time mentioned in the complaint, or that the tender was made on the 16th day of November, 1889, or upon any other day or time set forth in

the complaint. Plaintiff offered in evidence before the referee a contract in writing, executed by defendants, which is the same as alleged in the complaint, except that it is dated June 20, 1889, and is in favor of J. J. Stokes & Co. An objection was made to the admission of this contract in evidence, because it was immaterial, irrelevant, and incompetent. From the evidence it appears that at the time the complaint was drawn the contract was misplaced, and hence the mistake; but before the taking of testimony was begun, it was found, and a copy delivered to defendants' attorney. The evidence also shows that at the time the contract was made plaintiff was doing business under the name of J. J. Stokes & Co., and that the tender was made on the 18th day of September, 1889, in place of November 16th, as alleged in the complaint. When the cause came on for trial in the court below plaintiff asked leave to amend his complaint by conforming it to the facts proved; but his application was denied, and the complaint dismissed, on the ground that there was a material variance between the contract alleged in the complaint and the proof. The complaint does not aver the contract *in extenso*, but according to its legal effect. The variance claimed is that the contract offered in evidence is in favor of J. J. Stokes & Co., in place of J. J. Stokes, as alleged, and is dated June 20, 1889, in place of the 21st day of August of the same year. It is argued for respondent that this variance is fatal, and the contract should not be admitted in evidence. If the statute of this state has not changed the rule which is to govern in this case, the objection is well taken, and the court below was clearly right in holding that there was a fatal variance. The authorities are uniform to the effect that where a writing is the foundation of a suit or action the description thereof contained in the complaint must be proved as laid, and, where the instrument offered in evidence varies from the one pleaded, this variance renders it inadmissible, unless the rule has been changed by statute. Many of these authorities were cited by respondent's attorney on the argument. The statute of this state, however, contains provisions on the subject of variance applicable to all actions, and if they establish a different rule from the one recognized in the cases relied on by respondent we are bound to apply it. It is provided, in the first place, that no variance between the allegations and proof shall be deemed material unless it have actually misled the adverse party to his prejudice in maintaining his action or defense on the merits; and whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleadings to be amended upon such terms as shall be just. Hill's Code, § 96. It will be observed that it is not left to the judgment of the court whether, in a given instance, the variance was calculated to mislead, but that fact must be proved to the satisfaction of the court. Where the variance is not material, as above pro-



vided,—that is, where the party has not proved that he has been misled,—the court may either direct the fact to be found according to the evidence, or may order an immediate amendment, without costs. Id. § 97. But where the allegation is improved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a variance, but a failure of proof. Id. § 98. These provisions have materially changed the rule of evidence, and it does not now depend upon the incoherence of the two statements upon their face, but upon proof *allunde*, as to whether the party has been misled to his prejudice by the incorrect statement.

In this case the defendants did not offer any proof of the character required, nor did they claim that they had been in any way misled. In fact, from the record it affirmatively appears that they had full knowledge of the contract plaintiff was relying on, before any testimony was taken in the case whatever, and were furnished with a copy thereof. They both testified as witnesses, but did not undertake to deny the execution of the contract, or make any defense thereto, except that the tender was not made within the 90 days specified in the contract. They contented themselves by relying upon their objection to the admissions of the contract in evidence, claiming that the contract alleged in the complaint is different from that offered, and hence insisting that the proof was not within the issue. If, then, the discrepancy in the contract alleged and the one offered in evidence was a variance, as defined by the provisions of the statute above cited, it should have been regarded as immaterial, and the only question here is whether it was a fault of that kind, or a failure of proof, as defined in section 98. That it was an immaterial variance under the statute of this state, we think does not admit of serious question. *Dodd v. Denny*, 6 Or. 156; *Henderson v. Morris*, 5 Or. 27; 1 Rum. Pr. § 540; *Catlin v. Gunter*, 11 N. Y. 368; *Place v. Minster*, 65 N. Y. 89; *Harvester Co. v. Clark*, 30 Minn. 308, 15 N. W. Rep. 252; *Kopplekom v. Huffman*, 12 Neb. 95, 10 N. W. Rep. 577. In general terms the "scope and meaning" of the allegation in the complaint are that defendants agreed in writing to sell and convey by warranty deed to plaintiff block 22 in Williamport within 90 days from the date of the contract on the payment to them by him of the sum of \$200; that he tendered the money within the time specified in the contract, but defendants have refused to convey the land to him according to agreement. The contract offered in evidence is the same, in terms, as the one the legal effect of which is averred in the complaint. The property, the consideration, the terms of contract, the time of payment, and the parties are the same, and the only difference is the date, and that the contract is in favor of J. J. Stokes & Co., who is really the plaintiff. This is a variance in some particulars only, and not in the entire scope and meaning of the complaint. If defendants were in any way misled by the discrepancy between the allegations and proof, they should have made that fact ap-

pear to the court; and, not having done so, the variance must be considered immaterial, and the facts found according to the evidence. It was said by counsel for respondent on the hearing that the evidence did not show that the tender was made by plaintiff within the time provided in the contract. We have examined the testimony on this question, and, if it be conceded that time is of the essence of the contract, we think plaintiff has shown by a decided preponderance of the evidence that the tender was made within the 90 days provided in the contract. The decree of the court below will therefore be reversed, and a decree entered here as prayed for in the complaint.

#### STEEL V. HOLLADAY.

(Supreme Court of Oregon. April 14, 1891.)

#### EXECUTORS—COMPENSATION—EXTRAORDINARY SERVICES.

1. No commission can be allowed an executor on property which never came into his possession, nor on property which, although it belonged to the estate, has not been administered on, and is not under the control of the probate court.
2. Unusual and extraordinary services of an executor, for which the court is authorized to allow compensation, are such services as are not ordinarily required of an executor, in the discharge of the duties of his trust.
3. The claim of an executor or administrator for unusual or extraordinary services should contain a statement of each special service claimed to have been rendered, with its particular value, and, until such an account is presented, no allowance should be made therefor.
4. An executor is entitled to reasonable attorney's fees in any necessary litigation or matter requiring legal advice or counsel.
5. A claim of an executor for attorney's fees should ordinarily be presented in an itemized form, and not for an aggregate amount by the year, but, under the peculiar circumstances of this case, this rule ought not to be enforced.
6. It is the duty of an executor to keep and render a just account of his trust, and, if he thinks proper to keep a clerk for that purpose, he must do it at his own expense.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

W. W. Thayer and E. B. Williams, for appellant. Geo. H. Williams and A. H. Tanner, for respondent.

BEAN, J. By the last will and testament of the late Ben Holladay, the appellant, Joseph Holladay, was appointed executor of his estate. His right to act as such was contested, and finally sustained in this court. *Holladay v. Holladay*, 16 Or. 147, 19 Pac. Rep. 81. On the 11th day of April, 1888, he duly qualified and continued to act as such executor until May 31, 1889, when he was removed, on the petition of Esther Holladay, widow of Ben Holladay, by the county court of Multnomah county, for neglecting to file an inventory and appraisal of the property belonging to the estate, and the respondent, James Steel, appointed as administrator thereof. On an appeal to this court the decree of the county court was affirmed. In *re Holladay's Estate*, 18 Or. 168, 22 Pac. Rep. 750. On May 20, 1890, appellant filed his final account as such executor, in which he

claimed an allowance of \$10,000 for attorney's fees, \$7,912 as compensation for his own services, and \$700 for the services of a clerk. The respondent, as administrator, contested his right to an allowance for any of the items claimed by him, except the sum of \$2,000 for attorney's fees, and on a trial in the county court he was allowed \$4,916.66 for attorney's fees, but nothing for either of the other items. On an appeal to the circuit court the decree of the county court was affirmed, and hence this appeal. At the time of Mr. Holladay's appointment as executor all the property belonging to the estate of Ben Holladay was in the possession of himself and one George Weidler as receivers, and Mr. Weidler as trustee, and continued in their possession until after Mr. Holladay was removed as executor; so, as a matter of fact, no property whatever was reduced to his possession as executor. The compensation of an executor, unless provided in the will, is fixed by statute, and he is entitled—*First*, to all necessary expenses incurred by him in the management and settlement of the estate, including reasonable attorney's fees in any necessary litigation or matter requiring legal advice or counsel; *second*, his commission on the whole estate accounted for by him; and, *third*, such further compensation as may be just and reasonable for any extraordinary and unusual services not ordinarily required of an executor in the discharge of his trust. Hill's Code, §§ 1178, 1180. No property belonging to the estate came into the possession of appellant as executor, and none is accounted for by him, so there is nothing upon which his commission can be estimated or determined. No commission can be allowed on property which never came into the possession of the executor, nor on property which, although it belonged to the estate, has not been administered on, and is not under the control of the probate court. 2 Woerner, Adm'n, § 528. Although the estate of Ben Holladay was the owner of a large amount of property, it was in the possession of receivers, and neither the appellant, as executor, nor the county court, had any control over it.

The amount of the commission of an executor is a mere matter of mathematical calculation, based upon the whole estate accounted for by him, and until he has possession of some property and accounts for the same, there is nothing upon which to base such calculation; so that, on the record before us, appellant is entitled to no compensation whatever, unless it be for extraordinary and unusual services not ordinarily required of an executor. The claim presented by him is a general one for \$5,000 per year, without in any way specifying the special service rendered or the particular value thereof. The fees provided by statute are to be deemed ample compensation for an executor, except in unusual cases, and when he is required to render extraordinary services not ordinarily required of an executor. His additional compensation, if any, is within the discretionary power of the court to allow, and, when a claim is made therefor, it should be scrutinized with care, and

never allowed unless the court is satisfied that it is just and reasonable, and the services for which it is made should be stated and particularly set forth, in order that the court may know precisely for what services the extra compensation is asked, and the heir, creditor, or other persons interested in the estate may be informed so as to know what items, if any, they may desire to contest. In *Wisner v. Mabley's Estate*, 70 Mich. 271, 38 N. W. Rep. 262, it is said: "And no such account for services should be allowed without such statement is furnished by the executor or administrator of the estate." So in *May v. Green*, 75 Ala. 167, *SOMERVILLE, J.*, said: "The record fails to disclose any special or extraordinary services for which the administrator was entitled to compensation. Proof, moreover, should have been made of each special service with its particular value, and the whole should not have been aggregated by mere estimate without being itemized." To the same effect, see 2 *Woerner, Adm'n*, § 529; *Miller's Ex'r v. Simpson*, (Ky.) 2 S. W. Rep. 171. The record before us does not disclose that appellant performed any services not ordinarily required of an executor, but, as he says, they were "in managing the property and correspondence in regard to claims." These are services that usually fall within the ordinary routine of administration, and for which no extra compensation is allowed. What is "extraordinary and unusual services" will depend largely upon the peculiar circumstances of each particular case, and the allowance of compensation for such services is largely in the discretion of the court; but, before the court can allow anything therefor, the claim should be itemized, and each special service rendered, with its particular value stated, so that the court may act intelligently in the matter, and be able to deal justly both with the estate and the executor. The claim presented in this case is for the aggregate sum of \$7,912, without giving the items going to make up the amount, nor is the proof any more definite. The only witness who testifies in regard to the value of the services is the appellant himself, and he places them at \$5,000 per year, without attempting to give each special service, with its particular value, as the law requires he should do before being allowed anything therefor. It is true the record shows that appellant devoted a great deal of time to the business of the estate, and it seems but just that he should receive a reasonable compensation therefor, which no doubt he would be allowed if the services were unusual or extraordinary, within the meaning of the law, (a question, however, which is unnecessary for us to decide,) on the presentation of a proper account. But he has accounted for no property belonging to the estate, and therefore is not entitled to the commission allowed by law, and the services rendered by him were not unusual and extraordinary, unless the peculiar condition of the estate rendered them so, and, if they were, neither the claim presented, nor the proof, furnishes any basis upon which his compensation can be ascertained. To allow an

aggregate claim of an executor against an estate for extraordinary services, supported alone by his opinion as to the aggregate value of his service, would violate all the rules of both justice and law, and throw the door wide open for unscrupulous executors and administrators to rob and plunder the estates of their decedents.

We pass now to the claim for attorney's fees. That an executor is entitled to reasonable attorney's fees, in any necessary litigation or matter requiring legal advice or counsel, is not denied; nor is it denied that the employment of Mr. Williams as attorney by appellant was necessary and proper; but it is claimed that the services rendered were not reasonably worth the sum charged therefor. At the time of Mr. Holladay's appointment as executor the business of the estate was very much complicated. The assets, consisting of stock in various corporations, and large bodies of real estate in different parts of the state, were in the hands of receivers. The estate was largely indebted to various and sundry persons, both in and outside of this state, the aggregate amount of which was near \$500,000, and the estate was supposed to be insolvent. In this condition of affairs Mr. Holladay was unable to secure the services of an attorney who would undertake the laborious and exacting duties required, and look to the estate for his compensation. He was therefore compelled to pledge his own personal credit, in order to secure the services of an attorney at all, which he did by employing Mr. Richard Williams at the agreed compensation of \$5,000 per year. Mr. Williams continued to act as his attorney until his discharge, and it is clear, we think, from the evidence, that the services rendered by him were reasonably worth the amount agreed upon. It is so testified by Mr. Williams, as well as Judge Bellinger, who was particularly conversant with the vast and conflicting interests involved, and the complicated nature of the business. Indeed, it is not seriously contested by respondent, but it is claimed in his behalf that an itemized account for such services should have been rendered, and, until this is done, the executor is not entitled to an allowance therefor. The general rule undoubtedly is that all claims against a decedent's estate should be presented, if possible, in an itemized form, and it would have been much more satisfactory in this case if that had been done. The court should ordinarily refuse to allow an executor credit for alleged expenses in the settlement of the estate unless the account is definite, and the services proved to have been actually rendered and reasonably worth the sum charged. Such is the general rule, and courts should be slow to depart therefrom. But we think, under the peculiar facts of this case, the court, sitting as a court of equity, should not allow this wholesome rule to be invoked to defeat a just claim. The reason of this rule rests with the jealous care with which courts guard the estates of deceased persons, to prevent the allowance and payment of unjust and unreasonable claims. It requires

each item of the alleged claim to be stated, with its particular value, so that the executor, and all persons interested, may have a full opportunity to resist the payment of such items thereof, if any, as may be desired. But when the reason for the rule does not exist, the rule itself should not be operative. It would be impracticable, if not impossible, for an attorney of an executor, engaged in the management of an estate, as vast and complicated as the record shows this one to have been, to render an itemized account for his services. Almost his entire time was occupied in consultation with the executor, and matters connected with the estate. Claims aggregating large sums, and involving intricate and complicated questions, were presented for examination and investigation. Suits and actions against the estate, on alleged claims amounting in the aggregate to near \$150,000, were being prosecuted in both the state and federal courts. Some of these alleged claims grew out of transactions which took place in other states, rendering a vast amount of correspondence and investigation necessary in order to prepare for the defense of the actions brought thereon. From the time of the application of appellant for the appointment as executor until his final discharge, the estate seems to have been constantly harassed and annoyed by suits, actions, and proceedings in the courts. It was highly important that he have the advice and assistance of an attorney, and the contract with Mr. Williams was made in good faith, and the services faithfully rendered, and reasonably worth the sum agreed upon. The estate received the benefit, and it would now be unjust and inequitable to require Mr. Holladay to pay from his private funds for the services of Mr. Williams rendered him as executor, or any portion thereof, simply because an itemized account has not been kept or rendered.

The claim of \$700 for the services of a clerk was properly disallowed. The record does not disclose that Mr. Holladay paid out any money whatever for clerk hire, nor that he obligated himself to do so. The person whom he claims acted as his clerk was in the employ of the mill company at a salary of \$125 per month, during the time he charges the estate with \$50 per month for the services of the same person, and does not appear to have been employed by the executor, and, besides, "it is the duty of an executor to keep and render a just account of his trust; and if he is incompetent or too indolent to do so, and thinks proper to keep a clerk for that purpose, he must do it at his own expense." *Teague v. Dendy*, 2 McCord, Eq. 459; *Logan v. Logan*, 1 McCord, Eq. 1; *Lucich v. Medin*, 3 Nev. 93; *In re Moore*, (Cal.) 18 Pac. Rep. 884. It follows, therefore, that the decree of the court below must be modified so as to allow appellant for attorney's fees from the 11th day of October, 1887, to the 31st day of May, 1889, at the rate of \$5,000 per annum, and in all other respects affirmed, and that appellant recover his costs and disbursements in this court and the court below.

COULTER V. PORTLAND TRUST CO. SAME  
V. RASH. SAME V. WARNER.

(Supreme Court of Oregon. April 14, 1891.)

POWER OF ATTORNEY—CONSTRUCTION—AUTHORITY  
OF AGENT—PAROL EVIDENCE—NOTICE.

1. When an authority is conferred upon an agent by a formal instrument, as by a power of attorney, there are two rules of construction to be carefully attended to: (1) The meaning of the general words in the instrument will be restricted by the context, and construed accordingly; (2) the authority will be construed strictly, so as to exclude the exercise of any power which is not warranted, either by the actual terms used, or as a necessary means of executing the authority with effect.

2. Where one person deals with another, knowing that the other is acting under a delegated authority, it is his duty to inform himself of the extent of such delegated authority. In such case the principal is bound only to the extent of that authority.

3. "Sale" is a word of precise legal import, both at law and in equity. It means at all times a contract between parties to give and pass rights of property for money which the buyer pays, or promises to pay, to the seller for the thing sold.

4. When an agency is created by written instrument, the general rule is that the nature and extent of the authority must be ascertained from the instrument itself, and cannot be enlarged by parol evidence of an intention to confer additional powers, because that would contradict or vary the terms of the written instrument.

5. When a party claims title to real property, and the deeds through which he claims show an infirmity in such title, he is chargeable with notice of the state of his own title, and of every fact appearing in any of the deeds through which he derails title.

(Syllabus by the Court.)

Appeals from circuit court, Multnomah county; E D. SHATTUCK, Judge.

This is an action of ejectment brought to recover certain real property in the city of East Portland. The complaint is in the usual form, and contains all the allegations required by the statute. The answer traverses plaintiff's allegations, and then alleges title in the defendant. Upon the trial in the court below the plaintiff introduced the record evidence of his title by mesne conveyances from Elijah B. Davidson and wife, the original donees of the United States, and rested. The last conveyance in his chain of title was a deed of bargain and sale, with covenants of general warranty, from Howard H. Palmer, dated March 24, 1890. The defendant, also claiming title through Howard H. Palmer, offered in evidence a power of attorney from him to his wife, R. A. Palmer, as follows: "Know all men by these presents, that I, Howard H. Palmer, of Murray, Idaho, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, R. A. Palmer, in the county of Multnomah, Oregon, my true and lawful attorney for me, in my name, place, and stead, to transact any business whatever in a lawful manner, in connection with or necessary to the buying, selling, transferring, or mortgaging real estate, in said county and state, including the signing of all necessary papers, in order to transact any such business relating to real-estate transactions, also including the sealing and acknowledging the execution of said papers, and the delivery of the same. Giving and

granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation; hereby ratifying and confirming all that my said attorney or her substitute shall lawfully do, or cause to be done, by virtue thereof. In witness whereof I hereunto set my hand and seal this seventeenth day of March, A. D. 1887. HOWARD H. PALMER. [Seal.]

[Seal.] Executed in the presence of W. G. JENNE, J. V. ALLEN,"—which instrument was acknowledged before W. G. Jenne, notary public for Oregon, March 22, 1887, and recorded at 4:50 P. M., November 28, 1888, on page 443 of Book 108, Deed Records of Multnomah county. Defendant next offered in evidence the following instrument, as executed under the authority conferred by said power of attorney: "Know all men by these presents, that we, Howard H. Palmer and R. A. Palmer, his wife, in consideration of one dollar to us paid by W. G. Jenne, and for the further consideration that the said W. G. Jenne hereby assumes the responsibility of providing a suitable and comfortable home for and of properly clothing Nellie Palmer, the daughter of the said Howard H. Palmer and R. A. Palmer, until the said Nellie Palmer (now nearly three years of age) shall reach the age of 18 years, do hereby grant, bargain, sell, and convey to said W. G. Jenne, his heirs and assigns, forever, the following described parcel of real estate, to-wit: [description of premises in dispute:] containing eleven and one half (11½) acres, exclusive of a road to run across said tract north and south, and to be thirty (30) feet wide. Together with the tenements, \* \* \* and also all our estate \* \* \* therein or thereto, including dower and the right of dower; to have and to hold the same to the said W. G. Jenne, his heirs and assigns, forever. And we, Howard H. Palmer and R. A. Palmer, do covenant with the said W. G. Jenne and his legal representatives, forever, that the said real estate is free from all incumbrances, save and except one mortgage for six hundred (\$600) dollars, and interest thereon, in favor of the Solicitor's Company, and recorded in the records of said county and state; and that we will, and our heirs, executors, and administrators shall, warrant and defend the same to the said W. G. Jenne, his heirs and assigns, forever, against the lawful claims and demands of all persons whomsoever, except as above specified. In witness whereof we have hereunto set our hands and seals this 22d day of November, A. D. 1888. HOWARD H. PALMER. [Seal.] By R. A. PALMER, his Attorney in Fact. R. A. PALMER. [Seal.] Signed, sealed, and delivered in presence of W. H. NORMAN, J. C. MCGREN,"—which instrument was acknowledged by R. A. Palmer, both as wife and attorney in fact of Howard H. Palmer, November 22, 1888, and recorded next day at 4:50 o'clock P. M., Book 110 of

Deeds, on page 44. Plaintiff objected to the admission of the deed in evidence, as unauthorized by said power of attorney and void on its face. It was conceded at the trial that defendant had succeeded to whatever title passed to W. G. Jenne by this deed, and it offered no other documentary evidence. But the defendant offered oral testimony to prove certain alleged facts, which it claimed would affect the operation of this power of attorney and deed in respect of their passing the title in said premises from Palmer to Jenne. The plaintiff objected to such testimony as incompetent and irrelevant, and excepted to its admission by the court. He also excepted to the findings of fact based thereon as unsupported by any competent or sufficient evidence, and as themselves incompetent and irrelevant.

The findings of the court are as follows: "(1) That the first of said actions is brought to recover possession of the following described tract of land: [Here follows a description of the property, as set forth in the complaint.] (2) That the parties to said action, plaintiff and defendant, both claim title to the premises in each action involved, by deed from Howard H. Palmer, a former owner thereof. (3) That all said lands were portions of a larger tract, prior to the 29th day of January, 1887, owned by one Susan E. Jenne, who on said day conveyed all said larger tract of land to one William G. Jenne, her son, for the purpose of having the same divided among her children, of whom Rhoda A. Palmer, the wife of said Howard H. Palmer, was one; that, at the time of the execution of said conveyance by said Susan E. Jenne, she gave verbal direction to the said William G. Jenne in regard to the apportionment of her said lands among her children, and verbally stated to him that her daughter, Rhoda A. Palmer, should have no portion of said land, but that he should convey to said Howard H. Palmer the share to which his wife, as the child of the said Susan E. Jenne, would otherwise be entitled; that, in pursuance of said direction, the said William G. Jenne conveyed to the said Howard H. Palmer in fee all the lands in said actions involved; and that said Howard H. Palmer paid no consideration therefor. This last-mentioned conveyance is the source of title to said lands derived by the said Howard H. Palmer. (4) That thereafter the said Howard H. Palmer executed to his wife, the said Rhoda A. Palmer, a power of attorney bearing date March 17, 1887, and acknowledged March 22, 1887, wherein and whereby he empowered the said Rhoda A. Palmer, in his name, place, and stead, to 'transact any business whatever in a lawful manner in connection with or necessary to the buying, selling, transferring, or mortgaging real estate,' in Multnomah county, state of Oregon, 'including the signing of all necessary papers in order to transact any such business relating to real-estate transactions, also including the sealing and acknowledging the execution of said papers, and the delivery of the same;' that said instrument was witnessed and acknowledged so as to entitle

it to be recorded, and was on November 23, 1888, duly recorded in the office of the recorder of conveyances for said Multnomah county. (5) That at some time prior to the 22d day of November, 1888, the said Howard H. Palmer and Rhoda A. Palmer had executed to the Solicitor's Company a mortgage upon the land conveyed to the said Howard H. Palmer by the said William G. Jenne, to secure a loan of \$600 made by said company, which money was sent to the said Rhoda A. Palmer, in Idaho, by W. G. Jenne. (6) That on said 22d day of November said Rhoda A. Palmer, assuming to act as attorney in fact for said Howard H. Palmer, under said power of attorney, on his behalf and on her own behalf, executed to the said William G. Jenne a deed purporting to convey in fee-simple all the lands involved in these three actions, exclusive of a road across said tract north and south, to be thirty feet wide, upon an expressed consideration of one dollar, 'and for the further consideration that the said W. G. Jenne hereby assumes the responsibility of providing a suitable and comfortable home for, and of properly clothing, Nelle Palmer, the daughter of the said Howard H. Palmer and R. A. Palmer, until the said Nelle Palmer (now nearly three years of age) shall reach the age of eighteen years;' said conveyance shall also contain a covenant of general warranty of the title to said premises, and also a covenant that 'said real estate is free from all incumbrances, save and except one mortgage for six hundred (\$600) dollars, and interest thereon, in favor of the Solicitor's Company;' that said conveyance was duly witnessed and acknowledged, so as to entitle it to be recorded, and it was on the 23d day of November, 1888, duly recorded in the office of the recorder of conveyances of said Multnomah county. (7) That on the 4th day of February, 1889, said W. G. Jenne, with his wife, executed a deed, purporting to convey in fee-simple the tract of land involved in the first of the actions above set forth to the defendant the Portland Trust Company of Oregon, for a consideration of \$300 per acre, and thereafter said company executed to the defendants Rash and Warner deeds purporting to convey in fee-simple, as portions of the land to it conveyed, the tracts to which they respectively make claim of title. (8) That, at the time of the execution of said several conveyances, none of the defendants had any knowledge or notice of matters affecting the title to the lands to each conveyed, except as appeared from the record of conveyances. (9) That, from the purchase price of the lands conveyed by the said William G. Jenne to the said Portland Trust Company of Oregon, said company retained the amount due upon the mortgage to the Solicitor's Company, above mentioned, and therewith satisfied the same. (10) That the sum of one dollar mentioned in the deed of the 22d day of November, 1888, from the said Howard H. Palmer and Rhoda A. Palmer to the said William G. Jenne, was never paid, but that the said William G. Jenne took charge of the child in said deed mentioned from the date of its execution until the

month of March, 1890, when she was taken from his custody upon proceedings in an action of *habeas corpus* instituted by the said Howard H. Palmer against the said Wm. G. Jenne in this court. (11) That the said Rhoda A. Palmer died on or about the 17th day of December, 1888, and that from the date of the execution of the conveyance from William G. Jenne to Howard H. Palmer, above mentioned, to that of the death of the said Rhoda A. Palmer, the said Howard H. Palmer allowed the said Rhoda A. Palmer to control the land to him conveyed as aforesaid, and executed with her such instruments in relation thereto as she desired to have executed, and that the intent of the said Howard H. Palmer in executing said power of attorney was to enable his wife to manage and control the lands above described, in any manner that she might determine. (12) That the said Howard H. Palmer was not within the state of Oregon at the time of the execution of the deed by Rhoda A. Palmer as his attorney in fact to William G. Jenne, and did not know of the execution of said deed, or of any of said transactions connected with or relating to said premises, occurring after the execution of said power of attorney and mortgage, in March and April, 1887, until July, 1889, and that he never ratified the same. (13) That on the 24th day of March, 1890, the said Howard H. Palmer executed to the plaintiff a deed purporting to convey in fee-simple all the lands above described, in consideration of the sum of one hundred dollars paid by the said plaintiff to said Palmer, but that said Palmer still retains an interest in said lands; and that said consideration was a nominal one, and said conveyance was executed solely to vest the title to said lands in the plaintiff." These findings of fact were followed by conclusions of law in favor of the defendant, upon which judgment was entered, from which this appeal was taken. The other facts appear in the opinion.

W. W. Thayer and J. F. Watson, for appellant. Williams & Wood, for respondent.

STRAHAN, C. J., (after stating the facts as above.) The first question to which our attention will be directed is the construction to be given the power of attorney executed by Howard H. Palmer to his wife, R. A. Palmer, on the 17th day of March, 1887. By that instrument he created R. A. Palmer his true and lawful attorney in fact, and empowered her to transact any business whatever in a lawful manner, in connection with or necessary to the buying, selling, transferring, or mortgaging real estate in said county and state, including the signing of all necessary papers, in order to transact any such business relating to real-estate transactions; also including the sealing and acknowledging the execution of said papers, and the delivery of the same. In this case there is no question as to the power to buy or mortgage real estate, because the agent did not assume to act under the power created by those words. The only question that we need to consider is the

extent of the agent's power conferred by the words "selling" or "transferring." *Gouldy v. Metcalf*, (Tex.) 12 S. W. Rep. 830, is a recent case on this subject. In that case the attorney was authorized by the power "to buy, sell, and exchange property, to receive and receipt for money, to sell and dispose of property, to give bills of sale thereto, or to sell and transfer real estate, and to execute deeds thereto, or to do and perform any lawful act in or about or concerning my [the principal's] business, as fully and completely as if I were personally present;" and the court held that this did not authorize the attorneys to execute an assignment of the principal's property for the benefit of his creditors. In passing upon this question the court said: "The language used in the grant of general power is certainly very comprehensive, but the established rule of construction limits the authority derived by the general grant of power to the acts authorized by the terms employed in granting the special powers. When an authority is conferred upon an agent by a formal instrument, as by a power of attorney, there are two rules of construction to be carefully attended to: (1) The meaning of the general words in the instrument will be restricted by the context, and construed accordingly. (2) The authority will be construed strictly, so as to exclude the exercise of any power which is not warranted either by the actual terms used, or as a necessary means of executing the authority with effect. *Ewell, Evans' Ag. 204, 205; Reese v. Medlock, 27 Tex. 120.*" So in *Holbrook v. McCarthy*, 61 Cal. 216, which was a sale of land under a power of attorney, the terms of which were not followed, and the court held the act of the agent of no binding force upon the principal. So, also, in *Morris v. Watson*, 15 Minn. 212, (Gil. 165,) the agent had a general power to sell and convey real estate, and, assuming to act under such power, he mortgaged it, and the court held the act void. So, in *Bank v. Gay*, 63 Mo. 33, the agent had authority to use or sign the principal's name for the purpose of obtaining accommodation at a bank, which of necessity, remarked the court, authorized the execution of a note, and that the law would give effect to such purpose in the usual and ordinary way, but that such power did not authorize the execution of an instrument which was not a commercial note. The only departure claimed was that the agent signed his principal's name to a paper in all respects a promissory note, except it contained a clause for the payment of attorney's fees, if placed in an attorney's hands for collection; and the court held this provision destroyed its character as a promissory note, and that, as against the principal, it was void. This case would seem to the writer to be an extreme case, but it illustrates to what extent and how jealously courts scrutinize the acts of agents done in excess of their authority. So in *Dozier v. Freeman*, 47 Miss. 647, it was held that where one person deals with another, knowing that the other is acting under a delegated authority, it is his own folly if he does not inform himself of the extent of the delegated au-

thority. In such case the principal is bound only to the extent of that authority. And Society v. Poe, 53 Md. 28, is to the same effect. So, also, in Pollock v. Cohen, 32 Ohio St. 514, it was held where authority to perform a specified act, in specified modes, is conferred upon an agent by a regularly executed power of attorney, and general words are also used, the general words are limited by and to be construed with reference to the modes specifically named. And an able elementary writer says on this subject: "It results from the rules of interpretation applied to the construction of powers of attorney that where authority is given to perform specific acts, and general terms are also employed, the latter are limited to the particular acts authorized by the power." Section 359, Devl. Deeds. These principles are declared and illustrated by other cases. Bank v. Aymar, 8 Hill. 262; Wanless v. McCandless, 38 Iowa, 20; Tappan v. Morseman, 18 Iowa, 499; Towle v. Leavitt, 23 N. H. 360; Rossiter v. Rossiter, 8 Wend. 495; Billings v. Morrow, 7 Cal. 172; Rountree v. Denson, 59 Wis. 522, 18 N. W. Rep. 518; Story, Ag. § 72; Whart. Ag. § 227.

2. The authorities cited conclusively settle in what light a power of attorney is to be viewed, and how construed, and it only remains to ascertain in what manner Mrs. Palmer proceeded in the execution of the power conferred upon her. On the 22d day of November, 1888, she proceeded, assuming to act under this power of attorney, to execute to her brother W. G. Jenne a deed in the name of Howard H. Palmer and herself, whereby, for the consideration of one dollar, and "the further consideration that the said W. G. Jenne hereby assumes the responsibility of providing a suitable and comfortable home for and properly clothing Nellie Palmer, the daughter of said Howard H. Palmer and R. A. Palmer, until the said Nellie Palmer (now nearly three years of age) shall reach the age of eighteen years," did thereby grant, bargain, sell, and convey to said W. G. Jenne, forever, the real estate in controversy. Was this a sale? It is said in Frink v. Roe, 70 Cal. 296, 11 Pac. Rep. 820, that an agent authorized to sell and convey the property of his principal cannot, as against the principal, convey it in trust, for the payment of his own debts, to one who has notice of the terms of his agency. It was said in Williamson v. Berry, 8 How. 544: "'Sale' is a word of precise legal import, both at law and in equity. It means, at all times, a contract between parties to give and pass rights of property, for money, which the buyer pays or promises to pay to the seller for the thing bought and sold." And it was said in Mora v. Murphy, (Cal.) 23 Pac. Rep. 63: "A power to sell and convey is *prima facie* a power to sell for money, usually for cash paid;" and it is further said: "To give it any other meaning, it must be by some usage or custom in the country where the power is to be exercised, modifying the *prima facie* significance of the power conferred." So in Benj. Sales, (section 1,) which defines the requisites of a sale, "that it may

be defined to be the transfer of the absolute or general property in a thing, for a price in money;" and in section 2 it is observed, in considering the price, "that it must be in money paid or promised accordingly, as the agreement may be for cash or a credit sale; but if any other consideration than money be given it is not a sale." The principle is announced in Huthmacher v. Harris' Adm'r. 38 Pa. St. 491; Bigley v. Risher, 63 Pa. St. 152; Tied. Sales, § 1. Under no definition of the word "sale" that I have been able to find, or any authority relating to the subject of sales, can this attempted transfer of Palmer's property be called a "sale." By this attempted transfer of the land in controversy by Mrs. Palmer to her brother, she sought to make provision for the support of the infant child of herself and husband, and that was all. Whether such a stipulation as the one in the deed to Jenne created an obligation that might be enforced, if properly authorized, it is not now necessary to consider or decide. Let it be conceded that it was enforceable against Jenne, had Palmer elected to do so, it was in no sense a sale, but, at most, only an executory agreement, so far as the consideration was concerned. The performance of Jenne's agreement was in no manner secured. He might become insolvent, remove from the state, or simply refuse to care for and support Nellie, leaving Palmer's rights altogether uncertain and precarious.

3. But it was claimed on the argument here that, under the pleadings in this case, it was competent to aid this deed, and the power under which it was executed, in some way by parol evidence, and accordingly a large amount of such evidence was offered. It must be observed that no mistake or imperfection in the writings was put in issue by the pleadings. It is difficult to see on just what ground this parol evidence is offered. There is no latent ambiguity in these writings, and the court can have no difficulty in construing them, and determining just what their legal import is. But if it be conceded that parol evidence is admissible when there is no uncertainty in the writings, simply for the purpose of showing the situation of the parties and their relations to each other, as well as the property in controversy, it is not perceived how it could aid the respondent's contention. The fact is undisputed that the mother of Mrs. Palmer once owned this property, and deeded it to Palmer, the husband of R. A. Palmer. It likewise fully appears that she said at the time her daughter R. A. Palmer was not to have it. This deed to Howard H. Palmer gave him as absolute an estate in this land as if he had purchased it from some person outside of the family, and paid full value for it. There is no attempt by the pleadings to assert any equity in Mrs. Palmer at the time her mother made this deed, and, if set up, it is not perceived on what ground it could be sustained. But this parol evidence was designed in some way to enlarge the powers of the agent beyond what was specified in the writing, and it is believed this cannot properly be permitted. In Insurance Co.



v. Wilcox, 57 Ill. 180, it was held that it was a general rule that, where an agency was conferred by a written instrument, the nature and extent of the authority must be ascertained from the instrument itself, and cannot be enlarged by parol evidence of the usage of other agents, in like cases, or of an intention to confer additional powers, because that would be to contradict or vary the terms of the written instrument. The same case states for what purpose and to what extent parol evidence may be resorted to, and it is remarked that the usages of a particular trade or business, or of a particular class of agents, are properly admissible, not for the purpose of enlarging the powers of the agent employed therein, but for the purpose of interpreting those powers actually given; for the means ordinarily used to execute the authority are included in the power, and may be resorted to by all agents, and especially commercial agents. It was argued here that the defendant is a *bona fide* purchaser, and therefore its title could not be disturbed. It is not perceived in the present condition of this record that the question of good faith enters into the case. The very defect complained of constitutes an essential part of the defendant's title, and it must be held to be chargeable with notice of the state of its own title, and of every fact appearing in any of the deeds or writings through which it derails title. Wade, Notice, §§ 307, 308. These conclusions require a reversal of the judgment, and that the cause be remanded for a new trial. The same judgment will be entered in *Coulter v. Rash* and in *Coulter v. Warner*, submitted at the same time. These cases all depend upon identically the same principle, and the same judgment will be entered in each.

(20 Or. 491)

NEPPACH v. JONES.<sup>1</sup>

(Supreme Court of Oregon. April 14, 1891.)

## LACHES—WHAT CONSTITUTES STALE CLAIM.

1. What constitutes a stale equity is regarded as a vexed question hardly susceptible of an accurate definition. It is not length of time alone that is a test of staleness, but the question must be determined by the facts and circumstances of each case, and according to right and justice.

2. Nor, in determining whether or not the claim or equity is stale, is the court confined to the statutory period, but may refuse relief in cases where the delay is less or greater than that named in the statute.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

Nicholas & Osborne, for appellant. Ira Jones, for respondent.

LORD, J. This is a suit in equity to have a conveyance of certain lands therein described from the insolvent, William Ramsey, and its subsequent conveyance to the defendant, Jones, declared void, and the defendant required to convey the same to the plaintiff. The facts in substance were these: The insolvent, William Ramsey, made a general assignment for the benefit of his creditors on the 23d day of February, 1880, to one Pringle, but the court in 1890 thereafter appointed the plaintiff in the present suit

assignee. On the same day he executed a conveyance to one F. to the land in controversy, which was designed to pay or secure certain indebtedness as disclosed by the answer of the defendant, and soon thereafter died, leaving a will, by which he devised all his right and title to the land in dispute to his executors. A few days prior to such assignment, the defendant and his partner had commenced an action and levied an attachment on the said land, and a certificate was filed, as required by law, upon the date of such assignment. Several years intervening, and no proceedings being taken under the assignment, and acting on the supposition that it had been abandoned, the defendant obtained judgment on the 10th day of March, 1885, upon which execution issued April 6, 1885, under which the land was sold, and he became the purchaser. Some year or so thereafter a litigation was commenced and carried on between the executors of F. and the defendant, which was finally adjusted and settled, and the possession and title of F. were transferred to the defendant on the 15th day of December, 1888, who has since been in possession, and claims that the rights of the plaintiff are barred by the statute of limitations. It thus appears that the deed and assignment were more than 10 years old, and that no proceedings had been taken under the assignment until the commencement of the present suit, alleging that the deed to F. was fraudulent, and praying that it be declared void. The pleadings, and especially the answer, are quite voluminous in setting forth *in extenso* the action and proceedings in the attachment, and the sale made thereunder, the litigation instituted by the executors of F. to recover the property in controversy, and its final settlement, and the payment of a large sum by the defendant, and the proceedings taken under the assignment, showing that nothing had been done, or that it was in course of settlement, and other facts designed to exhibit the staleness and inequity of the claim and suit of plaintiff as against the rights of the defendant to the land in controversy. There is nothing in the record which specifies the ground upon which the suit of the plaintiff was dismissed, and the title of the defendant as against the plaintiff confirmed, other than the decree of the court, which "finds from the answer of the defendant, and not denied by the reply of the plaintiff, that the equities of the suit are with the defendant." This, we conceive, proceeded mainly upon the ground that the facts set up in respect to the assignment, and the laches and delay of the plaintiff while the defendant was harassed by litigation for the recovery of the property in dispute,—the title of F.—which he finally procured by a settlement and payment to the executors of a large sum of money, not denied or explained, exhibited a stale claim or equity which was fatal to the merits of his suit as assignee; that the case, as it stood confessed on the pleadings at the hearing by reason of such delay and laches of the complainant was such as would render a court of equity passive, or justify its refusal to grant re-

<sup>1</sup>Rehearing denied, post, 849.

relief. There is certainly nothing shown even to indicate what were the impediments to an earlier prosecution of the suit to secure the land in controversy for the payment of the claims alleged, or how, under the circumstances, he could have remained so long ignorant of his rights as such assignee, when so much was openly transpiring calculated to awaken his knowledge, if any rights he had, and no means were used to fraudulently keep him in ignorance of them. What constitutes a stale equity is regarded as a vexed question hardly susceptible of an accurate definition. It is not length of time alone that is a test of staleness, but the question must be determined by the facts and circumstances of each case, and according to right and justice. Nor in determining whether or not the claim is stale is the court confined to the statutory period, but may refuse relief in cases where the delay is less or greater than that named in the statute. From the original appointment to the commencement of the present suit no action has been taken or anything done, although covering more than the statutory period, to indicate any insolvent estate was in the course of settlement or pending, and it was certainly the duty of the plaintiff, if necessary for any cause, to seek the aid of a court of equity without unreasonable delay, for during the interval the defendant was pursuing modes to secure and perfect his rights upon principles substantially equitable, and without any fraudulent concealment; and, as the facts conceded in the pleadings in our judgment indicate that he could not have been without knowledge of the existence of such rights, and the defendant's conduct in the interim, he must have regarded such rights acquired by the defendant as just and equitable, and acquiesced in them; otherwise negligence would seem justly imputable to him. In *Petroleum Co. v. Hurd*, L. R. 5 P. C. 196, the court say: "The doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. \* \* \* Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy." Upon analogous principles, the lapse of time, especially when there was equal means, knowledge of the original transaction, and a failure to take any steps under the assignment, and no explanation or excuse for such delay, while at the same time the defendant was seeking openly in the same court to protect his title to the land in controversy from the action of the execu-

tors, and expending large sums in the settlement of such litigation, combined with all the circumstances set forth, much of which is matter of record, bring the case within the rule that lapse of time and staleness of the equity or claim require, upon principles of equity and justice, that the decree of the court below be affirmed, and the bill dismissed.

(7 Utah, 263)

## FERGUSON V. ALLEN.

(Supreme Court of Utah. April 18, 1891.)

CONTESTED ELECTIONS—JURISDICTION—MALCONDUCT OF OFFICERS—REJECTION OF LEGAL VOTES.

1. Comp. Laws Utah, § 3751, relating to contested elections, provides that no irregularity or improper conduct in the proceedings of the judges is such as avoids an election, unless it procures the person whose right to the office is contested to be declared elected when he has not received the highest number of legal votes. Section 3753 provides that when any election held for a county office is contested on account of malconduct of the judges of any precinct it can only be annulled when the rejection of the vote of such precinct would change the result in the remaining vote of the county. *Held*, in a contest for a county office, that where qualified voters, after their names have been illegally stricken from the lists, tender their votes, with affidavits of their qualification, and the same are rejected, they cannot then be counted or made available in such a contest; the power of the court being restricted to the rejection of fraudulent votes actually cast, or to the rejection of the vote of a precinct, where it appears that such vote would change the result in the remaining vote of the county.

2. The fact that fraudulent ballots are cast by persons who are not qualified electors is no ground for rejecting the entire vote of a precinct, where there are means of purging the poll, and ascertaining the actual legal vote.

3. The supreme and district courts have jurisdiction conferred upon them in contested elections by sections 3757, 3765, which provide that, after the filing of the grounds of contest, the district court shall proceed to hear and determine the same; and that, if either party is aggrieved by the judgment, he may appeal therefrom to the supreme court, as in other cases.

Appeal from district court, third district; T. J. ANDERSON, Justice.

Comp. Laws Utah, § 3757, relating to contested elections, is as follows: "Upon the statement of the grounds of contest being filed, the clerk must inform the judge of the district court thereof. The judge of said court must then, by an order to be entered by the clerk, name some day, not less than ten nor more than twenty days from the date of such order, to hear and determine such contested elections." Section 3765 provides that "either party aggrieved by the judgment may appeal therefrom to the supreme court, as in other cases of appeal thereto from the district court."

Arthur Brown and J. L. Rawlins, for appellant. C. F. Loufbourow and Zane & Putnam, for appellee.

MINER, J. The plaintiff, Fergus Ferguson, and the defendant, Clarence E. Allen, were each, respectively, candidates for the office of county clerk of the county of Salt Lake, territory of Utah, at the August election in 1890, and the only candidates therefor. At the canvass of the votes by the county canvassers of the precinct returns, that body adjudged that defendant, Allen, had

received a majority of 15 votes; the said plaintiff having received 3,740 votes, and the defendant having received 3,755 votes; and a certificate of election was accordingly given to the defendant, Allen, who is now in possession of the office. The plaintiff, within the time required by law, filed his notice of contest, and now claims that there are two distinct errors in that computation,—that is: (1) In the Bingham precinct three polling places were provided by the Utah commission, but no division was had of the registration list. The whole registration was left with the judges of each poll. That poll No. 3 in such precinct was established upon the canyon, in the mountains, for the accommodation of the voters at the Brooklyn mine. At this poll 41 ballots were cast at this election,—39 for the contestee, Allen, and 2 for the contestant. Thirteen of the 39 votes cast for contestee, Allen, were proved to be cast fraudulently, by persons not entitled to vote, and were rejected by the trial court, thus leaving Allen's vote in this precinct 26. It is now claimed by the contestant that the court erred in not rejecting the entire vote polled at this precinct, for the reason that the whole poll was proven fraudulent, and no legal votes were shown to have been cast. The contestant also claims that he is entitled to have counted in his favor 15 votes in the South Cottonwood precinct, which were not returned by the judges of election; and claims that the facts concerning these 15 voters are that 15 legal voters, whose names appeared upon the registration list, who were entitled to vote, were wrongfully stricken from the registration list by the judges of election themselves, so as to prevent their vote; that the said 15 voters, however, tried to vote, so far as they were able to do so, and that each of them tendered a ballot, together with an affidavit sworn in due form by each of said persons offering to vote, containing the oath required by the act of congress of March 3, 1887, known as the "Edmunds-Tucker Law;" and that the judges refused to put these ballots into the box. Each of the voters caused said ballots to be preserved, and his name written upon it, identified, and brought into court, so that the ballot was cast by each of the 15 voters as far as it was in the power of the voter to cast it. Each of these votes contained the name of the contestant. Counting these votes, he would have a majority over the contestee of eight votes. Contestant claims: (1) That the court erred in not throwing out the entire ballot of the third poll of the Bingham precinct, and deducting all the 39 votes from Allen's majority, for the reason that the whole of said poll was proven to be fraudulent, and no legal votes were shown to have been cast. (2) The court erred in not allowing the 15 votes which it determined to have been wrongfully and illegally kept from the ballot-box in South Cottonwood precinct, and found to have been by the votes tendered for Fergus Ferguson, to be counted for him.

The evidence upon this case as tried in the court below is not brought before this court by the record, and the only question before this court on the record is whether

or not the findings of fact by the lower court justify the conclusions and judgment of the court below, or whether other and different conclusions of law should have been reached upon the facts as found. Upon these points the court below found, among others, the following facts: "(8) That at said poll No. 3, in Bingham precinct, said 13 ballots were cast by persons who were not qualified electors of said precinct, but who fraudulently personated the names of persons whose names appeared upon the registration list, who were not present to vote. That each of said 13 ballots were cast, counted, and returned for the incumbent, contestee Allen, for said office of county clerk. (9) That in the precinct of South Cottonwood, in said county, 15 different persons presented themselves at the polling place on the day of election, and claimed the right to vote, and each tendered to the judges of election a ballot for contestant for said office of clerk of the county court, but with said ballot tendered on affidavit, sworn to before a justice of the peace by the persons so offering to vote, which affidavit contained the oath required by the Edmunds-Tucker law; and the ballot of each of said persons was refused by the judges for the reason that the names of none of said persons was upon the registry list of said precinct. That the names of each of said 15 persons had, prior to said day of election, been upon the registration list of said precinct, but each of said names had been by the judges of election stricken from said list before the opening of the polls, in accordance with the directions in writing from the deputy registration officer of said precinct. That the right of each of said 15 persons to vote at said election had been objected to by a qualified voter, in writing, before said deputy registrar, and a hearing had been had upon each of said objections after due notice had been given each of said persons before said deputy registrar, and said deputy registrar had determined on such hearing that the names of each of said persons should be stricken from the registration list of said precinct, which said determination was erroneous and illegal, the said 15 persons being qualified voters; but was duly certified to said judges, and the vote of each of said persons was refused by said judges of election, for the reason that the name of each had been so stricken from the registration list."

Upon the foregoing facts as found, the trial court found therefrom the following conclusions of law: "That to the majority of fifteen for the incumbent, as shown upon the face of the canvass and return, there should be added six votes on account of the matters set out in the fourth, fifth, and sixth paragraphs of the foregoing findings of facts, and that from the majority of the incumbent, as thus increased, should be deducted 14 votes, on account of the matter stated in the third and eighth paragraphs of said findings, leaving the incumbent a clear majority of seven votes out of all the legal votes cast for said office at said election. That the ballots offered to be cast for contestant in South Cottonwood precinct, as referred

to in the ninth paragraph of the said findings of facts, and which were rejected by the judges, and were not in fact cast, cannot be counted, nor can any of them be counted or made available to the contestant in this proceeding. And upon the foregoing facts and conclusions, it is adjudged and determined by the court that the contestant's complaint be dismissed, and that he take nothing by this proceeding; that the incumbent was legally elected to said office of clerk of the county court of said Salt Lake county, and his right and title to said office is confirmed."

The above findings include so much only as may be material in this discussion. On examination of the eighth finding of fact, we are unable to discover that there is any error of the court in its findings of law, so far as they apply to the third poll of the Bingham precinct. It is apparent from the findings that 13 ballots were cast fraudulently, by persons who were not qualified electors of that precinct, by personating those whose names appeared upon the registration list, but did not vote; and these 13 votes were properly deducted from the vote of the contestee, Allen. That there was fraud practiced at this poll there can be no question; but it does not appear from the findings of fact that the incumbent, or any of the officers conducting the election, participated in such fraud, or knew of it, or that the proceedings were so tarnished with fraud, neglect, or improper conduct on the part of the officers that the result of the election was rendered so unreliable and fraudulent as to make it impossible to ascertain the actual vote from other evidence in the case. Where the result at a poll, as shown by the returns, is false and fraudulent, and it is impossible to ascertain the actual legal vote from other evidence in the case, the vote of such poll must be wholly rejected. *Paine, Elect.* § 499; *McCrary, Elect.* §§ 488-490; *Phelps v. Schroder*, 26 Ohio St. 549; *Ex parte Murphy*, 7 Cow. 153; *Lloyd v. Sullivan*, (Mont.) 24 Pac. Rep. 218, 227; *Whipley v. McKune*, 12 Cal. 352; *People v. Pease*, 84 Amer. Dec. 242; *Cooley, Const. Lim.* 290; *State v. Hilmantel*, 23 Wis. 422. In this case the court was able, from the testimony, to purge the poll of the 13 fraudulent votes, and give effect to the legal or unimpeached votes cast at this election. We find no error in this. We also find that this court, as well as the court below, had jurisdiction under sections 3757, 3766, Comp. Laws 1888. *Russell v. McDowell*, (Cal.) 23 Pac. Rep. 183.

The ninth finding of fact, as to the vote at South Cottonwood precinct, and the conclusion thereon, presents a more difficult question for determination. The statute provided for a hearing before a deputy registration officer of objections to the right to vote of any persons registered. Section 246, p. 321, 1 Comp. Laws 1888, provides, among other things: "If upon such hearing the justice (by construction, deputy registrar) shall find that the persons objected to are not qualified voters, he shall, within three days prior to the election, transmit a certified list of the names of all such unqualified persons to the judges of election, and such judges shall

strike such names from the registry list before the opening of the polls." Section 3751, Comp. Laws Utah 1888, reads as follows: "No irregularity or improper conduct in the proceedings of the judges, or any of them, is such malconduct as avoids an election unless the irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected when he had not received the highest number of legal votes." See *Russell v. McDowell*, (Cal.) 23 Pac. Rep. 183. This statute should be construed with reference to the laws of the United States applicable to the subject. The trial court took testimony, and made its findings as above given. It appears from the findings of fact (from which the contestant only appeals) that the names of 15 qualified voters of South Cottonwood precinct had, prior to the day of election, been properly upon the registration list of such precinct; that on the morning of the election these names had been stricken from such list by the judges of election, in accordance with the direction of the deputy registration officer of that precinct after a notice and hearing had been given each of them; that such determination of the deputy registrar was erroneous and illegal, the said 15 persons being qualified voters; that each of said 15 persons presented themselves at the polling place on the day of election, and claimed the right to vote, and tendered the judges a ballot containing the name of the contestant for the aforesaid office, together with an affidavit, as required by the act of Congress of March 3, 1887, and that they were refused, for the reason that their names had been so stricken from the registration list.

The question presented here is whether the judges of election should have received or, in any event, counted, these 15 votes, so tendered for the contestant, notwithstanding their names had been illegally and erroneously stricken from the list of voters; no challenge being interposed, as provided in section 251, 1 Comp. Laws 1888. It is apparent that, if these votes had been received or counted for the contestant, the result would have been different, and the contestant, under the findings, would have received eight majority over the vote of Mr. Allen, the contestee. The authorities bearing upon this question are somewhat uncertain and conflicting, depending largely upon the statutes of different states. Bearing upon this question, we find in *Paine on Election*, § 499, the following general proposition: "Honest voters may lose their votes through criminal misconduct of dishonest officers of election. While it is well settled that the mere neglect to comply with directory requirements of the law, or the performance of duty in a mistaken manner, without bad faith, or injurious results, will not justify the rejection of an entire poll, it is equally well settled that when the proceedings are so tarnished by fraudulent, negligent, or improper conduct on the part of the officers that the result of the election is rendered unreliable, the entire returns will be rejected, and the parties left to make such proof as they

may of the votes legally cast for them. But when fraud on the part of the officers of election is established, the poll will be rejected, unless it shall prove to be possible to purge it of the fraud." In other words, the illegal and fraudulent rejection of a sufficient number of qualified electors in a precinct, which, if they had voted, would have changed the result of the election, was held to avoid the election in that precinct. *Renner v. Bennett*, 21 Ohio St. 431; *State v. Commissioners*, 17 Fla. 707; *Patton v. Coates*, 41 Ark. 111; *Phelps v. Schroder*, 26 Ohio St. 558; *State v. Baker*, 33 Wis. 71; 6 Amer. & Eng. Enc. Law, 292, 334, 364, 423, 430; *McCrary, Elect.* §§ 423, 476, 500; *People v. Bell*, 119 N. Y. 176, 23 N. E. Rep. 533; *Lloyd v. Sullivan*, (Mont.) 24 Pac. Rep. 218, 227; *Russell v. McDowell*, (Cal.) 23 Pac. Rep. 183; *People v. Bell*, 8 N. Y. Supp. 254; *State v. O'Day*, (Iowa,) 28 N. W. Rep. 642; *Perry v. Whitaker*, 71 N. C. 475; *People v. Canaday*, 21 Amer. Rep. 465; *Zeller v. Chapman*, 54 Mo. 502. I am unable to see the difference in the degree of fraud or misconduct presented by a case where the election officers illegally and wrongfully strike the name of a qualified voter from the registry list, or in which they illegally and fraudulently place the names of illegal voters on the registry list. In the latter case it is held to be misconduct in the officers. While a disregard of a mandatory provision in a statute as to the conduct of an election will ordinarily avoid an election, it is generally well settled that neglect or disregard of a directory provision of a statute designed to prevent fraudulent voting, followed by actual fraud of that character sufficient in extent to throw doubt on the true result of the election, is ground for rejecting the entire vote of a precinct, provided there were no means of purging the poll. Officers of election are, like other persons, presumed to know the law, and their deliberate neglect to do their duty, or their illegal, wrongful, and fraudulent performance of the duty imposed on them to register and permit all persons having such qualifications to vote, calls for an explanation on their part. In this case it is conceded by contestee's counsel that no evidence of justification was offered before the court below to explain or justify the acts of the election officers. This omission casts suspicion upon their integrity, and with the testimony before the court was presumably sufficient, *prima facie*, to make out a case of erroneous and illegal conduct on their part, as found by the trial court. The case of *Russell v. McDowell*, (Cal.), reported in 23 Pac. Rep. 183, fully sustains this doctrine, and also gives construction to section 3751, Comp. Laws 1888, which is similar to the California statute.

The object of the registry law is to preserve the purity of the ballot-box, and to guard against abuses to the elective franchise, and not to prevent any qualified elector from voting, or unnecessarily to hinder or impair his privilege. This right should not be impaired by the regulation. It must be a regulation, not a destruction, of the right. *Attorney General v. Common Council*, 78 Mich. 545, 44 N. W. Rep. 388;

*Page v. Allen*, 58 Pa. St. 338; *Dells v. Kennedy*, 49 Wis. 555, 6 N. W. Rep. 246, 331; *Warren v. Board*, 72 Mich. 398, 40 N. W. Rep. 553; *People v. Gordon*, 5 Cal. 235; *Webster v. Brynes*, 34 Cal. 273. So it has been held that the exclusion of legal voters through error in judgment (but not fraud) will not defeat an election, because it cannot be known with certainty afterwards how the excluded electors would have voted, and it would be dangerous to receive and rely upon voters' subsequent statements as to their intention, when unfortunately such intention was ineffectually expressed, after it is ascertained precisely what effect their votes would have upon the result. *Cooley, Const. Lim.* pp. 626, 780; *Newcum v. Kirtley*, 13 B. Mon. 515. "If, however, the inspectors of elections shall exclude legal voters, not because of honest error in judgment, but willfully or corruptly, and to an extent that affects the result; or if legal voters are intimidated and prevented from voting, or for any other reasons the electors have not had opportunity for the expression of their sentiment through the ballot-box,—the election should be set aside altogether, as having failed in the purpose for which it was called." *Cooley, Const. Lim.* 621; *State v. Echols*, 41 Kan. 1, 20 Pac. Rep. 523; *Renner v. Bennett*, 21 Ohio St. 441; *Phelps v. Schroder*, 26 Ohio St. 559; *Bell v. Snyder*, 4 Cong. Elect. Cas. 247; *McCrary, Elect.* § 11; *State v. Commissioners*, 17 Fla. 707; *People v. Bell*, (N. Y.) 23 N. E. Rep. 533; *People v. Thacher*, 55 N. Y. 584; *Paine, Elect.* §§ 513, 596; *People v. Pease*, 27 N. Y. 63; *People v. Cook*, 59 Amer. Dec. 470; *Capen v. Foster*, 23 Amer. Dec. 648; *Ebert v. Wood*, 2 Amer. Dec. 487. A proper rule in such cases is that any irregularity in conducting an election, which does not deprive a qualified elector of his vote, or admit a disqualified person to vote, or cast uncertainty on the result, should be overlooked in trying title to an office. *Cooley, Const. Lim.* 618. That no legal voter should be deprived of that privilege by an illegal act of the election authorities is a fundamental principle of law; but, in order for such voter to avail himself of that privilege, he must conform to such reasonable rules as are prescribed by law. He must leave nothing undone on his part that he should do in order to bring himself within this rule. He must see that his name is on the registration list, and otherwise entitled to vote. When he has done this, he has done all that the statute requires in this territory.

In this case it appears that each of these 15 electors had their names properly enrolled; that they were legal voters, and entitled to vote at this election; that the deputy registrar, without any authority of law whatever, erroneously and illegally ordered their names stricken from the lists of qualified electors on the morning of the election; that each of them went and tendered a vote for the contestant, with an affidavit of their qualifications as legal voters. They were refused because their names had been illegally and erroneously stricken from the list of voters by order of the deputy registrar. This illegal act, if it was such, upon the part of the regis-

tration officers, cannot be justified upon any pretext whatever. The rights and wishes of all people are too sacred to be cast aside and nullified by the illegal and wrongful acts of their servants, no matter under what guise or pretense such acts are sought to be justified. This right is a fundamental right. All other rights, civil or political, depend on the free exercise of this one, and any material impairment of it is, to that extent, a subversion of our political system. These registration and election officers act ministerially, or at most *quasi* judicially, and their acts may properly be reviewed and questioned in a proceeding to contest or try the title to any office made elective by the laws of the territory. *People v. Pease*, 27 N. Y. 45; *Gillespie v. Palmer*, 20 Wis. 544; *State v. Robb*, 17 Ind. 536; 5 Cal. 235; *People v. Van Cleve*, 53 Amer. Dec. 69; *Davies v. McKeeby*, 5 Nev. 369; 23 N. E. Rep. 533; *People v. Bell*, 8 N. Y. Supp. 234; *Perry v. Whitaker*, 71 N. C. 475; *People v. Canaday*, 21 Amer. Rep. 465.

These acts of the legislature herein quoted can properly be considered, in connection with the Edmunds-Tucker act, as applicable to this territory in the registration of electors and conduct of elections, and should be so construed as to give every man, who has that right, an opportunity to register and vote, and to have that vote honestly counted. Section 9 of the Edmunds-Tucker law declares vacant all registration and election offices of every description in the territory; and each and every duty relating to the registration of voters and conduct of elections, receiving and registering votes, and the canvassing the same, etc., shall, until other provisions be made by the legislature of the territory, as hereinafter provided, be performed by and under the existing laws of the United States and of said territory by proper persons, appointed by the Utah commission; \* \* \* and no person shall be excluded from the polls who is otherwise eligible to vote, on account of any opinion, etc.; \* \* \* nor shall they refuse to count any such vote on account of the opinion of the person casting the same on the subject of polygamy." The construction of this statute may be found in *McCrary, Elect. § 11*; 6 Amer. & Eng. Enc. Law, pp. 292, 430; *Murphy v. Ramsey*, 114 U. S. 15, 5 Sup. Ct. Rep. 747; *Buchanan v. Manny*, 2 Ellis. 287. Section 2007 of the Revised Statutes of the United States, relied upon by counsel for the contestant, might be a potent factor in the determination of this question had not the supreme court of the United States declared it unconstitutional in *U. S. v. Reese*, 92 U. S. 214. I am satisfied that no case can be found in the books which presents a stronger appeal in behalf of justice to an elector than is presented by the record in this case. Yet the law seems to be settled that, unless the ballot is actually cast, it cannot be counted in a local election contest. Justice CAMPBELL, in his opinion in *People v. Clcott*, 16 Mich. 311, says: "There is no case, so far as I have been able to discover, under any system of voting by closed ballot, which has held that any account can be taken of rejected votes in a

sult to try title for office." Judge Cooley, in his work on Constitutional Limitations, pp. 626, 627, says: "We have seen that no evidence is admissible as to how parties intended to vote who were wrongfully prevented or excluded from so doing. Such a case is one of many without a remedy, so far as candidates are concerned." And in such cases the injured parties have their right of action against the registration officers who violate their oaths, and maliciously or corruptly strike the name of a legal voter from the registration list, or maliciously or corruptly refuse to place such names upon the register; and such parties may be made liable in a civil action in damages, or prosecuted criminally for such corrupt, willful, and malicious acts. *Ashby v. White*, 2 Ld. Raym. 938; *Gillespie v. Palmer*, 20 Wis. 544; 6 Amer. & Eng. Enc. Law, pp. 306, 308, 443; *Hardesty v. Taft*, 87 Amer. Dec. 584; *Jenkins v. Waldron*, 11 Johns. 114; *Patterson v. D'Auterive*, 54 Amer. Dec. 564; *Caulfield v. Bullock*, 18 B. Mon. 494; *Morgan v. Dudley*, Id. 693. By section 3752, Comp. Laws 1888, it is enacted that when any election held for an office exercised in and for a county is contested on account of any misconduct on the part of the board of judges of any precinct election, or any member thereof, the election cannot be annulled and set aside upon any proof thereof unless the rejection of the vote of such precinct or precincts would change the result as to such office in the remaining vote of the county. Also, see sections 3751-3762, Comp. Laws 1888. It is contended with much reason that under the provisions of these statutes no vote can be counted for a candidate that is not actually cast for him while the polls are open, and that the power of this court is limited to the rejection of such fraudulent votes as were actually cast, or to the rejection of the vote of precincts on account of fraud in the officers conducting the election in cases where it appears that the rejection of the vote of such precinct would change the result as to such office in the remaining vote of the county. The full vote of South Cottonwood precinct is not reported or found by the trial court, therefore we are unable to determine whether or not the rejection of the entire vote of South Cottonwood precinct would change the result of the election for this office; therefore, upon the whole record, we find no errors. The findings and judgment of the court below are affirmed, with costs.

ZANE, C. J., and BLACKBURN, J., concur in the result.

(7 Utah, 256)

McGRATH V. TALLIANT.

(Supreme Court of Utah. April 18, 1891.)

EJECTMENT—EVIDENCE—AFFIDAVIT FOR CONTINUANCE—NEW TRIAL—NOTICE.

1. Comp. Laws Utah, § 3353, provides that a motion for continuance, on the ground of absence of evidence, may be made upon affidavit showing the materiality of the evidence, and that due diligence has been used to procure it, and that the court may require the moving party to state in the affidavit the facts he expects to prove. *Held*, that a statement to the effect that defendant is too sick to leave his bed, that his testimony is material, and that his attorney cannot

safely go to trial without him, is insufficient to require a continuance, where it is not made under oath, and does not contain a statement of the facts to be proven.

2. Section 3403 provides that the party intending to move for a new trial must, within 10 days after verdict, file with the clerk, and serve upon the adverse party, a notice of his intention; and, if the motion is made on a statement of the case, he must within 10 days after service of notice, or such further time as the court may allow, prepare a draft of the statement, and serve the same upon the adverse party. *Held*, that an order giving 30 days in which to prepare and serve such a statement does not extend the time for filing and serving notice.

3. Although an order allowing a statement of the case, on motion for a new trial, to afterwards stand as a bill of exceptions on appeal, is erroneous, exception thereto, when made for the first time in the appellate court, comes too late, and the bill must be regarded as part of the record.

4. Plaintiff in ejectment claimed, under a deed from a railroad company, part of a section designated by an odd number, lying within 8 miles of its line of road; and, to show title in his grantor, relied upon an act of congress granting thereto such of the sections indicated by odd numbers, within 20 miles of said railroad, as were not mineral lands, and such as had not been sold, reserved, or otherwise disposed of, and to which pre-emption or homestead claims had not attached. Defendant denied all the material allegations of the complaint, and the evidence showed that he was in possession when suit was instituted. *Held*, in the absence of proof that the disputed tract was not within any of the above exceptions, direction of a verdict for plaintiff was erroneous.

Appeal from district court, first district;  
J. A. MINER, Judge.

*Maloney & Perkins*, for appellant. *Smith & Smith*, for appellee.

**ZANE, C. J.** This is an action of ejectment to recover the land described in the complaint, and damages for its detention. The defendant filed an answer denying all the material allegations of the complaint. When the case was called for trial the defendant's counsel entered a motion for a continuance, and stated that the defendant was so ill as to be confined to his bed; that his testimony was material to the issues involved; that the statement was made upon the representations of defendant's physician, and that the attorney could not safely go to trial without the presence of defendant. The plaintiff objected to the continuance, and the motion was overruled. To this ruling of the court the defendant excepted, and assigns the same as error.

Section 3353, Comp. Laws Utah 1888, provides that a motion to postpone a trial, on the ground of the absence of evidence, can be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. It further provides that the court may require the moving party to state in an affidavit the evidence which he expects to obtain; and authorizes the adverse party to admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled, and if such admission is made, that the trial shall not be postponed. The statement made by the counsel was not sufficient to require a

continuance. It was not under oath, and was not a statement of facts expected to be proved. A continuance will not be granted because of the absence of a party, unless he is a material witness, and, if so, the facts expected to be proved by him must be stated under oath, unless the oath is waived. It must also appear that the party has used due diligence to be present at the trial. The ruling upon the motion to postpone was not erroneous.

The case was tried by the court and a jury, and a verdict was returned for the plaintiff on October 21, 1890, and on the same day judgment was entered on the verdict, and on motion of the defendant an order was made giving 30 days thereafter in which to prepare and serve a statement on a motion for a new trial, and staying execution in the mean time.

Section 3402 of the above-mentioned book provides that "the party intending to move for a new trial must, within ten days after the verdict, \* \* \* file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits or the minutes of the court or a bill of exceptions or a statement of the case. \* \* \* (3) If the motion is to be made on a statement of the case, the moving party must, within ten days after service of the notice, or such further time as the court in which the action is pending, or the judge thereof, may allow, prepare a draft of the statement, and serve the same, or a copy thereof, upon the adverse party." The above-mentioned order extended the time in which to prepare a statement of the case, and to serve the same, but did not extend the time in which to file with the clerk and serve upon the adverse party a notice of intention to move for a new trial. Extension of the time in which to prepare the statement and serve it does not include the extension of time in which to file and serve notice of intention to make the motion for a new trial. The language of the law is plain, and there is no room for construction.

We find no error in the order of the court refusing to settle the statement on which to submit the motion for a new trial. It also appears from the record in this case that on November 12th the motion for a new trial was set down for hearing on the 15th day of the same month, and that on the 20th, and within the thirty days given defendant to draft and serve a statement upon which to have a motion for a new trial, the defendant obtained another order, granting him five days further time in which to prepare, serve, and file a bill of exceptions. And on the 25th day, and within the five-days additional time, the court made the following order. "The above was prepared as a statement on motion for a new trial, and the same, on motion of the plaintiff's counsel not to settle it on the grounds that it was not prepared in the time required by law, was allowed, and the said unsettled statement, over the objections of the defendant, was stricken from the files, notwithstanding the defendant had thirty days from the 21st day of October, 1890, within which to



prepare, file, and serve statement on motion for new trial. The above [referring to the statement] is now presented to the court as a bill of exceptions on appeal, under section 3635, Comp. Laws 1888, and the same, having been examined by the court, is found to be in all things correct, and is hereby allowed, settled, and signed, and this bill of exceptions is hereby made a part of the record in this cause." The motion for a new trial was heard and overruled on the same day that the above order was made. No objection by the plaintiff in the court below to the order quoted, or to the hearing of the motion for a new trial, appears upon the record, nor does it appear that any exception was taken to the same. Under these circumstances, the court cannot treat the order as a nullity, and disregard the bill of exceptions. The action of the court in making it was erroneous, but the order was not void. The objection and exception to the order, and to the hearing of the motion for new trial on the bill of exceptions, comes too late, when made for the first time in this court on the argument of the case. We must regard the bill of exceptions as a part of the record.

The court directed the jury to find the verdict for the plaintiff on the evidence, and to this the defendant objected, and excepted. The record shows that a deed sufficient to convey any interest of the Union Pacific Railway Company in the land in dispute was made and delivered by it to the plaintiff; that the land was part of a section designated by an odd number; and that it is within three miles of the track of the road of that company, as constructed and operated. It also appears from the evidence in the record that the plaintiff had possession of the land before the defendant took possession. Upon this proof of title alone the plaintiff relied. The defendant in his answer denied all the material allegations of the plaintiff's complaint, and the evidence proves that the defendant was in possession of the land at the time the suit was brought. That gave him a right to hold the possession against any other person who could not show title to it. The plaintiff was required to prove that she held title from the government to connect her title with the title the government held. The evidence fails to show a grant by patent from the government to any one. The plaintiff relied upon the act of congress of July 1, 1862, and the act of July 2, 1864, amendatory thereof, to establish the grant of the lands to the Union Pacific Railway Company. The lands granted are described in the above-mentioned acts. If all the sections indicated by odd numbers, within 20 miles of the line as constructed and operated, had been granted, the evidence would have been sufficient to identify the land in dispute as a part of it. But the grant did not include all of such lands. In section 3 of the act of July 1, 1862, is found the following language: "That there be and is hereby granted to the said company \* \* \* every alternate section of public land designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on

the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed: provided, that all mineral lands shall be excepted from the operation of this act." 12 U. S. St. at Large, § 3, p. 492. And section 4 of the amendatory act mentioned amended section 3 of the act amended by striking out "five" where it occurs and inserting "ten," and by striking out "ten" where it occurs and inserting "twenty." 13 U. S. St. at Large, § 4, p. 358. The act above referred to required the company, within a specified time, to designate the general route of its road, as near as might be, and to file a map of the same in the department of the interior. These acts granted only such of the sections indicated by odd numbers, and such parts of them as were not mineral, and as had not been sold, reserved, or otherwise disposed of. They expressly provided that the grant should not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands or improvements of any *bona fide* settler. If the land in dispute was included in any of the exceptions or reservations of law, it was not granted to the Union Pacific Company. No evidence was offered to show that the tract in dispute was not within any of such exceptions or reservations. Without such proof, we are of the opinion that the evidence was not sufficient to support the verdict, and that the court erred in instructing the jury to bring in a verdict for the plaintiff. The judgment appealed from is reversed, and the district court is directed to grant a new trial.

ANDERSON and BLACKBURN, JJ., concur.

(7 Utah, 273)

*In re PRATT'S ESTATE.*

(Supreme Court of Utah. April 18, 1891.)

ILLEGITIMATE CHILDREN — RIGHT TO INHERIT—  
MORMONS.

1 Act Utah 1852, § 25, permitting illegitimate children to inherit from the father, is valid under Act Cong. Sept. 9, 1850, (9 St. p. 453, § 6,) providing that the legislative power of Utah shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of the act.

2. The act was not abrogated by Act Cong. July 1, 1862, (13 St. 501,) annulling all acts passed by the legislature of Utah territory, "which establish, support, maintain, shield, or countenance polygamy," since polygamy is neither established, maintained, nor countenanced by permitting illegitimate children to inherit from the father.

Following Cope v. Cope, 11 Sup. Ct. Rep. 223.

Appeal from district court, third district. *Bennett, Marshall & Bradley*, for appellants, *Milando Pratt et al. C. S. Varian*, for appellees.

PER CURIAM. Orson Pratt died in 1881, intestate, and left a large estate, and many polygamous children, and some legitimate children as well. The question is as to whether the polygamous children

should share in the distribution of the estate. The decree of the district court was that none but the legitimate children should inherit. This decree is reversed, and a decree entered that all of the children acknowledged by him as such in his life-time, or proved to be such by satisfactory evidence, shall share in the distribution of the estate. This decision is made on the authority of the case of *Cope v. Cope*, 137 U. S. 882, 11 Sup. Ct. Rep. 222, recently decided by the supreme court of the United States.

**PEOPLE ex rel. BOARD OF EDUCATION OF SALT LAKE CITY v. GODFREY et al.**

(Supreme Court of Utah. April 18, 1891.)

**ELECTIONS FOR SCHOOL PURPOSES—UTAH TERRITORY—"EDMUNDS LAW."**

1. Act Cong. March 22, 1882, (the Edmunds Law,) declaring vacant all registration and election offices in the territory of Utah, and providing that all duties relating to registration and elections should, until provision should be made by the legislature therein provided for, be performed under existing laws, by a board of five persons to be appointed by the president, who should continue in office until the legislature should make provision for filling the offices made vacant by the act, only vacated the offices then in existence, and did not prevent a legislature selected at an election, conducted by persons appointed by the board, from making laws by which such vacant offices might be filled; and the board of education of Salt Lake City, appointed by Act Utah March 13, 1890, to establish and maintain schools, and to conduct elections to determine whether school bonds shall be issued, have the right to conduct such elections.

2. Sess. Laws Utah 1890, art. 15, §§ 102, 103, providing that 15 days before an election for school trustees for levying taxes, for voting on the issue of bonds, or for any other purpose named in the article, the city councils of the several cities shall appoint three judges of election from each ward, etc., are, in so far as they relate to elections on the issue of bonds, and no further, repealed by sections 122-125 of the same act, relating exclusively to elections on the issue of bonds, and specifically providing another mode of conducting them by the board of education.

Appeal from district court, third district; T. J. ANDERSON, Justice.

*Sutherland & Judd*, for appellants.  
*Baldwin & Tatlock*, for respondents.

ZANE, C. J. This was an application based on an affidavit of Richard W. Young, a member of the board of education of Salt Lake City, for a writ of prohibition against the defendants, prohibiting them from publishing a notice of election to decide upon the issuing and sale of bonds to raise money to purchase school-house sites, and for buying and building school-houses, and from appointing judges to hold such election, and from receiving the returns thereof. The district court held that, upon the facts stated in the affidavit, the law did not authorize the issuance of the writ, and the plaintiff appealed to this court. The fifteenth article of an act of the legislature providing for a uniform system of free schools throughout the territory, in force March 13, 1890, makes the school trustees of each city of the first and second class, together with the mayor thereof, a body corporate, and invests them with the powers deemed necessary

to establish and maintain common schools in the districts embraced in such cities. The city of Salt Lake belongs to the first class. This board is in terms authorized to call elections at which to determine whether bonds shall be issued, to give the notices prescribed, to appoint judges to hold such elections, and to receive and canvass the returns thereof. Notwithstanding the provisions of the law referred to, the defendants issued the notice of the election mentioned in the application, appointed judges to hold the same, and required the returns thereof to be made to them as such board. Had that body the power to do so? To answer this question it becomes necessary to interpret section 9 of an act of congress approved March 22, 1882, known as the "Edmunds Law." That section is as follows: "That all the registration and election offices of every description in the territory of Utah are hereby declared vacant, and each and every duty relating to the registration of voters, the conduct of elections, the receiving or rejection of votes, and the canvassing and return of the same, and the issuing of certificates or other evidence of election in said territory, shall, until other provision be made by the legislative assembly of said territory, as is hereafter by this section provided, be performed under the existing laws of the United States and said territory by proper persons, who shall be appointed to execute such offices, and to perform such duties, by a board of five persons to be appointed by the president, by and with the advice and consent of the senate, not more than three of whom shall be members of one political party, and a majority of whom shall be a quorum. The members of said board so appointed by the president shall each receive a salary at the rate of \$5,000 per annum, and shall continue in office until the legislative assembly of said territory shall make provision for filling said offices, as herein authorized. The secretary of the territory shall be secretary of said board, and keep a journal of its proceedings, and attest the action of said board under this section. The canvass and return of all votes at elections in said territory, for members of the legislative assembly thereof, shall also be returned to said board, which shall canvass all such returns, and issue certificates of election to those persons who, being eligible for such elections, shall appear to have been lawfully elected, which certificates shall be the only evidence of the right of such persons to sit in such assembly: provided, that the said board of five persons shall not exclude any person otherwise eligible to vote from the polls on account of any opinion such person may entertain on the subject of bigamy or polygamy, nor shall they refuse to count any such vote on account of the opinion of the person casting it on the subject of bigamy or polygamy; but each house of such assembly, after its organization, shall have power to decide upon the elections and qualifications of its members; and at or after the first meeting of such legislative assembly, whose members shall have been elected and returned according to the provisions of this act, said

legislative assembly may make such laws, conformable to the organic act of said territory, and not inconsistent with other laws of the United States, as it shall deem proper concerning the filling of the offices in said territory declared vacant by this act.

The connection of the provisions of this section bearing upon the question under consideration will be more apparent if other portions of it are omitted. Without such parts the section would read: "All registration and election offices \* \* \* are declared vacant, and \* \* \* every duty relating to registration, \* \* \* the conduct of elections, the receiving of votes, their canvass and return, and the issuing of \* \* \* evidence of election, shall, until \* \* \* provision \* \* \* made by the legislature as by this section provided, be performed under existing laws, \* \* \* by persons appointed by \* \* \* a board of five persons, \* \* \* who "shall continue in office until the legislature \* \* \* shall make provision for filling said offices, as herein authorized. \* \* \* Said legislature may make such laws \* \* \* as it shall deem proper concerning the filling of the offices declared \* \* \* vacant by this act." This section declared all the election offices of the territory vacant, and provided that the duties belonging to them should be discharged by persons appointed by the board, until legislators chosen at an election held by such persons should enact laws by which they could be filled. The board was authorized to appoint persons to execute the offices made vacant by the first clause of the section and none other. In the use of the language, "all the registration and election offices of every description in the territory of Utah are hereby declared vacant," did congress intend only such as were then in existence, or did it also mean new election offices, created by a legislature chosen at an election held by persons appointed by the board provided in the section? Such a legislature, eight years after the ninth section took effect, provided for the creation of the corporation called the "Board of Education of Salt Lake City," and gave it power to call elections, to vote on the issuance and sale of bonds, and to appoint judges thereof, and to receive and canvass the returns. Such board, and the judges appointed by it, were given all authority necessary to such elections. If the power given and the duties specified with respect to such elections constitute election offices, then they are new ones, and of a corporation brought into existence eight years after the act of congress in question took effect. At the time the act of congress under consideration took effect, election offices existed in the various counties and municipalities in this territory. A portion of the language of the first sentence of the ninth section, considered alone, would indicate an intent to empower the board to appoint persons to execute the duties of election offices that might afterwards be made as well as those then existing. But the other language connected with this, found in the section declaring the offices vacant, and giving the board the power to appoint

until other provision be made by the legislature for filling the offices declared vacant, and requiring the performance to be under existing laws, should be considered with it. The offices which the board known as the "Utah Commission" was authorized and required to appoint persons to execute were those offices which the legislature was authorized to provide by law for filling, and they were the ones made vacant by the first clause of section 9. The election offices created by the legislative enactment of March 13, 1890, were not made vacant by the ninth section of the act of congress of March 22, 1882. The latter section was designed to vacate the offices then in existence, not to prohibit any legislature, whose members might be selected at elections conducted by persons appointed by the board, from making laws by which such vacant offices might be filled. The persons filling the election offices at the time the act of congress took effect were deemed unsuitable, and the laws for filling them then in force were believed to be objectionable. To remove and replace such unsuitable election officers, and to render nugatory such objectionable laws, was the purpose of section 9. So far that section evinced an intention to deny to the people of the territory to which it applied, for a time, the right to have their election offices filled by persons selected by them, or the right, through their legislature, to provide by law for filling them. Only to that extent does the section limit the political action of the people of the territory, or the political action of the counties or other municipalities in its borders with respect to their local affairs. Doubtless the belief of congress was that the public good demanded that the people of this territory should for a time be deprived so far of the principle of local self-government enjoyed by the citizens in the other territories and in the states. A law denying to the people of one territory privileges extended to all the others should be strictly construed. We are of the opinion that the section above quoted did not give the defendants the power to call the election to vote on the issuance of school bonds, and the sale thereof, or to appoint the judges of such election, or to receive or canvass the returns.

Reference has been made to section 23 of an act of congress in force March 3, 1887. This section, in effect, merely requires the laws enacted by the territorial legislature, mentioned in the section above quoted, to be approved by congress before taking effect. Our attention has been also called to an irreconcilable repugnancy between certain provisions of sections 102 and 103 of article 15 of an act of the territorial legislature, (Sess. Laws 1890, p. 128,) relating to elections to determine whether bonds shall be issued and sold, and sections 122-125 of the same act. The two sections first mentioned contain, among others, the following provisions: That "fifteen days before an election for school trustees for levying taxes, for voting on the issue of bonds, or for any other purpose named in the article, the city councils of the several cities shall appoint from each municipi-

pal ward three judges of such election." These sections also require the elections to be held in the municipal wards of the city at the time and place designated in the notice. Section 122 provides that the board of education may, when in their judgment it is advisable, call a meeting, and submit to a vote of the district the proposition to issue and sell bonds to raise money to purchase school-sites, to purchase or build school-houses. Sections 123 and 124 are as follows: "The meeting provided for \* \* \* shall be called by publishing a notice signed by the president and clerk of the board of education. \* \* \* Such notice shall contain—*First*, the time and place of holding such election; *second*, the names of three judges to conduct the same; *third*, the hours during the day (naming not less than eight hours) for which the polls will be open; *fourth*, the amount and denomination of the bonds, the rate of interest, and the number of years, not exceeding twenty, the whole or any part of said bonds are to run; *fifth*, for what purpose it is proposed to issue the bonds." "The board of education shall appoint three judges to conduct the election. \* \* \* At such elections the ballots shall contain the words 'Bonds,—Yes,' or 'Bonds,—No.'" Section 125 requires the returns to be canvassed by the board of education, and makes it the duty of that body to file with the clerk of the county a certified copy of the order of the board, and of the notice, and an affidavit showing when and where published, and also a statement showing the number of inhabitants, and the value of the taxable property in the district, and that the amount of bonds proposed to be issued does not exceed 2 per cent. of the value of such taxable property, and also facts showing that all matters in relation to the issue thereof were lawfully conducted. Sections 102 and 103 provide for calling and holding elections to vote for trustees, levying taxes, and other elections, as well as those for voting on the issuance and sale of bonds. Their provisions are more general, while those sections making it the duty of the board of education to call the elections, appoint the judges, canvass the returns, and make certificates, etc., are very specific. They provide alone for elections to vote on propositions to issue and sell bonds. They evince greater care in their preparation and more deliberation than the sections first referred to, so far as they relate to the issuance and sale of bonds. To hold that the latter govern elections to vote on the issue and sale of bonds does not invalidate sections 102 and 103, so far as they provide for elections other than to vote on the proposition for the issue and sale of bonds. The intention of the legislature is clear when all the provisions of the act relating to such elections are considered together. It is that these sections were intended to provide for holding all other elections mentioned in them except the one relating to bonds. As to the provisions relating to all other elections, there is no conflict between the two sections. And the provisions relating to the other elections do not depend on those

relating to elections for the issuance and sale of bonds. The latter may fall and the former stand. The provisions of sections 102 and 103 may stand, so far as they are not in conflict with the more special provisions of sections 122–125. The provisions of the first two sections, so far as they relate to elections to vote on the issuing and sale of bonds, and no further, are repealed by the latter sections. *Suth. St. Const. § 160; End. Interp. St. § 216.* The court holds that the election to decide upon the issuance and sale of the bonds in question should be called and conducted according to the provisions of sections 122–125, above referred to. And we further hold that the qualifications of voters must be determined by the laws of the United States, when any conflict arises between them and the laws enacted by the territorial legislature. We are of the opinion that the judgment appealed from is erroneous. Judgment reversed.

MINER and BLACKBURN, JJ., concur.

(7 Utah, 288)

BROWN v. SOUTHERN PAC. R. CO.

(*Supreme Court of Utah.* April 18, 1891.)

MASTER AND SERVANT—PERSONAL INJURIES—EMPLOYMENT OF INCOMPETENT FIREMAN.

1. In an action against a railway company for damages alleged to have been caused by the negligence of a fireman, temporarily operating a locomotive, in backing it up too rapidly, whereby plaintiff, a brakeman engaged in coupling, lost a hand, the court refused an instruction, based upon a contention that the fireman was a fellow-servant, that though the jury found that he caused the accident by too rapidly backing the engine, yet, if they found that he was qualified to perform the duties incident to his position, and that among them was that of handling the engine in the absence of the engineer, then they must find for defendant. It charged instead, in substance, that to entitle the plaintiff to recover they must find that the fireman was negligent or incompetent; that such negligence or incompetence must be proved, not by the circumstances of the accident alone, but that facts of his previous career must be taken into consideration; and that the defendant failed to use reasonable care in employing him. *Held* no error.

2. Where it appeared that plaintiff, at the time of the injury, was 23 years old; that he had been confined only about a month thereby; that he was still able to do light work about a farm; that his health was not at all impaired; that he was not educated for a profession; that at the time of the injury he was earning about \$75 per month,—a verdict of \$12,000, though reduced by permission of plaintiff's counsel to \$10,000, for the loss of a hand, is grossly excessive.

3. Such judgment being all remitted by plaintiff's counsel, except \$4,000, will be affirmed, with costs.

Appeal from district court, first district; H. P. HENDERSON, Justice.

J. L. Rawlins and L. K. Rogers, for appellant. Marshall & Royle, for appellee.

ANDERSON, J. This action is brought by plaintiff to recover damages alleged to have been sustained by reason of the negligence of the defendant, whereby plaintiff was so injured in one of his hands that it had to be amputated, and also for other bodily injuries. There was a trial to a jury, and a verdict for plaintiff for \$12,000, for which amount the court gave judgment. There was a motion for a new

trial, one of the grounds of which was that the damages awarded were excessive. Upon the hearing of this motion the court ordered the judgment reduced to \$10,000, by consent of plaintiff, and overruled the motion. The defendant brings this appeal from the judgment and from the order denying the motion for a new trial. The plaintiff was head brakeman on a train on the defendant's road at the time he received the injuries complained of. The train was going west, and reached Blue Creek station, on defendant's line of road, about 10 o'clock at night. At this point there is a hill where it is customary to attach another engine, called a "helper" engine, to the train to help it up the ascent. The conductor of the train ordered plaintiff to couple the helper engine, which was standing on a side track, to the engine drawing the train. Plaintiff opened the switch, and called to the man in charge of the helper engine to bring it out onto the main track, so that the coupling could be made. When the helper engine reached the main track plaintiff signaled the man in charge of it to back the engine up, which he did for about half the distance to the train, and stopped, when plaintiff adjusted the coupling-pin, and signaled him to continue to back the engine, while plaintiff ran to the stationary engine, stepped upon the cow-catcher, and picked up the push-bar to couple into the draw-head of the helper engine. The plaintiff testified that the engine came back with such speed and force that he failed to make the coupling, and was unable to get out of the way, and his left hand was caught between the bumpers of the two engines, and crushed, so that it had to be amputated. He also received a flesh wound in his right thigh. Plaintiff testified that the helper engine came back at the rate of four or five miles an hour. The helper engine was in charge of the fireman, he having been placed in charge of it by the engineer, who was temporarily absent. The plaintiff testified that it was too dark for him to see who was in charge of the engine. It is claimed by plaintiff that the fireman, Fay, who was in charge of the helper engine, was not competent to act as engineer, and that it was his negligent and unskillful management of the engine that caused the accident, and that his incompetency to act as engineer was known to the regular engineer, who placed him in charge, or could have been known if proper inquiry and examination had been made with respect to his competency, and that it was negligence in the defendant company to permit him to be placed in charge of the engine. On behalf of the defendant it is claimed that Fay, although only a fireman, was competent to manage the engine, that due care was observed in employing him as fireman, and that, being in fact a competent engineer, it was not negligence to intrust the engine to him for the particular duty then in hand; and also that he was a fellow-servant with plaintiff, and that, therefore, plaintiff cannot recover, even if the negligence of Fay caused the injury complained of. It is further contended that the plaintiff was guilty of negligence contributing directly

to the injury complained of, and for that reason cannot recover.

At the close of the evidence on behalf of the plaintiff, the defendant moved for a nonsuit, on the ground that no negligence on the part of the defendant had been shown; that, if any negligence had been shown which tended to produce the injury complained of, aside from the contributory negligence of plaintiff, it was the negligence of a fellow-servant; and that plaintiff was guilty of negligence which contributed directly to the injury complained of. The motion was overruled by the court, and this ruling is claimed as error. Whether the motion should have been sustained or not is now immaterial, as the defendant waived any error there may have been in the ruling of the court, by failing to stand on its motion, and in offering evidence in its behalf after the ruling of the court had been made. *Insurance Co. v. Crandall*, 120 U. S. 527, 7 Sup. Ct. Rep. 685; *Railroad Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. Rep. 321; *Insurance Co. v. Smith*, 124 U. S. 405, 8 Sup. Ct. Rep. 534.

At the close of the evidence the defendant requested the court to instruct the jury that the evidence did not warrant a verdict for the plaintiff, and that they should return a verdict for the defendant, which the court refused to do, and this refusal of the court is one of the errors complained of. We have examined the evidence, and think there was no error in the court submitting the question of negligence to the jury.

The defendant requested the court to give the following instruction to the jury: "The jury are instructed that if they find from the evidence that Fireman Fay caused the accident by too rapidly or otherwise backing the front engine onto the rear engine, yet if from the evidence they find that Fireman Fay was a competent fireman, and qualified to perform the duties incident to or usual to his position, and that among those duties was that of handling the engine during the temporary absence of the engineer, then the jury are instructed to find for the defendant."

In view of the instructions which were given the jury by the court, we think there was no error in refusing this one. The jury were instructed that, "to entitle the plaintiff to recover, by reason of the negligence or incompetence of Fireman Fay, they must find that not only was he negligent or incompetent, but that fact must have been known to the defendant, or should have been known to it, by the use of reasonable or proper care; and that they should not find that the fireman, Fay, was negligent or incompetent from the circumstances and facts occurring at the time and occasion of this accident, but should take into consideration his prior record and conduct, as well as his subsequent career, and the burden of proof is on the plaintiff." Again, the court instructed the jury that "the jury must find from the evidence, not only that Fireman Fay was incompetent or negligent before they can find a verdict for plaintiff, but they must also find from the evidence that the defendant was negligent, and failed to use

reasonable and proper care in his employment, or in his retention, and the burden of proof is on the plaintiff." We think these and other similar instructions given by the court presented the question as to the liability of the defendant for the alleged negligent acts of Fireman Fay, while acting in the capacity of engineer, as fairly and fully as the defendant was entitled to.

The jury returned special findings with their general verdict, in which they found every material fact in favor of the plaintiff, and it is insisted that neither the special findings nor the general verdict are supported by the evidence. But we need not discuss these questions, as the case must be reversed on another ground.

We think the damages awarded by the jury grossly excessive, and, even as reduced by the court, the amount of plaintiff's recovery is greatly in excess of what he is justly entitled to. The plaintiff testified that he was 22 years old when he was injured; that he was confined to the house about two and a half or three weeks, most of the time in bed, on account of his injuries, and that it was about a month before he could go out on the street, and that after getting out on the street the cold bothered his arm some; that he suffered pain longer with his leg than with his arm; that it was about three weeks before his leg healed up. He further testified that he had been employed as a brakeman about two and a half months; that before he began work as a brakeman he worked at home for his father on a farm; that he was in good health before he was injured, and earned his living by physical labor, and was not educated for any profession. He also testified that since he recovered from his injuries his health had been good, and that he is now a strong, healthy man; that he works for his father on the farm, but that about all he does is to do chores and work in the garden. He also testified that at the time he received the injuries complained of he was receiving from the railroad \$70 per month, and something additional for extra time, making his wages at that time amount to \$75 or \$80 per month. A railway company is entitled to have its rights and liabilities determined by the same rules of law and justice that apply in suits between individuals. For an injury similar to the one complained of in this case, if inflicted by an individual, no jury would find such a verdict as was returned in this case. It is not claimed that the injury was wanton or willful, and there was therefore no room for vindictive damages. The injury to the plaintiff was merely an accident, resulting, it is true, as found by the jury, from the carelessness of the defendant company, but still an accident, in the sense that it was not intentional. While the injury to plaintiff is severe, it only partially disables him, and there are many occupations in which he will be able to earn nearly, if not quite, as much as he usually earned before the accident. By the verdict as rendered, the plaintiff was given at once a nice little fortune, more than the majority of men earn in a lifetime, and vastly more than the great ma-

jority of men accumulate by a life of toil and privation. The annual income he would derive from the amount of the verdict, at the ordinary rate of interest, would be about one-fourth more than he was getting when he was injured, and the interest on the judgment, as finally modified, would exceed the highest wages the testified to ever having earned before the accident. There can be no reasonable doubt that the heavy damages awarded by the jury in this case were given under the influence of passion or prejudice, and, if passion or prejudice swayed the minds of the jury in awarding damages, the same or other improper influences may have operated upon their minds in determining the questions of fact necessary to fix the liability of the defendant. Doubtless the 12 men who composed the jury were, individually, honest men, but we are forced to the conclusion that they did not properly appreciate their duties and responsibilities as jurors in this case. The popular prejudice against railway corporations may not be wholly undeserved, but it should not be permitted to find expression in unjust verdicts. When the prejudice against these corporations becomes so strong as to taint the administration of justice, it becomes the duty of the courts to interfere. However reluctant to disturb the verdict of a jury for such a cause, we think the verdict in this case so excessive that it ought not to stand. While we consider it our duty to hold railway companies to a strict accountability for damages caused by their negligent or wrongful acts, yet we also feel it our duty to not permit a glaring injustice to be done them to satiate the demands of popular prejudice. The judgment must be reversed, and the cause remanded.

ZANE, C. J., and BLACKBURN and MINER, JJ., concur.

Thereupon, after the reading of the opinion of the court, the respondent, by his counsel, offered in open court to remit of the judgment herein all except \$4,000, and, the same being so remitted, it was ordered that the judgment herein be, and the same is hereby, affirmed for \$4,000, and costs.

(7 Utah, 296)

WEAVER v. WEAVER *et al.*

(Supreme Court of Utah. April 18, 1891.)

JUDGMENT FOR ALIMONY—EXECUTION AGAINST DECEASED HUSBAND'S ESTATE—GARNISHMENT.

1. Comp. Laws Utah 1888, §§ 8424, 4135, provide that when a judgment has been rendered against a decedent in his life-time no execution shall issue after his death, except only where the judgment is for the recovery of real or personal property, or the enforcement of a lien thereon. *Held*, that a money judgment rendered as alimony to the widow of decedent during his life-time was not within the above exception.

2. Under such circumstances, where plaintiff's right to enforce her judgment by execution has been extinguished by the death of the judgment debtor, she cannot have such process against a garnishee.

Appeal from district court, third district; ZANE, Justice.

*Frank Hoffman, for appellants. John R. McBride, for appellee.*

ANDERSON, J. On the 6th day of February, 1883, the plaintiff obtained a decree of divorce against the defendant David Weaver in the third district court. At the time of the commencement of the action, the court issued an injunction restraining the defendant from disposing of his property pending the suit. At the final hearing of the case the court found that the defendant had been personally served with the writ of injunction, the summons, and a copy of the complaint in the case, on the 29th day of May, 1882; and that on or about the 30th day of September, 1882, in violation of the injunction of the court, he sold and disposed of his property, and secretly left the jurisdiction of the court, taking with him the proceeds of the sale of his property, and without having complied with the order of the court, made at the commencement of the action, for the support of the plaintiff and her children pending the action, and for plaintiff's attorney fees. The court, by its judgment and decree, gave to the plaintiff the custody and control of her four minor children, and also gave her all the real estate owned by the defendant on the 29th day of May, 1882. The court also adjudged that the defendant pay to the plaintiff \$7,500, with interest thereon at the rate of 10 per cent. per annum until paid, and \$7,500 to her as trustee for the support and education of her minor children, and that he pay the counsel fees and costs of the case. On the 17th day of December, 1888, J. R. McBride, attorney of record for the plaintiff, filed a motion in the third district court that execution issue to enforce the decree, and in support of the motion filed his own affidavit, setting forth the above facts down to the rendering of the judgment; and, also, the further facts that the defendant left the territory of Utah in September, 1882, and has ever since remained beyond the reach of the process of this court; and that in 1884 he went to England, and remained there until August, 1888, when he went to Evanston, Wyo., where he died intestate in October of that year; that no part of the judgment or costs had been paid; that W. L. Pickard, of Salt Lake City, had bought a part of the defendant's property, and was indebted to him therefor in the sum of \$10,500 and interest thereon at 10 per cent. per annum since August 4, 1884; that an administrator of the estate of said defendant had been appointed in Wyoming, who had demanded of said Pickard the amount he was owing defendant. The court granted the motion of plaintiff, and ordered an execution to issue, and under it Pickard was summoned as a garnishee. He appeared in person and by attorney, and was sworn and examined as to his indebtedness to defendant. The court found that Pickard, by his own admission, had received from the defendant the sum of \$10,000 on the 4th day of August, 1884, for which he had given his note, due in one year, with interest at 7 per cent. per annum, no part of which had been paid, and that the note was non-negotiable in form; that the note was in

the possession of the administrator,—one Hilton,—in Wyoming; and that Pickard admitted an indebtedness to the defendant in the sum of \$10,000 and interest for one year at 7 per cent., and denied any other or greater indebtedness; whereupon the court ordered Pickard to pay the marshal on the execution the sum of \$10,700. Pickard paid to the marshal \$3,000 on the execution, March 8, 1889, since which time no more has been paid. In 1889 J. R. McBride was appointed administrator of the estate of said David Weaver in Salt Lake county, Utah, and, having obtained possession of the Pickard note, brought suit thereon on the 30th day of November, 1889, for the full amount of the note, less the \$3,000 which had been paid. Pickard defended by pleading the statute of limitations, and judgment was rendered in his favor April 12, 1890, and from which no appeal was taken. April 30, 1890, plaintiff applied to the third district court by motion for an order for the issuance of an execution to enforce the order of March 2, 1889, to collect the balance ordered to be paid. Pickard was cited to appear and show cause why the motion should not be granted. He appeared, and opposed the granting of the motion, and an order was made by the district court that an execution issue for the balance of principal and interest unpaid, amounting to \$8,359.10, to the granting of which order Pickard excepted, and brings this appeal.

The statutes of this territory provide that "the party in whose favor a judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement." 2 Comp. Laws 1888, § 3419. At the time the execution was issued on this judgment under which Pickard was garnished, more than six years had elapsed since the judgment was rendered. Whether, in a case where, pending an action, an injunction has been issued and served on the defendant, restraining him from disposing of his property, and he sells all his property notwithstanding such injunction, and leaves the territory, and remains away permanently, an execution may issue after five years from the rendition of judgment, we do not deem it necessary to determine in this case, in view of the other facts disclosed by the record. It may be proper to observe, however, that the statute makes no exception in such a case; the only exception provided by the statute being that "in all cases other than for the recovery of money the judgment may be enforced or carried into execution after the lapse of five years, by the leave of the court." *Id.* § 3423. It is provided by statute that, "when any judgment has been rendered for or against the testator or intestate in his life-time, no execution shall issue after his death, except as provided in the Code of Civil Procedure relative to executions. Judgment against the decedent for the recovery of money must be presented to the executor or administrator, like any other claim." *Id.* § 4135. The Code of Civil Procedure, relative to executions, provides that, "notwithstanding the death of a party after judgment, execution thereon may be issued, or



it may be enforced as follows: (1) In the case of the death of the judgment creditor, upon the application of his executor or administrator, as successor in interest. (2) In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon." *Id.* § 3424. The judgment sought to be enforced in this case was a money judgment, and was not a judgment for the recovery of real or personal property, or the enforcement of a lien; and under the sections of the statute above quoted no execution could issue thereon after the death of the judgment defendant. It follows, therefore, that the order of the court of March 9, 1889, that execution issue on the judgment, was void; and likewise the order of May 7, 1890, which was based on it, and from which this appeal was taken; and such is the general rule. 1 *Freem. Ex'ns* (2d Ed.) § 35. The plaintiff can have no greater right to enforce her judgment against the garnishee than she has against the judgment defendant, and, when her right to have execution issue was terminated by the death of the defendant, no proceedings in garnishment could be begun or carried on. Drake, in his work on Attachments, says: "The plaintiff's right to hold a garnishee exists only so long as, in the suit in which the garnishment takes place, he has a right to enforce his claim against the defendant. When his remedy against the latter is at an end, so is his recourse against the garnishee. That the latter may show that the plaintiff's right against him has been thus terminated cannot be doubted." Drake, *Attachm.* (2d Ed.) § 459. The court, therefore, erred in ordering that execution issue against the garnishee, and its action is reversed.

MINER and BLACKBURN, JJ., concur.

(16 Colo. 373)

WHALEN v. McMAHON, (APPEL *et al.*, Interveners.)

(*Supreme Court of Colorado.* April 13, 1891.)

GARNISHMENT—INTERVENTION—APPEAL.

1. Under Gen. St. Colo. 1883, § 2011, providing that third persons must assert their rights to property seized under attachment issued by a justice of the peace before the trial of the main action, a claimant of a fund garnished under an attachment cannot intervene after the trial of the main action and judgment for plaintiff.

2. An appeal by the intervenor from the order of the justice dismissing the petition of intervention, because filed after trial in the main action, should be dismissed, as the intervenors have no standing in court.

3. Where the intervenor claims the garnished fund by assignment from the debtor, and it appears by the assignment that it was not absolute, but only as security for what indebtedness the assignor might incur to the assignee, judgment should be given for the intervenor for only so much of the fund as is necessary to satisfy his debt, and for plaintiff for the balance.

Commissioners' decision. Appeal from Fremont county court.

Joseph H. Maupin, for appellant.

BISSELL, C. In 1887, Whalen brought this suit against the defendant, McMahon, to recover a sum of money which he al-

leged McMahon owned him. A writ of attachment was issued by the justice before whom the suit was brought, and served upon the Denver & Rio Grande Railroad Company as garnishee, which made answer, acknowledging an indebtedness to the defendant of \$113.84. The case was subsequently tried, and a judgment for the plaintiff followed. The company did not turn over the money either to the officer serving the writ or to the justice when they filed their answer. On the 13th of September, and 10 days after the rendition of judgment against defendant, Appel & Pope, who claimed to be the owners, by assignment, of the debt which was due from the railroad company to McMahon, sought to assert their claim to the money by means of a petition of intervention which they attempted to file with the justice. The right to file the petition was disputed, and the justice refused to entertain it. At this stage of the proceedings, a notice under the statute having been issued to the railroad company to show cause why final judgment should not be entered against them, judgment against the company was rendered in favor of the plaintiff for \$55.10, with the costs, making a total judgment of \$89.20. Appel & Pope, who sought to intervene and claim the money, attempted to take an appeal from the refusal of the justice to entertain their petition, an appeal was allowed, and the cause went to the county court, where a motion was made by Whalen to dismiss the appeal, which was denied. The court took jurisdiction of the case, heard it upon the merits as to the intervenors, and finally entered judgment for them for all the money due from the company to McMahon. It is apparent from this statement that the judgment of the county court cannot be maintained. Whatever right third parties may have to property which has been seized under a writ of attachment issued by a justice of the peace must be asserted before the trial of the main action. Gen. St. 1883, § 2011. This section plainly and distinctly limits the exercise of that right to a time antecedent to the trial of the action. It is thus evident that the justice was right in refusing to entertain the petition of intervention. It is equally clear that the motion to dismiss the appeal should have been granted. The intervenors, Appel & Pope, were without standing in court. They had never become parties to the suit, and were without right, either of contest or appeal. *Id.* §§ 1984-2011; *Downing v. Florer*, 4 Colo. 209. Since the case must be reversed, and further litigation over the fund is likely to ensue, the error which it is apparent the court committed in disposing of the merits of the suit will be considered. The answer which the railroad company filed in the justice's court, in response to the garnishee process, set up an assignment from McMahon to Appel & Pope, of which they had notice. Of course, it was their duty, as well as their privilege, to set up this assignment, and protect themselves from any liability which they otherwise might incur if they simply answered an indebtedness to McMahon, and judgment should be rendered against them. The court,

however took an erroneous view of the rights growing out of the assignment, as between the railroad company, the assignees, Appel & Pope, and the attaching creditor. The testimony which was introduced on the trial made it plain that the assignment, which was executed by McMahon to his grocers, Appel & Pope, was an assignment as security for whatever debt might be contracted between the assignor and the assignee, upon the sale of goods during the month for which the wages were assigned. In other words, the assignment was not an absolute assignment, for a valuable consideration, of the whole sum; but was a transfer to the grocers of so much of his money as might be necessary to liquidate any claim which they might have against him for goods delivered before the end of the month. The evidence before the court substantially was that the indebtedness to be protected by the assignment amounted to less than \$25, while the amount due by the railroad company was upwards of \$113, the excess being enough to satisfy the attaching creditor's debt. Under these circumstances, while the railroad company would have the right in the garnishment proceedings to protect themselves from the effect of the assignment, it was equally the right of the attaching creditor to show the nature, character, and extent of the transfer, in order that he might have judgment against the garnishee for whatever excess there might be over Appel & Pope's claim. According to the testimony, what was due from the railroad company was enough to cover both debts. Under these circumstances, had the appeal been properly taken, the judgment of the county court was wrong; for it should only have gone to the extent of holding that Appel & Pope, by virtue of their assignment, had the right to take enough of the claim against the railroad company to satisfy the debt which might be due to them from McMahon. The judgment should be reversed and remanded, with directions to the county court to dismiss the appeal.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed, and the cause remanded, with directions that the county court dismiss the appeal.

#### JOHNSON V. JONES.

(Supreme Court of Colorado. April 10, 1891.)

JURISDICTION—INSTRUCTIONS—PREFERRING CREDITORS—EVIDENCE—REVIEW ON APPEAL.

1. Replevin against a sheriff for the wrongful seizure of plaintiff's goods under an attachment against another can be brought in any court of competent jurisdiction, and need not be brought in the court out of which the writ of attachment is sued.

2. It is not error to refuse an instruction containing a correct abstract proposition of law, but having no application to the issues.

3. It is proper to refuse to instruct the jury that, from the fact of the intimacy of an insolvent debtor and his preferred creditor, they may infer that the creditor knew of the debtor's condition.

4. On appeal the court will not interfere with the verdict of the jury, unless it appears that they were actuated by passion or prejudice.

Commissioners' decision. Error to district court, Jefferson county.

*Bullock, Hardenbrook & Dixon* and *M. B. Carpenter*, for plaintiff in error. *H. N. Sales* and *I. R. Howze*, for defendant in error.

BISSELL, C. This was an action of replevin commenced in August, 1883, by James Jones against the defendant, Johnson, who was the sheriff of Jefferson county, to recover a quantity of stock and chattels which he had seized under a writ of attachment. The attachment writ was issued in a suit previously brought by one E. W. Tweedy against L. W. Jones in the district court of Arapahoe county. The plaintiff alleged title, and a wrongful taking by the sheriff. The sheriff justified, and set up the pendency of the attachment suit, and his levy thereunder. The property remained in the possession of the plaintiff up to the time of the trial. The case was tried to a jury, and they found that the plaintiff, James Jones, was the owner of the property which had been seized, that he was entitled to its possession, and had been damaged in the sum of \$1. Upon this verdict the proper judgment was entered by the court, and the defendant Johnson sued out this writ of error. Only three errors are relied upon.

The first contention of plaintiff in error is that the district court of Jefferson county was without jurisdiction to entertain the suit. The whole argument is based upon the hypothesis that, as the suit in which the writ of attachment was issued had been commenced in the district court of Arapahoe county, no action could be brought in any other court of concurrent jurisdiction within the limits of the state, which would in any wise affect the possession of the property. The argument is based upon the case of *Parks v. Wilcox*, 6 Colo. 489, 600, where the principle for which he contends was applied to a case of seizure of property by a federal marshal, and the subsequent institution of a suit against that officer in a state court by a person who claimed title. Neither the case nor the principle has any application whatsoever to the controversy here. Since the judgment in this case was rendered, this question has been put at rest in this state, and the principle controlling actions of this description within this jurisdiction has been declared and illustrated by an able and exhaustive opinion, containing a review of all authorities, in the case of *Wilde v. Rawles*, 13 Colo. 583, 22 Pac. Rep. 897. In that case the court decided that, wherever the goods of one not a party to the action were seized by the sheriff, the owner had an undoubted remedy against the sheriff as a wrong-doer. The court said "that if there is any principle of law which may be considered as entirely settled by a long series of uniform decisions in the courts, both at home and abroad, at common law and under the code practice, it is that he who, whether an officer of the law or otherwise, takes the property of another

without authority, is a wrong-doer, and the taking is wrongful." Proceeding upon this hypothesis, the court established the doctrine that the action for the wrongful taking might be brought in any court of competent jurisdiction. It therefore follows that the contention of the plaintiff in error that the court was without jurisdiction cannot be maintained.

Error is likewise predicated upon the refusal of the court to give three specified instructions. As to one of them, the response is that the subject-matter of the instruction was fully covered by the instructions which the court gave in the cause. As to another, it might be said that, while the instruction embodied a correct abstract proposition of law, it was of no practical application to the issues being tried before the jury, nor would it have aided them in reaching a correct verdict in the case. This being true, it was not error for the court to refuse to give it. While with equal propriety it might have been read, the refusal manifestly did the defendant no harm. The third and last instruction which the plaintiff in error claims ought to have been given by the court does not accurately express the law which controls this class of actions. The instruction asked, in terms, is: "Although the law permits an insolvent debtor to make choice of whom he will pay, it denies him the right in doing it to contrive that the other creditors shall never be paid, or to use the debt to delay, hinder, or embarrass the other creditors in the enforcement of their demands, if the grantor and the grantee be intimate; from this fact it may be inferred that the grantee knew the former's condition." It is evident that a condition is attached to the legal principle which is here sought to be stated, which can never determine its applicability in any case. While it may be true that the permission which the law gives to an insolvent debtor to make choice of the creditor who shall receive his money is coupled with the condition that it shall not be exercised for certain specified reasons which the law declares to be fraudulent, the right is never hampered by the relations which may exist between the debtor and the creditor; their intimacy is no limitation upon the right which the law gives. It may be true that the jury would have a right to take into consideration the relations existing between the parties in reaching a conclusion as to the knowledge possessed by the creditor of the debtor's financial straits, but that knowledge is not a necessary inference to be drawn from the extent or character of their friendship. It was a proper subject for the consideration of the jury, but to have instructed them to draw the inference would have been error, and the instruction, therefore, was properly refused.

The only other error insisted upon is that the verdict of the jury was not supported by the evidence. This error assigned simply calls for the reiteration of the rule which has long been established in the state, and always repeated wherever the question is raised, viz., that the court will never interfere with the verdict of a jury unless, "upon the whole record, it appears

that the jury acted so unreasonably in weighing testimony as to suggest a strong presumption that their minds were swayed by passion or prejudice, or that they were governed by some motive other than that of awarding impartial justice to the contending parties." *Green v. Taney*, 7 Colo. 278, 3 Pac. Rep. 423; *Barker v. Hawley*, 4 Colo. 327; *Lebanon Min. Co. v. Consolidated Republican Min. Co.*, 6 Colo. 372. Under this rule, the judgment in this case cannot be disturbed. There was abundant evidence upon which the jury could find the verdict which they rendered, and, whatever may be the opinion of the court as to the true merits of this case, it must be controlled by the verdict of the jury, when it is abundantly supported by competent testimony. The judgment should be affirmed.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

(45 Kan. 681)

**BARKER v. HOVEY et al.**

(Supreme Court of Kansas. Jan. 10, 1891.)

IMPROVEMENT OF HIGHWAYS — OPENING COUNTY ROAD — DEDICATION — SIDEWALKS — ESTOPPEL OF TAX-PAYER.

1. Under chapter 214, Laws 1887,—"An act providing for the improvement of county roads,"—the county board have no power to order the improvement of a strip of ground laid out and intended as a street through land platted into blocks and lots, that had never been used or traveled as a road, and that never had been regularly laid out as a road in accordance with the provisions of the general road law.

2. The board of county commissioners have no power to declare by resolution a strip of ground laid out and intended for a street or road through land platted into blocks and lots to be a county road.

3. A dedication to the county by the land-owners on each side of land sufficient for the purposes of a road, and an acceptance thereof by the board of county commissioners, accompanied by their declaration that the land dedicated shall constitute a county road, is in disregard of the proceedings prescribed by statute concerning roads and highways, and does not make the strip of land dedicated a county road, or a regularly laid out road. *Olyphant v. Commissioners*, 18 Kan. 386, cited and followed.

4. Under chapter 214, Laws 1887,—"An act providing for the improvement of county roads,"—the county board have no power to order a regularly laid out road to be improved to a greater width than that established by the proceedings under the general road law, by which the road in question was laid out and opened.

5. Under chapter 214, Laws 1887,—"An act providing for the improvement of county roads,"—the board of county commissioners have no power to order or contract for sidewalks 14 feet wide on each side to be built along a regularly laid out county road.

6. A tax-payer is not estopped from asserting a jurisdictional defect in assessment proceedings when he had no knowledge of the defect at the time the proceedings were instituted, nor until after the work had been commenced, nor until after the improvement had been completed.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Wyandotte county; O. L. MILLER, Judge.

*Hutchings & Keplinger*, for plaintiff in error. *Winfield Freeman, A. L. Berger*,

and *Scroggs & Gibson*, for defendants in error.

**SIMPSON, C.** This is an action brought under section 253 of the Code by the plaintiff, Thomas J. Barker, against the county commissioners, clerk, and treasurer of Wyandotte county, to enjoin the collection of certain taxes and special assessments levied upon plaintiff's land by pretended authority of chapter 214 of the Laws of 1887, being an act entitled "An act providing for the improvement of county roads." The facts, as disclosed by the pleadings, evidence, and findings, are substantially as follows: The plaintiff, Thomas J. Barker, is the owner of a tract of land situated in the suburbs of Kansas City, but beyond the limits thereof. This land abuts upon Quindaro boulevard, a street that runs along its northern boundary. Lying west of plaintiff's land, in the order mentioned below, and running parallel with its western boundary, are Seventh, Eighth, Ninth, and Tenth streets. Lying east of plaintiff's land in the order mentioned below, and running parallel with its eastern boundary, are Sixth, Hallock, Fifth, Thompson, Fourth, Walnut, and Third streets. The plaintiff's land is within one-half mile of all of these streets; and the county commissioners, by pretended authority of chapter 214 of the Laws of 1887, undertook to improve Quindaro boulevard, Third street, Fifth street, and Tenth street, by grading and paving them with cedar blocks, and to impose one-third of the cost of such improvement upon the tax-payers of the county by general taxation, and to charge the other two-thirds as a special assessment upon plaintiff's land, as provided in said road improvement law. This action was brought to enjoin the collection of said general tax, and also the collection of said special assessment, on the ground of various irregularities in the proceedings, and because the said chapter 214 of the Laws of 1887 is unconstitutional. Upon the trial the district court granted the injunction in the matter of the Quindaro boulevard, but denied it as to Third, Fifth, and Tenth streets. This petition in error is brought by the plaintiff to reverse the judgment of the district court denying the injunction in the matter of Third, Fifth, and Tenth streets, and the defendants have also filed a petition in error to reverse the judgment granting the injunction in the matter of the Quindaro boulevard.

It is claimed that chapter 214 of the Laws of 1887 is unconstitutional—*First*. Because it attempts to delegate legislative power to the commissioners, and confer upon them the absolute and arbitrary power to levy taxes and special assessments on the property of others. *Second*. The road improvement law is unconstitutional because it does not provide "a uniform and equal rate of assessment and taxation." *Third*. The act in question is in violation of section 15 of the bill of rights. *Fourth*. It is not within the constitutional right of the legislature to confer upon counties and other *quasi* corporations the power to levy special assess-

ments for local improvements; much less to confer that power upon a class of "resident land-holders." *Fifth*. The act is in violation of the fourteenth amendment to the federal constitution. In addition to the constitutional objection, it is urged that the proceedings are void for the following judicial defects and irregularities: As to Quindaro boulevard: *First*. The petition is not signed by a majority of the resident land-holders as required by section 1 of the act. *Second*. The county surveyor, in making the map of the taxing district, as required by section 3 of the act, omitted several tracts of land within the half-mile limit. *Third*. The county surveyor, in making the profile and specifications for the improvement, as required by section 3 of the act, wholly disregarded the petition, and specified a different improvement from that prayed for. *Fourth*. One of the road commissioners did not take the oath required by section 5 of the act. *Fifth*. No notice was given of the time and place of making the apportionment. As to Tenth street: *First*. At the time the petition was presented Tenth street did not in fact exist. *Second*. The apportionment was made and delivered to the county clerk before the day those interested had been notified to appear and make their complaints. *Third*. The apportionment was not signed or authenticated by the commissioners, and the record of their proceedings were not kept and filed with the county clerk, as required by section 7 of the act. *Fourth*. The omission of a cemetery in making the apportionment. As to Third street: The same irregularities occur as in the Tenth Street proceedings. As to Fifth street: The same infirmities exist in the proceedings as to this street as in Third and Tenth streets, except that Fifth street was a "regularly laid out county road" to a width of 40 feet, the same being improved, however, to a greater width. The petition for the improvement of this street fails to state "the time for which assessments in payment thereof are to be made" as required by section 2 of the act. In addition to curbing, grading, and paving on a concrete base the improvements of Fifth street also included the construction of sidewalks 14 feet wide on both sides of the street. The plaintiff's land had already been charged with three of these road-tax assessments for Quindaro, Third, and Tenth streets, and was therefore expressly exempted by section 8 of the act from further burdens. The case was tried by the court, and the following findings of fact and conclusions of law made:

"Findings of fact: (1) This action was begun November 10, 1888, to restrain the collection of taxes for special improvements in grading and paving Quindaro boulevard, a county road, Ninth, Fifth, and Third streets in Wyandotte county, made under the act providing for the improvement of county roads, (chapter 214 of the Laws of 1887,) and which were made in 1888, and fully completed as follows: Quindaro boulevard, June 14, 1888; Ninth, Fifth, and Third streets about October 18, 1888. The assessments had been made and

apportioned, and the amounts entered upon the tax-rolls of the county, and the county treasurer was proceeding to collect said taxes in the same manner as other taxes, when this action was instituted. (2) The petition for the improvement of Quindaro boulevard was on the 3d day of June, 1887, presented to the board of county commissioners of said county, and upon presentation of such petition the commissioners ordered a survey, map, and profile and specifications to be made and filed by the county surveyor, which were all made and attached together, properly authenticated by the signature of the county surveyor, and the map and profile offered in evidence are the ones and only ones made by the county surveyor, and by him filed with the board of county commissioners relating to said Quindaro boulevard improvement. (3) Afterwards the county commissioners appointed S. S. Sharpe, G. W. Bishop, and R. W. Gray, commissioners to take charge of said improvement. On January 8, 1888, said Sharpe resigned, he having been in the mean time elected county commissioner, and W. E. Connelley was appointed by the commissioners in his place, and afterwards Bishop and said Connelley resigned, and the county commissioners appointed T. W. Higgins and James Squires in their places. (4) Said commissioners were all properly qualified, except G. W. Bishop, who resigned before any considerable portion of the work of said improvement was begun. (5) The plaintiff lived upon his land just south of the Quindaro boulevard, and his land abuts thereon. He was residing at his said home all the time the improvements were being made upon all the streets mentioned, and was thoroughly familiar with the manner in which the construction of said improvement was carried on, and knew that his land was within the half-mile limit, and would be assessed to pay for such improvement under said law of 1887. (6) There were within the half-mile limit between the termini mentioned in the petition, along said Quindaro boulevard, twenty-one resident land-holders at the time of the presentation of the petition for the improvement of the said road. Only five of said resident land-holders signed the petition which was presented to the board of county commissioners, and upon which said board acted in ordering said improvement to be made and constructing the same. (7) The petition for the improvement of Quindaro boulevard was presented to plaintiff for signature, but he did not sign the same; and it nowhere appears in evidence that he knew who did sign it, or that it was not signed by a majority of the resident land-holders within the territory taxed until after said improvement was completed. (8) The map filed by the county surveyor included a triangular strip of ground on the south side of the road, improved at its junction with Fifth street, which was not within the half-mile limit, and excluded a similar tract on the north side of said Quindaro road, at the same junction, which was within the half-mile limit. (9) The map also excluded a small tract of land which was within the half-mile limit, and lying south of the road,

in a triangular form, and at that time within the city limits of Kansas City, as appears from the map; and also excluded a piece of land of about 40 acres, used as a cemetery, and marked 'Woodlawn,' lying within said limits; and the commissioners, on each of the improvements mentioned, excluded said last-mentioned tract in making up their apportionments. (10) It does not appear that the plaintiff knew what lands were included or excluded from said map. (11) The profile filed by the county surveyor showed the grade line of the road, and the commissioners in making the improvement made some slight deviations from such grade line, but such deviations did not in any manner injure the road, and to some extent reduced the cost of the improvement. Whatever change was made was at the request of the plaintiff, Barker. (12) The contract for the work was made by the commissioners for a foundation of one-inch cypress plank, and the work was constructed with one-inch cypress plank foundation. (13) Plaintiff knew what the petition called for, and also the kind of plank that was being used during all the work from the beginning. (14) The precise day upon which the road commissioners made their apportionment does not appear from the evidence, but upon June 14, 1888, they caused to be published a notice, of which the following is a copy: 'The board appointed to assess the benefits to property for grading and blocking of Quindaro boulevard have made their apportionment, and will meet the property owners interested at the office of the county clerk on Monday, Tuesday, and Wednesday, June 18th, 19th, and 20th, at 9 A. M. [Signed] R. M. GRAY, Chairman. T. L. HIGGINS, Secretary.' Which notice was published for one week in the official county paper, and is the only notice shown by the evidence to have been given by the said commissioners either before or after making their apportionment. Upon June 18, 1888, the said commissioners met, and their minutes show the following entry: 'June 18, 1888. The board, having finished the apportionment of benefits, and having advertised the same in the official county paper, met, as per said notice, as a board of equalization, and to hear complaints, if any are to be made, from property owners, and, after remaining in session all day, adjourned until to-morrow, June 19th. [Signed] T. L. HIGGINS, Secretary. R. M. GRAY, Chairman.' Said board were in session for the purposes mentioned in the foregoing entry each day thereafter until June 23d following, when they adjourned finally as a board, and the same day filed their report with the county clerk, together with all books and papers possessed by them relative to said improvement. Each day's entry in the minutes of their proceedings was signed by the chairman and secretary, and the last by all the board, as was also a paper delivered to the county clerk, which purported to be the final action of the board. (15) The improvement upon Quindaro boulevard was well constructed and of good material, and was of great value to the property owners within the half-mile limit, and enhanced the value of

all such lands to an amount greater than the tax assessed against it for such improvement. (16) The petitions for the improvement of Ninth and Third streets were in due form, and all the preliminary steps of surveys, map, and specifications were regularly ordered and filed, and Henry Horstman, Henry Swingley, and John Adams were duly appointed and sworn as commissioners to take charge of said improvements. (17) The work was begun about —, 1888, and completed about October 18, 1888. (18) The work upon the improvements was all well done, and materials used first class. (19) The commissioners kept full minutes of all their proceedings, but by accident the book in which such proceedings were kept was mutilated, and only a few pages thereof preserved and produced in court. The book of apportionments and papers offered in evidence are those kept and made by the commissioners. (20) The only notices given to the public or property owners along the line of said improvements, shown by the evidence to have been given by the commissioners either before or after their apportionments, of the cost of such improvements, were dated October 18, 1888, and were in words and figures as follows: 'Third-Street notice: The road commissioners on North Third street county road, having made apportionment of the cost of improving said road, will meet at the office of the county clerk of Wyandotte county, Kansas, in Kansas City, in said county, on Monday, Oct. 29, 1888, and continue in session until Wednesday, Oct. 31, to hear any complaints from property owners who may be taxed for the payment of said improvements. HENRY HORSTMAN, H. S. SWINGLEY, JOHN ADAMS, Commissioners.' 'Ninth-Street notice: The road commissioners on Ninth-Street county road, having made apportionment of the cost of improving said road, will meet at the office of the county clerk of Wyandotte county, Kansas, in Kansas City, in said county, on Monday, Oct. 29th, 1888, and continue in session until Wednesday, Oct. 31, to hear any complaints from property owners who may be taxed for the payment of such improvement. HENRY HORSTMAN, H. S. SWINGLEY, JOHN ADAMS, Commissioners.' Said notices were published for two weeks only, on October 18 and 25, 1888. (21) The report and apportionment made by the commissioners were duly filed, and on October 31, 1888, the plaintiff filed with the county clerk a paper which was called an appeal from said report, and protest against any tax against his property for said improvements, but no appeal was ever perfected by him, and he never made any further appearance before the county board in reference to the matter. The commissioners docketed the protest as an appeal, but no further order was ever asked or made in relation thereto. (22) On November 1, 1888, the tax-roll, with the cost of said improvements so apportioned, including the assessment on plaintiff's land, was by the county clerk delivered to the county treasurer for collection. (23) And at the time of the presentation of the petition for the improvement of said Third and Ninth

streets, those portions of them petitioned to be improved were not, and never had been, county roads. (24) One portion of Ninth and all of Third street had been laid out as streets through certain lands platted by the owners, but had not been used or traveled as roads, while another portion of Ninth street had never been opened in any way, or dedicated as a street, or laid out or traveled at the time the petition was filed; but in June, 1888, the owner of the land executed a deed therefor to the county. (25) No petition of householders for opening said road was filed, no viewers were appointed, or reports of utility filed, and no proceedings for laying out said Ninth or Third streets as county roads were had prior to the filing of the petitions for their improvement, but the commissioners, two or three months after the filing of the petitions, by resolution of the board declared the said streets to be county roads. (26) On April 11, 1888, and before the said improvements were completed, the boundaries of Kansas City, Kansas, were so extended as to bring all that part of Ninth and Third streets described in the petition for improvement within the city limits, and the name of said Ninth street was changed to 'Tenth street.' (27) The plaintiff lives and his land lies just south of the Quindaro boulevard, and between the improvement on Ninth street and that on Fifth street; and other streets intervene between plaintiff's land and Third and Ninth streets. (28) His (plaintiff's) land does not anywhere abut upon said Ninth or Third streets, but the improvements were and are of great value to the property of the plaintiff, and he has received benefits therefrom equal to and greater than the cost of such improvements taxed to him, and different from those to the general public. (29) The plaintiff living in the immediate vicinity, at all times knew that said Ninth and Third streets never had been county roads up to the time of the petitions for their improvement; and he also at all times knew that the improvements were being made under the said law of 1887, and that his land was within the half-mile limit, and would be assessed with its proportion of the cost of such improvements. (30) Fifth street, where improved, was regularly laid out as a county road, and had been traveled as such for many years prior to the filing of the petition for its improvement. (31) The same commissioners were appointed and qualified upon the improvement of Fifth street as upon Third and Ninth streets, and the work done was fully up to contract and a valuable and desirable improvement, and was completed about October 18, 1888. (32) The report of the commissioners as to the Fifth-Street improvement was filed upon the same day as those upon Third and Ninth streets. The tax-roll was delivered to the treasurer at the same time, and said street was brought within the new boundaries of Kansas City on April 11, 1888, and before the work was fully completed. (33) The commissioners gave only one notice, so far as the evidence shows, either before or after making their apportionment, and that was in words and figures as follows:

'Fifth-Street notice: The road commissioners on Fifth-Street county road, having made apportionment of the cost of improving said road, will meet at the office of the county clerk of Wyandotte county, Kansas, in Kansas City in said county, on Monday, Oct. 29, 1888, and continue in session until Wednesday, Oct. 31, to hear any complaints from property owners who may be taxed for the payment of said improvement. [Signed] HENRY HORSTMAN, H. S. SWINGLEY, JOHN ADAMS, Commissioners. Oct. 18, 1888.' This notice was published for two weeks only, on October 18 and 25, 1888. (34) On October 31st the plaintiff filed a paper named therein an appeal from the report of the commissioners as to Fifth street, but no appeal was perfected by him, and he at no time asked any order from the county commissioners to be made in relation to the assessment against his land, and no order ever has been made therein; and, while the county board docketed such protest as an appeal, it was never by either party thereafter treated as such. (35) None of the lands of the plaintiff abut upon Fifth street, and a street intervenes between the land of plaintiff and said street, but the land of plaintiff has been increased in value by said Fifth-Street improvement, and has derived benefits therefrom different from the general public, and to an amount greater than the cost of the improvement taxed to him. (36) By reason of the improvement of the boulevard, Tenth, Fifth, and Third streets, all that belt of country lying immediately south of the boulevard and between Ninth and Third streets, in which tract the land of plaintiff lies, has been made easy of access upon paved streets, has been greatly enhanced in value, and since said improvements were made has been more rapidly developed than any portion of Kansas City, owing largely to such improvements. (37) The petition filed for the improvement of Fifth street was properly signed, and was regular in form, except that it did not state the time for which assessments in payment of the improvement were to be made. The plaintiff saw and knew the contents of said petition before the improvement thereunder was begun. (38) The plaintiff was at all times fully aware of the work of improvement upon said street being done during the time it was progressing, and the manner of doing the same, and that his land was within the half-mile limit, and would be assessed to pay for such improvement."

"Conclusions of law: (1) The petition for improvement of Quindaro boulevard was void, and conferred no jurisdiction upon the board of county commissioners to make the improvement. (2) No sufficient facts have been shown to create an estoppel as to plaintiff. (3) The temporary injunction should be made perpetual as to the tax for the improvement upon Quindaro boulevard. (4) Third and Tenth streets were not county roads when the petition was filed, and never have been, and the commissioners had no jurisdiction to order the improvement; but the plaintiff, by reason of the facts shown in evidence, is estopped to set up the illegality

of the tax, and the temporary injunction is, as to the tax for both of those improvements, dissolved. (5) The Fifth-Street petition was irregular, but not void, and conferred jurisdiction upon the board of commissioners to order the work. (6) The plaintiff, having knowledge of the defect in the petition and other facts shown in the evidence, is estopped from setting up such irregularity at this time, and the temporary injunction is dissolved as to the assessment for the Fifth-Street improvement."

We do not deem it necessary in the disposition of these cases to consider but few of the many questions raised and discussed by counsel for the plaintiff in error. Three cases have been considered together, those of *Hovey v. Barker*, post, 591, 595, and *Stewart v. Board*,<sup>1</sup> embracing most, if not all, of the questions involved in this case. The record is in an unsatisfactory state. While it recites that it contains all the evidence, the various maps made by the county surveyor of the respective taxing districts are not contained in the record, although it recites that they were offered and received in evidence. This omission precludes us from having any intelligent knowledge of the various localities referred to in the record and briefs of counsel. The various questions discussed and determined in these cases all arise about the true intent and construction of the provisions of an act of the legislature of 1887 entitled "An act providing for the improvement of county roads." In the first section of the act provision is made for the commencement of proceedings to improve "any regularly laid out road." The expression in the title, and the words quoted in the first section, make it clear that the true intent and meaning of the act was to provide for the improvement of that class of roads that are established under the provisions of the general law of the state concerning highways as county roads. The roads then sought to be improved under this act must be regularly laid out county roads. There is no possible construction that can be given to this act to make it include within its provisions streets, or any portion thereof, in a city of the first class, or any other class of roads than the class specifically mentioned in the act. We have general laws providing for the organization and control of cities of the first class, whereby the most ample power is conferred upon the corporate authorities to make the most elaborate improvements of its streets. The improvement authorized by the act under consideration is that of a regularly laid out county road, entirely outside of the limits of any city of the first class. If any portion of the road intended to be improved lies within a city of the first class, this act has no application whatever to this portion. These remarks are deemed necessary, because, in the absence of the county surveyor's maps, it seems that probably when some of these proceedings were instituted, or certainly soon thereafter, some portions of the roads were in fact

<sup>1</sup> Opinion held pending rehearing.



streets in the city, so called in the record, and so designated in the findings of the trial court. In this case, as in the case of *Board v. State*, 42 Kan. 327, 22 Pac. Rep. 326, there is a very vigorous assault on the constitutionality of the act, but as there are other controlling questions that in our judgment are decisive of this controversy, it is not necessary to consider the question of its constitutional validity. That part of the judgment sought to be reversed by this proceeding in error are the findings of fact and conclusions of law with reference to the improvement of Tenth, Third, and Fifth streets.

1. As to Tenth street. This street was originally called "Ninth" street, but changed to "Tenth" by the city council of Kansas City, the boundaries of the city having been extended so as to include it before the improvements were completed. According to the twenty-third and twenty-fourth special findings of the trial court that portion of Ninth street petitioned to be improved was not and never had been a county road. A part of Ninth street had been laid out as a street through certain lands platted by the owners, but had not been used or traveled as a road; while another part had never been opened in any way, or dedicated as a street, or laid out, or traveled at the time the petition was filed; but in June, 1888,—more than nine months after the petition was presented and the improvement ordered,—the owners of the land through which the street was located executed a deed of the street to the county. No petition of householders for opening said road was filed; no viewers were appointed, or reports of utility filed; and no proceedings for laying out said Ninth street as a county road were had prior to the time of the filing of the petition for its improvement; but the county commissioners, two or three months after the filing of the petitions, by resolution of the board, declared said street to be a county road. We have already said that this law only authorizes the improvement of county roads regularly laid out. The road sought to be improved must be at or before the presentation of the petition a regularly laid out county road in order to confer power to order the improvement. It is not enough that, after the petition had been presented, the improvement ordered, and the work commenced, it had then been declared by resolution of the county board a county road. If the county board had power to so declare it would not meet the positive requirements of the act; but the board of county commissioners have no power to establish highways by resolutions. *Noffziger v. McAllister*, 12 Kan. 315; *Commissioners v. Muhlenbacker*, 18 Kan. 129; *Shaffer v. Weech*, 34 Kan. 595, 9 Pac. Rep. 202. So that neither at the time the petition for improvement was presented, nor during the continuance of the work of improvement, was Tenth street a county road, or a regularly laid out road. This is conclusive against the power of the board of county commissioners to consider the petition or order the improvement. But the court finds that by reason of the plaintiff's land being in the vicinity of the

improvement, and he residing thereon, and that the improvements were and are of great value to the property, and that he has received benefits therefrom greater than the cost of improvement taxed to him, and different from the general public, and that he knew that Ninth street was not a county road, and never had been up to the time of the filing of the petition, and that he knew that the improvements were being made under the law of 1887, and that his land was within the half-mile limit and would be assessed with its proportionate share of the cost of the improvement, by all these facts he is estopped from asserting that Ninth street was not a county road. It is said in reply to this, and very truthfully said, too, so far as many of these findings are concerned, that there is absolutely no evidence to sustain them. There is evidence tending to show that the land of Barker is in the vicinity of this street; that he has resided thereon for many years; that the improvement of the street was of some value to his property, and that he has received benefits therefrom; that he knew that the improvements were being made under the law of 1887; and that his land was within the half-mile limit; but apart from the nearness of the improvement to his land and his long residence thereon there is no fact shown or attempted to be shown from which any inference could possibly be drawn that he knew that Tenth street was not a county road. The proof of knowledge ought to be reasonably clear and strong before it is adjudged that he is estopped by it. We think that there is no evidence to sustain the finding of knowledge. If there was, it is hardly free from doubt, under the case of *City of Leavenworth v. Laing*, 6 Kan. 274, that Barker is not estopped from asserting the jurisdictional defect that it was not a county road that was being improved. The cited case is very like this one. The similarity in facts is strong, and in principle very great. In that case Laing was a resident of the city, knew that his land was being graded, and made no objection thereto. It appears that the grading was of great benefit to him, but no street or road was ever laid out or dedicated through his land. He enjoined the collection of an illegal assessment, as is done in this case. Laing knew that there was no road or street laid out through his land. There the proof of knowledge was positive, direct, and uncontroverted. Here a fact is found from which an inference of knowledge might arise. This court held that Laing, with positive knowledge of the jurisdictional defect, was not estopped, and, following that decision, with a belief that it is the true rule in cases of this character, we now say that Barker is not estopped. Whatever may be said about irregularities of all kinds and non-jurisdictional defects, we believe that it is not within the authority of any person or party in interest, by their action or silence or express assent, to confer a power upon tribunals of limited and special jurisdiction that the law has expressly withheld.

2. As to Third street. The same state of facts exist with reference to this street

that were found as to Tenth. It never was a county road or a regularly laid out road. All of this street had been laid out as a street through certain lands platted by the owners, but had not been used or traveled as a road. The owners of the land executed a deed of the street to the county. The street was declared a county road by resolution of the county board. The boundaries of the city of Kansas City were extended so as to include the improved portion of the street before such improvements were completed. The questions, therefore, as to this street (there being the same findings as to residence and knowledge) are the same as discussed and decided above with reference to Tenth street.

3. As to Fifth street. The finding of the trial court is that this street, where improved, was regularly laid out as a county road, and had been traveled as such many years prior to the presentation of the petition for improvement. The petition omitted one of the essential requirements prescribed by the second section of the act in this: it did not state the time for which the assessments for the payment of the improvement are to be made. While Fifth street was a county road, it was only 40 feet wide. It was improved to the width of 42 feet a part of the way, and 52 feet the remainder, with a sidewalk 14 feet wide on each side of the improved way. In view of other fatal defects, it is not now necessary to pass upon the question as to whether or not the omission in the petition to state "the time for which assessments in payment thereof are to be made," as required by the second section of the act, is jurisdictional, or a mere irregularity that does not deprive the county board of the power to act. The other enumerated defects are such that they cannot be sustained under any friendly construction of the provisions of this statute. The road might be improved to its full width in accordance with a fair construction of the act, taking neither economy nor utility into account; but when it is stretched beyond the boundaries of the road on either side to the extent of two or ten feet, such a departure from its width as regularly laid out and declared is not only without authority, express or implied, but is so clearly void that it is almost incredible that such an official tribunal as the board of county commissioners would have ever conceived the idea or tolerated a suggestion of it. But when, in addition to an arbitrary improvement in excess of the legally established width of the road, they add the cost of sidewalks on each side 14 feet wide, all pretense of compliance with the avowed purpose of the law is gone. They convert a road 40 feet wide—a width established under the provisions of the general road law—into one 70 feet wide a portion of its length, and the remainder 80 feet wide, by an unauthorized contract for improvement. These things are wholly unauthorized by the statute, and are absolutely without power and authority, and are not binding on the plaintiff in error, and in the very nature and essence of things ought never to be permitted to be successfully

enforced by any court. The same facts are urged as an estoppel against the plaintiff in error as in the other two streets. Some of these facts relied upon to estop him are sustained by evidence, the others are not. We have considered these findings in the Tenth-Street matter. They apply to all three of the streets taken together, and are not made specific as to each street. These attempts to exercise powers not granted in terms or fairly implied by the act render the assessments levied on the land of the plaintiff in error for the improvement of Fifth street void, and there are no sufficient facts pleaded or found to estop him from asserting the jurisdictional defects enumerated. It may be said that, as Fifth street was found to be a regularly laid out and traveled road, the cost of the improvement to the width of 40 feet is valid, and the plaintiff in error ought to have tendered or paid the tax on the legal width before he can ask to have the illegal part restrained from collection. If the tax had been so itemized and segregated that the defendant in error or the officers could by computation arrive at the amount assessed for the improvement of the 40 feet in width, this ought to and would have been required. But the record, so far as it shows about the assessments for the improvement of Fifth street, recites an aggregate sum of \$940.75 assessed against the land of the plaintiff in error, and it does not appear that the plaintiff had or could have had any means by which to determine what was the amount of legal taxes, if any there be, that was assessed against his land for the improvement of the legal width of the Fifth-Street road. We recommend that the judgment of the district court of Wyandotte county, as to the assessments for the improvement of Third, Fifth, and Tenth streets, be reversed, and the cause remanded for a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 698)

BARKER v. HOVEY *et al.*

(*Supreme Court of Kansas. April 11, 1891.*)

Motion to correct judgment. For former report, see ante, 585.

PER CURIAM. Upon the application of the plaintiff to have the judgment rendered in this court corrected, we find, upon an examination of the record, that the facts of the case were found by the court below. Upon those facts the judgment of that court as to the assessments for the improvement of Third, Fifth, and Tenth streets was reversed. Under section 559 of the Code the motion to correct the judgment of this court will be allowed, and the court below will be directed to render judgment upon the facts found by it in favor of the plaintiff and against the defendant for an injunction against the collection of the assessments on the streets above named.

(45 Kan. 699)

HOVEY *et al.* v. BARKER.

(*Supreme Court of Kansas. Jan. 10, 1891.*)

IMPROVEMENT OF HIGHWAYS—PETITION—ASSESSMENTS.

1. Under chapter 214, Laws 1887, ("An act providing for the improvement of county roads,")

the petition required by section 1 must be signed by a majority of the resident land-holders within one-half mile on either side of a regularly laid-out road, within the terminal points mentioned, or the board of county commissioners acquire no jurisdiction to order the improvement prayed for.

2. A tax-payer is not estopped from asserting a jurisdictional defect in the assessment proceedings when he had no knowledge of the defect at the time the proceedings were instituted, nor until after the work had been commenced.

(Syllabus by Simpson, C.)

Commissioners' decision. Error to district court, Wyandotte county; O. L. MILLER, Judge.

Winfield Freeman, A. L. Berger, and J. B. Scroggs, for plaintiffs in error. Hutchings & Keplinger, for defendant in error.

SIMPSON, C. This is a petition in error filed by the board of county commissioners and others, plaintiffs in error, to reverse one of the findings and a part of the judgment of the district court made in the case. The action was commenced by the defendant in error, Barker, under section 253 of the Code, to enjoin the collection of certain taxes and special assessments levied upon his land under the pretended authority of chapter 214, Laws 1887, being "An act providing for the improvement of county roads." We have considered some of the findings and rulings in the preceding case, (44 Kan. —, ante, 585.) that the plaintiff below brought here for review. At the trial below, the court found as follows, as to the improvement of the Quindaro boulevard: "(2) The petition for the improvement of the Quindaro boulevard was on the 3d day of June, 1887, presented to the board of county commissioners of said county, and upon presentation of such petition the commissioners ordered a survey, map, and profile and specifications to be made and filed by the county surveyor, which were all made and attached together, properly authenticated by the signature of the county surveyor; and the map and profile offered in evidence are the ones, and only ones, made by the county surveyor; and by him filed with the board of county commissioners, relating to said Quindaro boulevard improvement. (3) Afterwards the county commissioners appointed S. S. Sharpe, G. W. Bishop, and R. W. Gray commissioners to take charge of said improvement. On January 8, 1888, said Sharpe resigned, he having been in the mean time elected county commissioner, and W. E. Connelley was appointed by the commissioners in his place; and afterwards Bishop and said Connelley resigned, and the county commissioners appointed T. W. Higgins and James Squires in their places. (4) Said commissioners were all properly qualified, except G. W. Bishop, who resigned before any considerable portion of the work of said improvement was begun. (5) The plaintiff lived upon his land just south of the Quindaro boulevard, and his land abuts thereon. He was residing at his said home all the time the improvements were being made upon all the streets mentioned, and was thoroughly familiar with the manner in which the construction of said improvements was carried on, and knew that his land was

within the half-mile limit, and would be assessed to pay for such improvement under said law of 1887. (6) There were within the half-mile limit between the termini mentioned in the petition, along said Quindaro boulevard, twenty-one resident land-holders at the time of the presentation of the petition for the improvement of the said road. Only five of said resident land-holders signed the petition which was presented to the board of county commissioners, and upon which said board acted in ordering said improvement to be made, and constructing the same. (7) The petition for the improvement of Quindaro boulevard was presented to the plaintiff for signature, but he did not sign the same, and it nowhere appears in evidence that he knew who did sign it, or that it was not signed by a majority of the resident land-holders within the territory taxed until after said improvement was completed. (8) The map filed by the county surveyor included a triangular strip of ground on the south side of the road improved at its junction with Fifth street, which was not within the half-mile limit, and excluded a similar tract on the north side of said Quindaro road, at the same junction, which was within the half-mile limit. (9) The map also excluded a small tract of land which was within the half-mile limit, and lying south of the road, in a triangular form, and at that time within the city limits of Kansas City, as appears from the map, and also excluded a piece of land of about forty (40) acres used as a cemetery, and marked 'Woodlawn,' lying within said limits, and the commissioners on each of the improvements mentioned excluded said last-mentioned tract in making up their apportionments. (10) It does not appear that the plaintiff knew what lands were included or excluded from said map. (11) The profile filed by the county surveyor showed the grade line of the road; and the commissioners, in making the improvement, made some slight deviations from such grade line, but such deviations did not in any manner injure the road, and to some extent reduced the cost of the improvement. Whatever change was made was at the request of the plaintiff Barker. (12) The contract for the work was made by the commissioners for a foundation of one-inch cypress plank, and the work was constructed with one-inch cypress plank foundation. (13) Plaintiff knew what the petition called for, and also the kind of plank that was being used during all the work from the beginning. (14) The precise day upon which the road commissioners made their apportionment does not appear from the evidence, but upon June 14, 1888, they caused to be published a notice of which the following is a copy: 'The board appointed to assess the benefits to property for grading and blocking of Quindaro boulevard have made their apportionment, and will meet the property owners interested at the office of the county clerk on Monday, Tuesday, and Wednesday, June 18th, 19th, and 20th, at 9 A. M. [Signed] R. M. GRAY, Chairman. T. L. HIGGINS, Secretary,'—which notice was published for one week in the official county paper, and is the only notice shown by

the evidence to have been given by the said commissioners either before or after making their apportionment. Upon June 18, 1888, the said commissioners met, and their minutes show the following entry: 'June 18, 1888. The board having finished the apportionment of benefits, and having advertised the same in the official county paper, met, as per said notice, as a board of equalization, and to hear complaints, if any are to be made, from property owners, and, after remaining in session all day, adjourned until to-morrow, June 19th. [Signed] T. L. HIGGINS, Secretary. R. M. GRAY, Chairman.' Said board were in session for the purposes mentioned in the foregoing entry each day thereafter until June 23d following, when they adjourned finally as a board, and the same day filed their report with the county clerk, together with all books and papers possessed by them relative to said improvement. Each day's entry in the minutes of their proceedings was signed by the chairman and secretary, and the last by all the board, as was also a paper delivered to the county clerk, which purported to be the final action of the board. (15) The improvement upon Quindaro boulevard was well constructed and of good material, and was of great value to the property owners within the half-mile limit, and enhanced the value of all such lands to an amount greater than the tax assessed against it for such improvement. (16) By reason of the improvement of the boulevard, Tenth, Fifth, and Third streets, all that belt of country lying immediately south of the boulevard and between Ninth and Third streets, in which tract the land of plaintiff lies, has been made easy of access upon paved streets, has been greatly enhanced in value, and since said improvements were made has been more rapidly developed than any portion of Kansas City, owing largely to such improvements."

According to the sixth special finding, only 5 of the 21 resident land-holders that were within the half-mile limit between the termini mentioned for improvement signed the petition. It was this finding, in all probability, that induced the trial court to conclude that the petition for the improvement of Quindaro boulevard was void, and conferred no jurisdiction upon the board of county commissioners to make the improvement, that no sufficient facts have been shown to create an estoppel as to the plaintiff, and that the temporary injunction should be made perpetual as to tax for the improvement of Quindaro boulevard. The findings and conclusions as to this boulevard are claimed to be erroneous, and it is said, in support of this contention, that the statute confers upon the resident land-holders, only, the right to petition, and when the petition is presented the board of county commissioners exercise the same powers as they are authorized to exercise under the provisions of the general road laws. It is further said that the insufficiency of the petition cannot be urged in this action, as it is a collateral attack.

The first section of the act requires, in positive terms, "that whenever a majori-

ty of the resident land-holders within one-half mile on either side along the line of any regularly laid-out road, within the terminal points mentioned in the petition, shall petition the board of county commissioners of any county in this state for the improvement of any road as located, or any part thereof, it is hereby made the duty of such county commissioners to cause the same to be improved as herein-after provided." It would seem, on principle, that the requirement of this statute that a majority of the resident land-holders within the limit must sign the petition for improvement is not only imperative, and must always be complied with, but the power of the board to order the improvement cannot be exercised without the petition contains the names of that majority. The best reason for this is because the statute says so; and if you once depart from the plain letter of the act, and say that 5 land-holders out of 21 can compel action by the board, then any number less than a majority may do so. The position assumed by counsel for these plaintiffs in error with reference to this question is this: That under the first section of the act the board of county commissioners have the power to determine whether or not the petition was signed by a majority of the resident land-holders within the half-mile limit; that in this particular instance they exercised that power, and determined that the petition was signed by such majority; and that this finding cannot be attacked collaterally in this proceeding. Numerous cases decided by the supreme court of the state of Indiana are cited that fairly support this contention. The case of *Quindlan v. Myers*, 29 Ohio St. 500, is a formidable authority in their favor. They also cite the case of *Sleeper v. Bullen*, 6 Kan. 300, and call attention to the following language of the court: "Is the city liable? We think it is. The petition appears to be good upon its face. The city council, the agents of the city, and in whom is confided the province of deciding the question, decided and declared that the petition was good and valid; and now, after the contract has been executed on the part of the contractors, after the grading has all been done, the city is estopped from denying the validity of the contract, or its liability to the contractors for the grading." When this case is carefully examined, it will be seen that this language was used by the court with reference to a controversy between the city and the contractors, and has no application to the question of the validity of the petition as between a lot-owner, whose lot was assessed, and the city. The case was commenced by *Sleeper* and many others against the city of *Leavenworth* and the city treasurer to restrain the collection of a special tax assessed to pay for making certain local improvements on Fifth avenue, in the city of *Leavenworth*, alleging that there had not been any legal or proper petition presented to the city council praying for the improvements to be made, and that for the want of such petition the taxes levied to pay for the same were illegal and void. Subsequent to the filing

of the plaintiff's petition, Bullen and Dustin, the contractors who made the improvements, were made parties on their own motion, and in their answer they claimed that their contract was made with the city in good faith, and in ignorance of the facts respecting the petition, that they had performed and completed the contract, that their work had been accepted by the city, and demanded judgment against the city for the amount due them for making the improvements. The trial court found "that a petition for grading Fifth avenue between certain points had been signed by the requisite number of property owners affected thereby; and while said petition was in the custody of the city council, and without the consent of a majority of the property owners residing upon and owning the property to be taxed to pay for such improvement, it was changed by one of the signers by striking out the words, 'the north line of Tanner's farm,' and inserting the words, 'Fanny street, or where the grade will run out through the hill at Sigel Garden.'" Other facts were found, and the court held that the ordinance for grading Fifth avenue, and the assessments made thereunder, were void, and created no lien against the abutting property. This court, in reviewing the case, says: "The first question in the case is whether the contract with Bullen and Dustin, and the special tax levied to pay them for said grading, were legal. We think that they were not legal, for the reason that no sufficient petition was ever presented to the city council. It therefore follows that said city had no legal right to sell said lots for said special taxes." The court then considers a third question in the case, as to whether the city is liable to the contractors for the grading, and uses the language quoted in the brief, and relied upon by counsel for plaintiffs in error. There is no question in this case between the contractors and the county. The question here is between a land-holder and the board of county commissioners and treasurer. The first point in the syllabus of the *Sleeper Case* is: "A contract made by the city council under chapter 70, Laws 1867, for grading a street in Leavenworth city without a sufficient petition having first been presented to the council, is, and all proceedings under such contract are, void as against lot-owners." The case, as we take it, is authority for two propositions: *First*, that the board of county commissioners acquired no jurisdiction to cause the Quindaro boulevard to be improved on account of the insufficiency of the petition; *second*, the petition is subject to a collateral attack in cases like this. In the case of *Noffziger v. McAllister*, 12 Kan. 315, this court say that the county commissioners of Bourbon county had no authority to make an order putting the night herd law in force in a township without a petition from a majority of the qualified electors of the township asking for the same; that the petition is a jurisdictional fact, and without it no valid order can be made. The order of the

board recited that a petition had been presented by a majority of the qualified electors of the township. In this case there was a collateral attack. The cases of *Commissioners v. Muhlenbacker*, 18 Kan. 129, and *Shaffer v. Weech*, 34 Kan. 595, 9 Pac. Rep. 202, are both to the effect that the requirement that the requisite number of resident land-holders must sign the petition is a jurisdictional one; that it is a precedent condition, and a failure to comply with it will make all subsequent proceedings void.

The general rule applicable to such inferior jurisdictions as boards of county commissioners is that in their proceedings they are to be held to the strict limits of their authority as conferred and prescribed by statute. We are confident that the rule held and applied by this court is that the land-holder can show in a collateral action the want of jurisdiction of the county board to order the improvement, without he has so placed himself, by acts or words, as to be equitably estopped from so doing. The trial court finds as a conclusion of law that no sufficient facts have been shown to create an estoppel as to Barker in the matter of the Quindaro boulevard. The special findings of fact upon which this conclusion is based are the fifth, seventh, and thirty-sixth. The fifth shows that Barker was familiar with the manner in which the construction of said improvements were made, and knew that his land was within the half-mile limit, and would be assessed to pay for such improvement, under the law of 1887. The thirty-sixth shows that, by reason of the improvement of the boulevard and other streets, the land of the plaintiff was made easy of access upon paved streets, and has greatly enhanced in value. The seventh finds that the petition for the improvement of the boulevard was presented to Barker for signature, but he did not sign it, and that it is not shown that he knew who did sign it, or that it was not signed by a majority of the resident land-holders within the territory taxed until after the said improvement was completed. In our judgment this finding is conclusive against the contention of counsel for the plaintiffs in error that Barker is estopped from asserting the jurisdictional defect in the petition for the improvement of the boulevard. Giving to the plaintiffs in error the benefit of the most favorable reported cases, yet it is almost universally held that, in order to estop a tax-payer to object to a jurisdictional defect, he must have known of such defect at the time it occurred, or discovered it before the work was commenced. 7 Amer. & Eng. Enc. Law, 20, and citations in foot notes. Indeed, the rule is stated very much stronger than this in the case of *City of Leavenworth v. Laing*, 6 Kan. 274. The other findings do not recite sufficient facts to create an estoppel. We recommend that the findings and judgment of the trial court as to the boulevard be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(45 Kan. 707)

HOVEY *et al.* v. BARKER.

(Supreme Court of Kansas. April 11, 1891.)

On rehearing. For former report, see ante, 591.

PER CURIAM. Upon a re-examination of the former opinion handed down in this case, and the various authorities presented upon the argument for a rehearing, the motion will be overruled.

(89 Cal. 42)

McDONALD v. WELSH. (No. 13,832.)

(Supreme Court of California. May 7, 1891.)

SWAMP LANDS—SETTLEMENT—EVIDENCE.

1. Const. Cal. art. 17, § 3, providing that state lands which are "suitable for cultivation" shall be granted only to actual settlers, and in quantities not exceeding 320 acres to each settler, applies to swamp lands granted to the state by Act Cong. Sept. 28, 1850, when such lands are "suitable for cultivation," and can be reclaimed and cultivated by an actual settler. Following *Fulton v. Brannan*, ante, 506.

2. Evidence tending to prove that plaintiff determined to settle on the land at the time he examined the boundaries, and then intended to proceed immediately to build his cabin and to complete it in a reasonable time, and that he commenced to build the cabin as soon as he could get the lumber, and in fact completed it within a week after making application, is sufficient to justify a finding that he was an actual settler at the time he made his application, where there was no pretense that defendant ever settled on the land.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

*Freeman & Bates*, for appellant. *Chas. G. Lamberson*, for respondent.

VANCLIEF, C. This is a contest between the plaintiff and the defendants, Taylor and Welsh, for the right to purchase swamp land, referred by the surveyor general of the state to the superior court of Tulare county for trial. The judgment was in favor of the plaintiff. The defendant Welsh moved for a new trial, and, his motion being denied, he alone appeals from the judgment and from the order denying his motion for a new trial. The land in contest was segregated as "swamp and overflowed land," by authority of the United States, in October, 1884. The court found that the plaintiff settled upon the land, and in due form applied to purchase the same on the 9th day of December, 1887, and that the land then was, and ever since has been, suitable for cultivation. The court also found that the appellant on said 9th day of December, 1887, filed his application to purchase the land, but that he never was a settler on the land.

1. The principal point made by counsel for appellant is that section 3, art. 17, of the constitution has no proper application to "swamp and overflowed lands," because that class of lands must be considered as unsuitable for cultivation. On this point the very able argument of the learned counsel for appellant is a copy of their argument on the same point in the case of *Fulton v. Brannan*, (No. 13,603,) ante, 506, lately decided by this court. As it did not prevail in that case, it is unnecessary specially to reconsider it in this.

2. It is contended that the evidence does not sustain the finding that plaintiff was an actual settler on the land on the 9th day of December, 1887. The plaintiff testified that he had lived upon the land continuously ever since he built his cabin upon it, "which was about four or five days after making my application. I first saw the land in December, 1887. I went down from Hanford with a party of four. Mr. Diss, one of the party, showed me the corner stakes. The stakes he showed me were the south-west corner, the south-east corner, and the half-mile stakes. I returned to Tulare the same afternoon, and swore to the application. I went back to the land in four or five days, (about December 16, 1887, I think,) and built a cabin." H. H. Freeman testified: "I was with plaintiff when he went to look at the land. I helped him build his cabin. We built the cabin four or five days after he applied for the land. As soon as we could get the lumber there we built the cabin." There was no other evidence than the above as to the date of plaintiff's settlement on the land. There was no pretense that appellant ever settled on the land, and, therefore, no contest as to priority of settlement. If the land was suitable for cultivation the appellant was not entitled to purchase it, even though plaintiff had not applied for it. *Dillon v. Saloude*, 68 Cal. 268, 9 Pac. Rep. 162. The evidence tended to prove that plaintiff determined to settle on the land at the time he examined the boundaries thereof, December 9, 1887, and then intended to proceed immediately to build his cabin, and to complete the same within a reasonable time, and that he commenced to build the cabin as soon as he could get lumber on the land for that purpose, and actually completed it within a week after his application. This, I think, is sufficient to justify the finding as to plaintiff's settlement. *Gavitt v. Mohr*, 68 Cal. 507, 10 Pac. Rep. 337.

3. Appellant's counsel make the further point that the finding that the land was "suitable for cultivation at the time of the trial of this action, and at all times since plaintiff filed thereon," is not sufficient as against the defendant Taylor, whose application to purchase was filed in April, 1884, and against whom judgment was rendered for the reasons that his application was "made and filed before the land was subject to application or sale, and that said land is and was suitable for cultivation." If this is not a sufficient finding that the land "was suitable for cultivation" at the time Taylor made his application, yet it is a sufficient answer to the point made,—that there was no privity between the appellant and the defendant Taylor, and that the latter has not appealed from the judgment against him. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

88 Cal. 644

MCLEAN *et al.* v. CROW. (No 13,465.)

(Supreme Court of California. May 1, 1891.)

## FIRM NAME — CLAIMS AGAINST DECEDENTS — INSTRUCTION—NEW TRIAL.

1. A firm name showing only the surnames of the partners is not "a fictitious name," nor a "designation not showing the names of the partners," within Civil Code Cal. § 2466, requiring every firm doing business under such name or designation to file and publish a certificate showing the full names and residences of its members. Following *Pendleton v. Cline*, 85 Cal. 142, 24 Pac. Rep. 659.

2. Whether or not physicians' services were rendered during the last sickness of deceased, and so entitled to a preference, under Code Civil Proc. Cal. § 1646, is an immaterial issue in an action brought in the superior court by the physicians against the administrator for such services, as a judgment against the administrator can only have the effect of a claim duly allowed against the estate, and its order of payment must be determined on the marshaling of the assets in the probate court, where all the creditors may be heard.

3. Under Code Civil Proc. Cal. § 612, which provides that the jury, on retiring, may take with them all papers which have been received as evidence in the cause, except such as should not, in the opinion of the court, be taken from the person having them in possession, the court does not abuse its discretion by permitting the jury to take with them the claim on which the action is based, which forms a part of the complaint, and which has been received in evidence.

4. Where the court has charged that expert evidence as to the value of plaintiffs' services is not conclusive, and that it is only intended to supplement the general knowledge and experience of the jury in relation to the matters before them, and that they must exercise their own judgment upon the facts, independently of the opinion evidence, it is proper to refuse a further instruction that such evidence should be received with scrutiny and much caution.

5. The fact that the trial court denied defendant's motion for a new trial during the pendency of his application in the supreme court for leave to prove an exception cannot have prejudiced defendant, where his application was subsequently denied by the supreme court.

Commissioners' decision. In bank. Appeal from superior court, Stanislaus county; WILLIAM O. MINOR, Judge.

Code Civil Proc. Cal. § 612, provides: "Upon retiring for deliberation, the jury may take with them all papers which have been received as evidence in the case, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession."

*Stonesifer & Minor*, for appellant. *Hatton & Fulkert*, for respondents.

TEMPLE, C. This action was brought by S. McLean and C. W. Evans, partners doing business under the name and style of McLean & Evans, for services as physicians, rendered defendant's intestate during his last illness. The estate is said to be insolvent, and the answer denies that any such services were rendered the deceased during his last illness; that such services were worth more than \$150; and that the plaintiffs had made, acknowledged, or published the certificate of co-partnership and notice, as required by section 2466 of the Civil Code.

As the surnames of both partners appear in the firm name, and no part of the

name is fictitious, the case seems entirely covered by the recent case of *Pendleton v. Cline*, 85 Cal. 142, 24 Pac. Rep. 659.

Whether the services were rendered during the last illness or not was an immaterial issue in the case. Generally it is an easy thing to determine, the claim being recognized as a debt against the estate, whether it is or is not a preferred claim, under section 1646, Code Civil Proc. In case of doubt, the administrator may refuse to pay until required by an order of the court. At last the assets must be marshaled and the order of payment determined by the probate court, where other creditors may be heard. Suits on claims against an estate may be brought in any court, including justices' courts. It would be an anomaly to allow a justice of the peace, in a proceeding where other creditors could not be heard, to give a preference to one claimant over others, and enter a judgment binding on the probate court when it shall come to pass upon the relative rights of all creditors. The judgment against the administrator can only have the effect of a claim duly allowed against the estate, (section 1504, Id.,) to be paid in due course, and cannot give the creditor any further rights. As already intimated, a claim may, on its face, be plainly a funeral expense, or an expense of the last sickness, and, if allowed at all, manifestly a preferred claim; but there is nothing in the mode of allowance which fixes its rank. As there is no mode of allowance that can give a claim priority, it must follow that there can be no judgment establishing the validity of a claim, which the administrator or court has refused to allow, which can have that effect. In this case, had the administrator been satisfied that the claim was valid, though not for services rendered during the last illness, and therefore not entitled to rank as a preferred claim, his allowance would not have given it such rank, although on its face it purported to be for such services. It would still be an open question. This being so, we do not feel called upon to consider whether the phrase "last sickness" in section 1643, Id., means services rendered *in extremis*, although it would seem obvious enough that it must mean something more than that, and something more than the same phrase in statutes authorizing nuncupative wills.

Section 612, Id., we think, justifies the action of the court in allowing the jury to take with them the claim as presented, and upon which the suit is based, when they retired to consider their verdict. Besides constituting a portion of the complaint, it was a paper which had been received in evidence. It was a matter within the discretion of the court. *Clark v. Insurance Co.*, 36 Cal. 168.

The defense asked an instruction in regard to expert testimony, in substance, that the jury were to exercise an independent judgment, giving to such evidence such weight only as they deemed it entitled to; that it did not preclude them from exercising their own judgment upon the subject, and, further, it ought, like all opinion evidence, to be received with scru-



tiny and much caution. We see no objection to the instruction asked, and the court might well have given it, but it does not necessarily follow that the judgment should be reversed for the refusal. The object of the testimony was to prove the value of the medical services. The only evidence upon the subject was the expert testimony, and the statement of the doctors as to the nature of the service, the length of time, and the other circumstances of the attendance. At the request of plaintiffs, the court had already instructed the jury that they should consider these facts, and, "when they have all the facts and circumstances attending and surrounding the transaction, the opinion of experts as to value, based upon the same evidence, is not conclusive; their opinions are not to be substituted for the common sense and judgment of the jury. The purpose of their introduction is to supplement the general knowledge and experience of the jury in relation to the matters before them, and thereby to aid them in the exercise of their own judgment, to the end that a more just and accurate conclusion as to the value may be drawn from the evidence."

This covers all the points upon which defendant asked the court to instruct the jury, except the closing admonition as to caution in receiving such evidence. This is the duty of the jury as to all evidence, and is understood, particularly so when the jury are told that they must exercise their own judgment upon the facts, independently of the opinion evidence.

The sixth instruction asked by the defendant was so clearly wrong that it does not merit discussion. Plainly, the jury were to find the value of the services, whether more than \$150 or not.

The second instruction given at the request of plaintiffs is in exact accord with our ideas of the issues properly submitted to the jury.

The defendant objects to the order denying his motion for a new trial, on the ground that it was premature, as he had or was about to petition the supreme court for leave to prove his exception. The only evidence of this matter in the transcript is contained in the order denying a new trial, where it is recited, the "defendant objecting to the hearing of the motion at this time on the ground that defendant is petitioning the supreme court for leave to prove his exception." If the defendant had petitioned for leave to prove an exception which had been denied by the trial court, that court ought to have granted time for that purpose. There is here, however, no evidence of such fact, or any evidence that we can notice that such application was pending. The records of this court show that an application of that character was made June 8th, and was not successful. The motion for a new trial had been denied on the previous day, after due notice. Either party may bring such a motion to a hearing. What effect upon this order the allowance of an exception here would have had, if the application had been successful, we are not called upon to say. As it has turned out, the defendant has not

been injured. We think the judgment and order should be affirmed.

We concur: BELOHER, C.; VANOLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

88 Cal. 600

CARLOCK *et al.* v. CAGNACCL. (No. 13,693.)  
(Supreme Court of California. April 18, 1891.)  
PARTNERSHIP — FILING CERTIFICATE OF FIRM NAME.

A firm name showing only the surnames of the partners is not "a fictitious name," nor "a designation not showing the names of the partners," within Civil Code Cal. § 2466, requiring every firm doing business under such name or designation to file and publish a certificate showing the full names and residences of its members. Following *Pendleton v. Cline*, 85 Cal. 142, 24 Pac. Rep. 659.

Department 2. Appeal from superior court, Kern county; A. R. CONKLIN, Judge.

*Thomas Rhodes and Wells Hendershot*, for appellant. *J. W. Mahon*, for respondent.

McFARLAND, J. This action was brought to recover \$396.35 for certain personal property alleged to have been sold by plaintiffs to defendant. Defendant demurred to the complaint, and the court below sustained the demurrer. Plaintiffs appeal. The only ground of demurrer is that the complaint does not state that plaintiffs had filed a certificate of partnership, as required by section 2466 of the Civil Code. The complaint shows that the plaintiffs, F. M. Carlock and H. D. Robb, were copartners doing business under the firm name of Carlock & Robb. The firm name was therefore not a "fictitious name" nor "a designation not showing the names of the persons interested as partners," within said section of the Code. *Pendleton v. Cline*, 85 Cal. 142, 24 Pac. Rep. 659. Moreover, the proper way to raise such a point is by answer. The judgment is reversed, with direction to the court below to overrule the demurrer to the complaint.

We concur: BEATTY, C.J.; DEHAVEN, J.

93 Cal. 427

PEOPLE v. McNULTY. (No. 20,659.)  
(Supreme Court of California. May 1, 1891.)

MURDER—INSANITY—BURDEN OF PROOF—*NUNC PRO TUNC*—AMENDMENT—INFORMATION.

1. Insanity, as a defense to a charge of murder, must be established by a preponderance of evidence. Following *People v. Travers*, (Cal.) ante, 88.

2. A judgment stating that defendant has been convicted of the "murder" of deceased is sufficient, though it does not show that it was murder in the first degree.

3. The trial court can amend its minutes *nunc pro tunc*, to show, in accordance with the fact, that, when defendant appeared for judgment, he was asked "if he had any legal cause to show why judgment should not be pronounced against him."

4. An information charging that defendant did kill and murder "one James Collins" suffi-

ciently charges that defendant murdered a human being.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; D. J. MURPHY, Judge.

*Wilson & Troutt*, for appellant. *H. H. Hart*, Atty. Gen., for the People.

FOOTE, C. The defendant, McNulty, was charged, by information, with the murder of "one James Collins." He was convicted as charged, and prosecutes this appeal from the judgment rendered against him, and from an order denying a new trial. "The defense set up at the trial was insanity. The bill of exceptions is the charge of the court." The grounds of error alleged are that the court in its instructions charged the jury that the defendant must establish the fact of insanity, after proof of the alleged killing, by a preponderance of evidence; his contention, in brief, being that sanity is a necessary ingredient in the guilt of one charged with murder; that such guilt must be proved beyond any reasonable doubt; and hence, if the evidence discloses a reasonable doubt as to whether a defendant is sane, he must be acquitted. The question which is exhaustively presented, and the authorities fully stated and discussed, has recently been settled by an opinion of the appellate court of this state in *People v. Travers*, (Cal.) ante, 88, which as to the matter in hand reads thus: "(3) In the instructions given upon the subject of insanity, there was no error prejudicial to appellant. They are somewhat voluminous; but the main proposition contained in them was that a person is presumed to be sane until the contrary is shown, and that the burden is on a defendant of showing insanity by a preponderance of evidence. This rule has been established in this state by a long line of authorities. *People v. Myers*, 20 Cal. 518; *People v. Coffman*, 24 Cal. 237; *People v. McDonell*, 47 Cal. 134; *People v. Wilson*, 49 Cal. 13; *People v. Messersmith*, 61 Cal. 246; *People v. Hamilton*, 62 Cal. 377; *People v. Kernaghan*, 72 Cal. 609, 14 Pac. Rep. 566; *People v. Eubanks*, 86 Cal. 295, 24 Pac. Rep. 1014. And this long line of decisions cannot be held to have been overruled by *People v. Bushton*, 80 Cal. 160, 22 Pac. Rep. 127, 549, where the defense was accident; and *People v. Elliott*, 80 Cal. 296, 22 Pac. Rep. 207, where the defense was self-defense. In those cases the court was dealing entirely with those 'circumstances' referred to in section 1105 of the Penal Code, which mitigate or justify or excuse an act done by a sane man who might commit a crime, and its attention was not called in any way to that unusual and peculiar mental condition called 'insanity,' which renders a man utterly incapable of committing crime at all. In the opinion of the court in *People v. Bushton*, reference is made to *People v. Smith*, 59 Cal. 607, and *People v. Flanagan*, 60 Cal. 3, in which the very doctrine of the *Bushton* Case was stated; but in those cases—where the defenses were self-defense and defense of property—the court

certainly did not intend to overthrow the settled rule of the court on the subject of insanity. We are clear, therefore, that the undisturbed law of this state still is that the burden of showing insanity is upon a defendant who seeks shelter under it as a defense." 26 Pac. Rep. 90. This disposes of all the points made by counsel for the defendant.

An attorney, permitted to file a brief as *amicus curiæ*, has raised certain points as to the minutes of the court not showing that certain things were done which are required by law, and that the judgment was insufficient as not showing that the defendant had been convicted of murder in the first degree, although it does state that the sentence was "for the murder of James Collins on the 25th day of March, 1888, of which you have been duly convicted." The judgment was sufficient, as stating the general offense "murder" for which the defendant was convicted. *People v. Murray*, 43 Cal. 455; *Ex parte Simpson*, 47 Cal. 127. It appears that, upon a suggestion of the diminution of the record, there was filed here a certified copy of the minutes of the trial court, containing, among other things, an amendment of the minutes *nunc pro tunc*, as to the fact that when the defendant appeared for judgment he was asked "if he had any legal cause to show why judgment should not be pronounced against him." This amendment could be made by the trial court so as to conform to the true state of facts, even pending appeal. *People v. Murback*, 64 Cal. 372.

As to all other matters which it is complained were not done,—even if it be conceded, without deciding, that as the record originally appeared it affirmatively showed that they were not done,—the certified copy of the minutes of the proceedings show that none of the points made as to the sufficiency of the minutes are well taken; that everything was done which the statute required to save all the rights of the defendant when called up for sentence and judgment.

He also urges an objection to the sufficiency of the information in respect that it does not designate a human being as having been murdered by defendant in the allegation that the defendant "did then and there willfully, unlawfully, feloniously, and of his malice aforethought, kill and murder one James Collins;" the argument being that one James Collins might mean a horse as well as a person or human being. It is manifest that the defendant could not have been otherwise than informed by the language used that he was accused of the murder of a human being, when he was charged with having murdered "one James Collins." This is all that the law requires. Subdivision 6, § 959, Pen. Code; *People v. Freeland*, 6 Cal. 98. We therefore advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

ROSS v. KENNEDY *et al.* (No. 13,664.)

(*Supreme Court of California.* May 2, 1891.)

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge. *W. C. Kennedy*, for appellants. *Wallace & Prewett*, for respondent.

PER CURIAM. The judgment in this case must be affirmed on the point that the filing of appellant was prior to segregation, on the authority of *Garfield v. Wilson*, 74 Cal. 175, 15 Pac. Rep. 620; *Buchanan v. Nagle*, ante, 512; and other recent cases. This makes it unnecessary to examine the other points made by respondent. The judgment and order denying a new trial are affirmed.

87 Cal. 552

NORDHOLT v. NORDHOLT, (two cases.) (No. 13,962.)

(*Supreme Court of California.* Jan. 30, 1891.)

INFANCY—AVOIDANCE OF DEED—FULFILLMENT OF TRUST—DURESS.

1. One who takes and holds the legal title to land in trust cannot disaffirm or avoid his deed in execution of that trust on the ground of his minority.

2. In an action to avoid a deed on the ground of minority alone, there being evidence that plaintiff induced his mother to deed to him in trust for defendant, his brother, on his parol promise to convey it to him; that at the time he did not intend to keep his promise; that he afterwards conveyed it, with the secret intention of thereafter avoiding it on the ground of infancy, —it is error to admit evidence that the conveyance to defendant was induced by duress.

Commissioners' decision. Department 2.

Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

*Gage & Roberts* and *Brousseau, Hatch & Thomas*, for appellant. *Shinn & Ling* and *Anderson, Fitzgerald & Anderson*, for respondent.

VANCLIEF, C. The issues in these two actions were the same, and the actions were consolidated and tried together by the lower court on the same evidence. The court found for respondent on all the issues, and rendered judgment accordingly. The appeals are from the final judgment, and from an order denying motion for new trial. It appears by the pleadings that the parties are brothers, and that on November 17, 1886, their mother conveyed to the respondent, William, by deed absolute on its face, expressing a nominal consideration of one dollar, an undivided fourth part of certain real property situate in the city and county of Los Angeles; that appellant, John, claimed that this conveyance was in trust for him, and demanded of William a conveyance of the legal title; that on February 10, 1887, William, who was then a minor, over the age of 18 years, conveyed to John, by a bargain and sale deed, expressing a nominal consideration of one dollar, the same undivided fourth of the property; that this conveyance was claimed by appellant, John, to have been made in execution of the alleged trust. The respondent denies the trust, and seeks to avoid his deed of February 10th, to John, on the ground that at the time of its execution he was a

minor of the age of only 18 years. If the respondent took and held the legal title in trust for appellant, he cannot disaffirm or avoid his deed in execution of that trust, on the ground of his minority, since the execution of the trust was a duty which a court of equity would have compelled him to perform notwithstanding his infancy. *Elliott v. Horn*, 10 Ala. 348, and cases there cited; *Starr v. Wright*, 20 Ohio St. 97; *Prouty v. Edgar*, 6 Iowa, 353; *Schouler*, Dom. Rel. § 416. Therefore the respondent's right to disaffirm his conveyance of February 10th depends upon the issue as to whether he held the legal title in trust for the latter. Upon this issue the lower court found for the respondent, and the appellant contends that this finding is not justified by the evidence. There is nothing in the deed of the mother to respondent to indicate that the conveyance was in trust; nor is the alleged trust evidenced by any written instrument subscribed by the respondent or his agent. If the trust exists, it arises from fraud, and is therefore a constructive trust, not within the statute of frauds, which may be proved by parol; and this is the theory on which the case was tried. The evidence tended to prove that the mother, at the request of respondent, had been induced to convey the property in question to her four children, viz., respondent, appellant, and her two daughters, one undivided fourth to each; that William (respondent) had requested her to convey to him John's fourth in trust for the latter, on account of John's dissipated habits at that time, to be reconveyed to John when he should become temperate, or when William should become 21 years of age; that at first the mother consented to this, and, in the absence of John, William presented to her the draft of a deed to this effect, and requested her to execute it; that she refused to execute the deed as drawn, conveying John's fourth to William in trust, but did then (November 8, 1886) execute a deed to William and her two daughters, conveying to each one undivided fourth of the property; that afterwards (November 17, 1886) respondent again requested his mother to convey to him the other fourth, in trust for John, which she then did, without other consideration than the parol understanding with respondent and his express promise to her that he would reconvey that fourth to John, as above stated; that, at the time of making this promise to hold in trust and to reconvey to John, respondent did not intend to perform his promise, but intended to claim and hold that fourth absolutely for himself, as he does in these actions; that, upon John's claiming and demanding of him a conveyance of that fourth, he executed the deed of February 10, 1887, but with the secret intention of thereafter disaffirming it on the ground of his minority, as he is endeavoring to do in these actions. These facts, if proved, constitute such fraud as would justify a court of equity in declaring the respondent a mere trustee of the legal title for the benefit of the appellant. *Brison v. Brison*, 75 Cal. 525, 17 Pac. Rep. 689; *Adams v. Lambard*, 80 Cal. 426, 22 Pac. Rep. 180; *Sandfoss v. Jones*, 85 Cal. 481. And

the evidence, positive and circumstantial, on the part of the appellant, seems *prima facie* sufficient to prove them. Indeed, they seem to be supported by a decided preponderance of evidence properly admitted.

But it was claimed by the respondent on the trial, without any foundation therefor in the pleadings, that his deed to appellant of February 10, 1887, was executed under duress *per minas*, which his testimony on the trial had some tendency to prove. This testimony of the respondent as to threats by John was objected to by counsel for appellant, on the ground that it was irrelevant to any issue made by the pleadings. The objection was overruled by the court, and counsel for appellants excepted. Thereupon respondent testified as follows: "Well, at that time John thought he had a quarter interest in this property, and he used to ask me for the property all the time. At that time he was drinking very heavily, and he told me several times if I did not give him up that property he would do me up, or something to that effect. I felt the influence of him, and I talked with Judge Ling about it, and he said if I gave him a deed I could disaffirm it after awhile, and keep him quiet for the present. So with that I made a deed to him of one-quarter interest in the property. John would speak to me about the matter, on an average, every other day. He would say that he had an interest—a quarter interest—in the property, and that he wanted it; he wanted a deed to that property." I think the court erred in overruling the objection to this testimony to the possible, if not probable, prejudice of the appellant. The conveyance of February 10, 1887, under the circumstances of John's claim and demand, tended to justify an inference that the respondent then recognized the trust and his obligation to convey the property to John, which corroborates and strengthens the other evidence of the trust; but, if the conveyance was coerced by duress of any kind, no such inference could be drawn. Why, if respondent did not recognize the trust, did he execute the deed of February 10, 1887? This question, so pertinent under the circumstances, is answered by evidence of duress. But, since the execution of the deed was expressly admitted by respondent's pleadings, and the duress sought to be proved was affirmative matter in avoidance of the deed, it should have been specially pleaded; else no evidence to prove it should have been admitted against the objection of appellant. *McCreary v. Marston*, 56 Cal. 403; *McCreary v. Duane*, 52 Cal. 262; *Miller v. Sharp*, 48 Cal. 394; *McComb v. Reed*, 28 Cal. 281. The only matter pleaded in avoidance of the deed is the minority of the respondent, which, we have seen, is not available if the respondent held the property in trust as alleged, and as the evidence tends to prove. For the error in admitting respondent's testimony as to duress, I think the judgment and order should be reversed, and the causes remanded for a new trial.

1 concur: BELCHER, C.

HAYNE, C. I concur in the foregoing opinion, but go further. I think it would make no difference if the duress were pleaded in the fullest manner. The deed of the respondent can no more be avoided on the ground of duress than it can on the ground of minority. A court of equity will not lend its assistance to a man to set aside on the ground of duress an execution of a valid trust. That would be to assist a fraud. This question fairly arises, and, if it be not disposed of now, the case will probably come back again.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the causes remanded for a new trial.

88 Cal. 328

*In re* WRIGHT *et al.* (No. 13,806.)

(*Supreme Court of California*. March 19, 1891.)

INSOLVENCY—PETITION—VERIFICATION.

1. The allegation in a petition in insolvency against a firm, alleging that A. and B., doing business under the firm name of A. & B., are indebted, instead of averring that the firm "A. & B." is indebted, is not insufficient, as showing that the indebtedness is by the parties as individuals, rather than by the partnership.

2. Where, in a petition, different creditors have joined, having several debts, and are required to join in the verification, some of the matters must necessarily be stated upon information and belief, and that form of verification is proper, although there are no allegations in the petition which are stated to be upon information and belief.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

O. L. Abbott, for appellants. N. O. Bradley and G. E. Lawrence, for respondents.

TEMPLE, C. The only questions presented by this appeal are as to the sufficiency of the petition and the verification. They are as follows:

"In the superior court of the county of Tulare, state of California. In the matter of D. L. Wright and W. B. Wright, copartners doing business under the firm name of D. L. and W. B. Wright, insolvent debtors. To the Hon., the superior court of the county of Tulare, state of California. The petition of D. S. Cohn and S. Cohn, doing business under the firm name of Cohn & Co., Frederick Kern, Matthew McGovern, Frank T. Elam, and Geo. Wright, respectively, shows that petitioners are each residents of the state of California, and that D. L. Wright and W. B. Wright, copartners doing business under the firm name of D. L. and W. B. Wright, above named, are residents of the county of Tulare, state aforesaid, and are indebted to your petitioners as follows to the said firm of Cohn & Co. in the sum of \$1,241.85, on a promissory note executed and delivered by said firm of D. L. and W. B. Wright to said firm of Cohn & Co. of date October 28, 1889, for the principal sum of \$1,375, bearing interest at the rate of 10 per cent. per annum, no part of which has been paid, save and except the sum of \$152.15, leaving now due on said note the

sum of \$1,241.85; to Frederick Kern in the sum of \$60.75, for goods, wares, and merchandise sold and delivered to said insolvents within the last two years; to Matthew McGovern in the sum of \$8.50, for care of team and livery bill, furnished within two years last past; to Frank T. Elam in the sum of \$7.85, for blacksmithing and lumber, furnished within two years last past; George Wright in the sum of \$6.00, for brick and mortar, furnished within two years last past,—in all \$1,324.95; and each and all of said sums are now due, and the same or no part thereof has been paid, and neither of said petitioners has become a creditor of said firm of D. L. and W. B. Wright, by assignment within thirty days prior to the filing of this petition; that said D. L. and W. B. Wright, copartners as aforesaid, were on the 7th day of December, 1889, insolvent; that said firm of D. L. and W. B. Wright did, on or about the 7th day of December, 1889, transfer and convey to one E. E. Giddings and John Nance their certain livery stable outfit, and their stock belonging to said livery stable, and other property situate in the town of Dinuba and in Tulare county, with intent to delay, defraud, and hinder their creditors and your petitioners herein from collecting their just claims against said firm; that said firm of D. L. and W. B. Wright have transferred and conveyed all their property within thirty days last past, and now have no property, as your petitioners are informed and believe, subject to attachment. Wherefore your petitioners pray that the said court issue its order to said D. L. & W. B. Wright, copartners doing business under the firm name of D. L. & W. B. Wright, to show cause, at a time and place fixed by the court, why they should not be adjudged insolvent debtors, and the surrender of their estate be made for the benefit of their creditors in manner required of insolvent debtors.

his  
 "MATTHEW X MCGOVERN.  
 mark.

"Witness to signature of Mat- FREDERICK KERN.  
 thew McGovern, D. S. COHN & S. COHN,  
 N. O. BRADLEY. Copartners as COHN & CO.  
 "FRANK T. ELAM.  
 "GEORGE WRIGHT.

"State of California, county of Tulare—  
 ss.: D. S. Cohn, Matthew McGovern, and Frederick Kern, being each severally and duly sworn, says that he has heard read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge, except those matters therein stated on information and belief, and as to those matters that he believes it to be true, and said D. S. Cohn, above named, further says that he is now and was at all times herein mentioned a member of the firm of Cohn & Co., above named.

his  
 "MATTHEW X MCGOVERN.  
 mark.

"Witness to signature of Mat- FREDERICK KERN.  
 thew McGovern, D. S. COHN."  
 N. O. BRADLEY."

The objection to the petition is that it does not show that the creditors were creditors of the partnership, rather than of D. L. and W. B. Wright as individuals. The allegation is that D. L. and W. B. Wright, doing business as partners under the firm name of D. L. & W. B. Wright, are indebted, etc., and not that the firm of D. L. & W. B. Wright are indebted, etc. I think this averment can only be understood as charging that the indebtedness arose in the business of the copartnership. There is no provision in the insolvent act for adjudging two or more persons insolvent, and providing for a joint assignment, except section 35, which authorizes such proceedings in favor of or against partners in reference to partnership debts and assets. In such case the proceeding is properly for or against them individually as partners. This must be so, for the separate estate of each member of the firm also passes to the assignee. And such was the practice in bankruptcy in the federal courts. Partnership debts are, after all, only joint obligations, and the firm cannot be insolvent unless the individual members are so. It is, doubtless, necessary to show what the partnership debts are, for various questions are likely to arise between individuals and firm creditors in marshaling the assets and paying debts. The form adopted here in the averment of the partnership indebtedness is quite similar to that which has always been employed in pleading partnership indebtedness, and I think is sufficient. The objection to the verification is that it is in the usual form for the verification of a pleading, which includes matters stated on information and belief. There are no matters in the petition stated to be on information and belief, and the statute does not prescribe the form of the verification. Where different creditors, however, having several debts, are required to join in a verification, some of the matters must necessarily be stated upon the information and belief of each of the affiants. I think the petition and verification sufficient, and the judgment and orders appealed from should be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

88 Cal. 384  
 MURDOCK v. CLARKE et al. (No. 13,977.)  
 (Supreme Court of California. March 19, 1891.)

PAYMENT — APPLICATION — COMPOUND INTEREST —  
 ACCOUNTING BETWEEN MORTGAGOR AND MORTGAGEE.

1. Where mortgagees in possession of the mortgaged estate receive therefrom a net income over and above their expenditures, they are under obligation to so apply such payments to reduce the more onerous undertakings of the debtor if it can be done consistently with their receipt of all he has contracted to pay them; and where, of several obligations secured by such mortgage, one bears compound and the others simple interest, the payments must be applied so as to first extinguish the one bearing compound interest.

2. Where the court has made a finding upon settlement of the account of mortgagees in pos

session, stating it as of that date, and the decree is not entered until some time afterwards, it is not error for the court to make a supplemental finding showing the expenditures and receipts since the former account, and to modify it accordingly.

In bank. Appeal from superior court, Lassen county; KEYSER, Judge.

*A. L. Hart and Solen Hall*, for appellants.  
*J. D. Goodwin, D. W. Jenks, and W. N. Goodwin*, for respondent.

HARRISON, J. February 4, 1875, Adam Murdock borrowed from the defendant Clarke \$8,500, and executed to him his promissory note therefor, "with interest thereon at the rate of one and one-fourth per cent. per month from said 4th day of February, 1875, interest payable semi-annually, and, if not so paid, to be added to the principal, and bear a like rate of interest;" and at the same time conveyed to him certain real property consisting of the "Big Valley Ranch" and the "Beaver Creek Ranch" "for the purpose of securing the payment of said promissory note according to the terms thereof." March 22, 1875, Clarke conveyed to his co-defendant, Cox, an equal one-half of the interest in said note and security, and on the same day Murdock borrowed from Clarke and Cox the further sum of \$5,000, for which he gave them his promissory note for that amount, "with interest at the rate of one and a-half per cent. per month from date until paid." At that time it was agreed between Murdock and the defendants that the defendants "should have and hold the possession and control" of the said real estate, together with certain property "until the said promissory notes, with interest thereon, together with such further amounts or sums as should be advanced and paid out by said Clarke and Cox for said Murdock, should be fully paid to them." April 10, 1875, a bill of sale of said personal property was executed by Murdock to Clarke and Cox "in pursuance of said agreement, and as further security for the payment of said several amounts." The defendants took possession of the ranches aforesaid on the 22d day of March, 1875, and after the execution of the bill of sale therefor they also took possession of certain of the personal property therein described. After the execution of said bill of sale the defendant, at the request of Murdock, advanced and paid to and for his use and benefit other sums of money, for some of which he gave them his note, "with interest at the rate of one and one-half per cent. per month," and for a portion of which "no note or instrument in writing has ever been given." Murdock died intestate December 7, 1875, and thereafter his administratrix (the respondent herein) brought this action against the defendants for an accounting of the money received by them; and in the prayer to her complaint asked "that such sum as may be necessary for that purpose be appropriated to the payment of the said sums of money borrowed of the said defendants by the said Adam Murdock, with the interest thereon; and that said applications of said money to such payment be made as of the date at which the said money was

received by the defendants." The case came on for trial April 30, 1888, and in its decision rendered February 19, 1889, the court settled the account of the defendants from the time they took possession of said property down to May 1, 1888. In its findings of fact the court found "that since they have been in the possession of the said property, as aforesaid, the total expenses of defendants in the necessary and proper management and care of said property, properly chargeable to said estate, has been \$34,358.57, and their receipts from the products of said ranches, the sales of cattle and lease of hay land, have amounted to \$48,160.45." The court also found that the defendants had, in addition to realizing the foregoing amounts from said property, made use of the property so held by them, for their own benefit, and that "the value of the use and occupation of the said ranches on the part of the defendants for their own stock since the 1st day of November, 1877, up to the present time is \$1,000 per annum, and that the defendants are properly chargeable therewith." It also found "that no part of any money received by the defendants from the sale of stock or other products of the ranch, or from the leasing of the hay land, has been applied to the payment of the debts due to them by the estate of Adam Murdock;" and, in conclusion, "that upon a full accounting the plaintiff was indebted to the defendants on the 1st day of May, 1888, in the sum of \$29,752.59, no credit for compounding of interest being allowed defendants." From these findings the court found as its conclusions of law that the plaintiff was entitled to a reconveyance of the property "upon the payment to said Cox and Clarke of the said sum of \$29,752.59, with simple interest on the notes held by them against said estate since said date, less such sum as they may have received from said estate by the sale of cattle and other products, and the leasing of hay land, and less a rental of \$1,000 per annum since said date, for the use of said ranches for their own stock;" and directed a decree to be entered accordingly. Prior to the entry of the decree a supplemental account, rendered under the foregoing directions from May 1, 1888, was settled by the court, and in its decree, after settling said account, the court found that there was a total of \$31,926.37 due and owing from the plaintiff to the defendants, and directed and decreed that "upon the payment by plaintiff to defendants of the said sum of \$31,926.37, within thirty days after the entry of this decree, the defendants shall convey to the estate of Adam Murdock, deceased, all of said property then remaining in their hands. This decree was entered July 3, 1889, and thereafter the defendants appealed to this court "from the part of the judgment and decree rendered in favor of said defendants against said plaintiff, and which adjudges that no credits for compounding of interest be allowed the defendants, and which adjudges that there was due from the plaintiff to the defendants at the date of filing said decree, \$31,926.37 on-

ly." The points presented on behalf of the appellants are that the court should have computed interest upon the \$8,500 note by compounding the same according to its terms, and that the same rate of computation should be continued until the entry of the decree.

1. The rules governing the application of indefinite payments made by a debtor to his creditor, to whom he owes different obligations, had their origin in the civil law; but in those countries where the common law prevails the rules of the civil law have been greatly modified, and in some respects entirely repudiated. Both systems concur in giving to the debtor the right to designate at the time of the payment the debt to which he wishes the payment applied. Both systems also hold that, if the debtor shall not then designate the debt to which he wishes the payment applied, the creditor may make application of the payment; and that, if neither makes such application, it shall be made by the court. The principles upon which the application is to be made by the creditor or by the court differ widely in the two systems. By the rules of the civil law, if the debtor at the time of payment makes no application thereof, it is the duty of the creditor to make application in accordance with the supposed intention of the debtor, and to that debt upon which the creditor would have applied it had he been the debtor; and that any application by the court must be made to that debt which the debtor at the time had the most interest to discharge, irrespective of its effects upon the creditor. 1 Dom. Civil Law, book 4, tit. 1, § 4; 1 Evans, Poth. p. 528; Civil Code La., arts. 2163-2166. This rule has been recognized in some of the states of this country, but in the courts of the United States and of the greater number of the individual states it has been repudiated, and it may now be considered as the settled rule in this country wherever the common law prevails that when neither party to the transaction makes any application of the payment, and there are different debts due from the debtor to the creditor, the law will make the application in such a manner, in view of all the circumstances of the case, as is most in accordance with justice and equity, and will best protect and maintain the rights of both parties. *Field v. Holland*, 6 Cranch, 8; *Logan v. Mason*, 6 Watts & S. 9; *Stone v. Seymour*, 15 Wend. 19; *Smith v. Loyd*, 11 Leigh, 512; *Allen v. Culver*, 3 Denio, 284; *Story*, Eq. Jur. 459b.; 2 Greenl. Ev. § 533. One of the elements underlying the rule for the protection of each party in his rights is that the burden shall be made as light upon the debtor as is consistent with giving to the creditor all that the debtor has bound himself to pay. If the creditor by any application that may be made for him can receive all for which the debtor is under an obligation to him, it is but equity that it should be applied in such a mode as will be least onerous to the debtor. (On the other hand, when the interest of the debtor cannot be promoted by any particular application of the payment, or when it is a matter of indifference to him

in which mode the application is made, the law raises a presumption that the payment was actually received in the way that was of most advantage to the creditor. If the application can be so made as to discharge all the obligations of the debtor without increasing his burden, it will be deemed indifferent to him upon which obligation the payment shall be applied. The principles of this rule find their application in cases where it is held that a payment is to be applied to interest instead of principal; to an interest-bearing debt in preference to one bearing no interest; to the payment of legal interest instead of that which is usurious; to a debt that has matured rather than to one not yet due; to the payment of legal items in an account rather than of those which are illegal; and, on the other hand, for the purpose of protecting the rights of the creditor, a payment will be applied to the earlier items of an account in preference to later ones; to an unsecured debt in preference to one for which he holds security; and, when he has more than one security, to that debt for which the security is the most precarious. No specific rule can be laid down that will embrace all the cases that may arise for its application, inasmuch as the infinite variety of human transactions cannot be included within the limits of a formulated rule; and therefore courts must be governed by principles, rather than by fixed rules. In this state an attempt has been made for the guidance of courts in this matter, but the rules there prescribed are insufficient for all occasions, and do not embrace even the conditions of the present case. Section 1479, Civil Code, provides: "First. If neither party makes such application within the time prescribed herein, the performance must be applied to the extinction of obligations in the following order; and, if there be more than one obligation of a particular class, to the extinction of all in that class ratably: (1) Of interest due at the time of the performance; (2) of principal due at that time; (3) of the obligation earliest in date of maturity; (4) of an obligation not secured by a lien or collateral undertaking; (5) of an obligation secured by a lien or collateral undertaking." Neither of these subdivisions is directly applicable to the facts in this case. All of the obligations of Murdock are equally secured, and the moneys received by the defendants were at no time sufficient to extinguish all of the interest then due upon the principal obligations. The obligations also bear different rates of interest, and upon one of them the interest is to be compounded semi-annually, while the others bear only simple interest. Hence, instead of having the Civil Code as a guide, the court was compelled to take as its guide the equitable principles found in the above rule. Under these principles it was its duty to apply the payments that had been from time to time received by the defendants to those obligations which were most onerous to the plaintiff, so long as none of those obligations were impaired. Ordinarily this rule would require the payment to be applied in extinguishment of the interest upon that obligation which



bore the highest rate, but, inasmuch as in the present case the obligation which bore a lower rate of interest provided for compounding that interest, that became the most onerous, and, within the principles above stated, was the first to be extinguished, especially since thereby the defendants would suffer no loss, but receive all that Murdock had obligated himself to pay to them.

The findings show that from the time the defendants took possession of the property they were in the annual receipt of an income therefrom far in excess of their expenditures for its care and preservation, and that from that date until the time of the accounting they had in their hands moneys belonging to the plaintiff, which, added to the amount of annual benefit which they derived from the property, and from which the court found they were indebted to the plaintiff, greatly exceeded the interest accruing upon the \$8,500 note. It would be contrary to all principles of equity and justice for them to retain this money in their hands, and at the same time insist that the interest upon the \$8,500 note which they held against Murdock should accumulate by being compounded according to its terms. It was their duty to apply these moneys as fast as they were received to keeping down the interest upon the obligations for which they held the property as security, and upon that obligation which was most onerous to Murdock, and upon which the court must presume he would have intended the application, as being most beneficial to him. In applying money that had been received by the defendants, first to the discharge of the interest upon the obligation which provided for its compounding, and whatever surplus there might be to the reduction of the interest upon the other obligation, the court acted in accordance with the principles of the above rule, making the burden upon the plaintiff the least onerous consistent with the obligations that had been made by Murdock, and at the same time giving to the defendants all the money that they could have received had Murdock paid them from time to time the semi-annual interest as it fell due, with the moneys which they held in their hands for him. This application of the money in the hands of the defendants to the discharge of the interest upon the \$8,500 note, instead of being "a modification of the contract entered into between the parties," as is stated in appellants' points, is in reality an exact compliance with the contract. In this mode the interest on the note that was "payable semi-annually" was discharged in exact accordance with the terms of the note. The defendants received all that Murdock had agreed to pay them, and at the very time that such payment was to be made, and at the same time the burden of the different obligations was made lighter upon the plaintiff than it would have been had the other course been followed. The findings do not show the tabulation or stating of the account between the parties, but mere-

ly give the amount of the receipts and disbursements for each year, and the result of the accounting, "without making any allowance for compound interest." This result is consistent with the rule we have above stated. Inasmuch as the evidence upon which the findings were made is not before us, and the findings themselves do not show the several dates at which the money was received by the defendants, or present any facts inconsistent with reaching this result, upon the principles herein laid down we must assume that it is correct. We do not understand that the appellants contest the accuracy of the computation upon this principle. They contend that the account should have been stated by allowing compound interest.

2. The settlement of the account by the court as of May 1, 1888, was an adjudication by it of the amount then due from the plaintiff to the defendants, and was in the nature of a verdict or finding for that amount. A finding by the court in an action upon a promissory note embraces the whole amount due for principal and interest thereon at the date of the finding, and bears interest therefrom as a whole at the legal rate, and not according to the rate of interest stipulated in the note. *Alpers v. Schammel*, 75 Cal. 590, 17 Pac. Rep. 708; *Golden Gate Mill & Min. Co. v. Joshua Hendy Mach. Works*, 82 Cal. 184, 23 Pac. Rep. 45. Section 1035, Code Civil Proc., prescribes that "the clerk must include in the judgment entered up by him any interest on the verdict or decision of the court from the time it was rendered or made." Under this rule the defendants had no reason to complain of the mode of computation adopted by the court in its conclusion of law. In the present case, the account having been originally settled as of May 1, 1888, but the decision of the court not having been made until February 18, 1889, and the defendants having in the mean time made expenditures and received income from the property, a supplemental account was required. When the court came to settle that supplemental account it found "that since the trial of said cause on the 1st day of May, 1888, and up to the said 19th day of June, 1889, the said defendants have expended on behalf of said estate the sum of \$6,360.25, and have received as proceeds of said property the sum of \$4,186.47, leaving due to the defendants for expenditures over and above receipts, in addition to the said sum of \$29,752.59, the sum of \$2,173.78, making a total of \$31,926.37 now due and owing from the plaintiff to the defendants." We cannot say from this statement in the decree that a proper computation of the amount to which the defendants were entitled was not properly made by the court, inasmuch as it is not shown at what dates the moneys were respectively received or expended by the defendants. We find no error in that portion of the judgment from which the defendants have appealed, and it is therefore affirmed.

We concur: DEHAVEN, J.; SHARPSTEIN, J.; PATERSON, J.; GAROUTTE, J.

(39 Cal. 53)

CHAPMAN *et al.* v. DORAY. (No. 13,655.)

(Supreme Court of California. May 7, 1891.)

## PENAL ACTIONS—MINING CORPORATIONS—FAILURE TO POST NOTICES.

In an action for a penalty against a gold mining company brought under St. Cal. 1880, p. 184, which provides that such corporation shall on the first Monday of each month make and have posted in the office of such company certain reports and accounts current for the previous month, an answer denying the allegation of the complaint that said company had an office for the transaction of business is insufficient to raise a material issue; Civil Code, §§ 290, 321a, contemplating that all corporations shall have a place of business.

Commissioners' decision. In bank. Appeal from superior court, Sierra county; F. D. SOWARD, Judge.

*Gray & Sexton, H. V. Reurden, and F. R. Wehe, for appellant. Smith & Ford and T. M. Osmont, for respondents.*

**BELCHER, C.** This action was brought to recover the sum of \$1,000 liquidated damages, and costs of suit, under the provisions of an act of the legislature of this state approved April 23, 1880, (St. 1880, p. 184.) The complaint alleges that during the year 1889 the Pacific Gold Mining Company was a corporation, organized under the laws of this state, for the purpose of carrying on and conducting the business of mining; that the corporation owned valuable mining claims in the county of Sierra, and had its office for the transaction of business in the town of Howland Flat, in that county; that the plaintiffs and defendant were stockholders of the corporation, and the defendant was one of its board of directors, and its president and acting superintendent; that during the months of January, February, March, April, May, June, and July, 1889, the corporation was engaged in working its mines, and during each of said months it employed numbers of men therein, and incurred liabilities, and received and disbursed divers sums of money; that it became and was the duty of the defendant and his co-directors to make and have posted in the office of the company on the first Monday of each of said months, certain reports and accounts current for the previous month, as required by the act of the legislature before referred to, but that disregarding their duties and obligations in this regard, they failed, refused, and neglected to make, or cause to be made, or posted or filed, the reports and accounts required, or any of them. Wherefore judgment was asked for the penalty imposed by the statute. By his answer the defendant denied that the Pacific Gold Mining Company "had an office for the transaction of its business in the town of Howland Flat," or at any other place. He further denied that it was the duty of the directors of the corporation to cause to be made and posted the reports and accounts current, named and referred to in the complaint; denied that any duty or obligation was imposed upon the directors of mining corporations, by the act of April 23, 1880, to have made and posted reports and accounts current as alleged in the complaint, or any penalty for a failure to do so; de-

nied that, by reason of the facts alleged, the plaintiffs had been damaged in the sum of \$1,000, or in any sum, or at all. On motion of the plaintiffs, the court gave judgment in their favor on the pleadings, and from that judgment the defendant appeals.

The principal contention of the appellant is that the court erred in granting judgment on the pleadings, because the denial in the answer that the corporation had an office for the transaction of its business in the town of Howland Flat, or at any other place, raised a material issue. We do not think this contention can be sustained. The law contemplates that every corporation shall have an office. The Civil Code provides that when a corporation is formed its articles of incorporation must set forth the place where its principal business is to be transacted, (section 290;) and it may afterwards change its principal place of business from one place to another in the same county, or from one city or county to another city or county within the state, notice of such change being given by publication in a newspaper for three successive weeks, (section 321a.) It also provides that the by-laws of a corporation shall be kept in its office and be open to the inspection of the public during office hours of each day except holidays. Section 304. And the statute under which the plaintiffs seek to recover provides that "such account or balance sheet shall be verified under oath by the president and secretary, and posted in some conspicuous place in the office of the company." Now, if the appellant's contention should be sustained, it would be possible for the directors of every mining corporation to avoid the duties and penalties imposed upon them by the act. They could close up their offices, and then say, we have no office where the reports and accounts current can be posted, and therefore are under no obligation to obey the commands of the statute; or they could discharge their secretary, and then claim the same immunity, because there was no secretary who, in conjunction with the president, could verify the accounts and balance-sheets, and fit them to be posted, and therefore they need not be posted. But this would be simply an evasion of the mandates of the law. In *Schenck v. Bandmann*, 81 Cal. 231, 22 Pac. Rep. 654, the action was brought under the same statute to recover the declared penalty. The defendants sought to excuse themselves on the ground that they did not obtain the information necessary to enable them to make out the itemized account or balance-sheet for the month of October till the 15th day of November, and therefore they could not be held liable for not doing it on the first Monday of the month. The attempted excuse was held insufficient, and the judgment was affirmed. We think the defendant, and his co-directors here, had, or ought to have had, an office for the transaction of the business of the corporation, and the denial was therefore insufficient to raise a material issue. The other points discussed by counsel do not require any extended consideration. The statute complained of has been considered

and upheld in the following cases: *Loveland v. Garner*, 71 Cal. 541, 12 Pac. Rep. 616; *Beal v. Osborne*, 72 Cal. 805, 13 Pac. Rep. 871; *Schenck v. Bandman*, 81 Cal. 281, 22 Pac. Rep. 654.

We advise that the judgment be affirmed.

I concur: **FOOTE, C.**

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment is affirmed.

(89 Cal. 55)

**SCHOFIELD v. DORAY.** (No. 13,656.)

(*Supreme Court of California.* May 7, 1891.)

**PENAL ACTION—FAILURE OF MINING COMPANY TO FILE ACCOUNTS CURRENT—AMENDMENT.**

It is not error to refuse an amendment to an answer in an action for a penalty, under St. Cal. 1880, p. 134, against a mining company for failing to post certain reports in its office enabling defendant to plead in bar a judgment for the recovery of a penalty in another case, as the offense is a continuing one.

Commissioners' decision. In bank. Appeal from superior court, Sierra county; **F. D. Soward**, Judge.

*Gray & Sexton, H. V. Reardon, and F. R. Wehe*, for appellant. *Smith & Ford and T. M. Osmont*, for respondent.

**BELCHER, C.** This case is similar in character to that of *Chapman v. Doray*, ante, 605, (No. 13,655,) just decided. The pleadings are the same, except that the penalty sought to be recovered here was for the failure to make and post on the first Monday of August, 1889, the reports and accounts current for the previous month, while the failures alleged in *Chapman v. Doray* were for the months of January to July, inclusive, for the same year. Judgment in both cases was rendered on the same day, and the proceedings up to judgment were similar. In this case, after judgment had been rendered in *Chapman v. Doray*, and before judgment herein, the defendant asked leave of the court to file an amended answer, to enable him to plead the recovery and judgment in the other case as a bar to a recovery here. The court denied the motion, and the defendant excepted. Judgment was then entered, from which the defendant appeals, on a bill of exceptions. The same points are made here for a reversal of the judgment as were made in *Chapman v. Doray*, and, on the authority of the decision in that case, they must be overruled. It is further urged that the court erred in denying the defendant's application to amend his answer. We see no error in this ruling. The proposed answer would have presented no defense. Each failure is a delinquency for which an action may be maintained. It is true that, when the stockholders forbear to sue till after several failures have occurred, only one penalty can be recovered up to the time such forbearance ceases, and the suit is brought. *Loveland v. Garner*, 71 Cal. 541, 12 Pac. Rep. 616. But an action may be maintained for such delinquency as it occurs. We advise that the judgment be affirmed.

We concur: **FOOTE, C.; VANCLIEF, C.**

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment is affirmed.

(88 Cal. 407)

**PRINCE v. CITY OF FRESNO, (COUNTY OF FRESNO, Intervenor.)** (No. 13,781.)

(*Supreme Court of California.* March 31, 1891.)

**MUNICIPAL CORPORATIONS—RECORDER—FEES.**

The recorder of the city of Fresno, under *Deering's Pol. Code*, p. 880, §§ 806, 807, is vested with concurrent jurisdiction with justices of the peace of all actions, civil and criminal, arising within the corporate limits of the city, and shall receive such fees for his services as may be allowed by law to justices of the peace for like services, except that for his services in criminal prosecutions for violations of ordinances he shall be entitled to receive only such monthly salary as the board of trustees shall by ordinance prescribe. *Held*, that he is vested with a dual jurisdiction as recorder and justice, and that the fines he receives for violations of the Penal Code are to be paid over to the county treasurer, and he must be paid for his services as in the case of justices.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; **M. K. Harris**, Judge.

*W. D. Tupper*, Dist. Atty., and *H. H. Welch*, for appellant and intervenor. *Goucher & Jones*, for respondent. *C. C. Merriam*, for defendant.

**FOOTE, C.** This action was tried upon an agreed state of facts, under sections 1138 and 1140 of the Code of Civil Procedure. The plaintiff is the duly elected and qualified recorder of the city of Fresno, which is a city of the fifth class under the laws of the state. During the months of April, May, June, July, August, and September, 1889, he "collected fines in his court from parties convicted therein of violations of various provisions of the Penal Code of the state of California, as distinguished from violations of the ordinances of the city of Fresno, to the amount of \$646.90." He presented to the city his bill for fees claimed to be due him, earned during that time, in substance as follows: For fees in cases where fines were collected for violations of the Penal Code of the state, \$175; for fees in cases where fines were not collected for violations of the Penal Code, \$319.25; total fees claimed, \$494.25. The city refused to allow the bill in whole or in part. The county came in as an intervenor, claiming to be interested in the suit, and it is set out in the agreed facts that "if it be determined that the city is not liable to the recorder for said fees, then the county is liable, it being unquestioned that either the city or county is so liable; and if the determination of this suit is adverse to the recorder, the plaintiff, then the fines collected as aforesaid, to-wit, the said sum of \$646.90, should be paid in to the county treasurer; wherefore it is prayed that the questions raised by the facts above stated be determined by this court, and judgment entered accordingly." Judgment was rendered "that plaintiff pay to the county treasurer of the said county of Fresno, Intervenor herein, all fines heretofore imposed by him for violations of the provisions of the Penal Code, and

paid after commitment, and the residue of all such fines paid before commitment, after deducting therefrom the expenses of the prosecution in cases in which said fines were imposed; and that the intervenor, by its proper officers, agents, and representatives, audit and pay to plaintiff for his services heretofore rendered in cases of violations of the provisions of the Penal Code the same fees and compensation as are allowed by law to justices of the peace in like cases." The recorder's court of the city of Fresno, its jurisdiction, rules, practice, and procedure, are established by section 806 of the act entitled "Municipal Corporation Bill," page 830, Deering's Pol. Code. "Said recorder's court shall have jurisdiction, concurrently with the justice's courts, of all actions and proceedings, civil and criminal, arising within the corporate limits of such city, and which might be tried in such justice's court; and shall have exclusive jurisdiction of all actions for the recovery of any fine, penalty, or forfeiture prescribed for the breach of any ordinance of such city, of all actions founded upon any obligations or liability created by any ordinance, and of all prosecutions for any violation of any ordinance." Section 807 (same page) reads: "The recorder shall be judge of the recorder's court, and shall have the powers and perform the duties of a magistrate. He may administer and certify oaths and affirmations, and take and certify acknowledgments. He shall be entitled to charge and receive for his services such fees as are or may be allowed by law to justices of the peace for like services, except that for his services in criminal prosecution for violation of ordinances he shall be entitled to receive only such monthly salary as the board of trustees shall by ordinance prescribe, which compensation, when once fixed, shall not be altered within two years." The jurisdiction conferred by section 806, supra, on the recorder's court here involved, is: *First*. Concurrent with justices' courts, as conferred by general laws according to section 4316 of the Political Code, and section 832 et seq. of the Code of Civil Procedure, as to all matters ordinarily cognizable in a justice's court, within the corporate limits of the city of Fresno. *Second*. Exclusive jurisdiction within the same territory as to certain matters growing out of the ordinances of that city. He may, in addition to presiding as judge of the recorder's court, perform all the duties and have the powers of an ordinary magistrate. He may, like a justice of the peace, take acknowledgments and affidavits. Section 179, Code Civil Proc. He is for his services when acting, in like manner as a justice of the peace, allowed "to charge and receive for his services" the same fees as such justices "are or may be allowed by law \* \* \* for like services;" the only exception to this being that he is not entitled to receive fees in that way for anything done for his services in criminal proceedings under the city ordinances, but is for those services given a salary by the city trustees. It is not said expressly whom he shall charge, or from what source he shall

receive the fees for his action when exercising the jurisdiction and performing the functions of a justice of the peace.

The main question for determination is, we think, whether as to all criminal matters, under the Penal Code of the state, the action of the recorder is that of a justice of the peace or not. The appellant seems to contend that the recorder is a mere officer of the city of Fresno, under the law authorizing charters for cities of the fifth class, and that under section 1461 of the Penal Code, which gives the definition of a police judge, this recorder is such judge, and as such is not required, under section 1570 of that Code, to pay over fines to the county treasurer, but must, under section 1457, pay them to the city treasurer, and must get his fees from the city. But we do not agree to this view of the matter. As to a very similar statute conferring jurisdiction upon a recorder, it was said in *Curtis v. County of Sacramento*, 13 Cal. 292-294: "The appellant was recorder of Sacramento city, and, as such, claims that the county is indebted to him for fees due him for convictions made by him of divers criminals prosecuted under the laws of the state. The only question presented by the record is whether he is to be considered as a justice of the peace in respect to this claim, and is entitled, as if he were, to the fees. It seems that the charter of the city of Sacramento (Comp. Laws, 966, § 35) provides that the recorder 'should exercise all the powers of a justice of the peace in regard to offenses committed within the city limits, subject to all the rules governing justices of the peace, and have power to administer all oaths known to the law.' \* \* \* The point is made that the recorder is a judicial officer, and the constitution inhibits him from taking fees; but we think the constitution did not contemplate this class of officers as subjects of this inhibition. As a mere subordinate officer of the corporation, to carry into effect its by-laws or ordinances, he is less in dignity than a justice of the peace, and cannot be comprehended by a provision which expressly excludes justices; and we think that the mere addition of the duties of justices in respect to criminal matters has no effect in depriving the office of the same qualities in this respect as that of justices. Besides, as to all this matter, he is really, and in fact, a justice of the peace; and the constitution, when it exempted justices from the operation of this restraint, meant to exempt all those, by whatever name called, who are intrusted with the duties assigned by the law to those officers." (The italics are our own.) The decision, while covering other matters besides the one in hand, seems to go to the point involved here,—that a recorder of a city may have a dual jurisdiction and functions, and may be a justice of the peace as to the certain matters and a recorder as to others. So here we think that the law under consideration confers this jurisdiction, and we know of no provision in the constitution which inhibits the legislature from creating such an official. Const. Cal. art. 11, §§ 1-13. It appears, therefore, that as to such matters as are given him in charge as a justice of

the peace, the recorder is such an officer, and not a police judge. If the recorder imposed fines as a justice of the peace, and not as police judge, such fines by law are subject to be paid over to the county treasurer under section 1570 of the Penal Code, after payments of costs, etc. If, then, as we conclude, the recorder, as to all prosecutions under the Penal Code of which he has cognizance under the charter, is a justice of the peace, although section 807 of the municipal corporation bill does not in express terms declare that he shall charge the county for his fees when acting under that Code, it nevertheless gives him authority to charge and receive for his services such fees "as are or may be allowed by law to justices of the peace for like services." Section 225 of the county government act provides: "The following are county charges:" Subd. 5. "All charges and accounts for services rendered by any justice of the peace for services in the examination of persons charged with crime not otherwise provided for by law." Possessing, then, as the recorder does, the right to act and charge as a justice of the peace, and he being to all intents and purposes a justice of the peace, when acting under the Penal Code of the state as distinct from the city ordinances, he must be paid for such services as he may perform as such by the county, like any justice of the peace in a township of a county. And the fines are subject to the same disposition as if he had imposed them as such justice of the peace. For these reasons we advise that the judgment be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

88 Cal. 419

CHAPMAN v. BANK OF CALIFORNIA. (No. 14,158.)

(Supreme Court of California. March 21, 1891.)

APPEAL—TRANSCRIPT—NOT FILED IN TIME.

Where the transcript on appeal was not filed within the time prescribed, but it appears from the affidavits that the attorney of appellant, on the day the notice of appeal was served, was called to a distant state on account of the illness of his mother, and did not return until a few days before the time had expired, and that, owing to a press of business, by inadvertence he overlooked this case for a few days, but that within nine days after the time had expired he presented to the clerk a correct type-written copy of the record to be certified, but before it could be compared and certified the notice to dismiss was served, the motion to dismiss will be overruled.

In bank. Appeal from superior court, city and county of San Francisco.

T. M. Osment, for appellant. Newlands, Allen & Herris, for respondent.

DEATY, C. J. Motion to dismiss an appeal from a judgment and order denying a new trial on the ground that the transcript was not filed in time. The judgment in favor of defendant was rendered September 27, 1889. The order overruling plaintiff's motion for a new trial was made August 28, 1890. Notice of appeal

from the judgment and order was filed and served September 25th, and undertaking on appeal filed September 27th. The time for filing the printed transcript prescribed by rule 2 of this court expired November 5, 1890. On November 15th, no transcript having been filed, respondent served notice of his motion to dismiss. On the same day, but subsequent to the service of said notice, appellant filed a written transcript, duly certified by the county clerk, which was thereafter printed and served. The fact that the transcript was filed the same day notice to dismiss was served, but at a later hour, does not bring the appellant within the protection of rule 2 of this court, (Hoyt v. Railroad, 25 Pac. Rep. 160, No. 14,066,) and the motion to dismiss must prevail unless the appellant has by his affidavit shown a sufficient excuse for his delay to call for some relaxation of the rule providing for the dismissal of appeals for failure to file the transcript within the time prescribed. As to this, the undisputed facts are that on September 25th—the very day the notice of appeal was served—the attorney for appellant was called to the state of Tennessee on account of the illness of his mother, and did not return to California until October 24th. On his return, owing to the demands upon his attention of a multiplicity of business that had accumulated during his absence, by mere inadvertence he overlooked this case for a few days; but within nine days after the time for filing the transcript had expired, viz., on the 14th day of November, he prepared and presented to the county clerk a correct type-written copy of the record to be certified. The clerk was not able to compare and certify this transcript until the following day, and in the mean time the notice to dismiss was served. This shows that the appeal was taken and prosecuted in good faith. The delay in filing the transcript was trifling, and the hearing and decision of the cause on its merits will not thereby be delayed, at least not appreciably. The circumstances which occasioned the delay and oversight of counsel were such as to appeal strongly to the discretionary power of the court, and would, without doubt, have procured an order extending the time for filing the transcript if they had been brought to our attention before the motion to dismiss was made. If so, there is no reason why we may not after the motion relieve the appellant from the consequences of his delay when the facts show that before service of the motion to dismiss he was proceeding with all expedition to rectify his mistake. Motion denied.

We concur: MCFARLAND, J.; DE HAVEN, J.; PATERSON, J.; SHARPSTEIN, J.; HARRISON, J.

88 Cal. 640

Ex parte SPEARS. (No. 20,837.)

(Supreme Court of California. April 30, 1891.)

EXTRADITION—AFFIDAVIT—SUFFICIENCY.

An affidavit accompanying a requisition, which merely states that affiant "has reason to believe and does believe" that petitioner embezzled or fraudulently converted to his own use

the property mentioned, is insufficient for the governor's warrant of arrest as a fugitive from justice, in that it is not positive in its charge. PARANSON, J., dissenting.

In bank. *Habeas corpus*.

G. E. Riley and J. I. Caldwell, for petitioner. W. H. H. Hart, Atty. Gen., for respondent.

DE HAVEN, J. The petitioner is before the court upon a writ of *habeas corpus*, the return to which shows that he is in the custody of the sheriff of Nevada county by virtue of a warrant for his arrest as a fugitive from justice, issued by the governor of this state, in compliance with a requisition from the governor of the state of Alabama. The governor of this state was not authorized to issue his warrant for the arrest of petitioner unless it was shown to him that the petitioner is substantially charged with a crime in the state from which it is alleged he has fled, and the law of congress (Rev. St. § 5278) requires that this fact must be made to appear by a copy of an indictment found, or an affidavit made before a magistrate of such state, certified as authentic by the governor of the state making the demand. *Roberts v. Reilly*, 116 U. S. 95, 6 Sup. Ct. Rep. 291. And whether the alleged fugitive is so substantially charged with a crime is a question of law which is always open, upon the face of the papers, to judicial inquiry, on an application for discharge under a writ of *habeas corpus*. *Roberts v. Reilly*, supra. We have before us the copy of the affidavit accompanying the requisition of the governor of Alabama, and the sole question for determination is whether such affidavit substantially charges the petitioner with having committed any crime which would have justified his arrest in that state. The affidavit purports to have been made by one J. C. Orr, and charges that he (Orr) "has reason to believe, and does believe, that, within twelve months before making this affidavit in said county, W. A. Spears embezzled or fraudulently converted to his own use one carload mules, or the value of the same, to-wit, of two thousand dollars, the personal property of J. C. Orr, which came into W. A. Spears' possession by virtue of an employment to sell said mules." It is obvious that this affidavit does not directly charge that petitioner has committed any offense, and it would be a dangerous precedent to establish that any man may be deprived of his liberty and removed to another state upon such an accusation. The statement therein that affiant "has reason to believe, and does believe," that petitioner embezzled or fraudulently converted to his own use the property mentioned is not the statement of any fact, and for that reason the affidavit is fatally defective. The language of the supreme court of Michigan, in *Swart v. Kimball*, 43 Mich. 451, 5 N. W. Rep. 635, is applicable here: "Charges are not verified by an affidavit that somebody is informed and believes that they are true. This is mere evasion of the law. The most improbable stories may be believed of any one, and the man most free from any reasonable suspicion of guilt is not safe if he holds his

freedom at the mercy of any man three hundred miles off, who will swear that he has been informed and believes in his guilt." That such an affidavit is insufficient to support the issuance of a warrant, under the laws of this state, was held by this court in *Ex parte Dimmig*, 74 Cal. 165, 15 Pac. Rep. 619. We there said: "But a mere affidavit in the form of an information, containing no evidence, and followed by no deposition stating any fact tending to show guilt, is insufficient to support a warrant. The liberty of a citizen cannot be violated upon the mere expression of an opinion, under oath, that he is guilty of a crime." In *Ex parte Smith*, 3 McLean, 121, the affidavit accompanying the requisition of the governor of Missouri for the arrest of Smith was made by one Boggs, and charged "that on the night of the 6th day of May, 1842, while sitting in his dwelling in the town of Independence, in the county of Jackson, he was shot with intent to kill; and that his life was despaired of for several days; and that he believes, and has good reason to believe, from evidence and information now in his possession, that Joseph Smith, commonly called the 'Mormon Prophet,' was accessory before the fact of the intended murder, and that the said Joseph Smith is a citizen and resident of the state of Illinois." This affidavit was held insufficient as a basis for the governor's warrant, upon the ground, among others stated, that it was not positive in its charge. See, also, 1 Bish. Crim. Proc. § 222. It is true that the courts are not authorized to discharge a prisoner because of formal defects in the indictment or affidavit charging the offense, and that the sufficiency of the charge, as a matter of technical pleading, is to be tried and determined in the state from which the alleged fugitive fled. *Davis' Case*, 122 Mass. 329; *Kentucky v. Denison*, 24 How. 107. But the defect in the affidavit before us is not a mere technicality. The objection to its sufficiency is substantial, and it is that in judgment of law it does not make any charge at all. Upon the hearing the attorney general read as evidence, from a printed volume of the statutes of that state, section 4204 of the Criminal Code of Alabama, from which it appears that a warrant of arrest for a misdemeanor may be issued upon an affidavit in which the affiant states "that he has probable cause for believing, and does believe," that such offense has been committed; and it was argued that, inasmuch as no other section of this Code was formally offered in evidence, the court must presume that the affidavit here is sufficient under the laws of that state. We think, however, that we are not confined to this particular section, which is not applicable here, but are authorized to look into the volume in which it appears, and upon such examination we find the law of that state to be what, in the absence of all evidence, we would presume it to be, substantially like that of our own state, so far as relates to arresting one charged with a felony. It follows that the affidavit before us must be regarded as insufficient to justify the issuance of the executive warrant of arrest under which

the petitioner is detained in custody. Petitioner discharged.

We concur: BEATTY, C. J.; GAROUTTE, J.; McFARLAND, J.; HARRISON, J.

PATERSON, J., (*dissenting*.) I am unable to concur. "The warrant of the governor is *prima facie* evidence, at least, that all necessary legal prerequisites have been complied with," (Church, Hab. Corp. § 480,) and the petitioner has not made it appear to my satisfaction that the courts of Alabama could not hold him for examination on the affidavit charging him with embezzlement.

89 Cal. 1

DERBY *et al.* v. JACKMAN *et al.* (No. 13.-835.)

(*Supreme Court of California*. May 1, 1891.)

APPEAL — REVIEW — RECITALS OF JUDGMENT — CLAIMS AGAINST DECEDENTS — PROOF OF PRESENTATION.

1. Recitals, in a judgment on the pleadings, of the motion, the grounds thereof, and the ruling thereon, and the entry of judgment as a consequence, though not necessary to the validity of the judgment, are properly there, and, in the absence of a bill of exceptions, are conclusive evidence on appeal of the action of the court.

2. Where, after the commencement of an action, defendant died, and, his executors being substituted in his place, the supplemental complaint averred that the claim, duly verified, had been presented, the affirmative averment of the answer that the claim was not verified or presented as required by the statute is a sufficient denial.

3. Under Code Civil Proc. Cal. § 1502, providing that, if an action is pending against one at the time of his death, the plaintiff must present his claim to the executor or administrators for allowance or rejection, authenticated as required in other cases, and no recovery shall be had in the action unless proof be made of the presentation required, there cannot be judgment for plaintiff on the pleadings, but the presentation must be proven.

Commissioners' decision. In bank. Appeal from superior court, Merced county; C. H. MARKS, Judge.

*E. Jackman, in pro per.* J. K. Law, for respondents.

TEMPLE, C. This action was commenced against the testator of defendants. The executors having been substituted for the original defendant, plaintiffs made out and presented their claim against the estate, and then filed an amended complaint in which no mention was made of the presentation of the claim. Some months later they filed a supplemental complaint, in which the death, probate of the will, appointment, and qualification of the executors, and presentation of the claim, are alleged. After answer both to the amended and supplemental complaints, the plaintiffs moved for judgment on the pleadings. The motion was granted, and the defendants appeal from the judgment. There is no bill of exceptions, and the respondents now raise the point that the correctness of the ruling cannot be reviewed here, as the motion and the order granting it, and for judgment, are not brought up, and, as they claim, cannot be without a bill of exceptions. As a matter of fact, the judgment includes all that a bill of exceptions

could show,—all that is necessary for a review of this action of the court. The motion and the grounds of it are specifically recited, and the ruling upon it, and the entry of judgment as a consequence. The question is not whether these recitals are necessary to the validity of the judgment, but whether they are properly there, and constitute, for the purposes of this appeal, evidence of the action of the court below. The recitals are similar to those usually contained in what was called the *postea* of a common-law judgment, giving a history of the action of the court which led to the judgment. We think they are properly in the judgment, and, in the absence of a bill of exceptions, are conclusive evidence here of the action of the court. Instances in our Reports, where such recitals are referred to, as constituting evidence of what was done in the court below, are numerous. If the answers constituted a defense, judgment could not have been entered without a trial, unless the answers were disposed of in some mode known to the law. It was certainly proper to show in the judgment how this was done, and why judgment was entered without a trial.

The pleadings are verified, and it is claimed that the denials contained in the answers are insufficient, and raise no issue. This contention we think well grounded as to most denials in the answers, but there is one fact necessary to the plaintiffs' case which we think sufficiently denied to raise an issue, and therefore judgment was improperly entered on the motion. In the supplemental complaint it is averred that a claim duly verified was presented. The traverse of this allegation is in the affirmative form. Defendants aver that the claim was not verified or presented as required by the statute. The denial of the verification seems as broad as the allegation, and if that be deemed sufficient, as we think it is, the denial must be held so.

For another reason the judgment ought not to have been entered without evidence. Section 1502, Code Civil Proc., is as follows: "If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentations required." The effect of that section plainly is that, although due presentation of the claim be not denied, still it must be proven. If, as claimed by respondents, this section still leaves the matter subject to the usual law of pleading, to be proven when denied, but not when admitted, the requirement serves no purpose. Such would have been the case without it. It is just possible that this requirement was inserted under the expectation that the trial might proceed upon the pleadings as they stood at the time of the testator's death, without any supplemental pleading. Still we must presume the law-makers familiar with the practice, and the language is broad enough, even on that supposition, to require proof in all cases. The case of *Drake v. Foster*, 52 Cal. 225, does not help the re-



spondents, but is an authority against them. By implication it is held that not to require such proof is error, but where there was a trial on the merits it is held that objection on this ground cannot be made for the first time in this court. Here the plaintiffs moved for judgment on the pleadings, without evidence, and the defendants resisted the motion. No opportunity was afforded them for making this specific objection. This point and this construction of the statute were sustained in *Bank v. Howland*, 42 Cal. 132. We think the judgment should be reversed, and the cause remanded, with leave to defendants to amend their answer if they desire.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with leave to defendants to amend their answer if they desire.

39 Cal. 5

HERMOCILLA v. HUBBELL et al. (No. 14, 045.)

(Supreme Court of California. May 2, 1891.)

MINERAL LANDS—GRANTS—EXCEPTIONS.

1. Act Cong. March 3, 1853, being an act "to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," section 6 of which grants to the state of California land sections 16 and 36 "for the purposes of public schools in each township," does not include the mineral lands in those sections, though they are not specially excepted from the grant. *Following Mining Co. v. Consolidated Min. Co.*, 102 U. S. 167.

2. The grant by congress in 1853 being a grant *in present*, lands that were mineral lands then were excepted, and the fact that they were afterwards worked out and abandoned as unprofitable does not pass title to them to the state.

3. In ejectment by plaintiff claiming under a patent from the state, defendants, who are in possession of the land as mining claims under locations made in accordance with the law and the local customs, can contest the patent, as they are in privy with the United States.

Commissioners' decision. In bank. Appeal from superior court, Placer county; J. M. WALLING, Judge.

F. P. & C. Tuttle, for appellant. Hale & Craig and J. M. Fulweller, for respondents.

BELCHER, C. This action is ejectment to recover possession of the east half of the east half of the south-west quarter, and the west half of the west half of the south-east quarter, of a certain sixteenth section of land situate in Placer county. Other portions of the section are described in the complaint, but, as no contest was made as to them, they need not be referred to further. The defendants Hubbell, Shea, and California Quartz Mining Company alone answered. They denied all the averments of the complaint, and alleged that the portions of the section above described were in 1850, and ever since had been, and then were, mineral lands of the United States, having known valuable mineral deposits therein, consisting of placers containing gold in paying quantities, and quartz ledges or deposits of gold-bearing rock in place, carrying

gold and other precious metals in paying quantities; and that during all the times mentioned the said placers and quartz ledges had been, from time to time, in the actual possession of citizens of the United States, who were working and exploring the same for the gold and precious metals they contained. They further alleged that in the year 1880 two quartz mining claims, which are particularly described, were located on the demanded premises by citizens of the United States, and in conformity to the laws thereof and the local rules, regulations, and customs of the mining district,—one by the grantor of defendant Shea, and the other by the grantors of the defendant California Quartz Mining Company,—and that the locators and the said defendants, as their successors in interest, had ever since held, possessed, and worked their respective claims as mining claims. The case was tried by the court without a jury, and judgment was entered that the defendants above named were the owners and entitled to the possession of their respective mining claims as described, and as to them that the plaintiff take nothing; and that the plaintiff was the owner and entitled to the possession of all the balance of the land sued for as against all of the defendants. From this judgment, so far as it was against her, and from an order denying a new trial, the plaintiff appeals.

The plaintiff claimed title under a patent from the state, issued to one Banvard, her grantor, in 1870; and the first question is, was title to this land vested in the state at the time of the issuance of the patent? If it was, then the plaintiff was entitled to recover, and if not, we think the proper judgment was entered. Whatever title the state had was acquired under the act of congress of March 3, 1853, "to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes." 10 St. U. S. 244. By this act (section 6) it is declared that sections 16 and 36 "shall be, and hereby are, granted to the state for the purposes of public schools in each township." In *Higgins v. Houghton*, 25 Cal. 253, it was held by the supreme court of this state that mineral lands were not excepted from the operation of the grant of the sixteenth and thirty-sixth sections, made to the state by the act of March 3, 1853, and that as fast as the townships were surveyed the state became the owner of these sections absolutely. And see *Wedekind v. Craig*, 56 Cal. 642. The rule declared by this court, as above stated, has not been approved by the supreme court of the United States. On the contrary, it was held by that court in *Mining Co. v. Consolidated Min. Co.*, 102 U. S. 167, that the grant of the sixteenth and thirty-sixth sections of public land to the state of California by the act of March 3, 1853, was not intended to cover mineral lands, but that such lands were, by the settled policy of the general government, excluded from all grants. That decision is controlling, and must be followed here.

The question then remains, were the disputed premises at the time of the grant mineral lands,—that is, known to

be valuable for minerals? *Deffeback v. Hawke*, 115 U. S. 404, 6 Sup. Ct. Rep. 95. Upon this question the court below found as follows: "That during all the year 1850, and at the time of the acquisition of the said lands by the government of the United States, and continuously ever since, and on the 10th day of December, 1870, when the said patent was issued to the said E. M. Banvard, and at the time of the survey of the said lands and the return thereof by the said United States, the said east half of the east half of the south-west quarter, and the said west half of the west half of the south-east quarter, of said section sixteen were, and have been, and now are, known public mineral lands of the United States, having therein known valuable mineral deposits, consisting of gravel or placer deposits, and of quartz rock in place, bearing gold in paying quantities, and ever since the 26th day of July, 1866, have been free and open to exploration and purchase, and to occupation and purchase as mineral lands by citizens of the United States, and such as have declared their intention to become such citizens." It is claimed by counsel for appellant that this finding as to the mineral character of the land was not justified by the evidence, and hence that the judgment should be reversed. We do not think this position can be sustained. It is true the evidence was somewhat conflicting, but, taken as a whole, it was amply sufficient, in our opinion, to justify the finding. It is further claimed that the placer mines had been worked out, and the quartz mines abandoned as unprofitable, before 1870, and that there was no evidence showing or tending to show a holding or working of any part of the land at the time of the issuance of the patent in 1870. Conceding this to be so, still it cannot aid the appellant. The grant of the sixteenth and thirty-sixth sections was a grant *in presenti*, and the only question is, was the land in question known to be mineral in character at the time the grant was made? If it was, the title did not pass to the state, but the state took a right to other land in lieu thereof, and not a right to this land when its minerals should be exhausted. It is also claimed that the defendants were not in a position to attack the patent. But, as we have seen, the state had no title to the mineral land, and passed none to its patentee. The title still remained in the general government, and under its laws the land was open to occupation and purchase as mineral land. The defendants were in possession of their claims under locations which were made in accordance with the law and the local rules and customs. They were therefore in privity with the United States, and had a clear right to contest the patent and assert their rights. At the trial the defendants introduced evidence showing the work done on their claims after their location in 1880. This evidence was objected to by the plaintiff as irrelevant and immaterial, and the objections were overruled, and exceptions taken. The evidence was introduced to show that the claims were still valuable, and to overcome the plaintiff's theory that they were of no value. This, we

think, they had a right to do. But, if the rulings were erroneous, the plaintiff was in no way prejudiced by them, as she had no title. It follows that the judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

89 Cal. 15  
PEOPLE *ex rel.* MARIPOSA COUNTY v.  
COUNTS, Treasurer. (No. 14,029.)

(Supreme Court of California. May 4, 1891.)

COUNTY BONDS — NOTICE TO VOTERS — ORDERS.

1. Under the county government act, (St. Cal. 1883, p. 811, § 37,) providing that when the supervisors wish to create a bonded indebtedness they shall "by order specify the particular purposes for which the indebtedness is to be created, and the amount of bonds which they propose to issue," and shall submit the question of the issue of the bonds to the "qualified electors" of the county, an order and proclamation of election, stating that there is to be submitted the question of the issue of \$75,000 of bonds for the construction of "two public wagon roads in said county, — one from Bear Valley to Coulterville, and one from Mariposa to Yosemite," — sufficiently specified the particular purpose for which the indebtedness is to be created.

2. The fact that the order submits the question to "the people" does not invalidate it where the proclamation states that the question is to be submitted to the "vote of the people of this county," as it means the vote of only those people who are "qualified electors."

3. The board of supervisors, though required by the county government act to proceed by ordinance for some purposes, can proceed "by order" in such case, as section 37 of that act so provides.

Commissioners' decision. *In bank*. Petition for writ of mandate.

*Garret W. McEnerney* and *J. W. Congdon*, for petitioner. *L. F. Jones* and *Rosenbaum & Scheeline*, for respondent. *C. W. Cross*, *amicus curiæ*.

VANCLIEF, C. This is an original application to this court on the petition of Mariposa county for a writ of mandate to the treasurer of said county, commanding him to sell and dispose of, according to law, bonds of Mariposa county, alleged to have been issued in accordance with section 37 of the county government act, (St. 1883, p. 811,) for the purpose of constructing two public wagon roads in said county. An alternative writ issued, and the case stands upon a general demurrer to the petition. The section of the county government act above referred to is as follows: "The supervisors can only contract a bonded indebtedness other than such as is authorized by section twenty-six of this act as follows: They shall, by order, specify the particular purpose for which the indebtedness is to be created, and the amount of bonds which they propose to issue, and shall further provide for submitting the question of the issue of said bonds to the qualified electors of the county at the next general election, or at a special election to be called by the board for that purpose. If a special election, none but

qualified voters of the county shall be permitted to vote thereat, and it shall be held as early as possible in conformity with the general election law of this state. Notice shall be given of such election, by publication in some newspaper or newspapers published in the county, for four weeks prior thereto. If there be no newspaper so published, then by posting notices for the same time in each election precinct in the county, and at the court-house door. The ballots shall be printed, 'For the issue of bonds,' or, 'Against the issue of bonds.' If two-thirds of the electors of the county voting at such election shall vote in favor of issuing bonds, and not otherwise, the board may proceed to issue the amount of bonds specified, in the manner provided in this act for funding the floating indebtedness of the county; and all the provisions of this act relating to the issue and payment of bonds in the latter case shall apply to bonds issued under this section, except that such bonds shall not run for more than twenty years; and the board shall levy the tax necessary to create a sinking fund for the payment of the principal of said bonds, in each and every year after their issue, until finally paid. The revenue derived from the sale of said bonds shall be applied to the purpose or purposes specified in the order of the board, and no other. Should there be any surplus, it shall be applied to ward the payment of said bonds."

1. Upon the argument of the demurrer the respondent specified several grounds of objection to the petition, the principal one of which is that the board of supervisors did not, as required by the section above quoted, "by order specify the particular purpose for which the indebtedness is to be created." The petition shows that on the 7th day of May, 1888, the board, in regular session, passed and adopted the following orders: "Petitions having been received, signed by 598 residents of Mariposa county, to call a special election early in July, and thereat to submit to the electors of the county the question of voting to issue bonds to the amount of \$75,000.00, running twenty years, to be payable after the expiration of ten years, the funds raised from the sale of said bonds to be applied to the construction of two public wagon roads in Mariposa county,—one from Coulterville to Bear Valley, and one from Mariposa to Yosemite,—it is ordered that a special election be, and the same is hereby, called to be held Monday, July 9, 1888, for the purpose of submitting the issuance of bonds for the building of said roads to Coulterville and Yosemite to the people. It is ordered that the following proclamation be issued: Proclamation. Public notice is hereby given that in accordance with an order of the board of supervisors of Mariposa county, state of California, made on the 7th day of May, 1888, a special election be held throughout Mariposa county on Monday, July 9, 1888, for the purpose of submitting to the vote of the people of this county the question: Shall the board of supervisors of the county of Mariposa be empowered to issue bonds to the amount of \$75,000, running 20 years, to be payable after the expiration of 10 years, for the purpose of constructing two pub-

lic wagon roads in said county,—one from Bear Valley to Coulterville, and one from Mariposa to Yosemite; the ballots to be cast 'For the issue of bonds,' or 'Against the issue of bonds.' The polls must be opened at six o'clock in the morning of the day of election, and must be kept open until seven o'clock in the evening of the same day, when the polls shall be closed. It is ordered that the proclamation be published in the Mariposa Gazette for four weeks prior to said election." It will be seen that the order and proclamation of the board did state the purpose for which bonds of the county for \$75,000 were to be voted and issued, viz., the construction of "two public wagon roads in said county,—one from Bear Valley to Coulterville, and one from Mariposa to Yosemite." This was equivalent to proposing to create an indebtedness of the county to the extent of \$75,000 for the purpose expressed, since the issuing of the bonds of the county as proposed would necessarily create such indebtedness. The point most insisted upon under this head is that the purpose expressed is not a single purpose, but two distinct purposes. There is no complaint, however, that the expression of either of these purposes is not sufficiently explicit and definite. The roads were described as "public wagon roads," which the law requires to be at least 40 feet in width (Pol. Code, § 2620,) and the terminal of each road were defined. This was as definite a description as could well be made without an actual survey of the routes and grades, the expense of which the board had no authority to incur, before it was determined that the county would construct the roads. The object of the statute in requiring the board to "specify the particular purpose for which the indebtedness is to be created, and the amount of the bonds," is simply to notify the electors of the county of these facts, to the end that they may be enabled thereby to form an intelligent judgment as to the propriety of creating the proposed indebtedness for such purpose; and it would seem that this object is as well accomplished by the specification in the order under consideration as it would have been if the purpose, specified in the same way, had been to construct only one road. Suppose the purpose to be specified had been to extend an existing road by adding 10 miles to each end thereof; or to construct two branches to an existing road; or (as in this case) to construct two roads to connect at different points with an existing road, (as that from Bear Valley to Mariposa,)—might not the purpose to create indebtedness for the construction of the two roads, in each of the supposed cases, be regarded as a single purpose? Few purposes are executed by the performance of a single act. The execution of the purpose to construct a single road may require the construction of numerous bridges and the performance of various kinds of labor in different places. In *People v. Dunn*, 80 Cal. 211, 22 Pac. Rep. 140, it was held that the act of 1889 entitled "An act to provide a permanent site for the 'California Home for the care and training of feeble-minded children,' and to erect suitable buildings, thereon," had but one

purpose, and that an appropriation therefor as but one appropriation for a single purpose. The court said: "It was not necessary that there should have been a separate appropriation for the purchase of the land, another for the erection of the buildings, another for the construction of fences, and another for each improvement necessary to the proper completion of the proposed work." In view of the object of the statute in requiring a specification of the purpose for which indebtedness is to be created, what is the substantial difference between a specification of the purpose to construct one road of 20 miles in length, and an equally definite specification of a purpose to construct two roads, each of 10 miles in length? Would not the electors be as well informed as to the particular purpose in one case as in the other? The only attempted answer to this question by counsel is: (1) That by submitting the question as to the propriety of two roads at one election, "a voter was put in the awkward position of either voting for both propositions, or against both propositions. While he may have been exceedingly anxious that one of these roads should have been built, he may not have been willing to tax himself for the building of the other; and yet, in order to get the one, he had to submit to the other." And (2) that, inasmuch as the order does not specify what portion of the \$75,000 was to be expended on each road, "the board of supervisors might expend but the sum of \$1,000 for the road from Bear Valley to Coulterville, and \$74,000 on the other road." Might not these objections be urged with equal force against a purpose to construct a single road? A large portion of the electors might consider one-half of a proposed road very beneficial, and much needed by the public; while they might consider the other half, though perhaps more expensive, of very little public benefit. And might not the board of supervisors expend nine-tenths of the money appropriated for the construction of the whole road upon that half which will be least beneficial to the public? A statute of Arkansas authorized any county to subscribe to the stock of any railroad company in that state a sum not exceeding \$100,000, after obtaining the consent of the inhabitants of the county at an election held for that purpose. At an election held under the act the electors voted in favor of a subscription of \$100,000 to each of two railroad companies. The subscriptions and the bonds authorized by this election were held valid by the supreme court of the United States. *County of Chicot v. Lewis*, 103 U. S. 164. In *McMahon v. Board*, 46 Cal. 214, the purpose proclaimed to the electors was to raise \$30,000 for "improving highways in said township, for building bridges, macadamizing and improving the old county road in said township, and also to macadamize and improve a portion of the new San Pedro public road in said township." The court said: "If such a proclamation was a compliance with the statute, it would have been equally so if it had omitted to mention any particular road or highway, and had specified only

that the money was to be expended in the improvement of highways and the building of bridges generally in the township. The voters would have had no information as to what particular highways or bridges it was proposed to improve or build." This seems to justify the inference that, if the proclamation had specified each particular road and bridge to be improved, (though the purpose was to improve many,) it would have been sufficient. The proposal to improve two or more than two roads or highways in the township was not considered objectionable as being expressive of more than one object or purpose, although the accomplishment of that object, or the execution of such purpose, required the improvement of several roads and bridges. The decision in the case of *People v. Baker*, 83 Cal. 149, 23 Pac. Rep. 364, 1112, as a precedent, should be restricted to a state of facts substantially similar to the facts of that case. In that case the order expressed two purposes for which the money was to be expended: (1) "The purpose of constructing, grading, repairing, and maintaining bridges and public highways within the county;" and (2) "the purpose of erecting and maintaining a county jail, and poor-house, and hospital within the county." No particular bridge or highway was specified; nor was there any specification of the dimensions of the jail, poor-house, or hospital, nor of the site upon which either was to be built. From all the information given by the order and proclamation the electors could neither estimate the probable cost, nor form a judgment as to the necessity or usefulness of any one of the proposed improvements. The decision that the order in that case did not sufficiently specify the particular purpose or purposes for which the indebtedness was to be created, is undoubtedly correct, but it was based upon a state of facts widely and materially different from the facts of this case.

2. The order is said to be invalid, because it submits the question to the people, and not to the qualified electors. An election was called, at which "none but qualified electors of the county shall be permitted to vote." Section 37. And the petition states "that at said election none but qualified voters of Mariposa county were permitted to vote." Page 10. The proclamation prescribed by the order states "that, in accordance with an order of the board, \* \* \* a special election be held throughout Mariposa county on Monday, July 9, 1888, for the purpose of submitting to the vote of the people of this county the question," etc. Undoubtedly the "vote of the people of this county" meant the vote of only those people who were qualified voters or electors, and could not have been otherwise understood by the qualified electors. It was not necessary to use the precise language of the statute.

3. It is claimed that the board should have proceeded by ordinance, and not by order. Conceding that the county government act for some purposes requires an ordinance, while for other purposes only an order is required, it is only necessary, in answer to this objection, to say that

for the purpose under consideration section 37 of the act requires the board to do what it is thereby required to do, "by order."

4. The order and the proclamation do show the purpose to create a bonded indebtedness of the county, and the amount of the bonds proposed to be issued. I think the demurrer should be overruled.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the demurrer is overruled.

(89 Cal. 35)

CROOKS v. MILLER et al. (No. 13,052.)

(Supreme Court of California. May 4, 1891.)

NEW TRIAL — INSUFFICIENCY OF EVIDENCE — DISCRETION.

The granting of a new trial, on the ground of the insufficiency of the evidence to support the decision, is in the discretion of the court, and will not be disturbed, unless there has been a manifest abuse of discretion.

Commissioners' decision. In bank. *Franklin P. Bull, Mich Mullany, and Wm. Grant*, for appellant. *Estee, Willson & McCutchen*, for respondents.

FITZGERALD, C. Appeal from an order of the superior court of Alameda county granting a new trial. This is an action of ejectment, which was tried by the court without a jury, and judgment rendered in favor of plaintiff. The order appealed from states no ground upon which the motion for a new trial was granted. But the record shows that the motion was made and urged upon the ground, among others, "that the evidence is insufficient to justify the decision." We have reached the opinion, after reading the evidence attentively, that it must have been upon this ground that the court below based its action in granting the motion, and, as there is unquestionably a substantial conflict in the evidence, the granting of a new trial was clearly within the discretion of the court. Every presumption will be indulged in favor of the proper exercise by the court below of its judicial discretion in granting a new trial upon the ground of the insufficiency of the evidence to support the decision; and as it is the well-settled rule of this court not to interfere unless there has been a manifest abuse of discretion, and as no such abuse is disclosed by the record as would justify such interference, it follows that the order should be affirmed.

We concur: FOOTE, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

(89 Cal. 23)

CITY AND COUNTY OF SAN FRANCISCO v. PACIFIC BANK. (No. 14,146.)<sup>1</sup>

(Supreme Court of California. May 4, 1891.)

APPEAL—REVIEW—EVIDENCE—EXCEPTIONS.

A bill of exceptions containing all the evidence, but not specifying any particulars in which the evidence is insufficient to justify the decision of the court, does not bring up for re-

<sup>1</sup>Rehearing denied, post, 835.

view the sufficiency of the evidence under Code Civil Proc. Cal. § 648, providing that when the exception is to the decision on the ground of the insufficiency of the evidence to justify it the objection must specify the particulars in which the evidence is insufficient.

In bank. Appeal from superior court, city and county of San Francisco; J. P. HOGE, Judge.

*R. B. Mitchell and Henry C. McPike*, for appellant. *P. F. Dunne*, for respondent.

HARRISON, J. The judgment appealed from must be affirmed. The appeal is directly from the judgment, and is here upon the judgment roll alone. There is a bill of exceptions in the record purporting to contain all the evidence upon which the case was heard in the court below, but it does not contain any specification of errors wherein it is alleged that the evidence is insufficient to justify the decision of the court. Section 648, Code Civil Proc., declares: "When the exception is to the verdict or decision upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated with so much of the evidence or other matter as is necessary to explain it, and no more." The bill of exceptions in the present case does not "specify any particulars" in which the "evidence is alleged to be insufficient" to justify the decision of the court, but at the end thereof, after setting forth the evidence, is found the following statement: "The foregoing being all the evidence introduced on the trial, the cause was submitted to the court for decision, and, after considering the same, the court filed its findings of fact and conclusions of law, and ordered that judgment be entered in accordance therewith in favor of the plaintiff and against the defendant for the whole amount prayed for: to which order and decision the defendant then and there duly excepted." It has been repeatedly held by this court that such general exception is not a compliance with the foregoing section, and that the court cannot examine the evidence for the purpose of determining its sufficiency to justify the findings, but can only determine whether the findings support the judgment. *Coveny v. Hale*, 46 Cal. 552; *Watson v. Railroad Co.*, 50 Cal. 523; *Bonner v. Quackenbush*, 51 Cal. 180; *Coglan v. Beard*, 67 Cal. 303, 7 Pac. Rep. 738. As the appellant does not question the sufficiency of the findings to support the judgment, it must be affirmed, and it is so ordered.

We concur: DE HAVEN, J.; SHARPSTEIN, J.; GAROUTTE, J.; MCFARLAND, J.

(89 Cal. 11)

KEENA v. BOARD OF SUPERVISORS OF PLACER COUNTY. (No. 14,034.)

(Supreme Court of California. May 4, 1891.)

HIGHWAYS — ABANDONMENT — ORDER OF SUPERVISORS.

Under Pol. Code Cal. § 2643, subd. 3, providing that the board of supervisors must, "by proper ordinance," abolish such roads as are not necessary, and sections 2619, 2621, providing that

roads may be abandoned by "order" of the board, a road may be abandoned by order, as the words "proper ordinance" require nothing more than a proper order.

Commissioners' decision. In bank. Appeal from superior court, Placer county; B. F. MYERS, Judge.

*E. P. Tuttle*, for appellant. *A. K. Robinson* and *J. E. Prewett*, for respondent.

**BELCHER, C.** The record in this case shows the following facts: In 1872 a certain road in Placer county was laid out and declared to be a public highway by the board of supervisors of the county. In October, 1887, the board made and caused to be entered in its minutes an order that a certain described portion of the said highway "be, and the same is hereby, abandoned." In January, 1890, the board made another order that its order of October, 1887, be set aside and canceled, and that that portion of the road described therein be opened for public travel, and that the road overseer proceed immediately to remove all obstructions therefrom. The plaintiff then commenced this proceeding in the superior court of Placer county, to obtain a writ of review of the last-named order. The writ was granted, and a return thereto made, showing all the proceedings and orders taken and made by the board of supervisors for the laying out, abandonment, and reopening of the said road. The court found and decided that the road was properly laid out and became a public highway in 1872, and that it extended across land then and ever since owned by the plaintiff, and which within the last year had been inclosed by him; that on the 7th of October, 1887, a petition in proper form, and signed by more than 10 persons, all of whom were citizens, residents, and tax-payers within the said road-district, and taxable therein for road purposes, was presented to the board of supervisors, asking that the road be abandoned, and thereupon the board made and entered its order declaring that the road be discontinued and abandoned; that on the 11th of January, 1890, the board made and entered an order setting aside and canceling the order of October 7, 1887, and directing that the road so abandoned be opened for public travel as a public highway; that the plaintiff has asked and requested the board to vacate and set aside the order last mentioned, but it refuses to do so; that the plaintiff has no plain, speedy, or adequate remedy at law; that the action of the board in making and entering the order sought to be annulled is an especial injury and damage to plaintiff in this, that, unless the order be annulled, the board and its road-master will proceed to open and use the road through his lands without giving him adequate or any compensation therefor, and without having acquired the lawful right so to do; and, as a conclusion of law, that the order made on the 7th of October was valid and operated a discontinuance of the road, and the order made on the 11th of January was in excess of the powers of the board, and should be vacated and annulled. Judgment was accordingly so entered, and

from that judgment the defendant appeals, without any statement or bill of exceptions. It is argued for appellant that a board of supervisors has no power to cause a public road to be abandoned, except it be by a "proper ordinance," framed, passed, and published, as required by section 26 of the county government act, (St. 1883, p. 299;) and that as the attempted abandonment, here under review, was only by an order of the board, it was wholly ineffectual to accomplish the end intended, and the road still continued to be a public highway, notwithstanding the order. In support of this position, counsel rely upon section 2643, subd. 3, Pol. Code, which reads as follows: "The boards of supervisors of the several counties of the state shall have general supervision over the roads within their respective counties. They must, by proper ordinance: \* \* \*

(3) Abolish or abandon such as are not necessary." The chapter of the Political Code relating to highways was passed on the 28th of February, 1883, and there is nothing in it defining an ordinance, or showing how it differs from an order. The county government act was passed on the 14th of March following. The question then is, what was meant by the words "proper ordinance," as used in the section cited? In answering this question the county government act cannot be resorted to, but other parts of the Code can. Now, turning to section 2619 of the same chapter, we find a provision as follows: "All public highways, once established, shall continue to be public highways until abandoned by order of the board of supervisors of the county in which they are situated, or by operation of law, or judgment of a court of competent jurisdiction." And in section 2621 this language is used: "A road laid out and worked, and used as provided in this chapter, shall not be vacated or cease to be a highway until so ordered by the board of supervisors of the county in which said road may be located." In section 2643, supra, there are 11 subdivisions, prescribing the powers and duties of boards of supervisors in relation to roads; and to hold that most of these powers could not be exercised by ordinary order would evidently be absurd. For example, subdivision 10 is: "Audit all claims on the funds of the respective road districts when required to pay for right of way, or work or improvements thereon." The provisions of sections 2619 and 2621 clearly import that a highway may be abandoned by an order of the board of supervisors. In our opinion, therefore, the words "proper ordinance," as used in section 2643, mean nothing more, and require nothing more, than a proper order. It follows that the proceedings of the board in this regard were authorized and sufficient. It is further argued that the petition for the abandonment of the road was not accompanied by a bond, and was not in itself sufficient to meet the requirements of the statute, citing sections 2681 to 2695 of the Political Code. We do not think any bond is required by the sections cited, when the petition is only for the abandonment of a road. And, assuming that a petition is

necessary in such a case, the court below decided that the petition presented to the board was sufficient, and we cannot say that its decision in this respect was erroneous. We conclude, therefore, that the judgment should be affirmed, and so advise.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

89 Cal. 31

PENNIE v. SUPERIOR COURT *et al.* (No. 14,257.)

(Supreme Court of California. May 4, 1891.)

APPEAL—BOND—STAY OF PROCEEDINGS.

Under Code Civil Proc. Cal. § 949, providing that upon an appeal the judgment or order appealed from shall be stayed when appellant gives an undertaking on appeal in the sum of \$300, as required by section 941, an order requiring an administrator to pay intestate's adopted child a large sum of money as a "family allowance" is stayed by an appeal by other claimants of the estate, who execute the appeal-bond required by section 941.

In bank. *Certiorari* to superior court, city and county of San Francisco; J. V. COFFEE, Judge.

*Naphtaly, Friedenrich & Ackerman, (H. S. Brown, John R. Jarboe, and W. S. Goodfellow, of counsel.)* for petitioner. *T. I. Bergin, W. H. H. Hart, and Garber, Boalt & Bishop,* for respondent.

McFARLAND, J. This is an original proceeding here by *certiorari*, brought to review and annul an order of the superior court requiring petitioner as administrator of Thomas Blythe, deceased, to pay a large sum of money to Florence Blythe. The latter had brought an action under section 1664, Code Civil Proc., to have herself decreed to be the adopted child and heir of said Blythe, deceased; and on October 22, 1890, a decree had been entered by the superior court (respondent here) declaring her to be such adopted child and heir. From that decree certain defendants, known generally as the "Williams claimants," took an appeal to this court. On October 31, 1890, the court made an order granting a large amount of money to said Florence as a family allowance; and from this latter order the Williams claimants also appealed, giving the usual statutory undertaking on appeal provided for in section 941, Code Civil Proc., in the sum of \$300. Notwithstanding the appeal, the court afterwards, on November 19, 1890, made another order, directing the administrator to pay to Florence the amount of money mentioned in said order of October 31st; and the question presented is, does the appeal stay proceedings under the order appealed from?

We think that the question here presented was definitely settled in favor of petitioner's contention by the decision of the court in *Re Estate of Schedel*, 69 Cal. 241, 10 Pac. Rep. 334. In that case a legatee appealed from a decree of distribution, and gave the \$300 undertaking provided by section 941 of the Code of Civil Procedure; and it was contended that such an

undertaking did not stay proceedings upon the decree appealed from; but the court held otherwise, and said, among other things, as follows: "Sections 942 to 945, inclusive apply to appellants who are required to perform the directions of the judgment or order appealed from. This is manifest from their language. But the appellant in the present case is not required to do anything. It feels aggrieved by the decree, however, and has the right to appeal. The case is one not provided for in sections 942, 943, 944, and 945; and, consequently, by the terms of section 949, the perfecting of the appeal by giving the undertaking mentioned in section 941 stays proceedings in the court below upon the judgment appealed from." We see no sound distinction between that case and the one at bar. Such a distinction is contended for by respondent on the ground that the policy of the law puts an order in the form of a "family allowance" on a different footing from any other order which gives property of the estate to one litigant against the claims of others; but the alleged distinction is not discernible. The main point of the litigation seems to have been whether there was any family; and it is difficult to see why, in such case, the right of an appellant to keep the property *in statu quo* during the appeal is not as effective against an order of "allowance," as against an order of distribution. But as to the main fact upon which the *Schedel* case was decided, it is identical with the case at bar, namely, that in neither case was the appellant required to perform "the directions of the judgment or order appealed from." The general rule, as declared in section 949, is that the \$300 undertaking mention in section 941 "stays proceedings in the court below upon the judgment or order appealed from." The exceptions are contained in sections 942 to 945, inclusive; and those sections apply to cases where the appellant has money or other property in his possession which has been adjudged by the lower court to belong to the respondent, or where the appellant has been directed to do some act for the benefit of respondent; and where it would be unjust to allow the appellant to retain the possession of the property, and perhaps dissipate it, or put it out of his power to perform the act required, without securing respondent by a bond. But in the case at bar the appellants are in no such advantageous position. They are in possession of no property or money which they could squander during the appeal, and are not required to do any act. During the appeal the money involved will merely remain in the hands of the administrator, secured by his bond. The case, therefore, does not come within any of the exceptions above mentioned; and the execution of the order of October 31st was stayed by the appeal. The subsequent order of November 19th was, therefore, made without jurisdiction. It is ordered and adjudged that the order of the respondents, the superior court and the judge thereof, made on November 19, 1890, requiring the petitioner, as administrator, to pay to Florence Blythe the sum of



money mentioned in the said order of October 31, 1890, as set forth in the petition herein and every part thereof, he, and the same hereby is, set aside and annulled.

We concur: BEATTY, C. J.; DE HAVEN, J.; GAROUTTE, J.; PATERSON, J.

Mr. Justice HARRISON, deeming himself disqualified, did not participate in the foregoing opinion.

89 Cal. 26

GARDNER V. STROEVER. (No. 13,776.)

(Supreme Court of California. May 4, 1891.)

PUBLIC NUISANCE—INJUNCTION—SUIT BY PRIVATE PERSON.

1. The owner of a slaughter-house, who slaughters a large number of animals daily, and has no other place for slaughtering, is specially injured by an obstruction in the highway which wholly cuts him off from access to the slaughter-house, and may enjoin the nuisance by a suit in his own name, under Civil Code Cal. § 3493, providing that "a private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise."

2. Though the obstruction exists at the commencement of the suit, it may be abated by a mandatory injunction, as well as by a judgment that the obstruction be removed and the nuisance abated.

Commissioners' decision. In bank. Appeal from superior court, Butte county; P. O. HUNDLEY, Judge.

*Rearden & Freer*, for appellant. *Gray & Sexton*, for respondent.

BELCHER, C. The plaintiff brought this action to obtain an injunction restraining the defendant from maintaining an obstruction upon a public highway and for damages. The complaint alleges that there is, and for more than 10 years has been, a public road, situate in Butte county, and about 70 rods in length, extending from the Oroville and Miner's Ranch public road to the residence of one Nancy Cooper; that plaintiff is in possession and entitled to the possession of a slaughter-house situate on the south side of the said road, "and that the only means of entrance and exit to and from said slaughter-house to the said public highway, leading from Oroville to Miner's Ranch, or any other public highway, is over and along the said highway leading to the residence of Nancy Cooper aforesaid; that the defendant on the 20th day of February, 1889, wrongfully, unlawfully, and fraudulently, and for the purpose of vexing, annoying, and preventing this plaintiff from reaching his said slaughter-house, entered upon said public highway leading from the Oroville and Miner's Ranch road to the residence of Nancy Cooper, aforesaid, at a point between plaintiff's slaughter-house and said Oroville and Miner's Ranch road, and caused to be erected across said public highway an obstruction, to-wit, a building which completely obstructed said road, for all uses of a road, and wholly prevented this plaintiff from reaching his said slaughter-house; that plaintiff has no other way, convenient or otherwise, by which he can reach his said slaughter-house; that plaintiff is engaged in the butchering business in the town of Oro-

ville, and is compelled, in order to supply the wants of his customers, to slaughter a number of animals each day; that he has no other place for slaughtering said animals than the place heretofore described; that if the defendant is permitted to maintain his said obstruction across the public road as aforesaid, plaintiff's business will be entirely destroyed and broken up, to his damage in the sum of \$5,000; that, by reason of the acts heretofore complained of, plaintiff has been damaged in the sum of \$300." The prayer was for damages in the sum of \$300, and a perpetual injunction. The defendant demurred to the complaint generally and specially, and, his demurrer being overruled, answered denying all its averments. After trial, the court found all the material allegations of the complaint to be true, except as to the damages sustained; and as a conclusion of law that the plaintiff was "entitled to damages in the sum of one dollar, and to an injunction restraining the defendant from obstructing or maintaining any obstruction upon said road, and for costs of suit." Judgment was accordingly so entered, and from it the defendant appealed, and has brought the case here on the judgment roll.

It is urged for appellant that the demurrer should have been sustained because it appeared that the obstruction complained of was a public nuisance, and it did not appear that it was specially injurious to the plaintiff, or that he had suffered or would suffer any injury therefrom, other than what was common, in kind and character, to himself and all others living on the road beyond the point of obstruction, though on account of his business his injury might be greater in degree than theirs. The Code contains the following provisions: "Anything which is \* \* \* an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered." Code Civil Proc. § 731. "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." Civil Code, § 3493. In *Blanc v. Klumpke*, 29 Cal. 156, it was held that if a nuisance in a highway only affect the plaintiff in common with the public at large, in the use of the highway, he cannot have his private action; but if the free use of his private property is interfered with by such nuisance, he may have his private action to abate the same. And this seems to be the general rule, and well supported by the authorities. See *Wood, Nuis.* §§ 811, 830, and cases cited. Here it was alleged in the complaint, and found by the court, that the plaintiff had a slaughter-house where he was compelled, in order to carry on his business, to slaughter a number of animals each day, and that he had no other place for slaughtering the animals; that the obstruction was erected by the defendant for the purpose, and had the

effect, to wholly prevent the plaintiff from reaching his slaughter-house, and, if continued, would break up and destroy his business, to his damage in the sum of \$5,000. This, we think, clearly shows that the nuisance was specially injurious to the plaintiff, and that under the well-settled rules of law he had a right in his own name to commence and maintain an action to enjoin or abate it.

It is further urged that the injunction ought not to have been granted, because it appeared that the obstruction sought to be enjoined actually existed at and before the time of filing the complaint; citing *Gardner v. Stroever*, 81 Cal. 148, 22 Pac. Rep. 483. This position cannot, in our opinion, be sustained. An obstruction to the free use of property, so as to interfere with its comfortable enjoyment, is a nuisance, and the statute says it may be enjoined or abated. Such an obstruction must necessarily have an actual existence before it can be a nuisance. The judgment here might have been in direct terms that the obstruction be removed and the nuisance abated; but the mandatory injunction granted was evidently intended to have, and did have, the same effect. It was therefore an authorized and appropriate remedy. In the case cited the appeal was from an order refusing to dissolve a preliminary injunction granted on the complaint alone. The order was reversed on the ground that the obstruction complained of already existed. The court said that "mandatory preliminary injunctions are seldom granted, and only in a peculiar class of cases, of which this case is not one." We think the decision clearly right, but it in no way contravenes what has been said above. Obviously, alleged nuisances ought not, in ordinary cases, to be abated by preliminary injunctions; since it might appear on the trial that the alleged nuisance was not a nuisance, or that the plaintiff had no right to sue for its abatement in his own name. It results, in our opinion, that the judgment should be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(89 Cal. 38)

SPEAR v. LYON. (No. 14,007.)

(Supreme Court of California. May 5, 1891.)

APPEAL—REVIEW—CONFLICTING EVIDENCE.

Where, in an action for the balance due on a contract, the court finds from conflicting evidence that no false representations were made as alleged by defendant, its finding will not be disturbed.

In bank. Appeal from superior court, Sutter county; PHILIP W. KEYSER, Judge. *W. H. Cobb*, for appellant. *Barney & Donohoe*, for respondent.

GAROUTTE, J. This is an appeal from the judgment and order denying defendant's motion for a new trial. On the 8th day of July, 1889, appellant bought of respondent several stacks of hay, unmeasured, and agreed to pay therefor at the

Cal. Rep. 26-28 P.—12

rate of \$6 per ton; the purchase price to be ascertained by the measurement of the hay upon the basis of 512 cubic feet to the ton. The hay was measured, and amounted to 275 tons. At the time of the purchase appellant paid \$1,200 upon the contract, took possession of the hay, and forthwith proceeded to bale and remove it from the field. This is an action to recover the balance of the purchase price. Appellant's contention is that as a matter of fact there were only 185 tons of the hay as shown by the baler's weights, and asks judgment for \$90 against the defendant, setting out that respondent represented to him that the hay was of such quality that 512 cubic feet thereof would make a ton; that appellant relied upon such representations, and that they were false, and therefore the agreement to measure the hay upon the basis of so many cubic feet to the ton should be set aside and disregarded. This contention of appellant as to a warranty is completely answered by the following finding of the court: "That the plaintiff did not make the defendant any false or fraudulent representations with regard to the quality or quantity of said hay, or as to its measurement, or as to the manner in which it was stacked; nor did he make any warranty as to the quality or quantity." The evidence of the plaintiff and defendant is conflicting upon this point, and consequently we will not disturb the finding. The order striking out the testimony of the defendant, Lyon, when he was recalled, even if error, was not prejudicial, as he had previously testified to the same matters upon his redirect examination in chief.

Let the judgment and order be affirmed.

We concur: DE HAVEN, J.; MCFARLAND, J.; HARRISON, J.; PATERSON, J.

(89 Cal. 38)

KELLEHER *et al.* v. CRECIAT. (No. 13,628.)

(Supreme Court of California. May 6, 1891.)

EXCEPTIONS—WHEN SETTLED—SUFFICIENCY OF NOTICE.

Under Code Civil Proc. Cal. § 650, providing that the exceptions taken at the trial, if the action were tried without a jury, must be settled, by the party desiring a bill of exceptions, within 10 days after receiving notice of the entry of judgment, and section 1010, providing that "notices must be in writing," a copy of the findings and judgment, served on the attorneys of the unsuccessful party by the attorneys of the prevailing party, is sufficient notice of the entry of judgment; and a bill of exceptions must be settled within 10 days after the service of such copy, unless the time is extended by order of court. Distinguishing *Biagi v. Howes*, 66 Cal. 469, 6 Pac. Rep. 100.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. WARD, Judge.

*Wicks & Ward*, for appellants. *Stephens & Appel* and *O'Melveny & Henning*, for respondent.

BELCHER, C. This case was tried by the court, and findings and judgment in favor of the defendant were filed on the 11th day of June, 1889. On the next day, after the entry of the judgment, a copy of the findings and judgment and a copy of

defendant's memorandum of costs and disbursements in the action were delivered to the law clerk of plaintiffs' attorneys, at their office, and the following indorsement was then and there made by the clerk upon the memorandum of costs: "Received copy of the within memorandum of costs, together with copy of the findings and final decree in the within mentioned action, after filing of said findings and filing an entry of the decree, this June 12, 1889. WICKS & WARD, per C., Plaintiffs' Attorneys." On the 21st of the same month, the plaintiffs' attorneys served upon defendant's attorneys and filed a notice of intention to move for a new trial of the action, and that the motion would be made upon a statement of the case to be thereafter prepared and settled. On the 2d of July plaintiffs' attorneys obtained an order for 10 days' extension of time within which to prepare and serve their statement on motion for new trial, and on the 11th of the same month they obtained another order for an additional extension of 20 days within which to prepare and serve such statement. No statement on motion for new trial was ever served or filed, and no order extending the time within which to prepare or serve a bill of exceptions was ever obtained or applied for. On the 9th of August plaintiffs' attorneys had an order entered dismissing the motion for new trial, and thereafter, on the same day, served on defendant's attorneys their draft of a bill of exceptions in the action, and a notice of appeal from the judgment, stating therein that "said appeal is taken on the judgment roll and on bill of exceptions." On the 16th of August defendant's attorneys served on plaintiffs' attorneys notice that they would move the court to strike out plaintiffs' draft of a bill of exceptions, on the ground that the same was not prepared or served within the time required by law, or within any further time allowed by the court or a judge thereof. This motion subsequently came on for hearing, and was denied; and thereupon the judge of the court settled, allowed, and certified the bill as it is presented in the transcript. The foregoing facts are shown by a supplemental bill of exceptions, prepared, certified, and filed on behalf of defendant.

1. The first question presented here for decision is, was the plaintiffs' bill of exceptions prepared and served within the time allowed by law? Of course, if it was not, it must be disregarded. The Code provides as follows: "When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, within ten days after the entry of judgment, if the action were tried with a jury, or after receiving notice of the entry of judgment, if the action were tried without a jury, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party." Section 650, Code Civil Proc. "Notices must be in writing." Section 1010, Id. The appellants contend that they never received any written notice of the entry of the judgment,

and that their bill of exceptions was therefore served in time; citing *Biagi v. Howes*, 66 Cal. 469, 6 Pac. Rep. 100. On the other hand, the respondent contends that the copy of the findings and judgment served on appellants' attorneys, after entry of judgment, as shown by their acknowledgment of service above set out, was a sufficient notice to meet the requirements of the Code. We think the respondent's contention should be sustained. The case cited by appellants is not directly in point. The question in that case arose under a different section of the Code, and it was whether or not the defendants served and filed their notice of motion for new trial in time. The action was tried by the court without a jury, and the decision was announced on the 28th of March. The defendant's attorney was present in court at the time, waived findings, and asked for and obtained an order of court staying proceedings on the judgment for 20 days. No notice of the decision *eo nomine* was ever given, but notice of the rendition and entry of the judgment was given on the 5th of April following. On the 15th of the same month, the defendants gave notice of their intention to move for a new trial, and thereafter, within the time allowed by the court, prepared and served their statement. It was held that, under section 659 of the Code, a party intending to move for a new trial, when the action was tried by the court without a jury, has a right to wait for a notice in writing of the decision from the adverse party before giving notice of his intention; and he is entitled to such notice before he is called on to act, although he was present in court when the decision was rendered, and waived findings, and asked for a stay of proceedings on the judgment. In this case, written notice, in substance and effect, of the entry of the judgment was given, and the appellants acted on that notice in their proceedings to obtain a new trial. "The law respects form less than substance." (Civil Code, § 3528,) and, in our opinion, the notice should be held sufficient, (see *Barron v. Deleval*, 58 Cal. 95; *Mullally v. Benevolent Society*, 69 Cal. 559, 11 Pac. Rep. 215.) This being so, it follows that the appellants' bill of exceptions was not served in time, and hence that it must be disregarded.

2. The judgment roll discloses no error, and we therefore advise that the judgment be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(39 Cal. 41)

In re MILLER. (No. 20,843.)

(Supreme Court of California. May 6, 1891.)

ORDINANCES—VALIDITY—EXCESSIVE PUNISHMENT.

Order No. 1587 of the board of supervisors of the city and county of San Francisco is not void for imposing an unreasonable punishment in providing as a penalty for the uttering, etc., of profane and obscene language, and words and language having a tendency to create a breach of the peace, a fine not exceeding \$1,000, or imprisonment not exceeding six months, or both.

In bank. Application for writ of *habeas corpus*.

A. J. Spinetti, for petitioner.

PER CURIAM. The petitioner sets forth "that he is held under a warrant of arrest issued by the police court of the city and county of San Francisco, upon a complaint charging him with uttering, etc., profane and obscene language, and words and language having a tendency to create a breach of the peace, in violation of section 28, order 1587, of the board of supervisors of said city and county of San Francisco;" and alleges as a reason for the issuance of the writ "that said ordinance is null and void, as the penalty imposed for its violation by section 1 thereof is a fine not exceeding one thousand dollars, or imprisonment not exceeding six months, or both, which is unreasonable, and renders the ordinance void." We can conceive of many cases in which a fine of \$1,000 and an imprisonment for the term of six months would not be an unreasonable punishment for the uttering of profane and obscene language in the presence of other persons. Whether the offense in any particular case is sufficient to justify such punishment must be determined by the court before whom the offense is tried.

The application for the writ is denied.

DORRIS v. SULLIVAN. (No. 13,934.)

(Supreme Court of California. May 7, 1891.)

APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

Where there is no bill of exceptions, and it does not appear which party introduced upon the trial a verbal contract that should have been in writing, nor that either party objected to it, an appeal will not be entertained.

Commissioners' decision. In bank. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

Spencer & Raker and C. A. Raker, for appellant. Goodwin & Jenks, for respondent.

VANCLIFF, C. This is an action for damages for diverting water from a ditch alleged to be the property of the plaintiff, and for a perpetual injunction restraining such diversion in the future. Judgment passed for the defendant, and the plaintiff brings this appeal from the judgment, upon the judgment roll, without any bill of exceptions, and contends that the court failed to find upon material issues of fact, and that the findings of fact do not support the judgment. There are 13 findings of fact, occupying 6 pages of the transcript, and 5 findings called "conclusions of law," which include some matters of fact. That the findings support the judgment is too obvious to require special consideration; and that there is either a direct finding, or a finding by necessary inference from facts found, on every material issue, seems quite as clear. As there is no bill of exceptions, the record affords no ground for the point made on the statute of frauds. It does not appear which party introduced the verbal contract, which, it is claimed, should have been in writing, nor that either party objected to it. I

think there is no merit in the appeal, and that the judgment should be affirmed.

We concur: FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

GSCHWANDER v. COURT.

(Supreme Court of Oregon. Nov. 8, 1890.)

PLEADING—DEMURRER—ANSWERING OVER—WAIVER.

Where a defendant demurs to the complaint, which being overruled, answers over, and a verdict and judgment are rendered against him, the judgment will not be reversed on objection to the complaint on appeal, though some of its material allegations appeared to be legal conclusions, and the breaches in the writing declared upon were defectively assigned.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

Alfred F. Sears, Jr., for appellant. Alex. Brenstein, for respondent.

STRAHAN, C. J. The meaning of two clauses of the contract have been presented, one by defendant and the other by plaintiff. The defendant relies upon this clause of the contract: "In case that the performance of the undersigned should prove incompetent or unsatisfactory to the party of the first part, said party of the first part shall have the right to terminate this contract at any time, and shall not be held liable for any damages for such termination, or for any wages after such termination." The defendant claims that he had a right, under this part of the contract, to terminate it when he saw proper to do so, and of that he was made the sole judge by the terms of the contract itself. The plaintiff contends that the foregoing clause is modified by this provision: "The engagement holding good until it has been faithfully fulfilled by the parties of the second part, or canceled by the party of the first part for intoxication, vulgarity, or infringement of the rules by the parties of the second part." The rule of construction is that each and every part of a contract must be so construed that all may have effect, if it can be done. Looking at this entire contract, and its manifest object, the first clause may properly be held to refer to the competency of the plaintiff's Tyrolean Warblers, and their ability to give satisfaction to the defendant; and the other clause relates entirely to the personal conduct of the Warblers in and about defendant's theater. The two clauses relate to different subjects, and were inserted for different purposes. The last clause does not in any way limit or affect the first. If the defendant had alleged in his answer that the performance of the Tyrolean Warblers proved incompetent or unsatisfactory to him, and that he terminated the contract for that reason, an altogether different question would have been presented. It would have then become necessary to determine whether or not the contract sued on is within the principle announced in *Zaleski*

v. Clark, 44 Conn. 218; Brown v. Foster, 113 Mass. 136; McCarren v. McNulty, 7 Gray, 139; Railroad Co. v. Inhabitants of Brewer, 67 Me. 295; Manufacturing Co. v. Ellis, 68 Mich. 101, 35 N. W. Rep. 841; Gibson v. Cranage, 39 Mich. 49; Hoffman v. Gallagher, 6 Daly, 42; Gray v. Railroad Co., 11 Hun, 70; Machine Co. v. Smith, 50 Mich. 565, 15 N. W. Rep. 906; Benj. Sales, (Bennett's Ed.) pp. 560, 561, note; Singlerly v. Thayer, 108 Pa. St. 291, 2 Atl. Rep. 230; Boiler Co. v. Garden, 54 Amer. Rep. 715, and note. But the defendant did not make this question in his answer. He tendered a different issue altogether, and, having been defeated on it before the jury, seeks to try a different question in this court. It is true the complaint is somewhat faulty in the manner of assigning breaches of the contract sued on. It is alleged that the defendant wrongfully and without cause discharged plaintiff and his "Gschwander Trio," and refused to permit them to serve as aforesaid, though they were ready and willing to serve. It would have been better pleading to have followed the wording of the writing in assigning breaches, but we are not trying this case now on demurrer, but are considering the sufficiency of the complaint after verdict. In such case a more liberal intendment prevails in support of the judgment, and which we think ought to be invoked in this case. Aiken v. Coolidge, 12 Or. 244, 6 Pac. Rep. 712; Houghton v. Beck, 9 Or. 325; Andros v. Childers, 14 Or. 447, 13 Pac. Rep. 65; Willer v. Navigation Co., 15 Or. 153, 13 Pac. Rep. 768. It follows that the judgment appealed from must be affirmed.

#### MERCHANTS' NAT. BANK V. POPE.

(Supreme Court of Oregon. March 20, 1891.)

REPORT OF REFEREE—WHEN SET ASIDE—FACTORS—POWER TO PLEDGE—INTEREST.

1. The provisions of the Code of this state, to the effect that the court may affirm or set aside the report of a referee in whole or in part, and may make another order of reference, as to all or so much of the report as is set aside, to the original referees or others, or may find the facts and determine the law itself, and give judgment accordingly; and that, upon a motion to set aside the report, the conclusions thereof shall be deemed and considered as the verdict of a jury,—only authorize the court to set aside such report as to conclusions of fact, under the same circumstances in which it is authorized to set aside the verdict of a jury and grant a new trial, which it is authorized to do when the verdict is against the great weight of evidence.

2. Where the court sets aside the report of a referee in whole or in part, and elects to find the facts and determine the law itself, it is its duty to find the facts and conclusions of law in the same manner as it is required to do when it tries a case without the intervention of a jury.

3. A factor or commission merchant, who receives goods to be sold upon commission, has no authority to pledge them; but, where he has advanced money upon the goods, he thereby acquires a lien upon and special property in them to the amount of such advances, which he may pledge for his own use.

4. Where certain commission merchants received from time to time amounts of fish oil from a company engaged in the Alaska trade, upon the understanding and promise to make sale of it for the account of the company, and to render the proceeds thereof, less their charges for services in that behalf; and it was agreed between the mer-

chants and the company that an account current of interest charges should be kept and paid at the rate of 10 per cent. per annum; and the merchants, after receiving and shipping portions of the oil to a consignee in a foreign market for sale, upon which they had made advances to the company on account thereof, drew in their own name, and for their own use, against the consignments, and negotiated the drafts upon their own credit, but attached thereto the bills of lading as collateral security for the payment thereof: held, that interest upon the money received by the merchants in the negotiations of the drafts did not constitute a proper debit against them in their account with the company.

5. Held, further, that the circuit court could not properly decide that interest upon said money, so drawn, was chargeable in the account against the said merchants, in the absence of a finding of fact justifying such decision.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county.

Charles H. Carey, for appellant. L. B. Cox, for respondent.

THAYER, C. J. The counsel for the appellant contends that a circuit court cannot properly interfere with the findings of a referee regarding any fact as to which there is a conflict of evidence, and insists that there was evidence in this case tending to prove that the said firm of George Pope & Co. was to receive 5 per cent. commissions on all shipments and sales of oil and fish, and that the said circuit court should have left undisturbed the findings of fact by the referees upon that question. He also contends that there was no evidence authorizing said circuit court to allow to the trading company credits for interest upon the certain drafts drawn by the said firm against consignments of oil shipped by the firm for said company. The statute (section 229, Civil Code) provides as follows: "The court may affirm or set aside the report [referring to the report of the referee before whom a trial of the issues in an action has been had] either in whole or in part. If it affirm the report, it shall give judgment accordingly. If the report be set aside either in whole or in part, the court may make another order of reference, as to all or so much of the report as is set aside, to the original referees or others; or it may find the facts and determine the law itself, and give judgment accordingly. Upon a motion to set aside a report, the conclusions thereof shall be deemed and considered as the verdict of a jury." The language of this section of the Code is too plain to be mistaken. It authorizes the court to set aside the report of a referee under the same circumstances in which it is authorized to set aside the verdict of a jury and grant a new trial, which it may do when the verdict is against the great weight of evidence; and in case it does set aside the report, in whole or in part, it is the duty of the court to make another order of reference, as to all or so much of the report as is set aside, to the original referees, or to others, or it may find the facts and determine the law itself, and give judgment accordingly. If the court adopt the latter course, it is its duty to find the facts and conclusions of law in the same

manner it is required to do when it tries a case where a jury trial has been waived. The court did not pursue that mode in this case, but I do not think the error is of such a nature as would authorize a reversal of its decision, as it evidently did not prejudice the rights of the appellant. It, however, would have been better practice to have pursued the course indicated, and cases may arise in which it would be highly important that it should be done.

I have examined the evidence as to the amount of commissions which the said firm was to receive upon the shipment and sales of the oil and fish, and am of the opinion that the circuit court very properly made the reduction in the amount found to be due by the referees. The only testimony upon that point seems to have been that given by McDonald, and he testified that he made the arrangements himself on behalf of the firm to sell the oil at 5 per cent. commission,  $2\frac{1}{2}$  of which was to go to R. D. Welch, and  $2\frac{1}{2}$  to be retained by the firm. This arrangement covered the first shipments up to a certain date. That afterwards he made arrangements with Mr. Lowenberg to the effect that the trading company should pay  $7\frac{1}{2}$  per cent. commissions, 5 per cent. of which was to be retained by the said firm of Pope & Co. The referees allowed 5 per cent. commissions on all oil sold, and the circuit court only made the reduction in accordance with the arrangement as testified to by said witness. It is claimed that McDonald, in making out a statement of the accounts between the trading company and the firm, charged the 5 per cent. commissions on all the sales; but this was hardly sufficient to impeach his testimony regarding the arrangement made with Lowenberg, nor does the testimony of Pope contradict that of McDonald's in regard to the said arrangement. The finding of the court that the trading company should have credit for the sum of \$43.08, on account of fish sold by the firm of George Pope & Co., instead of \$21.25, as found by the referees, involves so slight a difference that the counsel for the appellant expressed at the hearing a willingness to waive any point regarding it. The decision of the circuit court, however, that the trading company was entitled to credits for interest upon the certain draft referred to, does not seem to be supported by allegations, finding, or proof. It could not have been claimed by the respondent in the complaint, as the balance of the entire accounts between the company and the firm claimed by it was only \$7,740.56, which evidently did not include a credit of \$5,936.92, the proceeds of the draft for that sum drawn by the firm against certain consignments of oil. That the firm should have credit for the amount of said draft was the main contention between the parties to the action; and the referees found that issue in favor of the appellant, which finding the circuit court substantially confirmed. By giving the firm that credit, the claim of the respondent only amounted to \$1,803.64, the difference between the \$7,740.56 and the \$5,936.92, which was subject to a further reduction for interest charged in

favor of the trading company upon the money drawn. The appellant admitted in the answer an indebtedness of the firm to the trading company of the sum of \$1,394.90, to which should have been added the \$189.54, the overcharge for commissions upon the shipment and sales of the oil. The real difference, therefore, in the accounts between the parties as claimed by them in the pleadings, after being adjusted in the respects above mentioned, was very small. The circuit court, however, increased it several hundred dollars, by deciding that the trading company was entitled to credits for interest upon the drafts referred to. This allowance, apparently, was on account of a matter which was not legally in controversy between the parties, as it did not in fact constitute any issue in the case. There was no evidence concerning it, except that Pope & Co., after making shipments of the oil, and after having made advances to the trading company on account thereof, drew against the consignments, and negotiated the drafts so drawn at the city of Portland. They did this in eight instances, but did it upon their own account, and by pledging their own credit. It is true that they attached the bills of lading to the drafts negotiated, which became collateral security in the hands of the holders of the drafts. They were entitled to do that, and I cannot see that it gave the trading company any right to claim interest on the money so obtained. Pope & Co. had no authority to pledge the oil for the payment of the drafts, but they had a lien upon it constituting a special property interest, to the amount of the advances made by them to the trading company, which they had a right to pledge for their own use. *Coleb. Coll. Sec.* §§ 407, 408. The decision of the circuit court allowing interest on said draft must therefore be reversed, and the judgment rendered by said court be so modified that the respondent recover of the appellant the said sum of \$1,394.90, found due by the referees; the further sum of \$189.54, the rebate upon the commissions as charged by the firm of Pope & Co., with \$25.76 interest on said last-mentioned sum; also \$42.75, the price of the fish sold by said firm in excess of the amount found by the said referees,—amounting in all to the sum of \$1,652.95, together with interest thereon at the rate of 10 per cent. per annum from the time of the commencement of the action. The case will therefore be remanded to the said circuit court, with directions to enter judgment as herein provided, with costs and disbursements in favor of the party legally entitled to recover the same; each party to pay their own costs and disbursements incurred in this court; and neither will be entitled to recover costs or disbursements from the adverse party.

LEWIS v. BIRDSEY *et al.*

(*Supreme Court of Oregon.* May 1, 1890.)

REPLEVIN—TITLE TO SUSTAIN—POSSESSION—ATTACHMENT—LEVY.

1. In an action to recover the possession of personal property, the plaintiff ordinarily must

show that he is the owner of the property, or is lawfully entitled to the possession of it by virtue of a special property therein. The ownership, however, requisite to maintain such an action need not be absolute; a right to the possession and dominion over it for the time is all that is essential.

2. Hence where one person is in possession of personal property, exercising dominion over it, and another takes and carries it away without his consent, the former may maintain an action against the latter to recover the possession of the property, although in fact it belongs to a third person, unless the latter can justify his taking of the property by showing such a privity existing between him and the owner as would entitle him to represent the owner's interest in it.

3. A sheriff, in the execution of a writ of attachment, is not authorized to take personal property into his custody where it is in the possession of a third person. In such case he can only attach the property by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having the possession of the same.

4. Where a plaintiff owned a band of cattle, a part of which he agreed to trade to one G., in consideration that G. would convey to him a half interest in a certain lot of land in the town of C. P., and would also assign to him certain policies of insurance upon the buildings situated on the lot, and the plaintiff took the cattle to be traded to C. P., and left them there to remain a certain length of time, when he would return and consummate the trade; and the plaintiff returned at the expiration of the time, but, ascertaining that G. had not assigned to him the policies of insurance, as agreed, took the cattle and sent them back to the pasture, where he was keeping the band from which he had taken them; and subsequently the sheriff, under a writ of attachment in an action wherein one C. was plaintiff and said G. was defendant, in attempting to attach the cattle so agreed to be traded as the property of G., seized and took into his custody, against the protest of the plaintiff, a number of cattle, which he selected from the band without knowing whether or not they were the cattle agreed to be traded: *held*, that the attempted levy was a nullity, and that the plaintiff had such an ownership in the cattle, even if he had made a bill of sale of them to G., and the latter had conveyed to him the interest in the said lot, but had failed to assign to him the policies of insurance, as would entitle him to maintain an action against the sheriff to recover the possession of the cattle seized.

(*Syllabus by the Court.*)

Appeal from circuit court, Jackson county; L. R. WEBSTER, Judge.

P. P. Prim, R. Williams, and C. W. Kahler, for appellant. H. K. Hanna and Francis Flitch, for respondents.

THAYER, C. J. The issues in this case involve the right of the appellant to the possession of the cattle mentioned in the complaint, as against the respondents. The latter claimed the right to the possession of the cattle under the attachment proceedings referred to in the answer to the complaint. The grounds of error relied upon by the appellant consist entirely of exceptions taken to instructions given by the court to the jury, and to the refusal of the court to give certain instructions as requested by the appellant's counsel. It appears from the bill of exceptions contained in the record that the appellant gave evidence at the trial of the action showing that he was the owner of 23 head of full-blooded Galloway cattle; that he was keeping them in a Mr. Bybee's pasture, in said county of Jackson; that

he had been keeping them there four or five weeks prior to the time of the alleged taking by the respondent Birdsey, mentioned in the complaint; that a short time before said taking he took out from the pasture 7 head of the 23 head of cattle, and drove them over to Central Point, and turned them over to William Gates and Mr. Fenton to take in; that he gave Mr. Fenton charge of the cattle, and told him to keep them until he came in Sunday morning; that this was on the 14th or 15th of September, 1889; that he took the 7 head of cattle over to Central Point to trade with Mrs. Gates for an undivided half interest she owned in lot 11, block 11, town of Central Point; that he was to give her the cattle for her half interest in the lot, and she was to assign to him her interest in the insurance policies on the buildings situated thereon; that the cattle were not delivered to Mrs. Gates, because he did not come back until Monday morning, and she had left the Sunday evening before, and had not assigned to him the insurance policies, that he then took charge of the cattle, and had them sent back to the pasture with the others, but, on the following Monday, Birdsey, as sheriff, took the 8 head of cattle in controversy, which were a part of the said 23 head, under the attachment in favor of Cooper and against William Gates. It also appears from the bill of exceptions that, when the said sheriff went to levy the attachment upon the cattle, the appellant notified him that they belonged to him, (appellant,) and forbade his taking them; and that the sheriff not being able to identify the said 7 head taken over to Central Point, those which he intended to levy upon, he employed one Edward McDonald to go with him and pick them out; that they took out 8 head, including a suckling calf, but did not know whether they were the same animals which had been taken to Central Point and driven back. It further appears from the bill of exceptions that the respondent W. G. Cooper was called as a witness, who testified that he had had conversations with the appellant in regard to the cattle; that he asked him about the black cattle,—if he had not traded Gates some black cattle; that appellant said, "Yes." Witness asked where they were. Appellant said, "Out at Bybee's pasture." That he traded them for real estate; gave Gates a bill of sale of the cattle. Witness asked him why the cattle did not belong to Gates. Appellant said they were Gates'. Witness asked him why they were not at Gates' now. That appellant said: "They agreed to assign over those fire insurance policies, and when I came in Monday morning I found they hadn't done it, and I took the cattle right straight back home." The honorable judge of the court, in signing the said bill of exceptions, appended to it the following certificate: "The above bill of exceptions is hereby allowed. The evidence above set out is not all the evidence in the case, but there was other and additional evidence upon all the points mentioned in the evidence as here set out."

The instructions of the court to the jury are too voluminous to be considered *seri-*



atim, and I shall not attempt it, but shall content myself by referring to some rules of law which bear upon the questions involved. The case was a very simple one to determine. The appellant was clearly entitled to the possession of the cattle, unless they belonged to William Gates at the time they were taken by the respondents. If the appellant had agreed to sell the cattle to Mrs. Gates, or to William Gates, for that matter, and the latter had not performed the conditions upon which the sale and delivery were agreed to be made, the vendee would not have been entitled to the possession of the cattle, nor the sheriff to take them under the attachment proceeding. Neither was the sheriff entitled to take the cattle from the appellant by virtue of the writ of attachment, so long as the latter had them in his possession, claiming to be their owner. The case of Spaulding v. Kennedy, 6 Or. 208, is decisive upon that point. Nor was the appellant required to prove general ownership of the property, in order to entitle him to a recovery of the possession thereof. If he had a right to the possession of it as against the respondents, it was sufficient. In Sprague v. Clark, 41 Vt. 10, the supreme court of that state, in construing a statute upon the subject of replevin, use this language: "Under this statute, any person who is entitled to the possession of any goods or chattels may maintain replevin against any person who unlawfully takes or detains such goods or chattels from him. To entitle him to the possession, it is not necessary that he should be the owner, or that he should be entitled to possession, as against all others. It is sufficient if he is entitled to the possession as against the person who takes it from him. In such case the taking of it from him is an unlawful taking. A person who is in the possession, claiming the property or an interest in it, or a legal right to the possession, may maintain replevin against any person taking the property from him who cannot show a better right to it. The defendant in the action of replevin can prevail only when it appears that he is entitled to a return of the property, and that can be only when it appears that his right is superior to that of the plaintiff. The question is to be determined according to the respective rights of the parties to the suit." This decision, though made under a statute, is, I think, a fair exposition of the general rule of law upon the subject. The supreme court of New York, in Rogers v. Arnold, 12 Wend. 31, by NELSON, J., says: "It has long been settled in this state that the possession of personal chattels by the plaintiff, and an actual wrongful taking by the defendant, are sufficient to support replevin, and that it may be brought where trespass *de bonis asportatis* will lie;" citing several of the earlier cases. The Civil Code of this state does not provide when a person may maintain replevin, but it does provide that, in an action to recover the possession of personal property, the plaintiff may claim an immediate delivery thereof, when he is the owner of the property, or is lawfully entitled to the possession of it by virtue of a special

property therein; from which it may be inferred that at least such an interest in personal property will entitle the plaintiff to recover the possession of it in the action when it is wrongfully detained from him. In Johnson v. Carnley, 10 N. Y. 570, the court of appeals held that an actual possession of the property by the plaintiff, coupled with an equitable interest therein at the time of the seizure by the sheriff, was sufficient to maintain the action, and to entitle the plaintiff to a return of the property, although the general property and right of immediate possession be at the same time in a stranger, the defendant showing no privity between himself and such stranger. This I am inclined to believe is the true rule upon the subject.

The lawful possession of personal property is a sufficient title, in my opinion, to entitle the possessor to recover it against one who has taken it without right. This view is sustained by the language of Justice NELSON in Rogers v. Arnold, supra, at page 35, as follows: "When we speak of property in the plaintiff or in the defendant in this action, it is material to understand what is meant by the term. From the language used in some of the books, it might be inferred that the question between the parties involve the absolute ownership of it. The case already referred to, showing under what circumstances this action will lie, negative this idea. Right to the possession and dominion of the goods and chattels for the time is all that is essential. This is the view which this court had of the question at an early day. Harrison v. McIntosh, 1 Johns. 380. It is conceded by the learned judge who delivered the opinion in that case that an interest of the plaintiff in the property which would have sustained trespass or replevin would have constituted a good replication to the plea of property in strangers." It would be a remarkable doctrine, indeed, if one person could invade the possessions of another, take and carry away without authority goods and chattels he was claiming and exercising dominion over, and defeat his recovering them back by a plea that some stranger owned them. The respondents in this case could gain no standing in court to question the appellant's ownership of the cattle without first showing that William Gates owned them, and that the writ of attachment was duly levied upon them. A defendant in such a case, in order to justify the taking of property claimed by the plaintiff, must show not only that it belonged to a third person, but that there was such a privity between him and the third person as entitled him to represent the latter in the ownership of the property. Nor does the evidence in the case, as shown by the bill of exceptions, estop the appellant from claiming the cattle. If he told the respondent Cooper everything testified to by the latter; and, even more, if he had told him that he had sold the cattle to Gates in consideration of the half interest in the lot and the assignment of the policies of insurance, that he had executed a bill of sale of the cattle, and received a deed for the property, but that the policies of in-

insurance had not been delivered to him, and he refused to deliver the cattle until they were,—it would not have constituted an estoppel. The appellant had an undoubted right, as before suggested, to hold the cattle until the agreement upon the part of the Gates family was fully performed. A party cannot be compelled to deliver property upon a sale thereof, when delivery and payment are to be simultaneous, until the vendee has fully performed the terms of the agreement on his part. Until then the vendor has a lien upon the property, amounting to a special property in it, and is entitled to hold it as against every one. The theory upon which this case was tried in the circuit court, as indicated by the instructions given to the jury, and the refusal of the court to give instructions requested by appellant's counsel, which were excepted to, is clearly in conflict with the views herein expressed. The judgment appealed from will therefore be reversed, and the case remanded to the said circuit court for a new trial in accordance with the principles of the foregoing opinion.

CHITTENDEN V. PRATT. (No. 13,799.)

SAME V. MCRAE. (No. 13,800.)

(Supreme Court of California. May 21, 1891.)

PURCHASE OF MORTGAGED GOODS — ESTOPPEL OF MORTGAGEE.

Plaintiff held a mortgage on crops to secure his rent, and defendants, with full knowledge of his lien, sold goods to the tenant, and took hay, covered by the mortgage, in payment. At plaintiff's request the bank holding the note for the rent wrote defendants that the mortgage existed, and that for their own protection they should satisfy themselves that it had been paid. Plaintiff also wrote to his tenant that the sale to defendants was a good one, and advised the tenant to hold them to it. *Held*, that these letters did not estop plaintiff to require defendants to account to him for the value of the hay received.

In bank. Appeal from superior court, Placer county; B. T. MYERS, Judge

Clinton L. White, Grove L. Johnson, and Albert M. Johnson, for appellant. Taylor & Hoell and John M. Fulweiler, for respondents.

PATERSON, J. Both of these cases present the same issues, were heard on the same evidence, and have been brought here on appeal in one transcript. In 1885 plaintiff leased to William Foster certain lands for the cropping season of 1885-86, and took from him a mortgage on the growing crop to secure the payment of the rent. By the terms of the mortgage the plaintiff "had the right to enter upon the leased premises, and to cut and harvest said crop, thresh, sack, remove, and sell the same, and out of the proceeds of such sale to retain, first, all cost and expenses incurred in cutting, harvesting, threshing, sacking, removing, and selling said crop; and also to retain out of such proceeds the principal and interest secured by said chattel mortgage." The mortgage was duly executed and recorded, and defendants had actual notice of its existence. After the execution and recordation of the mortgage, and before the crop

was harvested, Foster purchased certain articles of personal property from each of the defendants, and promised to pay for the same in hay at \$10 per ton. When the crop was ready for harvesting, the plaintiff did not avail himself of the privilege referred to in finding 3, set forth above, but permitted Foster to harvest the crop, and prepare it for market. The defendant McRae received from Foster 90,225 pounds of hay, and defendant Pratt received hay amounting in value, at \$10 per ton, to \$319.32; but the amount due each defendant from Foster was greater than the value of the hay each received at \$10 per ton. On June 14, 1886, the California State Bank held the note and mortgage as collateral security; and at the request of plaintiff, who had heard that Foster intended to sell some of the hay to the defendants, sent a letter to each of the defendants, which was received on the following day, a copy of which follows: "Dear Sir: We hold a crop mortgage of Mr. Wm. Foster to Aretta Chittenden, on the crop raised on the Mrs. Chittenden ranch, to secure the payment of a note for twelve hundred and ninety dollars (\$1,290) and interest. We understand that you have bought a part of the hay; hence, before you settle with Mr. Foster for the same, you will do well to satisfy yourself that the mortgage above spoken of has been paid; otherwise we shall hold you responsible. Yours truly, CALIFORNIA STATE BANK." One of the defendants showed the letter he had received to Foster, whereupon the latter wrote to plaintiff as follows: "Roseville, June 18, 1886. Mr. Chittenden—Sir: I write to you to inform you that the bank has notified Mr. Pratt and Mr. McRae that they must not buy anything off the ranch. I sold that hay for ten dollars (\$10) per ton. Now they can take that hay for the same price. You or them have spoilt my sale, so either you or them must take that hay for the same price, and take it right away; for the hay is baled now, and the sun is bleaching it out, and the hay was sold on the ranch. Please let the bank know, for the hay must be moved; and, if not, either them or you will have to pay me damages. Respectfully, WM. FOSTER." The plaintiff, through his agent, replied, saying: "Sacramento, June 21, 1886. Friend Foster: I have just returned from the ranch. On my return found a letter from you. If I had received it before, would have come and seen you. I will be up again in about a week. You say in your letter that the bank had notified Pratt and McRae that they must not buy anything from the ranch. That is not so. I have just come from the bank, and saw a copy of the letter to them. They always reserve a copy of all they do. It is simply this: They wrote them they held a crop mortgage of \$1,290 and interest on the crop. If you go to Pratt and McRae, and ask to see the letter, you will find that this is all there is about it. You have made a good sale of the hay, and probably they would like to crawl out of it if you were foolish enough to let them. You said you had it in black and white with them, and, if so,

you will hold them to the bargain. No one has done anything to interfere with your deal. Yours, respectfully, W. A. CHITTENDEN." All of the hay taken by the defendants was part of the mortgaged crop. Foster has paid \$673 on the note made by him to plaintiff, and the balance is now due. The correspondence referred to all occurred before any of the hay was removed from the ranch. The defendants credited the account of Foster with the amount each had received from him, and refused to account to plaintiff for any part of the hay. Plaintiff thereupon commenced this action to recover the value of the hay. The court below held that the plaintiff was estopped by her letter of June 21, 1886, to Foster, from claiming anything; that she therein authorized Foster to make the sale on his own account, and waived any claims he might otherwise have asserted under the mortgage; and such is the contention of respondents here. The defendants were charged with notice that the legal title to the hay was in the plaintiff, (*Berson v. Nunan*, 63 Cal. 550,) and that she could not be divested of her lien through a wrongful removal of the property from the land, (*Wilson v. Prouty*, 70 Cal. 196, 11 Pac. Rep. 608; *Martin v. Thompson*, 63 Cal. 4.) The defendants, as creditors of Foster, could not have taken the mortgaged property under an attachment, without first paying or tendering to plaintiff the amount of the mortgage debt, (*Wood v. Franks*, 56 Cal. 217;) and, as the lien continued, the taking by defendants was a conversion for which plaintiff has a right of action, unless she is estopped by the letter referred to, (*Wilson v. Prouty*, supra.) We are unable to give to the letters and acts of the parties the effect which was given to them by the court below. The defendants were notified that if they took the hay they would have to see that the mortgage debt was paid by Foster, or they would be held responsible. The letter of June 21st does not relieve them from this responsibility. The plaintiff evidently considered that the sale to defendants would be an advantageous one to all parties. She would receive the amount due her, and at the same time the mortgagor would obtain a good price for the property, and be enabled thereby to reduce his indebtedness. She did not desire to interfere with the sale, but she did nothing that was inconsistent with her rights, or which tends to show that she intended to waive her right as mortgagee, or to induce a change of position on the part of the defendants. Foster had written that "the bank has notified Mr. Pratt and Mr. McKae that they must not buy anything off the ranch." This was evidently a misapprehension of the terms of the letter which had been written by the bank, and the plaintiff proceeded in her letter of June 21st to correct his error. There is nothing in her letter indicating an intention on her part of permitting the defendants to appropriate her crop without paying the mortgage debt. There is no merit in the other contention of the respondent. It is not a case of variance, nor was there a failure

of proof. It is well settled in cases of this kind that a party may waive the tort, and sue in *assumpsit* for the value of the property. *Lehmann v. Schmidt*, 87 Cal. 15, 25 Pac. Rep. 161. No doubt respondents acted in the utmost good faith, and in the belief that they were entitled to the property under the circumstances, but plaintiff cannot be deprived of her property through a mistake of the defendants. The judgment and order in each case are reversed, and the causes are remanded for new trials.

We concur: HARRISON, J.; DE HAVEN, J.; GAROUTTE, J.; MCFARLAND, J.

89 Cal. 115

HEIDT v. MINOR et al. (No. 12,947.)

(Supreme Court of California. May 18, 1891.)

NOTARY PUBLIC—MISCONDUCT—LIABILITY OF SURETIES.

1. A notary public, who was also engaged in negotiating loans, represented to plaintiff that certain persons desired to borrow and gave her what purported to be mortgages executed by them, to which he had appended his certificate of acknowledgment, and on the faith of which plaintiff gave him the money to be delivered to the mortgagees. The mortgages were forgeries. The notary converted the money to his own use, and absconded, and plaintiff brought suit on his bond. Held that, as receiving money is no part of the official duty of a notary, his sureties are not liable for that fraudulently retained by him, but only for the damages caused plaintiff by the falsehood of his certificate of acknowledgment.

2. The measure of plaintiff's damages from this element of the notary's fraud is the value of the mortgages if they had been valid.

MCFARLAND, J., dissenting.

In bank. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

Archer & Bowden and A. L. Rhodes, for appellants. S. F. Leib, for respondent.

SHARPSTEIN, J. The defendants were sureties on the official bond of a notary public by the name of Cordell. Cordell, while acting as notary public, also acted as real-estate agent and broker in the purchase and sale of lands, making loans, collecting interests, rents, etc. The plaintiff upon several occasions employed Cordell as such broker or agent to make loans for her, and in the purchase of property, and often consulted him as to such matters, and sometimes acted upon his advice in relation thereto. In several of the loans so made, Cordell produced to plaintiff a note and mortgage prepared and acknowledged before himself, and she would then go with Cordell to the bank and pay him the money for the borrower, and Cordell would deliver to her the note and mortgage. Upon the 28th of August, 1885, he, then being a notary public, exhibited to the plaintiff what purported to be a note and mortgage, signed by one Charles E. Wilson, for the sum of \$1,000, the mortgage purporting to be of certain lands in the county of Santa Cruz, to secure the payment of the note. To the mortgage was appended by said Cordell, as notary public, a certificate of said Wilson's acknowledgment of the execution of said mortgage. Cordell represented to plaintiff that the note and

mortgage was executed by said Wilson, and that he wished to borrow of plaintiff \$1,000 thereon, and plaintiff thereupon received said note and mortgage, and paid to Cordell, for Wilson, the sum of \$1,000. Afterwards, on the 8th of April, 1886, said Cordell, still being a notary public, procured of plaintiff \$1,000 upon what purported to be the note and mortgage of one Joseph Curtis. The mortgage purported to be upon lands in San Benito county, to secure the payment of said note of said Curtis. Said Cordell had attached to said mortgage a certificate of acknowledgment made before him as a notary public, and attested to the same by affixing his official notarial seal thereto. By means of said forged notes and mortgages, and the false certificates of acknowledgments attached to said mortgages, plaintiff was induced to receive said notes and mortgages, and place in the hands of said Cordell, for said Wilson and Curtis, \$2,000, which said Cordell fraudulently appropriated to his own use, and in the month of August, 1886, absconded, and has ever since been absent from the United States. Plaintiff did not know before the absconding of said Cordell that said notes and mortgages were forged. Upon the foregoing facts the court found that plaintiff was entitled to judgment against the defendants for the sum of \$2,000, and interest on \$1,000 from August 28, 1886, and on the further sum of \$1,000 from April 8, 1886. Judgment was entered accordingly. From that defendants appeal.

The only question presented here is, do the facts found by the court support the judgment? The facts found establish beyond any question the civil and criminal liability of Cordell. But the liability of his sureties, the defendants, depends upon the terms and conditions of the bond which they executed. The sureties upon an official bond undertake for nothing which is not within the letter of their contract. "The obligation is *strictissimi juris*, and nothing is to be taken by construction against the obligors. They have consented to be bound to a certain extent only, and their liability must be found within the terms of that consent." Per COOLEY, J., in *Bank v. Ziegler*, 49 Mich. 157, 18 N. W. Rep. 496. That is a clear and concise statement of a rule universally accepted, but as might naturally be expected, courts have differed as to the delinquencies of the principal for which the sureties made themselves liable. The defendants in this case undertook that said Cordell should well and faithfully perform all the duties of his said office as required by law, and the requirements of the statutes of this state, and faithfully execute and perform all the duties of such office required by any law to be enacted subsequently to the execution of said bond. The duty of notaries public is prescribed by the Political Code. Among other things, they are required "to take the acknowledgment or proof of powers of attorney, mortgages, deeds, grants, transfers, and other instruments of writing, executed by any person, and to give a certificate of such proof or acknowledgment indorsed on or attached

to the instrument." Pol. Code, § 794. It is for a breach of the duty enjoined on their principal by this clause that the defendants are held to be liable to the plaintiff by the court below. The Code provides that, "for the official misconduct or neglect of a notary public, he and the sureties on his official bond are liable to the parties injured thereby for all the damages sustained." Id. § 801. It is no part of the duty of a notary public to receive money from or for anybody. It was misconduct, but not official misconduct, to fraudulently obtain it. And it is only against his official misconduct that the sureties consented to indemnify persons injured thereby. He did not receive any money in his official capacity.

Under a law of the state of New York, a supervisor, before entering upon the discharge of his duties as such, was required to give a bond, with sureties, for the faithful discharge of his official duties as such supervisor during his term of office, and well and truly keep and pay over and account for all moneys belonging to his town, and coming into his hands as such supervisor. The board of supervisors of Madison county, by resolution in due form, as authorized by law, levied the sum of \$1,500 upon the town of Sullivan, in that county, for the temporary relief of the poor of that town, and \$52 for highways and bridges; and in the warrant attached to the tax-roll of the town directed the collector to pay said sums to the supervisor of said town, which he did, but the supervisor did not account for or pay over the whole of said sum, and appropriated a portion thereof. An action upon his official bond for the recovery of the amount so appropriated was prosecuted against his sureties, and a judgment against them for said amount was entered against the defendants, and affirmed by the supreme court, and reversed on appeal by the court of appeals. In the opinion of the court of appeals it is said that "the only objection to the recovery is that the moneys for which a recovery was had are not within the condition of the bond." After quoting said condition, as before stated herein, and the statutes relating to the raising of moneys in towns for the support of highways and bridges and the poor, the opinion proceeds: "The supervisor has no authority under the law to receive moneys, even in trust, raised by tax for the support of highways and bridges, or of the poor. Moneys raised for such purposes are expressly excluded from those which he is authorized to receive or pay over." Further on in the opinion the court says: "The principal in the bond received, officially and as supervisor, precisely what the law authorized him to receive and no more. The appellant, in becoming surety upon the official bond of the supervisor, must be supposed to have known the law and the limit and extent of the liability in his case assumed." The judgment of the court below was reversed. *People v. Pennock*, 60 N. Y. 421. In *Welsh v. Lumisden*, 2 Hailes, 376, John Syme, messenger, was intrusted by Welsh with letters of horning and caption against one of his debtors. Instead of attaching the

debtor's effects by pawning, the messenger received them from the debtor himself, sold them by public roup, to the extent of the debt, and applied the proceeds to his own use. He became insolvent, and Welsh, the creditor, pursued Lumsden, his cautioner, for the debt. "The lords found the cautioners only liable for the messenger's faithful execution of his office, but not for any money allowed to come into his hands."

In the case at bar the judgment against the sureties is for money which their principal fraudulently obtained from the plaintiff. It was not in the line of his official duty to receive money from any one for any purpose. His receiving of it was purely a voluntary act on his part, and one for which his sureties did not agree to be liable. The contention of respondent's counsel is that the sureties are liable because there was attached to the counterfeit mortgages a false certificate of their principal as notary public of the due acknowledgment of the execution of said mortgages by the persons whose names had been forged to them, and that but for that certificate the money received by said principal would not have been delivered to him. But it was no part of his official duty to receive money upon valid notes and mortgages, and if these notes and mortgages had been valid, and he had received money from the mortgagee for the mortgagors, and neglected to deliver it to the mortgagors, we think no one could contend that the defendants would be liable for such misconduct of their principal to any one who might be injured thereby. The official misconduct for which the defendants were liable to any one who was injured thereby consisted in his making and attaching to the counterfeit mortgages certificates of their due acknowledgments; and the plaintiff is not entitled to recover any more than her loss by reason of said certificates being false instead of true. If the mortgages had been valid in every respect, their value as securities would have depended upon the value of the mortgaged property. If its value had been as great or greater than the sums secured by them, then the loss to the mortgagee might, in case of a false or fatally defective certificate of acknowledgment, be equal to the sums secured to be paid by said mortgages. Otherwise they might be of less value, or no value at all, as in the case of *McAllister v. Clement*, 75 Cal. 182, 16 Pac. Rep. 775, in which the finding was that the property mortgaged was wholly valueless, and that plaintiff had not suffered any damage by reason of the defective certificate of acknowledgment. The judgment in that case, in favor of the defendants, was affirmed by this court on the ground that no action will lie to recover damages if no damages have been sustained. In that case the mortgage was given to secure the payment of a promissory note for \$600. In that case the court found that the mortgaged property was valueless. In this case it did not find that it was of any value. And that distinguishes this case from *People v. Butler*, (Mich.) 42 N. W. Rep. 278, which more strongly supports respondent's contention

than any other cited in her behalf. In that case it was found to be of sufficient value to constitute good security for the loan. If, as we have no doubt, the liability of the defendants is limited to losses sustained through the official misconduct of their principal, the judgment in this case is clearly erroneous. The official misconduct consisted in certifying falsely to the acknowledgments of the mortgages. The defendants are liable only for what would be the value of those mortgages if valid. The court has not found that they would be of any value if valid. Therefore the proper basis for determining the liability of the defendants is wanting. The findings do not support the judgment, and it must be reversed. Judgment reversed.

We concur: BEATTY, C. J.; DE HAVEN, J.; HARRISON, J.; GAROUTTE, J.

PATERSON, J. I concur in the judgment on the ground last stated in the opinion.

I dissent: MCFARLAND, J.

(88 Cal. xxi)

HEIDT v. MINOR et al. (No. 12,948.)

(Supreme Court of California. May 18, 1891.)

In bank. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

Archer & Bowden and A. L. Rhodes, for appellants. S. F. Leib, for respondent.

PER CURIAM. Upon the authority of *Heidt v. Minor*, ante, 627, (No. 12,947,) this day filed, the judgment is reversed.

(3 Cal. Unrep. 398)

McCOY v. SOUTHERN PAC. CO. (No. 14,091.)<sup>1</sup>  
(Supreme Court of California. May 20, 1891.)

RAILROAD COMPANIES — STOCK KILLING — NEGLIGENCE — FENCES.

1. The fact that a herder, after having rounded up his sheep a mile and a quarter from a railroad track, and after some of them have lain down as if for the night, takes his dog and goes home, is not such contributory negligence as will relieve the railroad company from liability if the sheep afterwards stray on the track and are negligently killed; and the admission of incompetent evidence as to the custom of rounding up and herding sheep is not prejudicial to the company.

2. In an action against a railroad company for negligently killing stock, an allegation that the damage was caused by defendant's failure to maintain a good and sufficient fence will include any defect in the fence without more particular reference to it.

3. One who has only a right to pasture his stock on another's land, adjacent to a railroad, is entitled to the protection of the statute requiring railroad companies to maintain a fence.

BEATTY, C. J., and MCFARLAND, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

Chipman & Garter, for appellant. John F. Ellison and A. M. McCoy, for respondent.

TEMPLE, C. This action is for damages for killing plaintiff's sheep by the defendant's locomotive and cars. Plaintiff was the owner of a band of about 3,000 sheep, which he avers were lawfully grazing in a field adjoining defendant's railway, near Rawson's switch, in Tehama county:

<sup>1</sup> Reversed in banc. See 29 Pac. 1110.

that, by reason of the failure of the defendant to make and maintain a good and sufficient fence, they, without his fault, strayed upon the track of the railway, and were run over and killed; also that defendant so negligently and carelessly ran and managed its engine and cars that they ran over and killed plaintiff's sheep. The defense is a general denial and a charge of contributory negligence. It appears that Boyd Bros. were in possession of what was known as the "Healey Ranch," as tenants of one Kraft. In the fall of 1889, they sold to plaintiff the stubble feed on the ranch after the grain was removed, and let him into such possession as was necessary to enable him to pasture the fields. Plaintiff was to take charge of his sheep while there, Boyd Bros. assuming no responsibility with reference to them. Boyd Bros. continued to live upon the place, and contracted with plaintiff to board his herder. Plaintiff had possession of no buildings, was not to reside upon the place, but kept his herder there to look after the sheep. Under this contract he drove his sheep on the place on or about the 16th day of September, and they were left there in charge of a herder. On the night of the 7th of October the herder "camped the sheep" about one mile and a quarter from the railroad. After "rounding them up" at this place, he remained until some of them had laid down, apparently for the night, and then went home. The night was rainy, and the sheep strayed from this place to an opening in the fence at Rawson's switch, and out upon the track, and were run over, and some of them killed, by a train running towards Red Bluff, at about half past 7 in the evening. The same train returned in the morning, and again ran over and killed some more of them at about the same place. Rawson's switch, where the sheep entered, was a flag station, and the land inclosed by the defendant at that point is wider than at other places. On the side next this field the fence is some 270 feet further from the track. This extra width is 60 panels measured by the fence, or about 1,090 feet in length along the railway. Near the center of this the Rawson and Healey ranches join, and the opening is near the division fence. The defendant had quite recently constructed a new fence along the right of way and this extra width or reserve, which was evidently intended for use in connection with the station. The opening had been made by Boyd Bros. with the consent of the section boss or master. His duty in reference to such matters appears from the evidence of Davis, the division foreman, to be, if he finds any slight repairs required in the fence which he has the means to make, then to make such repairs, but defects which he has not the lumber or other means to repair it is his duty to report to the division foreman. Boyd Bros. desired this opening for their private accommodation. There was already a gate through which they could have had access to the station, but it was less convenient. They took down a panel 16 feet long, in March preceding the accident,

and it had never been replaced, or the fence made good by a gate or any other device. The section master, when he gave consent to make the opening, promised to have a gate placed there, but it had never been done. The old fence, which had shortly before been replaced by the new one, had an opening at the same place, in which there had never been a gate. In short, there had always been an open road there leading from Boyd's house to the station. The field was a large one; how large is not shown. But it extended from the Sacramento river on the south to the railway on the north, and it is stated that the house was about one mile from the railway, and a mile and a half from the river; also that all the bottom land was in grain, and 400 acres of the upland. The plaintiff and his herder both testify that they had not seen this opening before the accident, and did not know of its existence. The plaintiff had seen two gates opening into the right of way, and had given special directions for extra care in keeping them closed. The sheep had been upon the place about 20 days before the accident, and during that time Boyd Bros. had done some hauling through this opening, as they had done before.

A motion for a nonsuit was made at the conclusion of plaintiff's evidence, on the ground of insufficiency, specifying the particular defect claimed; but as the motion was denied, and further evidence put in by both parties, it is not now necessary to consider whether this motion was properly denied; for all the points which can now be urged against this ruling arise also upon the objections to the sufficiency of the evidence to justify the verdict. At the trial very numerous exceptions were taken to the rulings, admitting, or refusing to admit or strike out, evidence. We have carefully examined the record as to these objections, and, as to most, it is sufficient to say there is nothing in them, or the evidence in question was so entirely immaterial that no harm could result either way. A few only we deem it necessary to specially notice. A large number of such exceptions have reference to opinion evidence, as to the proper herding of sheep and the custom of other herders in such cases. The matter in contention seems to have been whether the fact that plaintiff's herder "rounded the sheep up," as the phrase is, a mile and a quarter from the track, and, after some had lain down, took his dog and went off for the remainder of the night, was contributory negligence. But we think, as matter of law or of general knowledge, this would not constitute such negligence as would relieve the defendant of liability. Evidence, therefore, upon this point could not have been prejudicial to the defendant.

One source of damage stated in the complaint is the failure to maintain a good and sufficient fence. In *McCoy v. Railroad Co.*, 40 Cal. 532, it is said: "The neglect of the defendant to build the fence certainly did not operate to dispossess the plaintiff of his entire field, or, what is the same thing, prevent him from making lawful use of it. Besides, he probably knew that,

so long as the defendant chose to continue running its cars upon this open track, it undertook at its peril that no harm should come to the stock for the want of a proper fence." It must follow that adjoining proprietors may use their land whether fenced or not, or whether the fence is sufficient or not, and are not bound ordinarily to take any precautions, even when they know the fence to be insufficient, but may use their land in the ordinary manner, relying upon the responsibility of the railroad corporation in case of loss. Whatever complaint the owner of the sheep could have made on the subject of want of care on the part of his herder, as against dogs or coyotes, or panic from any source, the defendant was not interested in it. Had there been a good and sufficient fence, with no openings in it, there certainly would have been no negligence, in reference to the defendant, in leaving such a band of sheep overnight without a keeper, in a stubble field of the extent of this one. There was proof that neither plaintiff nor his herder knew of the open space in the fence. It appears that the fence along the right of way was in general a good one, and there is no allegation in the complaint in reference to the open space through which the sheep passed to get upon the track. Objection is made that, without such allegation, evidence of damage in such case is inadmissible. But it is evident, admitting that the defect in the fence is the fault of defendant, that the averment that defendant failed to maintain a good and sufficient fence would include such a defect, or any defect, which rendered the fence insufficient. The case of *Jahant v. Railroad Co.*, 74 Cal. 9, 15 Pac. Rep. 362, does not sustain appellant. In that case there was no such allegation as to the insufficiency of the fence, but the damage was averred to result from the careless and negligent management of defendant's cars. The horses were on the track, therefore, presumably through the fault of the plaintiff. A remark was made, apparently not necessary for the decision of the case, that this presumption was not sufficiently negated by the general averment that the animals escaped without his fault.

The court refused to give the second instruction asked by the defendant. It reads as follows: "I instruct you, gentlemen of the jury, that a person who pastures his sheep upon the land of another person, required by law to be fenced by a railroad corporation, upon an understanding or agreement with such owner or his tenant, by which it is agreed that such owner or tenant shall not, in any degree or manner, become responsible for the safe-keeping of said sheep, but that said sheep shall be taken care of exclusively by their owner and his herders, and such owner or tenant of the land shall remain in possession of the land, taking care of the fences, making and using openings therein, cultivating and tilling the soil, reserving the use of all buildings and farm implements, and in every way exercising acts of dominion and control over said premises, except merely permitting the owner of the sheep to keep his sheep upon

the premises, for the sole purpose of eating the feed therefrom growing upon said lands, is not entitled to the protection of the statute requiring a railroad corporation to fence such lands." We think the court properly refused this instruction. Any person lawfully occupying the land is entitled to the protection of the statute. One who only has the right to pasture his stock temporarily upon the land, as admittedly the plaintiff in this case had, is as much entitled to its benefit as the owner of the land.

The third instruction was properly refused. The objections to it are numerous. It required the court to usurp the province of the jury, and draw conclusions from the evidence. It erroneously implies that there was a necessity of notice to defendant of the opening, although made with its knowledge and consent. It ignores the duty of the defendant to take constant care of its fences, which require it to know within reasonable time of defects, and to repair them. The evidence, we think, plainly tended to show that there was a mixed possession of the ranch by plaintiff and Boyd Bros. The principal dominion and control was doubtless in the plaintiff. But at the same time Boyd Bros. were also living upon the place with such limited possession and rights as would not interfere with the plaintiff. The defendant at the trial took the ground that, under such circumstances, plaintiff had no rights under the statute at all. In this we think it was wrongly advised. No doubt, however, under such circumstances, the parties having a mixed possession, under a contract, each, under certain circumstances, is liable to suffer for the acts of the other. If, for instance, the opening was in the fence through the fault of Boyd Bros. during such co-occupation, and through no fault of defendant, the plaintiff ought not to have recovered. Had an instruction embodying this proposition, and free from objection, been offered, it should have been given. But, although counsel for the defendant made the proposition in various ways, it was always accompanied with something which justified the court in refusing it. Generally, as in the third instruction asked, it was stuffed with an argument which counsel was anxious to have the court make to the jury,—a practice which has become altogether too common. An instruction should be a simple proposition of law, in form, if possible, specially applicable to the facts of the case. But the argument as to its effect should, in general, be left to counsel.

The sixth rejected instruction comes nearest to this simple legal proposition. But there the relation between Boyd Bros. and plaintiff which the jury were required to find, in order to apply the rule, was simply that plaintiff entered into the use of the pasture under contract with Boyd Bros. The fact of co-occupation was ignored. In this case counsel differ widely as to the rights acquired by plaintiff under his contract. Defendant insists that Boyd Bros. were left with full dominion and control, and plaintiff had not even a qualified possession. The instruction lays



down no rule which the jury could understand. They are told plaintiff cannot recover if Boyd Bros. could not have recovered under similar circumstances. If similar means the same, the conclusion is quite obvious, and needed no indorsement from the court. If not the same, but in some respects like, in what respects? The jury are not told under what circumstances Boyd Bros. could not have recovered. But why refer to such hypothesis? The question was not as to the liability of Boyd Bros., but whether, under the circumstances, plaintiff could recover. An instruction could easily have been framed to the effect that a joint occupation, by mutual consent, being found from the evidence, plaintiff could not recover if the opening was made by Boyd Bros., without the consent of defendant, and there was no negligence on its part. Outside of the questions already discussed, the charge that the evidence is insufficient to sustain the verdict must depend upon the question whether there was evidence tending to prove the authority of Daly, the section master, to authorize the opening in the fence. We think there was sufficient evidence to justify such conclusion. In their business railroad companies require numerous agents, of whose authority the public knows nothing, save what appearances indicate. It is important both to the public and to the company that such appearances be implicitly relied upon. Unless they were so, the business of such companies would be greatly impeded. It was clearly the duty of the defendant to have some agent whose duty it would be to take care of the fences which it was bound to maintain. The facts show that the agent whose duty it was in this case to keep watch over the fences was Daly. The court and jury were not bound to take his disclaimer of authority as conclusive. We think the weight of the evidence was with the conclusion of the jury upon the subject. We think the judgment and order should be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFARLAND, J. I dissent. The Boyd Bros. were clearly in possession and control of the land and the fences. If they opened the fence, they certainly could not have recovered if their sheep had gone through the opening and been killed. Plaintiff's sheep were being pastured on the land subject to the general control of the land by the Boyds; and, if the sheep were injured by any misconduct of the Boyds, the latter were, perhaps, responsible to plaintiffs for such injury. But if the Boyds kept the fence open for their own convenience, neither they, nor any one temporarily occupying part of the land for a special purpose under them, can complain of the defendant. This proposition is practically admitted in the prevailing opinion of the court, but it is said that this proposition was not presented in the instructions asked by appellant. I think it was clearly presented, particularly in the

sixth instruction asked. I think that the phrase, "if the Boyd Bros. could not themselves have recovered damages to their stock under similar circumstances," could not possibly have been understood by the jury in any other way than as meaning that if the sheep had belonged to the Boyd Bros., and had escaped onto the railroad under the circumstances under which plaintiff's sheep so escaped, and the Boyd Bros. could not recover, then plaintiff could not recover. I do not see how any intelligent jury could understand it in any other way. I think that the judgment should be reversed.

BEATTY, C. J. I dissent.

(87 Cal. 532)

WILLIAMS v. MITCHELL *et al.* (No. 13,762.)  
(*Supreme Court of California*, Jan. 29, 1891.)

RESCISSION OF SALES—FRAUDULENT REPRESENTATIONS—EVIDENCE.

1. In an action for the balance of the price of certain land and "water certificates," defendants alleged that plaintiff, through his agent, fraudulently represented that water was piped to the land; that the right to the use of a certain amount of water was appurtenant to it, otherwise than as expressed in the water certificates; and that plaintiff would assign to defendants shares of stock in the company other than the water certificates. The evidence showed that the agent's authority was only to find a purchaser at a fixed price, and he denied having made any such representations. One of the defendants, at the time of his interview with plaintiff's agent, visited the land, and there was nothing there to indicate either pipe or water anywhere upon it. The water certificates, which showed on their face what they were, were delivered to defendants with the deed. It was admitted that a short time after the sale defendants knew there was no water piped on the land. *Held*, that the finding that there was no fraud on the part of plaintiff was justified by the evidence.

2. As defendants claim that the invalidity of the water certificates "is stamped upon their face," their right to rescind, on the ground that the certificates are void, is lost by their unreasonable delay of 17 months after receiving the certificates, and until 2 months after commencement of action for the price, to offer to rescind.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

*Allen & Miller, Waters & Gird, and Harris & Gregg*, for appellants. *George E. Harpham and H. M. Willis*, for respondents.

VANCLIEF, C. On June 11, 1887, the plaintiff sold and conveyed to the defendants six lots of land, containing 20 acres each, and at the same time assigned to the defendants certain written obligations of the Bear Valley Land & Water Company, (a corporation,) to furnish and deliver at a certain point a certain quantity of water, to be used on each of said lots, called "water certificates." The consideration to be paid by the defendants for the land and water certificates was \$24,000, of which \$6,000 was paid in hand. For the balance of the purchase money the defendants made two promissory notes to the plaintiff for \$9,000 each, secured by their mortgage on said land. This action is brought to foreclose the mortgage. The answer of the defendants admits the ex-

execution of the notes and mortgage, and then proceeds as follows: "(2) That said notes and mortgage were executed and delivered as and for part of the purchase money of said real estate in complaint described, together with certain water-rights by plaintiff represented as appurtenant thereto, as well as for certain shares of stock in the Bear Valley Land & Water Company, a corporation organized and existing under the laws of the state of California, and for no other or further consideration. (3) That said defendants were induced to so purchase said lands and stock, and to execute and deliver said notes and mortgage, by means of false and fraudulent representations at the time and before that time made by plaintiff to defendants, in this, to-wit: That, at and before the purchase of said real estate, appurtenances, and shares of stock, the said plaintiff, by and through his duly-authorized agent, represented to defendants that water for irrigation purposes was actually piped on said land from the reservoirs of said Bear Valley Land & Water Company; that the right to use twelve miners' inches of said water was appurtenant to said land; that plaintiff would transfer and deliver to defendants shares of stock in said Bear Valley Land & Water Company, representing ownership of twelve miners' inches of water of said corporation; that plaintiff owned the land lying immediately adjacent to the premises in complaint described; that upon said lands plaintiff would at once cause to be constructed a large hotel building at a cost of \$20,000, and numerous private dwellings; that the materials to be used in their construction were already purchased by plaintiff, and the contract for the erection thereof let. (4) Defendants, relying upon such representations and believing them to be true, and on the faith thereof, purchased said premises in complaint described, and said stock of plaintiff, and on the 11th of June, 1887, accepted from plaintiff a deed therefor, with six certain instruments in writing, issued under the seal of said Bear Valley Land & Water Company, and signed by its president and secretary, denominated 'water certificates,' and in consideration thereof paid to plaintiff six thousand dollars in cash, and executed the notes and mortgage as in complaint set out and described. (5) That at the date of the acceptance of said deed and said water certificates defendants believed that said water certificates were in fact shares of stock in said corporation, and entitled the defendants, as holders thereof, to the rights and privileges of stockholders in said corporation, and conveyed to defendants the rights and privileges so contracted to be conveyed and transferred by plaintiff, to twelve miners' inches of water of said corporation. (6) Defendants allege that notwithstanding said promises and representations of plaintiff, that neither at the time of said purchase, or now, or at any time or at all, was any water piped on said land from the reservoir of said Bear Valley Land & Water Company, nor from any water supply or source, and no pipes for conveying water were laid on said land

at all, nor in the vicinity thereof. (7) That in truth and in fact no water-rights were appurtenant to said lands, and no hotel building or private dwellings or structures of any kind have been erected on said adjacent lands, in whole or in part, except a certain excavation alleged to be for a basement for an hotel, although more than one year has elapsed since said purchase, and no steps have been taken by plaintiff to cause said improvements, or any of them, to be made on said adjacent lands, although he has ever since remained and still remains the owner and holder thereof. (8) That said lands were at the date of said purchase and now are irrigable lands, and without water-rights appurtenant, or water for use in irrigation, are of little value and worth less than \$5,000; that water-rights appurtenant to such lands, for purposes of irrigation, would be valuable, and worth \$6,000 and more; that shares of stock in said Bear Valley Land & Water Company, representing twelve miners' inches of water, would be of great value, to-wit, of the value of \$5,000 and more; that the erection and construction of said hotel buildings and private dwellings, as agreed upon, would enhance the value of said premises \$10,000 and more; that, without said improvements on said lands adjacent, the premises so purchased by defendants are worth \$10,000 less than with such improvements made as represented. (9) Defendants are informed and believe, and therefore allege the fact to be, that said written instruments, styled 'water certificates,' issued by said corporation to defendants, were and are issued without authority of law and are void; that said corporation had no authority in law to issue the same, and the issuance of the same conveyed and transferred no rights as stockholders or otherwise to defendants; that the same are not shares of stock, and do not transfer or vest in the defendants the privileges or rights of stockholders, and do not convey or vest in defendants twelve miners' inches of water of said corporation, or any water or rights whatsoever, and the same are of no value, and defendants allege that they were ignorant of the true character and value of said written instruments styled 'water certificates' until the commencement of this action, and defendants further allege that plaintiff never transferred, conveyed, or attempted to convey to said defendants any of said water-rights or shares of stock in said Bear Valley Land & Water Company whatever. (10) Defendants allege that the acts, commissions, and representations of plaintiff, above set forth, were done and made by him with intent to defraud, and that he thereby did defraud, defendants of their rights in the premises. (11) Defendants allege, further, that by reason of the acts, omissions, and representations, practices, and fraud of plaintiff, as above set forth, the consideration for said notes in complaint mentioned has wholly failed, and the same were obtained by fraud, and wholly without consideration, and plaintiff should not maintain his action thereon."

The defendants also filed what they de-

nominate "a further answer to complaint, and by way of cross-complaint," in which they allege substantially the same facts alleged in their answer, with only the additional averment that on December 13, 1888, (nearly two months after the commencement of this action,) the defendants tendered to plaintiff a reconveyance of the land and reassignment of the water certificates, and demanded a surrender and cancellation of the notes, and a return of the cash payment of \$6,000, all of which was rejected and refused by the plaintiff. The prayer of the cross-complaint is that the notes be canceled, and that defendants have judgment against the plaintiff for the \$6,000 paid and interest.

The water certificates and the indorsements thereon are in the following form: "Class A 7,200 certificates. Issue of June 1, 1886. Number 113. Number of certificates, 20. Bear Valley Land and Water Company water certificate. These twenty certificates issued by the Bear Valley Land and Water Company, a corporation, to Rhodes, Mitchell, and Hoopes, for twenty acres, are guaranteed by said company to entitle the holder hereof to receive a continuous flow of one-seventh of an inch of water to each acre of land to which the same shall be devoted, or multiple thereof, as is designated on the face hereof, for the six summer months in each year, for the contract times, beginning under the contracts of this company with the North and South Fork ditches, respectively. The inch mentioned herein is equivalent to a flow of one-fiftieth of a cubic foot per second. The holder of this certificate may elect to accumulate the use of water hereunder in any one or more months of said six months, the aggregate in any one month not to exceed one-fourth of the whole for that year; and the holder is also entitled to his proportion of the six months' winter water accruing under the contracts of the North or South Fork ditches on which it may be used in the proportion which this issue of certificates and those that may be hereafter issued bears to the whole of such benefits. The point of delivery of water used under this certificate shall be at the points designated in the contracts with the North and South Fork ditches, respectively. This issue or award of water is adopted as a method of distribution and of the use of the same to the company's stockholders, in consideration of the covenants contained in the indorsement hereon; and the interest represented by this certificate shall not become appurtenant to or pass by voluntary act or by operation of law with any land upon which the water represented may be used. A transfer hereof shall only be made by surrender of this certificate to the company and the reissuance of a new certificate, and upon the signature of the concurrent contract on the records of the company. J. G. BURT, President. E. A. HOLT, Secretary. [Seal of said Company.]" Indorsement: "The holder of this certificate hereby accepts the same on the following conditions: That this certificate shall and is to be held subject to and in accordance with the terms of the contract signed by the holder hereof upon its

issuance by the company." The contract mentioned in the indorsement on the certificate, to be signed by the holder, was signed by the defendants on July 7, 1887, and is as follows: "Know all men by these presents, that whereas, the Bear Valley Land and Water Company, a corporation, has this day issued to the undersigned, Rhodes, Mitchell & Hoopes, twenty certificates of said corporation, being certificate No. 113, in consideration of the agreements hereinafter contained, and subject to the conditions hereinafter set forth and contained in said certificate, and the undersigned has received and accepted said water certificates, subject to all such agreements and conditions: Now, therefore, we hereby agree that, in consideration of the issuance of said water certificates to us by said corporation, and in payment for the water which said certificates entitle us to receive each year from said corporation in accordance with the provisions of said certificate, we will, without notice or demand, pay to said corporation annually hereafter, and within thirty days after the first day of January in each year, the sum of \$20, being \$1 per year on each of said water certificates, such payment to be made at the office of said corporation in the city of San Bernardino, state of California. And if said sum of \$20 be not paid to said corporation in full, at the time and in the manner hereinbefore provided, then said certificate No. 113, and all covenants and agreements therein contained, and the water certificates therein referred to, shall become and be null and void, and all rights thereunder shall be forfeited, and shall forever cease and determine, and the foregoing contracts shall be void. And whenever said certificate No. 113 shall be surrendered to and canceled by said corporation, then the foregoing contract shall be void. In witness whereof we have hereunto set our hands and seals this 7th day of July, A. D. 1887. RHODES, MITCHELL & HOOPES. By G. H. CONDEE, Agent." The court found for the plaintiff on all the issues, and decreed a sale of the mortgaged property in the usual form, and the defendants appeal from the final decree, and from an order denying their motion for new trial.

1. The appellants contend that the findings which negative the fraudulent misrepresentations charged in the answer and cross-complaint are not justified by the evidence. It will be observed that the averments are that the plaintiff made the false and fraudulent representations by his agent. The evidence shows that the alleged agent was C. P. Condee, whose authority, if he had authority, extended no further than to find a purchaser of the property at a fixed price, and who, in his testimony on the trial, denied that he ever represented that water was piped or conducted to or upon the land sold; or that the right to the use of any water was appurtenant to the land otherwise than expressed in said water certificates; or that plaintiff would assign to defendants any shares of stock in the water company corporation other than said water certificates, though he may have called those certificates water stock; or that any con-

tract for the erection of an hotel or other buildings had been made by the plaintiff. Such representations as were made by Condee before the sale were first made to the defendant Rhodes (who was acting for the other defendants) at a place on the land where Condee is charged with having falsely represented that the water was then piped, yet there was nothing on the land to indicate that there was either pipe or water anywhere upon it. The water certificates, in the form aboveset out, were indorsed by the plaintiff, and delivered to the defendants' agent with deed for the land, on June 11, 1887, and received by defendants on July 11, 1887. It is admitted that defendants knew no water had been piped on the land as early as October, 1887, and the evidence strongly tends to show that the defendant Hoopes must have known the same in July, 1887; yet the defendants made no offer to rescind until December, 1888, about two months after the commencement of this action. There is no evidence nor pretense that the plaintiff personally made any false representation whatever. As the defendant Rhodes testified that he had been in the real-estate business a number of years, and had personally visited and examined the land on two occasions before he made the purchase, it is difficult to understand how he could have been deceived by the alleged representations of Condee as to water being piped on the land at the times he examined it, when he saw no signs of pipes, water, or hydrants, and asked no questions as to where they were; and it is still more difficult to conceive how the defendants could have been deceived as to the purport or nature of the water certificates at the time they accepted those certificates with the deed for the land. Considering these circumstances, which, to some extent, justify the application of the maxim, *caveat emptor*, in connection with the testimony of Condee, which denies all the material misrepresentations charged, I think the finding that there was no fraud on the part of the plaintiff is justified by the evidence.

2. Appellants contend that the water certificates are void and of no value, because (1) "they were issued gratuitously, and consequently amounted to a fictitious increase of the indebtedness of the company;" and (2) they "represent or evidence a division and withdrawal and payment to the stockholders of a part of the capital stock of the company;" and therefore, to the extent of the value of the water, the consideration for the notes and mortgage failed. There is no pretense that the water company has failed or refused to furnish or deliver the water as per certificates, or has denied its obligation to do so; and the only evidence relating to the matter is to the effect that the water company regards the certificates as valid obligations which it has always been ready and willing to perform; but it is claimed that their invalidity "is stamped upon their face." While I am inclined to the opinion that the certificates are valid for what they purport to be, I think it unnecessary, and certainly not desirable, to decide the question in this case to which the

water company is not a party. As counsel claim that the alleged invalidity of the water certificates appears upon their face, and have pointed to no extraneous fact on which it depends or from which it may be inferred, the defendants must have known all the facts touching such invalidity on July 11, 1887, when they personally received the certificates, and were informed by Mr. Condee that he, as their agent, had executed for them the agreement above set forth,—to pay the water company \$20 a year on each of the six certificates. It is not denied that Condee was authorized to execute this agreement. Under these circumstances, if the defendants desired to rescind their purchase on the sole ground that the water certificates were void, (and it appears that they had no other ground,) they should have offered to rescind promptly, within a reasonable time. A delay of 17 months, and until 2 months after the commencement of this action, and 38 days after the appearance of the defendant Rhodes, was unreasonable. The other points made by appellants' counsel require no special consideration, as those of them which are not founded upon a misconception of facts have no bearing upon the merits of the case as viewed here. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed

89 Cal. 57

JATUNN v. O'BRIEN et al. (No. 13,711.)

(Supreme Court of California. May 7, 1891.)

IRRIGATION—EASEMENT FOR DITCH—TAX—DEEDS.

1. In an action to enjoin the widening of an irrigation ditch it appeared that the ditch had been maintained prior to 1866, but was then allowed to fill up and be disused until 1874, when defendants opened it to a less capacity than formerly, and so used it until 1884, when plaintiff purchased the land through which it ran. There was no evidence to show who constructed and used the ditch before defendants opened it. Held, that defendants could not, after plaintiff's purchase of the land, increase the ditch to its former capacity.

2. A tax-deed reciting that it is based on an assessment to a certain person "and unknown owners" is void.

Commissioners' decision. In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

J. W. Cross and P. F. Simonds, for appellants. Chas. W. Kitts, for respondent.

VANCLIFF, C. The sole object of this action is to obtain a perpetual injunction against the defendants, restraining them from enlarging a water-ditch running through plaintiff's land. The case was tried by the court, and as a result of the trial an injunction was granted restraining defendants from enlarging their ditch to a greater capacity than 12 inches in depth, 14 inches in width on the bottom, and 20 inches in width at the top, with a carrying capacity of 123 inches of water, measured under a pressure of 6 inches. Defendants moved for a new trial on two

grounds: "(1) That the decision of the court giving judgment for the plaintiff is against law;" and "(2) on account of errors occurring at the trial, and excepted to by the said defendants." The motion was made on a bill of exceptions. The court denied the motion, and defendants appealed from the judgment, and from the order denying their motion.

The findings show that the lands of plaintiff through which the ditch runs consisted of 80 acres, to 40 acres of which he acquired title by patent from the United States on July 20, 1874. The other 40 acres were conveyed to him by the Central Pacific Railroad Company on December 20, 1884, having been patented to the railroad company April 30, 1884. "That prior to 1862 there had been constructed on, over, and across the lands herein described [plaintiff's lands] a ditch known as the 'Camp Far West Ditch.' That the same was used up to the year 1866, at which time the further use of the same was discontinued,—the ditch was allowed to go to ruin, became filled up, and the flumes thereon allowed to rot, fall down, and in places to be carried away by strangers," and was totally unused from 1866 to 1873. That in May or June, 1874, and before plaintiff acquired title to any part of his land, defendants entered upon the ditch, and cleaned it out, and reconstructed it to the size and capacity above stated, viz., 12 inches in depth, 14 inches in width on the bottom, and 20 inches at the top, with a carrying capacity of 123 inches of water, measured under a pressure of 6 inches, and in that condition, and to that capacity only, used and conveyed water through it for irrigating purposes until 1888, when they commenced the enlargement of it complained of, and to enjoin which this action was brought. The defendants' right to the possession and use of the ditch to the full extent and capacity to which they reopened it in 1874 and used it until 1888 is not questioned by the action, nor infringed by the injunction granted. But appellants contend that they are entitled to enlarge it to the size and capacity which it had when originally constructed prior to 1862, and while used prior to 1867. The trial court decided as matter of law that defendants' property in the ditch was only such as they acquired by appropriation, possession, and user prior to 1885,—that is, prior to the conveyance of the land to the plaintiff,—because, as matter of fact, there appeared to be no privity between defendants and the person or persons who originally constructed, owned, and used the ditch prior to 1867. It was not proved, nor was there any evidence tending to prove, who constructed the ditch, or who owned or used it prior to the time, in 1874, when defendants took possession of and reopened it.

For the purpose of proving that they had acquired the title of the original constructors and former owners of the ditch the defendants offered in evidence a tax-deed to defendant Smith, dated September 2, 1875, based upon an alleged assessment therein recited, of "certain property, including the property" described in the deed, made, "between the first Monday of

March and the first Monday of July, 1874, to R. M. L. Camden and unknown owners." The property sold for taxes thus assessed is described in the deed as "the property so as aforesaid assessed, situated in said county of Nevada, and described as follows, to-wit: Water right and ditch from Wolf creek to Camp Far West." In connection with this offer defendant Smith testified that there was only one ditch "which starts from Wolf creek and goes to Camp Far West." Plaintiff's counsel objected to the admission of the tax-deed on several grounds, and particularly on the grounds: (1) That the assessment to "Camden and unknown owners," upon which the deed rested, was void; and (2) that defendant was in possession of the ditch from May, 1874, until after the sale thereof for taxes, and therefore it was his duty to pay the taxes. The court sustained the objection, and counsel for defendants excepted; and the principal point made by the appellants is that the court erred in excluding the tax-deed. I think the objection to the deed was properly sustained on the ground that the assessment therein recited was void. *Grotefend v. Ultz*, 53 Cal. 666; *Grimm v. O'Connell*, 54 Cal. 522; *Hearst v. Egglestone*, 55 Cal. 366. The bill of exceptions states that "in support of their case the defendants offered testimony tending to show that prior to 1874 said ditch was 2 feet wide on the bottom, with flumes 32 inches in width;" and it does not appear that this testimony was disputed. Upon this counsel for appellants base their point that the decision is against law. But, since defendants failed to connect themselves with the title of the former owners or original constructors, it is immaterial what was the size or capacity of the ditch as originally constructed and used. The defendants are entitled to maintain and use the ditch and flumes on plaintiff's lands to no greater width or depth than they reconstructed and used them between 1873 and 1885. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

KILBURN v. KILBURN. (No. 12,981.)

(Supreme Court of California. May 7, 1891.)

DIVORCE — CIVIL MARRIAGE — LEGALITY — EVIDENCE.

1. In a suit for divorce, it appeared that plaintiff and defendant, after the birth of an illegitimate child, entered into an agreement for a present marriage. Plaintiff's mother testified to the agreement, and that defendant asked her to take plaintiff to an adjoining county, and authorized her to introduce her as his wife, and that he said he wanted it kept quiet in the county where he lived. Defendant at no time after the alleged agreement cohabited with plaintiff, though on a few occasions they had sexual intercourse, and he only contributed \$70 to the support of plaintiff and the child. There was no evidence that any one knew of the relations between the parties except themselves and plaintiff's mother and sister. Held, that there was not such an assumption of marital rights as could constitute a civil

marriage, under Civil Code Cal. § 55, requiring that consent to the marriage must be followed by a mutual assumption of marital rights, duties, and obligations.

2. In such case, no marriage having been shown between plaintiff and defendant, evidence of defendant's marriage to the woman with whom he is charged in the bill as having committed adultery is properly excluded as immaterial.

In bank. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

*H. V. Morehouse*, for appellant. *Wm. H. Webb*, for respondent.

DE HAVEN, J. Action for divorce. The court below, approving and adopting the special verdict of the jury on this point, found that on May 23, 1886, the plaintiff and defendant entered into a contract of marriage, by which they agreed then and there to a present marriage, and that this contract was followed on their part by a mutual assumption of marital rights, duties, and obligations. The defendant, who is the appellant here, contends that the finding is not justified by the evidence. It appears that the parties first met at a skating-rink in Salinas city, in August, 1885. At their second meeting, which was about a week afterwards, this acquaintance ripened into an act of illicit intercourse, followed by other similar acts at opportune times, until, as a fruit of this relation, the plaintiff gave birth to a child on May 16, 1886. One week thereafter defendant went to see plaintiff at the residence of her sister, where she was stopping. Here the plaintiff met defendant in the parlor alone, and at this meeting the plaintiff testifies that she and defendant agreed upon a present marriage, and that it was to be kept secret in Salinas city, but not elsewhere, and the baby was to be named after him. As stated, no witnesses were present; but plaintiff's mother and sister each testifies that she came into the parlor afterwards, and that defendant then repeated to her the said agreement made with plaintiff in reference to a present marriage, and also said that he wanted plaintiff to go into a neighboring county and live for a while, the mother to go with her. The mother also testified that she was authorized by defendant to introduce plaintiff as his wife, and she did so, "only he wanted it kept quiet, so that it would not get back into the valley. He didn't care about it elsewhere." The plaintiff and her mother then went to the city of San José, and there remained until March following. During this period the defendant called to see her once, remaining from 9 or 10 o'clock in the morning until 1 o'clock in the afternoon. From the time of the alleged contract of marriage until the commencement of this action the plaintiff and defendant never cohabited together,—that is, lived together in the same house,—although upon a few occasions they had sexual intercourse with each other; nor is there any evidence that they were generally reputed to be husband and wife in the community where both lived, and defendant never contributed but \$70 to the support of plaintiff and her child. There is nothing to show that, if such relation existed, it was known to any one

except the parties, and the mother and sister of plaintiff. It is true, the mother testifies that she introduced plaintiff as the wife of defendant, but she does not name the person to whom such introduction was made, nor does such person or persons give evidence in the case. The defendant himself, in his testimony, denies that he ever agreed to marry plaintiff, and there is other evidence which tends to corroborate him on this point; but, as the finding of the court below was in favor of plaintiff, we have only thought it necessary to give the foregoing general outline of the case, as shown by the testimony offered by her, and upon which the court must necessarily have based its findings. With this general statement of the nature of the evidence, we proceed to consider whether it is sufficient to show the existence of a marriage between the parties.

1. Section 55 of the Civil Code provides: "Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations." As there is a substantial conflict in the evidence as to the contract or agreement for a present marriage between the plaintiff and defendant, we cannot, under the settled rule here, disturb the finding of the court below on this point. This consent being established, our next inquiry is whether the evidence is sufficient to establish the fact that such consent was followed by a mutual assumption of marital rights, duties, or obligations, and in order to answer this it is necessary to first determine what is meant by the words "marital rights, duties, or obligations," as here used. We have no doubt that they refer to such rights, duties, and obligations as arise from the contract of marriage, and constitute its object, and therefore embrace what the parties to such contract mutually agree to perform towards each other and to society. "Marriage is considered in every country as a contract, and may be defined to be a contract according to the form prescribed by the law, by which a man and woman, capable of entering into such a contract, mutually engage with each other to live their whole lives together in the state of union which ought to exist between a husband and his wife." Shelf. Mar. & Div. 1. The mutual agreement of the parties to live together in the professed relation of husband and wife is essential to create a contract of marriage, and the contract, when made, imposes upon the parties to it the obligation to do so, and there can be no assumption or entering upon the discharge of such duty or obligation, as contemplated by section 55 of the Civil Code, without the cohabitation of the parties consenting to a present marriage. And by cohabitation is not meant simply the gratification of the sexual passion, but "to live or dwell together; to have the same habitation, so that where one lives and dwells there does the other live and dwell also." *Yardley's Estate*, 75 Pa. St. 207. This was in effect so held in *Sharon v. Sharon*, 79 Cal. 670, 22

Pac. Rep. 26, 131, the court there saying: "The commencement of true and open matrimonial cohabitation under such an agreement is a mutual assumption of marital rights, duties, and obligations, while mere copulation, without such cohabitation, is insufficient." The evidence in this case falls far short of showing that, after the alleged consent to marry, these parties ever assumed the marital rights, duties, or obligations of the marriage relation as we have defined them. There was no cohabitation, such as almost universally accompanies marriage, and nothing to indicate to the community that they had assumed such relation.

2. The defendant offered to prove that he was on September 3, 1887, regularly united in marriage with Nellie Rowe, he woman with whom he is charged in the complaint to have committed adultery, and for this purpose offered to introduce a marriage license in due form, authorizing such marriage, and the certificate of a clergyman, showing its solemnization. These papers were excluded by the court. This ruling was correct. This kind of evidence has been considered sufficient to rebut the presumption of marriage which otherwise would follow from proof of cohabitation and general reputation that such cohabitation was matrimonial in its nature. *Case v. Case*, 17 Cal. 598; *Jones v. Jones*, 48 Md. 391. We are not called upon here to either affirm or dissent from the rule announced in these cases. It is sufficient to say that it does not apply to the facts of this case. There was no proof of cohabitation in this case, and we do not see how the excluded evidence, in connection with the other evidence in the case, could have any legitimate or logical tendency to disprove the statements of witnesses who testified directly to the fact that more than a year previous thereto the defendant agreed to become the husband of the plaintiff. This offered evidence, however, demonstrates the wisdom of the law in requiring an open matrimonial cohabitation of the parties thereto as evidence of marriage, where there is no solemnization, so that those contracting this relation may have some reasonable assurance that its validity, and the legitimacy of their children, will not be overthrown by proof of a prior secret marriage upon the part of either the husband or wife, and of which the other had no notice or suspicion. Judgment and order reversed.

We concur: BEATTY, C. J.; MCFARLAND, J.; HARRISON, J.; GAROUTTE, J.; PATERSON, J.

89 Cal. 79

*Ex parte SMITH.* (No. 20,844.)

(*Supreme Court of California.* May 15, 1891.)

CRIMINAL LAW—BAIL, PENDING APPEAL—HABEAS CORPUS.

1. Unless extraordinary circumstances intervene, a person convicted of a felony ought not to be admitted to bail pending appeal.

2. On petition for *habeas corpus* by one convicted of a felony, for the purpose of ordering that he be admitted to bail, the supreme court will pass on the merits of the petition irrespective of an inflexible rule not to admit any person convicted of a felony to bail, adopted by the trial

court, in whose discretion the allowance of bail is placed by Pen. Code Cal. § 1272.

3. On such petition the supreme court will not pass on errors of law committed on trial in which conviction was had.

In bank. Application for *habeas corpus*.  
S. J. Hinas and Frank Short, for petitioner.

GAROUTTE, J. This is an application for the issuance of a writ of *habeas corpus* for the purpose of ordering that the defendant be admitted to bail pending his appeal. The petition for the writ sets forth that "the petitioner was charged by information, in the superior court of Fresno county, of the crime of murder. That thereafter he was convicted of the offense of manslaughter, and sentenced to imprisonment in the state prison for ten years. That a motion for a new trial was denied, and the judge of the trial court issued a certificate of probable cause; and an appeal upon the merits of the case is now pending in this court. That the trial court committed errors of law that appear from the face of the record, and that the evidence at the trial was insufficient to justify a conviction. That the trial court has established a uniform rule that it will not admit any defendant to bail pending appeal, upon conviction for felony." In this class of cases, bail is allowed as a matter of discretion, and not as a matter of right. Section 1272, Pen. Code. In *Ex parte Smallman*, 54 Cal. 36, this court outlined the general character of facts necessary to exist, upon which to base an exercise of this discretion, and held that, except where circumstances of an extraordinary character had intervened, a person convicted of a felony ought not to be admitted to bail pending an appeal; and to the same effect is *Ex parte Marks*, 49 Cal. 681, and *Ex parte Brown*, 68 Cal. 183, 8 Pac. Rep. 829. The petition in this case shows no such circumstances. We cannot, in this proceeding, examine into the alleged errors of law committed by the lower court, and thus prejudice the case before it comes before us upon its merits. The fact that the trial court has adopted an inflexible rule not to admit any defendant to bail who has been convicted of a felony can have no weight with us, however inconsistent such rule may be, when compared with section 1272 of the Penal Code. This court passes upon the merits of the petition as presented to it, and regardless of any action or rule the trial court may have adopted. Application denied.

We concur: BEATTY, C. J.; DE HAVEN, J.; HARRISON, J.; MCFARLAND, J.; PATERSON, J.

89 Cal. 81

DOUGHERTY v. WARD *et al.* (No. 13,392.)

(*Supreme Court of California.* May 16, 1890.)

TRIAL—AMBIGUOUS FINDINGS.

A finding of law "that plaintiff is entitled to judgment, that plaintiff take nothing by this action, but that defendants \* \* \* have judgment against plaintiff for their costs herein," is sufficiently clear to support a judgment for defendants.



Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

*Wm. T. Daggett*, for appellant. *Wm. M. Pierson* and *Ben Morgan*, for respondents.

McFARLAND, J. Plaintiff appeals, and the only point made by him is that the findings do not support the judgment, because, as appellant contends, the court finds as a conclusion of law "that plaintiff is entitled to judgment," while judgment is rendered for defendants. But the whole finding of law from which appellant takes the above quotation is as follows: "That plaintiff is entitled to judgment, that plaintiff take nothing by this action, but that said defendants, Hubert Ward and Annie Ward, have judgment against plaintiff for their costs herein." This roundabout way of expressing the conclusion that plaintiff should take nothing by his action, and that defendants should have judgment against him for costs, was probably the result of inadvertence, or, perhaps, the word "not" was accidentally omitted after the word "is;" but the sentence, as it stands, clearly enough expresses the meaning that plaintiff should take nothing, and that defendants should have judgment against him. The judgment is affirmed, with \$100 damages, and the superior court is directed to include that sum of money in the judgment, in addition to other costs.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

89 Cal. 101

*In re DENNERY.* (No. 13,646.)

(*Supreme Court of California.* May 16, 1891.)

INSOLVENCY—PETITION—PARTIES—PLEADING.

1. Under the insolvent act of California, (1880,) § 8, providing that an adjudication of insolvency may be made on the petition of five or more creditors, whose debts amount in the aggregate to not less than \$500, a petition setting forth that the demand is for a certain sum, and accrued for goods sold and delivered at a certain place by petitioners to respondent, within one year last past, at his request, sufficiently states the debt.

2. A proceeding under the insolvent act to declare a debtor insolvent is a special proceeding, and not an action, within the meaning of Civil Code Cal. §§ 2466, 2468, requiring partnerships doing business in the state, under a designation not showing the names of the partners, to file a certificate with the clerk, etc., before they shall be allowed to maintain "an action."

3. A partnership doing business in the state, three of whose members are residents of the state, though the other is a non-resident, is a resident of the state, within the meaning of the insolvent act of California, (1880,) providing for declaring a debtor insolvent on petition of five or more creditors, "residents" of the state. *HARRISON, J.*, dissenting.

4. It is not necessary that the petition in insolvency proceedings state the names of the members of the firms signing the same as creditors.

In bank. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

*Johnson, Johnson & Johnson*, for appellant. *Naphtaly, Friedenrich & Ackerman*, for respondent.

GAROUTTE, J. This is an appeal from an order of the superior court of Sacramento county, adjudging appellant an in-

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solvent debtor upon petition of his creditors. In the lower court a demurrer was interposed, which was overruled. The defendant then answered, setting up, among other things, a failure by the petitioning copartnership firms to make, file, or publish any certificate of their copartnership. Petitioners' demurrer to the answer was sustained, and an amended answer was filed, and the matter was heard upon the petition and amended answer. The demurrer to the petition was properly overruled. The petition sets forth every fact required to be set forth by section 8 of the insolvent act, and in addition alleges that the petitioners are creditors of the said Dennery, and the nature of their respective demands is as follows: "The demand of said G. L. Jones & Co. is for \$206.25, United States gold coin, and accrued for goods, wares, and merchandise, sold and delivered at San Francisco aforesaid by them to said respondent, within one year last past, at his request." The claims of the other petitioners are set out in the same manner. We think the foregoing statement sufficient. "Involuntary proceedings in bankruptcy are not in any sense proceedings merely for the collection or security of the particular demand of the petitioning creditors. They are for the benefit of all the creditors. \* \* \* The fact that the petitioning creditor has a provable debt to the requisite amount is necessary to be shown for two purposes only, viz.: *First*, to show that the alleged debtor occupies that relation; and, *second*, to show that the petitioner has the requisite qualification to commence the proceeding. Its office is then exhausted, and it has not and is never given any other force or effect." *In re Sheehan*, 8 N. B. R. 345. The form of the petition in the case at bar is practically the same as found under the United States bankrupt act, and which is designated "Form No. 54." *Bump, Bankr.* (9th Ed.) 933. A creditor who can file a petition for involuntary bankruptcy is one whose demand is provable under the act. *Phelps v. Claen*, 3 N. B. R. 87. Section 87 of the insolvency act provides that all debts not payable until a future time may be proved against the estate of the debtor; hence it follows that a creditor may join in the petition, although his demand is not yet due. And for these reasons it does not appear necessary to allege in the petition of insolvency a breach of the insolvent's contract, namely, that the debt is due and unpaid; but, be that as it may, these petitioners each allege a demand against the insolvent, and set out the nature of it, which would seem to be ample to put the insolvent upon his defense. In the case of *Campbell v. Judd*, (Cal.) 7 Pac. Rep. 804, the court held the petition sufficient, where the facts alleged as to the nature of the demand were much more meager than in the present case. The case of *In re Russell*, 70 Cal. 132, 11 Pac. Rep. 622, cannot be held to overrule *Campbell v. Judd*; but, upon the contrary, seems to cite it with approval. The facts alleged in that case were far more meager than were found in *Campbell v. Judd*, and the petition was clearly fatally defective. The insolvent should

have an opportunity to deny and contest the claims of petitioning creditors prior to an adjudication of his insolvency, and it is equally true that he should have notice of the facts on which the claims of indebtedness are based, in order to properly make such contest, and when those facts are stated the requirements of the statute are satisfied, even under the principle laid down in *Re Russell*, supra. As to whether the facts set out in the petition are sufficient upon which to recover in an action for the indebtedness, it is unnecessary to decide.

As to the point raised by the demurrer, that the petition fails to state the names of the members of the firms petitioning, the facts are to the contrary, and, again, this court has already decided it has no merit. *Campbell v. Judd* and *In re Russell*, supra. The demurrer to the answer was properly sustained.

Sections 2436, 2468, Civil Code, providing that partnerships doing business in this state, under a designation not showing the names of the partners in such business, must file a certificate with the clerk, etc., or shall not be allowed to maintain an action, etc., is not applicable to the signers of a petition in involuntary insolvency. A proceeding in insolvency is not an action, as defined by section 22, Code Civil Proc., but is in the nature of a special proceeding, and is included within section 23 of that Code. Section 2468, Civil Code, has been so strictly construed by this court that it has been held not to apply to actions for tort. *Ralph v. Lockwood*, 61 Cal. 155. It does not by express terms include special proceedings, and the court will not by intentment enlarge the inhibition for the purpose of defeating a remedy to which the party otherwise would be entitled.

It is urged that the California Jewelry Company cannot be a petitioning creditor because one member of the firm resides in Germany. It is a copartnership doing business in this state, and three members of the firm reside here. We have already held that it is not necessary to set out the names of the members composing the firms in order to constitute a valid petition, and not necessary to file the certificate required by the Civil Code in order to give a partnership the right to petition, and the mere non-residence of one of the partners should certainly not defeat the right of the firm to become a petitioning creditor. The firm is regarded as an entity, and when the statute speaks of the petitioners being residents of this state it must be construed with reference to the person who may be a petitioner. A copartnership composed of four persons, as in the case of the California Jewelry Company, must be regarded as a resident, within the meaning of the statute, when its business is carried on in this state, and three of its members are residents of this state. The authorities cited by appellant have been carefully examined, and do not overthrow the foregoing views. Let the judgment be affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.; PATERSON, J.; MCFARLAND, J.

HARRISON, J. I dissent. The right of a court to adjudicate an individual to be insolvent is purely of statutory creation, and can be exercised only in the terms and under the conditions prescribed by the statute. Any attempt to confer the control and management of the estate of one person upon another, against the will of the owner, even for the purpose of subjecting the same to the payment of his liabilities, is an extraordinary interference with the natural right of the individual to the management and control of his property, and can be upheld only by some positive statute authorizing such proceeding. Such power is not to be presumed to exist, nor is its exercise to be sustained by any forced or unusual construction of the terms of a statute, but must find its support in clear and explicit language. Section 8 of the insolvent act of 1880 provides that "an adjudication of insolvency may be made on the petition of five or more creditors, residents of this state, whose debts or demands accrued in this state, and amount in the aggregate to not less than five hundred dollars;" and section 9 provides: "Upon the filing of such creditors' petition the court shall issue an order requiring such debtor to show cause, at a time and place to be fixed by the court, why he should not be adjudged an insolvent debtor; and at the same time, or thereafter, upon good cause shown therefor, said court may make an order forbidding the payment of any of the debts and the delivery of any property belonging to such debtor to him or for his use, or the transfer of any property by him." The court acquires no jurisdiction to take any step or make any order, until after there shall have been filed with it "such" a petition as is prescribed by section 8. One of the essential requisites of this petition is that it be made by five or more creditors "who are residents of this state." Although, for the purpose of making such petition, a partnership is a creditor, within the meaning of this section, such "creditor" is not a resident of this state, unless all the members of the partnership are residents of this state. Neither of the individual members of the partnership is a "creditor" of the insolvent, within the meaning of this statute, but such "creditor" is the partnership made up of all of its members. No action can be maintained against a debtor upon a partnership obligation unless it be brought by all of the partners, and, as the debtor is not liable to an action by either member of the partnership, such member is not his "creditor" for the purpose of making a petition that he be adjudicated an insolvent. The insolvency laws of a state are enacted for the benefit of its own citizens, and are limited in their operation to the citizens of that state. It is in recognition of this principle that the statute above quoted requires that the petitioning creditors shall be residents of this state. But, if it should be held that the petition can be made by partnerships of which some or any of the members are non-residents, this legislation would be for others than residents of this state. Such purpose of the legislature should be specifically declared, rather than that the

court should so decide from any uncertain language found in the statute. The fact that the business of the partnership is carried on in this state does not make, or tend to make, the partnership itself a resident of this state, and whether one or any number less than all of its members are non-residents is immaterial, if once it be admitted that it is not essential that all of its members be residents here. It might be, and often is, the case, that the non-resident is the chief member of the partnership, while the resident members, although a majority in number, have but a slight interest in the business, and consequently might not represent a sufficient amount of the debt to bring their interest within the minimum requirement of \$500. In the present case the court finds that one of the petitioning creditors was the California Jewelry Company, a partnership consisting of four members, and doing business in this state; and that H. Levison, one of its members, was not a resident of this state at the time the petition was signed, but at "all said times was and is a resident at Hamburg, Germany." The California Jewelry Company was not, therefore, a creditor authorized to sign a petition for the adjudication of the debtor as an insolvent, and, inasmuch as the petition was not signed by five creditors, "residents of this state," it was insufficient to confer any jurisdiction upon the court to adjudicate him an insolvent.

89 Cal. 98

*CURRAN v. KENNEDY et al.* (No. 13,759.)

(*Supreme Court of California.* May 16, 1891.)

ADMINISTRATORS—FAILURE TO ACCOUNT—SUFFICIENCY OF FINDINGS—TIME FOR APPEAL.

1. By the express provisions of Code Civil Proc. Cal. § 989, an exception to a decision, on the ground that it is not supported by the evidence, cannot be reviewed, where the appeal is not taken within 60 days after the rendition of judgment.

2. In an action against the executors of intestate's administrator for his failure to account for a sum received from a certain insurance company on a policy on intestate's life, conceding that it is a material issue whether the company was ever incorporated or had an existence, a finding that intestate had insured with said company, "a corporation formed by special act of congress of said United States," is sufficient.

3. On the issue of the administrator's failure to account for the sum received on the policy, a finding that he, in his capacity as administrator of intestate's estate, and for the use of the estate, received \$2,672.25, the proceeds of said policy, and failed to account with the estate for \$2,642.25, a portion of said proceeds, is sufficient.

4. A finding that on a certain day letters of administration of intestate's estate were issued by a certain court to "plaintiff herein, that said letters have not since been revoked," is sufficient on the issue that an order of said court was duly given, made, and entered appointing plaintiff administrator of said estate.

In bank. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Chas. F. Hanlon, for appellants. James Gartlan, for respondent.

SHARPSTEIN, J. The plaintiff, as administrator of the estate of Thomas Cushing, deceased, sues the defendants as executors of the last will and testament of Phillip

Kennedy, deceased, and alleges, in substance, that said Phillip Kennedy, in his life-time, was the duly-appointed administrator of the estate of said Thomas Cushing, deceased, and that said Phillip Kennedy, as such administrator, received \$2,670.93 from the National Life Insurance Company of the United States of America, on a policy of insurance upon the life of Thomas Cushing, for which he, said Phillip Kennedy, never accounted to the estate of said Thomas Cushing, and that said Phillip Kennedy died before the completion of his duties as administrator of the said estate of said Thomas Cushing. For a separate and second cause of action plaintiff alleges that said Phillip Kennedy, as administrator of the estate of said Thomas Cushing, received other personal property of the appraised value of \$130, for which he never accounted. The complaint was demurred to on various grounds, and the demurrer overruled, and properly overruled, we think. A motion to strike out the amended complaint, and the amendments thereto, was properly denied. Conceding that the objections to questions put to the witness Garness should have been sustained, and that the court erred in overruling them, the error was a harmless one. The witness did not contradict or vary anything contained in the copy of the policy attached to the complaint which the defendants admitted to be a true copy. Whether the court erred in denying the defendants' motion for a nonsuit depends upon the evidence then before the court, and we think there was sufficient to justify the order denying said motion. The appeal was not taken within 60 days after the rendition of the judgment, and the exception to the decision on the ground that it is not supported cannot be reviewed. Code Civil Proc. § 989.

Appellants assign as error the failure of the court to find upon material issues, which are specified as follows: "The court fails to find on the issue on the first cause of action alleged, as to whether or not the alleged insurance company was ever incorporated, or had an existence." Conceding that this was a material issue, which we do not, the court found "that Thomas Cushing, plaintiff's intestate, had insured his life for \$3,000 with the National Life Insurance Company of the United States of America, a corporation formed by special act of congress of said United States," which we deem a sufficient finding upon that issue; and we think it a sufficient finding that the said Thomas Cushing entered into a written contract of insurance, as alleged in the complaint and denied in the answer. A copy of the alleged contract was attached to the complaint, which was admitted by the answer to be a true copy of said contract. Upon the issue raised by the allegation and denial, that Phillip Kennedy did not account for the sum received by him upon said insurance policy, the court found that Phillip Kennedy, in his capacity of administrator of the estate of said Cushing, and for the use of said estate, received \$2,672.25, the proceeds of said policy, and failed to account with the estate of said Cushing for

\$2,642.25, a portion of said proceeds. We think this a sufficient finding on that issue. The finding "that on the 9th day of July, 1887, letters of administration of the estate of said Cushing, deceased, were issued by the superior court of Marin county, state of California, to plaintiff herein; that said letters have not since been revoked,"—is a sufficient finding upon the issue raised by the allegation and denial that an order of said court was duly given, made, and entered appointing said plaintiff administrator of said estate of said Thomas Cushing, deceased. Judgment affirmed.

We concur: DE HAVEN, J.; MCFARLAND, J.; PATERSON, J.; GAROUTTE, J.; HARRISON, J.

89 Cal. 82

PEOPLE v. MERKLE. (No. 20,770.)

(Supreme Court of California. May 16, 1891.)

HOMICIDE—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—COMMUNICATIONS OF HUSBAND AND WIFE.

The affidavit of defendant's husband that he, and not defendant, killed deceased: that before the trial he told her of it, but refused to allow her to use the communication; and the affidavit of defendant that this fact was communicated to her by her husband, but that he did not give her permission to use it,—are not *per se* grounds for a new trial.

Department 2. Appeal from superior court, Napa county; R. CROUCH, Judge.

Henry Hogan and Wm. Gwynn, for appellant. W. H. H. Hart, Atty. Gen., for the People.

DE HAVEN, J. The defendant, Margaret Merkle, was charged by information with the murder of one Joseph Von Wyl. Upon her trial the jury returned a verdict finding her guilty of manslaughter, and she was thereupon sentenced to imprisonment in the state-prison for the term of five years. From this judgment, and an order denying her motion for a new trial, she appeals. The ground upon which appellant chiefly relies for a reversal of this judgment and order is her contention that the court erred in not granting her motion for a new trial on account of newly-discovered evidence, which she was not able to produce upon the trial. The nature of this evidence fully appears in the affidavits of herself and husband, filed in support of her motion in the court below. The affidavit of the husband is in substance that he, and not the appellant, committed the homicide; that he told her of the fact that he had done this before the trial, but that he refused to allow her to use the communication in any way in her defense; and that the fact was not during the trial made known to the attorneys for appellant. This affidavit sets out in minute detail the circumstances under which the affiant claims that he inflicted upon Von Wyl the wound which resulted in his death. The affidavit of appellant is to the effect that before her trial her husband told her that he himself had cut Von Wyl, and then proceeds: "I did not see him cut Von Wyl, and all I know about Von Wyl being cut is from what my husband then said to me, and he has never given me per-

mission to state, in court or otherwise, what he confided to me. I asked him if he did not think it would be best for me to state what he had told me about his cutting Von Wyl, and he replied: 'No, do not state that which I told you; you are innocent of any crime, and they will not convict you.' I know that the law cannot compel a wife to testify against her husband, except with his consent, except in cases of criminal violence upon one by the other. I knew that I was innocent, and I did not believe that I would be convicted, and never told any person what my husband had told me relative to his cutting Von Wyl, and I thought it was my duty not to say anything about it." The husband was a witness upon the trial, and testified with particularity as to what he then claimed took place between himself, Von Wyl, the appellant, and others, immediately preceding the death of Von Wyl. We do not consider the fact that appellant could not have produced upon her trial the evidence set out in the affidavit of her husband without his consent, and that such consent was refused, as one which would conclusively entitle her to a new trial. But, undoubtedly, it was the duty of the court below, in passing upon appellant's motion, to give most careful consideration to these affidavits, and if, when weighed in connection with the evidence given upon the trial, there would be in the mind of the judge a reasonable doubt as to the justice of the verdict, a new trial should have been granted. The supreme court of Mississippi, in *Cavanah v. State*, 56 Miss. 310, in which case a new trial was asked, upon the ground that a person incompetent to testify upon the trial had since been rendered competent, and that his testimony could be had for the defendant on another trial and might secure the acquittal of the defendant, use this language, which we consider equally applicable here: "We do not consider this as *per se* a ground for a new trial. It is to be considered. It is an important element, and may be entitled to much weight, as one circumstance in determining a motion for a new trial, but it has no higher character than this. In some cases it would be more persuasive than in others. In no case is it alone sufficient to entitle a party to a new trial. Each case must be determined by its circumstances, and the new trial granted or refused, according to the view taken of the whole evidence, in connection with the evidence of the acquitted party, now made competent as a witness for the other." Granting or refusing a new trial must necessarily rest largely in the discretion of the court in which the trial has been had, and we cannot say from the record before us that the court below failed to exercise a fair and reasonable judgment in denying appellant's motion for a new trial. The court was not bound to accept as true the confession of the husband that he alone committed the homicide, and which exonerated the appellant from the charge against her, so far as his affidavit could do so, but it was the duty of the judge to consider the probability of its truth when placed beside all the other evidence in the

case. In thus viewing it, the court must necessarily have passed upon the credibility of Hancock, the main witness for the prosecution, who testified clearly to the fact that appellant had a knife, and with it struck at the deceased, in the encounter immediately preceding his death, and whose testimony, if true, makes it hard to believe that any other than she could have inflicted the wound which caused the death of Von Wyl. In addition to this positive testimony of the witness Hancock, it was proper for the court to consider that no one of the witnesses to the occurrences immediately preceding the death of Von Wyl saw the husband engaged in the conflict at the time when he now says that he cut Von Wyl, and that no one of those present during the altercation and fight, immediately preceding his death, appears to have suspected that the husband did the cutting. It is sufficient, however, to say that the whole question presented by appellant's motion for a new trial necessarily involved a consideration of the credibility of the witnesses who testified upon the trial, and we cannot say that the court erred in its judgment as to the witnesses to whom credit should be given. Judgment and order affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

89 Cal. 86

COHN v. WRIGHT *et al.* (No. 14,068.)

(Supreme Court of California. May 16, 1891.)

MECHANICS' LIENS—FINDINGS AS TO TIME—ABANDONMENT OF CONSTRUCTION—FURNISHING MATERIAL—PLEADING—NOTICE OF LIEN—TERMS OF CONTRACT.

1. In an action to enforce a mechanic's lien, the right to which depends on the filing of a notice within a certain number of days after the completion of the building, a finding that the building was completed "on or about" a certain day is insufficient.

2. A finding that parties, after commencing the construction of a building, abandoned the construction, is insufficient, where it appears that such abandonment was only on their conveyance of the property, and there is no finding that their grantee abandoned the construction.

3. Conceding that a notice of lien attached to a complaint and marked as an exhibit may, by reference, be made part of a complaint, and treated as a sufficient averment of the terms and conditions of the contract, by an allegation that the materials were furnished on the terms and conditions therein set forth, there must still be a direct allegation in the complaint that the materials were furnished to be used in the construction of the building on which the lien is claimed.

4. The allegation of the notice of lien that it was "agreed that the price of all materials furnished \* \* \* should be due on the delivery of the same" is a sufficient statement of the terms of the contract.

In bank. Appeal from superior court, Tulare county; W. W. Cross, Judge.

O. L. Abbott, for appellants. N. O. Bradley and G. E. Lawrence, for respondents.

PATERSON, J. This is an action to foreclose a material-man's lien. It is alleged in the complaint that the barn and corral mentioned in the notice of lien were completed on the 25th day of November, 1889, and that the store-room had not been

completed because the defendants had abandoned the work, and did not intend to complete it. The defendants denied that the barn, or corral, was completed at any time subsequent to November 22, 1889, and alleged that the store-room was completed before said date. The court failed to find on the issues thus raised. The only finding on these issues is as follows: "That said shed and store-room were completed on or about the 22d day of November, 1889, and on or about the 27th day of November, 1889, said defendants D. L. and N. B. Wright commenced the construction of said store-room building; \* \* \* that on the 6th day of December, 1889, said defendants D. L. and N. B. Wright sold and transferred to said defendant E. E. Giddings all of said real property above described, and thereupon said defendants D. L. and N. B. Wright abandoned their intention to complete said store-room." Inasmuch as the notice of lien was not filed until December 23, 1889,—31 days after the time when defendants claim the buildings were completed,—the exact date of the completion of the buildings is a material fact to be determined by the court below. "On or about the 22d day of November, 1889," is too indefinite and uncertain. "On or about" is a relative term. It is sufficiently definite in certain connections, but in cases of this kind, where the right of a person depends upon his doing a particular thing within a definite number of days after a certain event, it is necessary for him to allege and prove that the acts were performed within the time required by law. An allegation that the plaintiff had filed his notice of lien "on or about" a certain day would not be good, and a finding in those words is equally insufficient.

The court found that D. L. and N. B. Wright had abandoned the construction of the store-room. This would have been sufficient if they had continued to own the property, but it appears that they conveyed to Giddings, and it does not appear whether the latter had or had not completed or abandoned the construction of the building.

There is no allegation in the complaint that the materials were furnished for or to be used upon the property sought to be charged with the lien. It is not enough to allege that the materials were furnished by plaintiff, and actually used by defendants in the construction of the building. Bottomly v. Grace Church, 2 Cal. 90; Houghton v. Blake, 5 Cal. 240; Holmes v. Richet, 56 Cal. 310. There is an allegation in the complaint that "the materials were furnished upon the terms and conditions set forth in plaintiff's notice of lien hereto attached, marked 'Exhibit A,' which is hereby referred to and made a part hereof;" but, conceding that an exhibit of this kind may be thus made a part of the complaint, and treated as a sufficient averment of the terms and conditions of the contract, there should be a direct allegation in the complaint that the materials were furnished to be used in the construction of the building or structure upon which the lien is claimed.

The demurrer of Giddings pointed out the particular defect and uncertainty referred to, and should have been sustained. The complaint refers to the exhibit, and makes it a part of the pleading, simply for the purpose of showing the terms and conditions of the sale to defendants, viz., the price of the materials, and when payable.

We think that the notice of lien is sufficient in form and substance, and, if filed in time, would support a judgment in favor of the plaintiff. *Tredinnick v. Mining Co.*, 72 Cal. 80, 13 Pac. Rep. 152. It states it was "agreed that the price of all materials furnished by said firm of Cohn & Co. should be due on the delivery of the same." In *Hooper v. Flood*, 54 Cal. 221, the notice of lien under consideration stated simply that the terms and conditions of the contract "are and were cash." The judgment is reversed, and the cause is remanded for a new trial, with directions to sustain the demurrer to the complaint, and to allow the plaintiff a reasonable time in which to amend, and the defendant a reasonable time in which to answer.

WE CONCUR: SHARPSTEIN, J.; DE HAVEN, J.; HARRISON, J.; GAROUTTE, J.; McFARLAND, J.

89 Cal. 122

SMITH v. HILL *et al.* (No. 13,853.)

(Supreme Court of California. May 18, 1891.)

TOWN-SITE LANDS—EXISTING MINES—CONVEYANCE TO COUNTY JUDGE—CHANGE IN COURTS.

1. Under Rev. St. U. S. § 2392, providing that "no title shall be acquired" under the provisions relating to town-sites, and the sale of lands therein, "to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws," the grantees of such lands cannot be deprived thereof because of the discovery of minerals in them subsequent to the grant, but there must be at the time of the grant a paying mine known to exist, or one which there is good reason to believe exists.

2. Under Const. Cal. art. 6, §§ 5, 6, (St. 1880, pp. 2, 23,) making the superior courts the successors to the county courts, and clothing the judges of the superior courts with the powers formerly exercised by the county judges, where land was patented to the county judge under the town-site act, to be held in trust for the use and benefit of the inhabitants of a town, the superior court judge who succeeds him is the proper person to convey the land, as the trust is an official one.

In bank. Appeal from superior court, Placer county; J. M. WALLING, Judge.

*Wallace & Prewett* and *D. W. Spear*, for appellants. *John M. Fulweiler*, for respondent.

PATERSON, J. This is an action to quiet title. The answer denies that the plaintiff is the owner or ever was entitled to the possession of any lands in block 1, except as a miner under the mining laws of the United States, and avers that any right he ever had was lost by reason of his failure to comply with the provisions of section 2324 of the Revised Statutes of the United States; alleges that defendant Belle Hill is the owner and entitled to the possession of the property. In further defense, the defendants alleged that the lands

in controversy are part of section 10, township 12 N., range 8 E., Mt. Diablo base and meridian, and are, and for 20 years last past have been, mineral lands; that in 1871 the lands were, and ever since have been, generally and well known to contain, and did in fact contain, a valuable mine of gold-bearing quartz, and since said year have been worked as such under valid mining locations, and large quantities of gold have been from time to time extracted therefrom; that on June 1, 1887, and while the lands were open to location as public mineral lands, the defendant Belle Hill duly located the mine and ground as a quartz mining claim by posting a notice in due form, and filing a copy thereof in the office of the county recorder, as required by the mining customs of the district; that she took possession under her said location, and has ever since, and for more than five years last past, held the same, and has complied with the provisions of said section 2324. The court found that on April 15, 1879, a patent was issued to J. I. Fitch, county judge of Placer county, for the lands in controversy, among others, to be held by him in trust for the use and benefit of the inhabitants of the town of Auburn; that thereafter the lands were surveyed and platted in blocks and lots, and the lands were described therein as lot 2, block 1, in N. W. ¼ of said section 10, and were designated as surveyed to and claimed by M. Dodsworth, (plaintiff's grantor;) that at the time of the issuance of the patent to said county judge there was no mine of gold, silver, cinnabar, or copper therein, or any valid mining claim or possession; that on June 8, 1881, B. F. Myres, judge of the superior court of the county of Placer, a successor of said Fitch, conveyed the land to said Dodsworth, and at that time there was no such mine or mining claim thereon; that on April 18, 1888, said Dodsworth conveyed to plaintiff; that on January 1, 1887, defendant Belle Hill posted a notice of location on the lands as mining lands, and on September 29, 1888, posted an amended notice claiming the lands as mining lands, copies of which were recorded; that plaintiff and his grantors held the possession of the lands, claiming the same under the town-site patent and the deed from Judge Myres, from April 15, 1879, until the 1st day of January, 1887; that defendants have no claim to the lands other than through the location and improvement of the land under the mining locations referred to. The court rendered judgment for the plaintiff. The defendants' motion for a new trial was denied, and they have appealed.

Appellants contend that the lands contained a mine of gold at the time they were patented to Judge Fitch, and therefore no title passed to Dodsworth. In support of this contention, they cite section 2392 of the Revised Statutes of the United States. That section reads as follows: "No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws." The evidence shows that from 1872 to 1874

some mining was done on the land, but there is nothing to show that on April 15, 1879, when the patent was issued, the land was regarded as valuable for mining purposes. Long prior to that time mining on the land had ceased because it would not pay. The mine appeared to be worked out. As the land was not known to be mineral land at the time of the issuance of the patent, and as there was no good reason to believe at that time that the land contained any mine of gold, silver, cinnabar, or copper which would pay to work, it is unnecessary to consider whether the evidence shows the subsequent discovery of a valuable mine on the lands. The term, "mine of gold, silver, cinnabar, or copper," as used in the exception found in the act, and in the reservation of the patent, means a paying mine known to exist at the time of the grant to the county judge, or one which there was good reason to believe then existed. A similar question was presented in *Francœur v. Newhouse*, 40 Fed. Rep. 618, 43 Fed. Rep. 238. In that case Judge SAWYER held that where a grant to a railroad excepts mineral lands, the term "mineral lands" means land known to be mineral land when the grant took effect, or which there was then good reason to believe was mineral land. And in a town-site case recently decided by the supreme court of the United States, it was held that the grantee of the county judge could not be deprived of the lands because of the discovery of minerals in them subsequent to the grant. Justice FIELD, delivering the opinion of the court, said: "It is true the language of the Revised Statutes touching the acquisition of title to mineral lands within the limits of town-sites is very broad. The declaration that 'no title shall be acquired,' under the provisions relating to such town-sites and the sale of lands therein, 'to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws,' would seem on first impression to constitute a reservation of such mines in the land sold, and of mining claims on them, to the United States; but such is not the necessary meaning of the terms used. In strictness they import only that the provisions by which the title to the land in such town-sites is transferred shall not be the means of passing a title also to mines of gold, silver, cinnabar, or copper in the land, or to valid mining claims or possessions thereon. They are to be read in connection with the clause protecting existing rights to mineral veins, and with the qualification uniformly accompanying exceptions in acts of congress of mineral lands from grant or sale. Thus read, they must be held, we think, merely to prohibit the passage of title under the provisions of the town-site laws to mines of gold, silver, cinnabar, or copper, which are known to exist, on the issue of the town-site patent, and to mining claims and mining possessions, in respect to which such proceedings have been taken, under the law or the custom of miners, as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then

lay buried unknown in the depths of the earth. The exceptions of mineral lands from pre-emption and settlement, and from grants to states for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness, and to justify expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining states which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term 'mineral,' in the sense of this statute, is applicable. \* \* \* In connection with these views it is to be borne in mind also that the object of the town-site act was to afford relief to the inhabitants of cities and towns upon the public lands, by giving title to the lands occupied by them, and thus induce them to erect suitable buildings for residence and business. Under such protection, many towns have grown up on lands which, previously to the patent, were part of the public domain of the United States, with buildings of great value for residence, trade, and manufactures. It would in many instances be a great impediment to the progress of such towns if the titles to the lots occupied by their inhabitants were subject to be overthrown by a subsequent discovery of mineral deposits upon their surface. If their title would not protect them against a discovery of mines in them, neither would it protect them against the invasion of their property for the purpose of exploring for mines. The temptation to such exploration would be according to the suspected extent of the minerals, and, being thus subject to indiscriminate invasion, the land would be to one having the title poor and valueless, just in proportion to the supposed richness and abundance of its products. We do not think that any such results were contemplated by the act of congress, or that any construction should be given to the provision in question which could lead to such results. Our conclusion, as already substantially stated, is that congress only intended to preserve existing rights to known mines of gold, silver, cinnabar, or copper, and to known mining claims and possessions, against any assertion of title to them by virtue of the conveyances received under the town-site act, and not to leave the titles of purchasers on the town-sites to be disturbed by future discoveries." *Davis v. Wiebold*, 11 Sup. Ct. Rep. 628, (filed April 6, 1891.)

It is claimed by appellants that Judge Myres had no authority to convey the land to plaintiff, because the constitution of 1879 abolished the county court and the office of county judge; that the superior judge could not lawfully convey the property to plaintiff without express legislation authorizing him to do so. We do not think this contention is sound. Under the constitution and laws of this state, the superior courts are the successors of the



county courts which existed prior to 1879. Sections 5, 6, art. 6, Const.; St. 1880, pp. 2, 23. The judges of the superior courts are clothed with all the powers formerly exercised by the county judges, and as the trust created by the patent to Fitch was an official trust, and in no sense a personal one, Judge Myres became the successor of the county judge, and as such was authorized to convey the lot. *Supervisors v. Railroad Co.*, 24 Wis. 126; *Whitelsey v. Hoppenyan*, (Wis.) 39 N. W. Rep. 355.

There is no evidence of any valid mining claim or possession at the time of the grant to Dodsworth, and, as it was not known to be mineral land, it was not "public mineral land" when the defendant Belle Hill located thereon. *Deffebach v. Hawke*, 115 U. S. 392, 6 Sup. Ct. Rep. 95. The court did not err in excluding Exhibits A and B. They were clearly incompetent and immaterial evidence. Although the appellants' specifications of insufficiency of the evidence to support the findings are not set forth with particularity or in proper form, we have disregarded the objection made by respondent, and considered all of the points made by appellants. The judgment and order are affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.; SHARPSTEIN, J.; HARRISON, J.; GAROUTTE, J.; MCFARLAND, J.

89 Cal. 110

MAYRHOFER v. BOARD OF EDUCATION *et al.*  
(No. 13,675.)

(Supreme Court of California. May 18, 1891.)

MECHANICS' LIENS—SCHOOL BUILDINGS.

Const. Cal. art. 20, § 15, gives material-men a lien upon the "property" to which they have furnished material, and Code Civil Proc. § 1183, grants them a lien upon "any building" to which they have furnished material; but Const. art. 11, § 18, prohibits school-districts from incurring indebtedness exceeding the annual revenue provided therefor, unless provision shall be previously made for the payment thereof by taxation. *Held*, that a public school-house is not subject to the mechanic's lien laws.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

John M. Lucas, for appellant. J. P. Goodwin, Wellborn, Parker & Stevens, and Watson & Hicks, for respondents.

TEMPLE, C. This action was brought to foreclose a lien for materials furnished to a subcontractor for the building of a public school-house. Final judgment was entered upon demurrer to the complaint, and plaintiff appeals from the judgment. Whether the laws of this state give to mechanics and material-men the right to have a lien upon such buildings is the only question necessary to consider upon this appeal. Section 15, art. 20, of the constitution, provides: "Mechanics, material-men, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the legislature shall provide, by law, for the speedy and efficient enforcement of such

liens." Section 1183, Code Civil Proc., enacts that mechanics and material-men shall have a lien for labor or material used in the construction of any building or other structure. The following sections prescribe the procedure and the effects of certain acts. The claim is made that public buildings are included both in the word "property" used in the constitution, and in the phrase "any building" used in the Code, and therefore it must necessarily follow that mechanics and material-men are by these provisions given a right to a lien upon such buildings. But this ignores the rule of statutory construction, that the state is not bound by general words in a statute which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it. Says Mr. Justice STORY in *U. S. v. Hoar*, 2 Mason, 314: "In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary, force to the government itself. It appears to me, therefore, to be a safe rule, founded in the principles of the common law, that the general words of a statute ought not to include the government or affect its rights, unless that construction be clear and indisputable upon the text of the act." To the same effect are the following cases: *Swearingen v. U. S.*, 11 Gill. & J. 373; *Com. v. Baldwin*, 1 Watt, 54; *Bank v. U. S.* 19 Wall. 239; *U. S. v. Davis*, 3 McLean, 454; *U. S. v. Williams*, 5 McLean, 133; *Com. v. Johnson*, 6 Pa. St. 136; *Josselyn v. Stone*, 28 Miss. 753; *People v. Herkimer*, 4 Cow. 345; and a great many others. It is misleading to say that this construction is adopted on the ground of public policy. The import of the language is not limited, because it would be against public policy to give to the words their natural effect, but because, in view of familiar rules of construction, a different intent is manifested in the language used. The government was created and shaped by the constitution. It is not an end in itself, but a mere instrumentality for public service. Its powers and functions exist only for the people. One of its functions is to enact laws for the government of the inhabitants within its limits, thereby affording them protection and advancing their general welfare. The property it holds is simply to enable it to perform the service required of it. It is as much devoted to public use as are the streets and highways, though in a different way, and it is generally held by a different tenure. Instead of being the natural and obvious conclusion that a general law providing remedies for private individuals was intended to enable a creditor of the state to seize this property for the satisfaction of his debt, it would be a most unnatural inference. The constitution has itself provided, as the only means which the state has for the payment of its debts, the exercise of the sovereign power of taxation. And for each political subdivision the rule is the same. These revenues are divided into specific funds, and one furnishing

labor or materials to the state knows to what he must look for payment. He becomes a creditor of a specific fund, and has no rights except with reference to such fund. The law conferring the right to a mechanic's lien implies a right of action to enforce it. One cannot sue the state, unless expressly authorized by statute, and this principle is embodied in our constitution. General statutes creating new remedies for individuals have never been held to authorize such suits. The former constitution of the state provided: "All property in the state shall be taxed in proportion to its value." There was no express limitation upon the meaning of the words used, and unquestionably in their natural import they included public property. It was held that such construction would be inconsistent with the purposes of taxation, (*People v. Doe*, 36 Cal. 220,) and it is strange that such a case ever arose. The inconsistency there was perhaps a little more obvious than here, but the principle is the same, and the claim here is really as inconsistent as there with the theory, plan, and policy of the government with reference to its revenues and its tenure of the property it holds for public service.

The public policy appealed to is laid down in the constitution itself. It is a constitutional policy. The section under consideration on its face purports to be a Code provision providing a remedy by individuals against individuals. The constitutional policy referred to but emphasizes the rule of construction which would have been sufficient of itself. And the position is firmly fixed beyond cavil by section 18, art. 11, which prohibits school-districts from incurring indebtedness exceeding the annual revenue provided for it, unless before the indebtedness is incurred provision shall be made for the payment of the debt by taxation. Could there be a plainer declaration that all indebtedness shall be paid from the revenue provided by law? Supposing, therefore, as we must, that the section in the constitution was framed in view of the well-known rule of construction, and in the same instrument in which are the other provisions alluded to, and that it omits to mention public buildings, it is manifest from the language itself that they are not included. It would follow that the judgment should be affirmed.

We concur: FITZGERALD, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

80 Cal. 125

ELTZROTH v. RYAN *et al.* (No. 18,723.)

(*Supreme Court of California*. May 19, 1891.)

PUBLIC LAND—PATENTS—QUIETING TITLE—EVIDENCE—RECORDS—EXCEPTIONS—PRACTICE.

1. Receipt by the patentee of a patent for land issued to him by the United States is not necessary to pass title.

2. Code Civil Proc. Cal. § 1919, provides that a public record of a private writing may be proved by a certified copy, and section 1951 provides that the certified copy of the record of a conveyance may be read in evidence with like effect as the original, on proof by affidavit or otherwise that

the original is not in possession or under control of the party producing the copy. *Held*, that it is not necessary to prove the loss of an original patent before introducing a certified copy thereof in evidence.

3. If it were necessary for a patentee to prove the loss of the original patent before introducing a certified copy in evidence, his testimony that he never received the original, and did not know what had become of it, would be sufficient.

4. In an action to quiet title to land, where plaintiff proves his title, it is not incumbent on him to show that he has not parted with it, or that he is entitled to possession.

5. It is no defense to an action to quiet title to land that a patent under which plaintiff derived title was not recorded until after the action was commenced.

6. In such action, where defendant relies for his title on a constable's sale under execution on a judgment of a justice of the peace, he must show affirmatively that the justice had jurisdiction to render the judgment.

7. The supreme court cannot consider an exception on the ground of the insufficiency of the evidence, unless the particulars wherein it is insufficient are specified, as required by Code Civil Proc. Cal. § 648.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Code Civil Proc. Cal. § 1919, provides that "a public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record." Section 1951 provides that "every instrument conveying or affecting real property, acknowledged or proved, and certified as provided in the Civil Code, may, with the certificate of acknowledgment or proof, be read in evidence, in an action or proceeding, without further proof; and a certified copy of the record of such conveyance or instrument thus acknowledged or proved may also be read in evidence with like effect as the original, on proof, by affidavit or otherwise, that the original is not in the possession or under the control of the party producing the certified copy." Section 648 provides that "when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient."

*Welles Whitmore*, (*David Stoddart*, of counsel,) for appellants. *Chas. G. Lamberson*, for respondent.

BELCHER, C. This is an action to quiet title to a quarter section of land in Tulare county. The complaint was filed March 13, 1888, and is in the usual form in such cases. Defendant Ryan did not appear. Defendant Wythe appeared, and by his answer denied all the averments of the complaint, and alleged that each of the defendants had a legal title and interest in the land and premises in question. At the trial the plaintiff was a witness, and testified that he purchased the quarter section in controversy from the United States, but that he never received the patent for it, and did not know what became of the original patent. He further testified, on cross-examination, that he lived in Tulare county during the year 1874, and then left, and did not return to the county until March, 1888. He then introduced in evidence the copy of a United States patent,

dated April 15, 1875, conveying to him the said quarter section. Attached to the copy was a certificate of the acting commissioner of the general land-office at Washington, under seal, certifying "that the annexed copy of patent in favor of David Eltzroth, founded on Visalia, Cal., cash entry No. 2,212, is a true and literal exemplification from the record in this office." The copy was recorded in the recorder's office of Tulare county on June 27, 1888. The defendant objected to the copy of the patent being received in evidence, on the ground that the loss of the original had not been accounted for; that it appeared from the testimony that the plaintiff never received a patent for the land; and that it appeared upon its face to have been recorded in the county after the action was commenced. The court overruled the objection, and the defendant reserved an exception. The plaintiff then rested his case, and the defendant moved for a nonsuit, on the ground that the plaintiff had failed to make out a case, in this: That his title, if any, appeared to have been acquired subsequent to the commencement of the action; that it appeared from the evidence that he had never received a patent for the land; and that it did not appear that he was ever entitled to the possession thereof. The motion was denied, and an exception taken. To make out his case the defendant attempted to show that he had acquired title to the quarter section by and through a constable's sale thereof to his grantors, under an execution issued on a judgment rendered against the plaintiff by a justice of the peace on the 21st day of October, 1875. To this end he offered in evidence the constable's certificate of sale and deed, in proper form, and conveyances from the grantees named therein to himself. He then proved that the plaintiff named in the judgment commenced an action against the plaintiff herein in the justice's court in 1875, and obtained a judgment therein for \$76 and costs, and that the record of the action was destroyed by fire, in the year 1886. The justice of the peace, in whose court the action was commenced, testified: "I remember that there was a judgment rendered in that action in favor of the plaintiff and against the defendant. I know that there was an execution issued on that judgment against the property of the defendant, but I cannot describe the land sold." The plaintiff objected to the certificate of sale and deeds being received in evidence, upon the ground that they were irrelevant, immaterial, and incompetent, for the reason that no foundation had been laid for their introduction. The court sustained the objection, and the defendant duly excepted to the ruling. The case was thereupon submitted for decision, and the court made its findings, and gave judgment for the plaintiff. In due time the defendant moved for a new trial upon a bill of exceptions. The motion was denied, and he then appealed from the judgment and order.

The rulings complained of were clearly right. It was not necessary that the plaintiff should have received and accepted the patent in order to vest in him title

to the land granted. It is settled law that title by patent from the United States is title by record, and the delivery of the instrument to the patentee is not, as in a conveyance by a private person, essential to pass the title. *U. S. v. Schurz*, 102 U. S. 378; *Donner v. Palmer*, 31 Cal. 514; *Chiple v. Farris*, 45 Cal. 539; *Miller v. Ellis*, 51 Cal. 73; *Cruz v. Martinez*, 53 Cal. 239. It was not necessary that the plaintiff prove the loss of the original patent before he could introduce the copy in evidence. Sections 1919, 1951, Code Civil Proc. But, if such proof had been necessary, we think the plaintiff's testimony that he never received the patent, and did not know what had become of it, quite sufficient. And it was not necessary that the plaintiff prove that he had not parted with his title, or that he was entitled to the possession of the land. A status once established is presumed by the law to remain until the contrary appears. *Kidder v. Stevens*, 60 Cal. 414. The objection that the copy was not recorded until after the action was commenced was frivolous. It was entirely immaterial, for the purposes of the case, whether the copy had been recorded or not.

As to the defense. A justice's court is an inferior court, and its jurisdiction must be shown affirmatively by a party relying upon, or claiming any right under, its judgments. *Jolley v. Foltz*, 34 Cal. 321; *Kane v. Desmond*, 63 Cal. 464. Here there was no proof that the defendant in the justice's court case relied upon was ever served with summons, or voluntarily appeared therein. It must be presumed, therefore, that the justice had no jurisdiction to render the judgment which he testified was rendered in his court, and that the same was void. This being so, the purchasers at the constable's sale acquired no interest in the property bid in by them. The appellant contends that the findings of the court were not justified by the evidence, and that the judgments should therefore be reversed. But the bill of exceptions brought up in the record contains no specifications of particulars in which the evidence is alleged to be insufficient to justify the findings, and this point cannot therefore be considered. Section 648, Code Civil Proc. It follows that the judgment and order appealed from should be affirmed, and we so advise.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

39 Cal. 141

PEOPLE ex rel. PIXLEY et al. v. POND et al. (No. 14,194.)

(Supreme Court of California. May 19, 1891.)

MANDAMUS TO BOARD OF ELECTION COMMISSIONERS.

Under the repeated decisions of the supreme court of California, a writ of mandate will not issue to compel the registrar and board of election commissioners of the city and county of San Francisco to count the votes cast in certain precincts for candidates for the offices of supervisor and police commissioner, to declare the result, and to issue certificates of election accordingly.

In bank. Application for *mandamus*.  
*N. S. Wirt*, for petitioners. *Davis Louderback*, for respondents.

PATERSON, J. This is an application for a writ of mandate to compel the respondents, the registrar and board of election commissioners, to count the votes in certain precincts of the city and county of San Francisco alleged to have been cast for candidates to fill the office of supervisor for the first board of supervisors, and also those cast for candidates for the office of police commissioner. The first 12 petitioners named herein were candidates for the office of supervisor, and the last 8 named were candidates for the office of police commissioner. It is alleged that every one of the petitioners received about 1,500 votes, and was elected to the office for which he was a candidate, there being no opposing candidate; and petitioners ask that the respondents be required, after counting the votes, to declare the result, and to issue certificates of election accordingly. The questions argued by counsel for petitioners are not new. They may not have been presented so forcibly or with as great perspicuity before, but they have been determined adversely to the contentions of the petitioners after careful consideration of the constitutional and statutory provisions germane to the subject, and we feel constrained to adhere to the construction heretofore adopted. The contention of petitioners who claim to have been elected as members of the first board of supervisors has been settled adversely to them by the decisions in *Desmond v. Dunn*, 55 Cal. 248, 249, and *People v. Board*, 3 Pac. Rep. 412; and the claim of the others, by the decisions in *Staudé v. Board*, 61 Cal. 313; *Heinlen v. Sullivan*, 64 Cal. 378, 1 Pac. Rep. 158; and *People v. Hammond*, 66 Cal. 655, 6 Pac. Rep. 741. The effect which a decision overruling those cases would have upon municipal proceedings for over 10 years past is so apparent that it is unnecessary for us to point out the reason why we should adhere to the decisions referred to, at least so far as the board of supervisors is concerned, even though we should believe that they were based upon an erroneous construction of the provisions involved; and, although the rule applies with less force to the case of the police commissioners, no good reason has been shown why the decisions heretofore rendered should be departed from. If the principle is wrong, or the system works unsatisfactorily, the remedy remains with the people. Writ denied.

We concur: BEATTY, C. J.; HARRISON, J.; DE HAVEN, J.; GAROUTTE, J.; MCFARLAND, J.

89 Cal. 134

JUDGE v. OHM. (No. 14,418.)

(*Supreme Court of California*. May 19, 1891.)

APPEAL—FAILURE TO FILE TRANSCRIPT.

An appeal will be dismissed if the transcript is not filed within the time prescribed by rule of court.

In bank. Motion to dismiss appeal.

*Jos. M. Kinley*, for appellant. *W. C. Belcher*, for respondent.

PER CURIAM. It appears by the certificate of the county clerk of the city and county of San Francisco that appellant filed her notice of appeal upon the 5th day of January, 1891, and her undertaking on appeal upon the 10th day of the same month. That the bill of exceptions was settled upon the 2d day of January, 1891, and was filed the day following. A motion to dismiss the appeal was made April 15, 1891, upon the ground that no transcript had been filed within the time prescribed by the rules of this court. Although the time to file the transcript in the cause had long since gone by at the hearing of this motion, still no transcript was on file at that time, and no cause shown for such failure to file the same.

Let the appeal be dismissed.

89 Cal. 156

WILLIS v. McMAHAN et al. (No. 13,170.)

(*Supreme Court of California*. May 20, 1891.)

INNKEEPERS—REFUSAL OF ENTERTAINMENT—EVIDENCE—INSTRUCTIONS.

1. In an action against an innkeeper for refusal to entertain plaintiff, an invalid, thereby preventing him from receiving the benefit of the water of a mineral spring appurtenant to the hotel, from which it is alleged that he had derived much benefit theretofore, it is not error to allow plaintiff to testify that deprivation of the water had injured his health.

2. Where there is no evidence that defendants refused to allow plaintiff the use of the water, it is not error to refuse defendants' request to instruct that they were not bound to furnish such water.

Commissioners' decision. Department 1. Appeal from superior court, Lake county; *R. J. HUDSON*, Judge.

*Marshall Arnold*, for appellants. *R. W. Crump*, for respondent.

TEMPLE, C. Appeal from judgment and order denying defendants' motion for a new trial. Action for damages for refusal to entertain plaintiff at defendants' hotel, thereby preventing him from receiving the benefit of Bartlett Springs water. It appears that defendants were proprietors of Bartlett Springs, in Lake county, and of a hotel at the springs, for the accommodation of guests, who resorted there in great numbers for the water, which was the principal inducement for guests to visit the hotel. The plaintiff was an invalid, and had on several occasions been entertained at the hotel and benefited by the water. On the 9th day of June, 1888, he again requested entertainment as a guest. There was room for his accommodation. He was a fit and proper person, and had ample means of payment. The manager, one of the proprietors, being present, refused him entertainment, saying: "I'll teach you how to get up a petition to have me removed." It is claimed here that the court erred in allowing plaintiff to testify that preventing him from using the water had a very injurious effect upon his health. Under the circumstances, however, this amounted to no more than the previous statement that the water had benefited him; that he was an invalid,

and had visited the springs hoping to be benefited again. The jury could not have been misled, for it could have had no other meaning. The complaint avers, and the evidence shows, that the water was the principal inducement to visitors of the hotel, and was the sole inducement to plaintiff. Necessarily, to be deprived of it would be an injury in his estimation. Error is also claimed in the refusal to give defendants' fourth instruction, to the effect that defendants were not bound to furnish water of the spring. There was no evidence that they refused to allow plaintiff the use of it. His injury was in being refused entertainment at the hotel, and, in consequence, the use of the water. We think the judgment and order should be affirmed.

We concur: BELCHER, C.C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

89 Cal. 154

PACIFIC PAY. CO. v. BOLTON *et al.* (No. 14,162.)

(Supreme Court of California. May 20, 1891.)

APPEAL—UNDERTAKING—SUFFICIENCY.

Where defendants have filed an undertaking on appeal from the judgment against them and one for stay of execution, in neither of which is made any reference to an appeal from an order denying their motion for new trial, they cannot perfect the latter appeal by filing an undertaking in the supreme court, and claiming the benefit of Code Civil Proc. Cal. § 954, for that section refers to defective undertakings, while in this appeal from the denial of a new trial there is no undertaking at all.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDON, Judge.

J. M. Wood, for appellants. Otto Tum Suden, for respondent.

GAROUTTE, J. This is a motion to dismiss an appeal from an order denying a new trial. It is based upon the ground that the appeal was not perfected within the time required by law, inasmuch as appellants filed no undertaking on appeal from the order denying the motion for a new trial. It appears that appellants filed an undertaking on appeal from the judgment in the sum of \$300, coupled with an undertaking in the sum of \$500, for the purpose of staying the execution, conditional upon the affirmance of the judgment. No reference whatever is found in the undertaking as to any appeal from the order denying defendants' motion for a new trial. At the time this motion was heard appellants had filed a sufficient undertaking in this court, approved by the chief justice, claiming the benefits to be derived from section 954 of the Code of Civil Procedure, and claiming that the original undertaking was simply insufficient. Their contention in this regard cannot be sustained, and their action in filing the undertaking in this court is of no avail. The filing of a new undertaking in this court in accordance with the foregoing section of the Code is limited to

cases of defective undertakings, and in this case there is nothing whatever upon which to found a valid undertaking upon an appeal from the order denying the new trial. The undertaking filed in the lower court does not refer to any appeal from the order denying the motion for a new trial, and upon its face there is an entire absence of anything to indicate that such was its purpose and intent. The foregoing facts of this case are the same as are found in *Schurts v. Romer*, 81 Cal. 244, 22 Pac. Rep. 657, and the court in dismissing that appeal said: "For these reasons the bond approved and filed in this court was ineffectual for any purpose, and the appeal must be dismissed;" and to the same effect is *Bernland v. Beecher*, 74 Cal. 618, 16 Pac. Rep. 510. Appellants' counsel relies upon section 965 of the Code of Civil Procedure, which provides that executors who have given official bonds may rely upon such bonds in appeals from orders and judgments of the superior court in matters pertaining to the estate, etc. It is sufficient to say that there is nothing in the record to show that the defendant executors ever gave any official bond, and this is not an appeal from an order made in the "proceedings had upon the estate." While the notice of the motion to dismiss the appeal is technically defective, it is plainly apparent that the error is clerical, and it should not invalidate the notice. Let the appeal from the order be dismissed.

We concur: HARRISON, J.; PATERSON, J.

89 Cal. 158

PEOPLE v. WALLACE. (No. 20,683.)

(Supreme Court of California. May 20, 1891.)

HOMICIDE—EVIDENCE—WAIVER OF OBJECTION—INSTRUCTIONS.

1. On indictment of an employee in a low theater, resorted to by immoral women, for murder, the admission of evidence that defendant had solicited a woman inmate to live with him is prejudicial error.

2. The inmates of such resort having been called as witnesses, the jury are the sole judges of their credibility, and it is error for the court to instruct that, since the law licenses such resorts, it is submitted whether it is justifiable to charge the inmates with want of veracity, unaccompanied by other proof.

3. On indictment for murder, a witness cannot testify that when the shot was fired, killing deceased, a third person, shown to have shortly before conversed with defendant, exclaimed that he would bet defendant killed deceased; nor can he testify to the fact that a remark was made without giving its substance,—the evidence being mere hearsay.

4. The fact that defendant's attorney, after repeatedly objecting to the admission of such evidence, persistently sought to be brought out by the state notwithstanding the court ruled it incompetent, consents to the witness' saying what the remark was in reply to inquiry from the jury, is not a waiver of defendant's objection. The evidence being incompetent and prejudicial, the court should not have admitted it, even with consent of counsel, and, having done so, should have stricken it out. PATERSON, J., dissenting.

5. Error in the court's refusal to strike out such evidence is not cured by a subsequent instruction that defendant is not bound by anything said, not in his hearing or presence, by the person who made the remark, such instruction not being a plain and unequivocal direction to disregard the evidence.

6. The court cannot, on appeal, disregard evidence erroneously admitted, and look into the unobjectionable evidence to determine whether it is sufficient to sustain the verdict.

In bank. Appeal from superior court, city and county of San Francisco; J. McM. SHAFTER, Judge.

*Robert Ferral and Samuel Shortridge*, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

DE HAVEN, J. The defendant was convicted of the crime of murder in the first degree, for the killing of one Albert H. Rice, and adjudged to suffer the penalty of death. From this judgment, and an order refusing him a new trial, this appeal is taken. The homicide was committed at a place known as the "Elite Theater," in San Francisco. The deceased was the proprietor of this resort, and the defendant was employed there for the purpose of keeping order and suppressing disturbances. This so-called "theater" is spoken of by one of the witnesses as a "cellar," and was denominated by counsel for the appellant, during the trial, as a "dive," and its character is sufficiently disclosed by the testimony, which shows that the theater is below the street, and that it is a part of the duty of the "actresses" there employed to serve drinks, attend the "boxes," and solicit patronage for the bar. Upon the trial Lulu Vernon, an "actress" in this "theater," was a witness for the people, and was permitted to testify that defendant knocked at her bedroom door on the day of the shooting, and that she did not admit him. The attorney for the people then asked her: "Since you have been working at the Elite Theater, has this man Wallace asked you to be his girl?" The question was objected to by appellant, whereupon the attorney for the people made this statement: "If your honor please, this defendant has had his counsel ask this woman if she has been leading a decent and virtuous life, and I want to show what endeavors this defendant has made to induce her to live with him." The objection of the defendant was overruled, and the witness answered: "Yes; he asked me to be his girl." She further said she told him "No," that she "didn't wish any fellow." The admission of this testimony was erroneous. It was not relevant to any issue involved in the case, and was clearly calculated to present the appellant before the jury as a low and degraded character. It may be that there are those who look with some indifference upon the moral delinquencies of men in their social relations with the other sex, if such conduct is not too flagrant and notorious. But, even if this should be assumed as the fact, it would not follow that this evidence was not prejudicial, as its object—its declared purpose and effect—was to show that appellant had proposed to "live" with this woman in a state of shameless immorality. One of the attorneys for the people concedes this in his brief. He says: "The whole testimony at full length amounts to one single verbal request by him that she should take up with him the relations which are common to people of their class

and surroundings, and which make no greater figure in our estimation of such people than would marriage among people of a different social plane, and whose lives are ordered more in accordance with conventionalities." The occupation of this witness, all of the surroundings and character of the so-called "theater" in which she was employed, were fully disclosed by the evidence, and the proposition to "live" with her, and she to become his "girl," looked to a relation which need not be characterized here, but which the jurors, as men of ordinary observation, must be presumed to have fully understood. But one inference could be drawn from this testimony, and that most prejudicial to the appellant, in the minds of men of ordinary decency and of average morality. The evidence, having only this tendency, and being wholly irrelevant, should not have appeared in the case. *People v. Fair*, 43 Cal. 137; *People v. Dye*, 75 Cal. 112, 16 Pac. Rep. 537; *People v. Tiley*, (Cal.) 24 Pac. Rep. 290.

2. One Moore was called as a witness for the people, in rebuttal, and referring to the time of the homicide, and a restaurant near the Elite Theater, this question was asked him: "Between five minutes to eight and five minutes past eight, and while you were in the restaurant after you had left Wallace and had a conversation with him, in which he mentioned Rice's name to you, did you not hear a pistol shot, and exclaim immediately, 'Wallace has killed Rice?'" The witness answered, "No." This question called for irrelevant and incompetent testimony, but, as it was answered in the negative, of itself did no harm; but afterwards one Guthrie, the keeper of the restaurant in which the remark was alleged to have been made, was placed upon the witness stand by the prosecution and asked: "After the firing of the shots, did this man Moore say to you that Wallace had killed Rice?" The court sustained an objection to this upon the ground that the matter was hearsay, and inadmissible under any circumstances. This ruling was clearly right. The incompetency of the evidence called for by the question is glaring, but, notwithstanding this, and the ruling of the court asserting its inadmissibility, the question was immediately repeated by the attorney conducting the prosecution, and the defendant was again compelled to appeal to the court. The court finally ruled, notwithstanding the objection of defendant, that the witness might answer directly whether Moore did or did not make any remark at the time and place referred to, indicating that he heard the shots which killed Rice, but must not repeat the language used, to which defendant duly excepted. In this ruling the court erred, as it was immaterial whether Moore heard the shots or not, and the answer of the witness that Moore did say something, taken in connection with the direct question as to the language used, which was not allowed, could hardly fail to suggest to the jury the nature of the remark made, and was little less damaging to the defendant than if such rejected question had been answered in the affirmative. At this point different

jurors began to more particularly question the witness about the circumstances, and finally one juror said: "We have not heard yet what the language was that this Moore used at the time." Whereupon the attorney for the people, instead of answering that such testimony was not under the rulings of the court proper to be laid before the jury, said: "That is what we would like to have, and we do not object to letting it go in." Objection was made by the attorney for appellant, and the court once more ruled the testimony inadmissible. In the face of these objections, and in contempt of the repeated rulings of the court, the counsel conducting the prosecution again announced: "I would like to have the juror's question answered as to what Moore said." Thereupon counsel for appellant withdrew his objection, and the witness answered: " \* \* \* He said, 'No; I will bet you it was Wallace shot Rice, the proprietor;' and I said to him, 'No; it was two of the women that were shot.' He says, 'The reason that I think it was him was this: that I was with him this afternoon, and that he had sent a messenger boy for his pistol, and said he would shoot him.'" That this testimony was merely hearsay, and therefore incompetent, is plain, and that it bore directly upon a most vital point in the case, namely, whether the killing of Rice had been contemplated by appellant, and was the result of a fixed purpose after deliberate premeditation, is also apparent. The rule which forbids the introduction of hearsay evidence is one which is so generally understood, and closely adhered to, that it is seldom that the admission of such evidence is assigned as error in an appellate court. But in the case of *People v. Jacobs*, 49 Cal. 384, the trial court admitted evidence similar to that which we are now considering, and it was there held that when a witness is called by a party, and does not testify as expected, nor give testimony against him, the party calling him is not permitted to prove that the witness had made at some other time the statement to which he had refused to testify, for to do so would enable the party to get the naked declarations of the witness before the jury as independent evidence, as was done in the present case. Here the alleged declarations of the witness Moore, not made under oath, or in the presence of appellant, were given to the jury as evidence in the case, to prove that the killing of Rice was the result of a preconceived design upon the part of appellant. The character of this testimony cannot be disguised by calling it an impeachment of the witness Moore. Viewed in every light, and reduced to its last analysis, it was hearsay; simply one witness testifying that he heard another person say that the defendant had told him that he intended to kill the deceased.

After the reception of this testimony the appellant moved that it be stricken out. The motion was denied, the court giving as a reason for its action that the evidence was admitted without objection. It has undoubtedly been held in many cases that it is a sufficient answer to such a motion that the evidence was received

without objection. The rule is one of practice, and is applied in order to save the time of the court, which otherwise would be uselessly consumed in listening to testimony, and then striking it out; and also to prevent a party from obtaining an advantage by deliberately consenting that a witness may give evidence upon a certain point with the expectation or belief that it may be favorable to him, and then having it excluded when the evidence is not satisfactory. Under its operation, when without objection secondary evidence has been received where primary should have been produced, or evidence of confessions, or dying declarations, or of experts, without proof of the preliminary facts required by law, or when competent evidence of an irrelevant or immaterial fact has been allowed by consent, the trial court may properly deny a motion to strike out such evidence thus admitted. In such cases it is held that a party has no legal right to complain, if the court, in the exercise of its discretion, retains the evidence. The motion to strike out is addressed to the sound legal discretion of the trial court, and when the objection to the evidence is not merely technical, as in the instance above given, but is substantial, and it also appears to the court that the justice of the particular case before it requires such action, the subsequent motion to strike out should be allowed. Indeed, a court may properly refuse to receive, even with the consent of the parties, evidence which in law is not recognized as fit and appropriate. In *Monfort v. Rowland*, 38 N. J. Eq. 185, the court declares: "The court is not bound to accept anything but legal evidence, and should seldom, if ever, allow its judgment to be controlled by anything else. The parties are at liberty to make such agreements respecting the evidence as they may see fit, but the court is not bound by them. The court may recognize them if it thinks proper to do so, but it should in no case sanction them if they are against the policy of the law, or dangerous to the safe administration of the law." In the case of *Parker v. Smith*, 4 Cal. 105, it was held that the court might of its own motion strike out and instruct the jury to disregard the illegal testimony of a witness, although given without objection from the opposing party. The court there say: "On the trial of this cause one of the witnesses deposed to a state of facts which upon his cross-examination proved to be hearsay evidence, and wholly inadmissible; whereupon the court ordered the testimony of the witness to be stricken out, and instructed the jury to disregard it. The appellant assigns this as error—*First*, because the testimony was not objected to *in limine* by the respondent; and, *second*, because the court of its own motion ruled it out. \* \* \* The right of the court to interfere is also undoubted. The testimony was clearly improper. The duty of the court was not confined to passing upon such portions of the testimony as may be excepted to, but extends to the preservation of the rights of litigants, and a proper disposition of the matters in controversy." If this is the



right and duty of the court in a civil case, with much greater reason can it be said that in a trial for murder, in which the life of a defendant is involved, the court ought not to refuse to strike out testimony which is inherently illegal and incompetent, and which, under well-settled rules of law, cannot be received as legal proof of any fact. We think the court should have excluded this incompetent evidence upon defendant's motion. The court ought to have done so, not only because of the nature of the evidence, but because the defendant had more than once objected to its introduction, when the counsel conducting the case for the people was endeavoring by repeated questions to get it before the jury, in open defiance of the rulings of the court, and the objection to it was only yielded in deference to what seemed to be the wish of a juror to hear the evidence. But the court ought not to have permitted the defendant to be placed in this position, and should have enforced its previous rulings on its own motion. But, whether it did this or not, the testimony should have been excluded upon the subsequent motion of the defendant.

3. The court afterwards, in its charge to the jury, gave this instruction: "Some evidence has been admitted of a statement made by one Moore, at the restaurant of a Mr. Guthrie, immediately after the shooting; but in this connection I say to you that the defendant at the bar is not bound by anything Moore may have said not in his presence and hearing." This was not equivalent to excluding this evidence from the consideration of the jury. It was not a plain and unequivocal direction to them to wholly disregard it as illegal, and not proper to be considered at all, and therefore cannot be regarded as obviating the error in the previous ruling of the court.

4. The court erred in charging the jury: "In this connection I think it proper to say the law allows and licenses this class of theaters. It allows and licenses the sale of liquor therein. While this state of things exists it is submitted whether, by the mere keeping of such a place, it is justifiable to charge its inmates with want of veracity, unless accompanied with other proof." In this instruction the court very clearly intimates that in its opinion the witnesses referred to had been unjustly assailed, and that any argument against their credibility, based upon the fact that they were inmates of this "theater," was not justifiable. But whether such an argument was justifiable—that is, whether it ought to influence the judgment of the jury in passing upon the credibility of these witnesses—was a question solely for the consideration of the jury, and the instruction quoted was an invasion of their province, and erroneous. *Com. v. Barry*, 9 Allen, 276; *People v. Fong Ching*, 78 Cal. 169, 20 Pac. Rep. 396. Jurors must be left to determine for themselves whether an attack upon the credibility or truthfulness of a witness is sustained by the facts before them, and whether an argument addressed to them for the purpose of convincing their judgment upon the point is one which ought in fairness and justice to have been urged; and, no matter how

flimsy, unreasonable, or unjust such attack may appear to him, the judge is not allowed in his charge to oppose the weight of his opinion against the argument of counsel as to the credibility of the witnesses, but must leave the whole matter to be disposed of by the good sense of the jury, which will generally be found adequate for that purpose. In this case the record discloses that the witnesses referred to in this instruction gave material evidence against the defendant, and the giving of this instruction cannot be overlooked, as an immaterial error, which could not possibly have affected the verdict of the jury. There are other assignments of error, but we do not deem it necessary to pass upon them. We are not authorized to disregard the errors above pointed out, and look into the unobjectionable evidence in the case for the purpose of determining its sufficiency to justify the verdict. To weigh the evidence, and determine whether it establishes the guilt or innocence of the defendant, is the exclusive province of a jury; and the defendant is entitled to have this issue submitted to the jury upon legal and competent evidence alone, and upon proper instructions from the court. We cannot speculate or know what the verdict of the jury would have been if the errors referred to in this opinion had not appeared in the case, but are compelled to render judgment upon the questions of law presented by the exceptions of the defendant. Judgment and order reversed.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.

PATERSON, J., (*concurring*.) I think the defendant waived his right to complain of the ruling of the court with respect to the statement made by Moore at the restaurant, immediately after the shooting, by withdrawing his objection to the questions asked; but, if this were not so, the error was cured by the court in its instruction to the jury that the defendant was not bound by anything Moore may have said not in his presence and hearing. For the reasons stated in paragraph 4 of the opinion, however, and on account of other errors not noticed in the opinion, I think the defendant was prejudiced by the rulings of the court, and that he is entitled to a new trial. The written statement of Charles F. Smith contained evidence of conversations other than the conversation inquired into in his examination in chief,—statements which were clearly hearsay. The testimony of Ashe, as to what the deceased stated before he met the defendant prior to the homicide, may not have had any important bearing on the case in the minds of the jury, but it was, nevertheless, erroneously admitted. The instruction of the court that "the killing must take place while the person killed is in the very act of making such unlawful and violent attack, and under such circumstances that the person assailed cannot resort to other legal means to save and protect himself, except retreating or running, which he is not bound to do," omits the element of appearances on which

the party assailed is entitled to act, provided for by section 197, subd. 2, Pen. Code. *People v. Flanagan*, 60 Cal. 2. The same is true of the instruction of the court that, to justify a person for killing another upon the ground of self-defense, the killing must be done under a well-founded belief that it was absolutely necessary for such person to kill the deceased to save himself from great bodily harm. *People v. Anderson*, 44 Cal. 68.

(7 Utah, 303)

**POOL v. SOUTHERN PAC. R. CO.**

(Supreme Court of Utah. April 18, 1891.)

MASTER AND SERVANT—DEATH OF EMPLOYEE—FELLOW-SERVANTS—DAMAGES.

1. In an action against a railroad company for the negligent killing of an employe, the evidence showed that deceased, who was a car-repairer, was sent by the foreman to repair a car standing in defendant's yard, and while he and others were under the car, upon which they had failed to display a red flag, an engine was heard. One of the men went out, and, in the hearing of deceased, told the switchman directing the engine of deceased's position. The engine was stopped within six feet of the car, but the switchman signaled it to back, which it did, striking the car, and killing deceased. *Held*, that a verdict for plaintiff was proper. **BLACKBURN, J.**, dissenting.

2. One who is employed by a railroad company, under a foreman, to make repairs in its repair-shops and on cars standing in its yards, is not a fellow-servant of a switchman, who, under orders of the yard-master, directs the movement of cars in the yard.

3. Under Comp. Laws Utah 1888, §§ 2962, 3179, giving the personal representative and heirs of one whose death is caused by the wrongful act of another the right to sue for damages for the benefit of his distributees, and providing that such damages may be given as are just, the jury, in an action for the death of a husband and father, may consider the number and ages of his family, his age, his ability to earn wages and provide for his family, and what his expectancy may have been, in order to arrive at the pecuniary loss sustained by his family.

Appeal from district court, first district; **H. P. HENDERSON, Judge.**

*Kimball & White and E. M. Allison*, for appellant. *Ma. shall & Royle*, for appellee.

**MINER, J.** This action was brought by the plaintiff, as administratrix of the estate of Joseph S. Pool, deceased, to recover damage for the alleged negligent killing of Joseph S. Pool while repairing a car in defendant's yard at Ogden, Utah, September 12, 1888. The action was tried with a jury in the first district court at Ogden, April 4, 1890, and a verdict rendered in favor of the plaintiff for the sum of \$10,000. This defendant assigns as error: (1) Contributory negligence on the part of the deceased, Joseph S. Pool; (2) that Switchman Kilpatrick was a fellow-servant of deceased, and his contributory negligence, if any, caused the death of the deceased, who was a fellow-servant at the time; (3) excessive damages; (4) errors in the instructions of the court to the jury.

The undisputed facts in the case show that at the time of the accident in question the deceased, Joseph S. Pool, together with two co-laborers, named Powers and Rice, were engaged as car-repairers for the defendant at their shops at Ogden,

under the orders of Mr. Starr, their foreman. That on the day in question Powers and Pool were ordered by Starr to repair a car on the repair track No. 1 in defendant's yard, where it was customary to make slight repairs to cars. At this place there were six or seven parallel tracks besides the main track on defendant's line. That Pool and Powers were engaged in repairing this car in question, and they were in a position under the car near the draw-bars, between the rails of the track, when the noise of an approaching switch-engine warned them of their dangerous position. Plaintiff produced one Frank J. Powers, who testified in substance that he heard a noise, and remarked to Pool, who was under the car: "I have an idea that they are coming." He said, "Yes; they are coming in here." Says I, "Let's get out;" and Pool immediately moved to get out on the east side of the car. Mr. Rice [the co-laborer] was standing by the side of the car, outside of the track; and I told him in the hearing of Pool to go and stop the engine and caboose, and not let it hit the car. I told him that the car could not go out until it was repaired. Rice said, "All right," and then he stepped down to the other end of the car, and made signal to stop the engine. The engine came down within six feet of our car and stopped. I heard Rice tell somebody not to hit the car; that we were working on it. As soon as I heard that order given I went to work with Pool under the car. I felt uneasy, however, and I looked out soon after, and saw one of the yard-men, Kilpatrick, giving a signal to back up. I said to Pool, "Look out, Pool; they are right on us;" and I threw myself over the rail, and was injured. After I got out I saw Pool lying between the two cars badly injured. He died soon afterwards. The cars came together with great force, and caught Pool between them. The engineer on the engine was Mr. Weaver; the fireman was Mr. Purdy; the switchman and brakeman were Benjamin Kilpatrick and William Taylor. At the time of the accident, they, Kilpatrick and Taylor, were standing about one hundred feet from us. Kilpatrick was acting as one of the switchmen. We both relied on Rice seeing that the engineer was notified that we were under the car, and we thought he would attend to it. We put out no red flag as a signal to the engineer before we went under there. Such flag would have notified the engineer. We didn't do it because it was too much work, and we thought it would only take a few minutes to make the repairs; and we also knew that I had told Rice to warn the engineer to watch us, and not to back up. I heard Rice tell the switchman, Kilpatrick, not to hit the car; and supposed that they would not do so. I heard Rice tell the switchman not to hit the car, and that was satisfactory to me. I heard Rice talking to the switchman, Kilpatrick,—I think it was Kilpatrick,—and I think Kilpatrick, the switchman, signaled the engineer to back up after he had been warned not to do so by Rice. Kilpatrick was a brakeman in the yard, and was sometimes called a switchman. He

attended to switching in the yard, and doing ordinary work of a brakeman, and helps to make up trains, and gives signals to engineers to back up and start. Kilpatrick gave the signal to back up, and that caused the accident. Kilpatrick was acting at the time under orders from the yard-master. The duty of the car-repairers was to obey the foreman's orders, and work in the shop, and make small repairs in the yard occasionally. When Rice spoke to and warned Kilpatrick, the engine was about twenty feet away, and I was under the car with Pool, and heard Kilpatrick make some reply to Rice." George C. Rice, a witness produced by the plaintiff, testified, in substance, "that at this time Kilpatrick was riding on the steps on the forepart of the caboose as this engine backed down towards our car. I told Kilpatrick, the switchman, not to attach to the car,—not to hit it; that there were men working under the car. The engine came to within six feet of this car being repaired, and stopped after this notice by Rice to Kilpatrick. Soon after this Kilpatrick gave a signal to the engineer for it to come back. The engine came back with great force, and Pool was injured and killed." The defense offered no proof, and Kilpatrick was not sworn in the case. Pool was an able-bodied man, of good character, 29 years of age at the time of his death, and was receiving \$75 per month from the defendant, and had a wife and several children dependent upon him for support. The jury found as special findings of fact, upon questions submitted to them by the court, that Kilpatrick was negligent in the discharge of his duty as switchman in giving signals to the engineer to back his engine down against the car under which the deceased, Pool, was working, knowing when he gave such signal that Pool was working under the car. They also found that at the time of the injury Pool was using such precaution and care to avoid injury as a prudent man, in the exercise of due care should do; and that Kilpatrick was not a fellow-servant of Pool.

From the testimony given in the case we are satisfied that Kilpatrick was not a fellow-servant of the deceased, but was then engaged in a different kind and department of service, and was not in the same common employment, and was under the orders of a different master. Nor can there be any question made but that Kilpatrick heard the signal from Rice to stop the engine, and that he acted upon such signal, and did stop the engine about six feet from the car in question, under which the deceased was working at the time. The signal was understood by the switchman, Kilpatrick, and obeyed by him. The verbal communication to Kilpatrick to stop the engine was a notice and warning as certain, positive, and safe as if there had been a red-flag signal used in such case. In any event, Kilpatrick received it, understood it, and replied to it, and complied with it at the time, and he would have done no more had there been a red-flag signal placed by the car. Powers and the deceased, Pool, assumed, as they would have a right to as-

sume under the circumstances, and as the jury found, that there would be no danger in proceeding with their work, and before they had completed it Kilpatrick, the switchman, with notice of their position and danger, and without giving any warning, negligently gave the signal to back up, and the engine immediately backed up with great force, and Pool was caught between the cars and killed. "An employer is not liable for injuries to his servant caused by the negligence of a fellow-servant in a common employment; but this exemption does not extend to injuries caused by the carelessness or negligence of another person in the master's service in an employment not common to that in which the person injured is engaged, and upon a subject in regard to which the person injured has a right to look for care and diligence on the part of the other person as the representative of a common master." *Daniels v. Railway Co.*, (Utah,) 23 Pac. Rep. 762; *Railroad Co. v. Kelly*, 127 Ill. 637, 21 N. E. Rep. 203; *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Morton v. Railway Co.*, (Mich.) 46 N. W. Rep. 111; *Railway Co. v. Morgenstern*, 106 Ill. 216; *Kane v. Railway Co.*, 128 U. S. 91, 9 Sup. Ct. Rep. 16; *Reddon v. Railway Co.*, 5 Utah, 344, 15 Pac. Rep. 262; *Hough v. Railway Co.*, 100 U. S. 213; *Railway Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590.

The special instructions were properly submitted by the court to the jury, and their findings under the evidence should not be disturbed. Comp. Laws 1888, §§ 3374, 3978; *Webb v. Railway Co.*, (Utah,) 24 Pac. Rep. 616. So, also, we think the question of negligence or contributory negligence was properly submitted to the jury. In such cases, in order to determine whether an employe, by recklessly exposing himself to peril, has failed to exercise that degree of care for his personal safety that might reasonably be expected, has thus by his own negligence contributed to cause the accident, regard must always be had to the circumstances of the case, and to the exigencies of his position; and the decision of this question ought not to be withheld from the jury unless the evidence, after giving the plaintiff the benefit of every inference to be fairly drawn from it, so conclusively shows contributory negligence that the court would be compelled, in the exercise of sound judicial discretion, to set aside any verdict rendered or returned in his favor. *Kane v. Railway Co.*, 128 U. S. 91, 9 Sup. Ct. Rep. 16; *Morton v. Railway Co.*, (Mich.) 46 N. W. Rep. 111; *Railway Co. v. Steinburg*, 17 Mich. 99. Defendant's counsel contend that the trial court erred in instructing the jury, among other things, that they should "determine, in the first place, the number of the family, the number of the children, and the ages of the family, and determine the age of the deceased, his ability to earn wages and provide for the family; determine from your own experience. You can judge as to what his expectancy may have been, and from all these circumstances determine what in a pecuniary sense this family has lost by the loss of the husband and father; the care he may have given those chil-

dren; and determine it in a business way, and without sentiment, just how much in a pecuniary sense they ought to recover for the injury that they have sustained." Section 2962, Comp. Laws 1888, reads as follows: "That every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount received in every such action shall be distributed, by direction and decree of the proper probate court, to such persons (other than creditors) as are by law entitled to distributive shares of the estate of such deceased person, in such proportions as are prescribed by law." Section 3179, *Id.*, reads as follows: "When the death of a person, not being a minor, is caused by a wrongful act of another, his heirs and personal representatives may maintain an action for damages against the person causing the death: or if such person be employed by another person, who is responsible for his conduct, then also against such other person. In every action, under this and the preceding section, such damages may be given as under all the circumstances of the case may be just." The evident purpose of these provisions of the statute was to allow the widow and heirs or personal representatives of the deceased to recover such pecuniary damages as, under all the circumstances of the case, were just. Now, what were the circumstances of the case contemplated by the statute from which the jury are to estimate the damages? Plainly, they should determine from the evidence in the case, based upon well-defined facts or known circumstances, what the pecuniary injury and loss to the wife and children was, resulting from the death, which was made the basis of the action; and to ascertain these fairly the jury should know and determine the number in the family dependent upon him for support and previously provided for; the number and ages of the children; their kindly demeanor towards each other, or the lack of it; the loss of his society as a husband and father; the age and health of his wife, and age and health of the deceased; his ability to earn wages and provide for his family; determine what he has done, and was then doing, or would be likely to do, for his family; and from these facts and circumstances determine what pecuniary damages the wife and family were justly entitled to as pecuniary compensation to them resulting from the death in question. What the family would lose by the death would be what it was accustomed to receive or had reasonable expectation of receiving in his life-time. The extent of the loss should not be measured by the wealth or poverty of the recipients or giver, but by his beneficent and pecuniary contributions given, or in reasonable expectation of being given, to the widow and heirs, as shown by the proof and judged from all the circumstances of the case to be just, but measured by pecuniary standard. If the testimony did not show that there were heirs living who were pecuniarily injured by his death, no recovery should be had, as in that case no one had sustained any pecuniary loss or injury by his death. Van

Brunt v. Railway Co., 78 Mich. 580, 44 N. W. Rep. 321; Railway Co. v. Bayfield, 37 Mich. 205; Balch v. Railway Co., 34 N. W. Rep. 884; Tilley v. Railway Co., 24 N. Y. 471; Railroad Co. v. Goodman, 62 Pa. St. 339; Railroad Co. v. Keller, 67 Pa. St. 300; Staal v. Railroad Co., 57 Mich. 239, 23 N. W. Rep. 795; Railroad Co. v. Shannon, 43 Ill. 338; Matthews v. Warner, 29 Grat. 570; Lockwood v. Railroad Co., 98 N. Y. 523; Cook v. Railroad Co., 60 Cal. 604; Webb v. Railway Co., (Utah.) 24 Pac. Rep. 616; Beeson v. Mining Co., 57 Cal. 38; Clifford v. Allman, 84 Cal. 529, 24 Pac. Rep. 292. The amount of damages to be given was a question for the jury to determine under the statute, and we cannot disturb their findings in this case. On the whole record we find no error. The judgment of the lower court is affirmed.

ZANE, C. J., and ANDERSON, J., concur.

BLACKBURN, J. (*dissenting*.) This suit is brought to recover damages for the death of Joseph S. Pool, caused, as is claimed, by the negligence of the defendant company. A trial was had, and verdict and judgment for plaintiff. Defendant moved for a new trial, which was overruled, and it appealed. The undisputed facts are substantially as follows: Decedent and one Powers were employees of the defendant company, at work at Ogden, in its repair-shops, and were directed by the foreman to make some slight repairs on a car on a track in the yard. They went to the car, and had to go under it to make the repairs, and did not put out the usual signal—a red flag—for their protection, thinking, as the witness explained, it was too much trouble for the length of time it would take them to do the work. After they had commenced work they heard an engine coming, and one of them requested a man by the name of Rice, a fellow-servant, engaged in the repair-shop, to stop the engine, and give warning that they were at work on the car. The engine stopped a few feet from the car they were at work upon, and they resumed work; and in a very short time a switchman employed in the yard, by the name of Kilpatrick, gave a signal to the engineer to back up, which he did with great force, and the decedent was injured, and died in a very short time. The evidence in behalf of the plaintiff in reference to what took place immediately preceding the accident is as follows: Powers: "When I saw the engine come down upon us, I said to Rice, 'Go and stop him, and don't let him hit this car at all, as it has to be repaired before it can go out.' I saw him go to the other end of the car, and give the usual signal to stop. He did not say anything at that time. They came within about six feet of the car, and stopped. I heard Mr. Rice tell somebody not to hit this car; that they were working there. We went right to work again under the car. I heard Rice speak to Kilpatrick, and I heard Kilpatrick make some reply; but I did not know what it was. The car was moving then, and moved up to about six feet, and stopped. He told Kilpatrick not to hit the car; and I think he

told him we were working there." Rice: "I had no conversation further than to tell Kilpatrick not to touch the car, for men were working there. He was twenty or thirty feet away at the time. They stopped within about six feet of the car. The next thing I saw was Kilpatrick signalling the engineer to back up, and it came back with great force." Three errors are assigned for the reversal of this case: (1) Contributory negligence of the decedent; (2) Kilpatrick was a fellow-servant of the deceased; (3) excessive damages.

I think Kilpatrick was not a fellow-servant of the deceased, under the rule laid down by this court in the case of Daniels v. Railway Co., (Utah,) 23 Pac. Rep. 762. I adhere to that decision, and think it states the best rule, considering the many divers decisions on that subject. The jury found that he was not a fellow-servant, and also his negligence caused the death of the decedent. These findings would sustain the verdict if there was no want of reasonable care contributing to his death on the part of the decedent. This question was also submitted to the jury: "Did the deceased use such care and precaution to avoid the injury as a prudent man in the exercise of due care should have used?" To this question the jury answered, "Yes." I have disposed of the question as to whether Kilpatrick was a fellow-servant of the deceased. But the important one was, was the decedent guilty of contributory negligence? The jury found he was not. Was that finding right, and, if not right, is the appellate court bound by it? The rule is, if the finding of the jury is clearly and manifestly against the weight of the evidence, the trial court should grant a new trial, and if it fails to do that, it is error, and the appellate court should reverse. *Hil. New Trials*, 336, 339; *Keaggy v. Hite*, 12 Ill. 100; *Belden v. Innis*, 84 Ill. 78; *Insurance Co. v. Beck*, 74 Ill. 165; *Bolton v. Howell*, 18 Ind. 181; *Smith v. Ireland*, 4 Utah, 187, 7 Pac. Rep. 749; *Hopkins v. Ogden City*, 5 Utah, 390, 16 Pac. Rep. 596.

I think in this case the jury wholly misconceived the force and effect of the evidence. It was all given in behalf of the plaintiff. The decedent neglected to put out the well-known and usual signal of warning, a red flag, because it was too much trouble, and trusted to one Rice to protect him. Rice was his fellow-servant, and if he was hurt by the negligence of Rice, his fellow-servant, the plaintiff cannot recover. Rice says he told Kilpatrick, the switchman, who was controlling the engineer running the engine, not to touch the car; the decedent was at work under it; that Kilpatrick was 20 or 30 feet away. He does not say that Kilpatrick heard him. Indeed, he was not asked that question. If Kilpatrick heard the warning, and, notwithstanding, signaled the engineer to move back, his act was more than negligence,—it was malice and murder. We cannot think that Kilpatrick heard the warning. We are not ready to presume him guilty of deliberately killing the decedent. Rice must have failed to make Kilpatrick hear and understand him. If so, Rice's negligence contributed

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to the injury, and the defendant was not guilty of negligence through Kilpatrick, and the plaintiff cannot recover. But were the decedent and Powers, his companion, guilty of contributory negligence in not hanging out the red flag, the usual signal, and one that the switchman and the engineer and everybody connected with the operation of the railroad understood and respected? I think they were. In all human probability the accident would not have happened if the red flag had been put up. The engineer would have seen it, and not have obeyed the signal of the switchman. The switchman would have seen it, and not have given the signal to back up. By intrusting their safety to Rice, they took the chances of his carelessness in giving the proper information to the switchman, and the chances of the switchman hearing and understanding Rice. Their safety would have been certain if the flag had been hung out. It was a mute and silent warning, but neither switchman nor engineer could have mistaken it, nor would they have disobeyed it. I think, therefore, as a matter of law, that the decedent, by neglecting to use the well-known signal,—the usual and well-understood precaution,—and trusting to the chance of a fellow-servant protecting him, was guilty of contributory negligence on his part, and the plaintiff cannot recover. Railroad employes occupy very responsible positions. The safety of themselves, their fellow-employes, the safety of the property of the company, and the lives of the traveling public depend upon their diligence in the performance of their duties, and in the strict use of the ordinary precautions, well understood and prescribed by the company. Railroad employes may not at their pleasure set aside the rules and precautions made by the company for their protection, and substitute others, without assuming all the risks consequent upon such substitution. The other alleged errors need not be noticed, as this one is sufficient to reverse the case. I think the trial court should have granted a new trial; and this case should be reversed, and a *venue de novo* awarded.

#### BURKHARD v. MITCHELL.

(Supreme Court of Colorado. April 13, 1891.)

##### AUTHORIZED ACT OF AGENT—RATIFICATION.

Where an owner gives his agent authority to rent his premises, and it is not shown whether the authority of the agent as to the length of the lease was limited or not, and the agent leases for two years, while the owner claims that he had no authority to execute a lease for more than a year, but notwithstanding accepts rent from the tenants for four months after the end of the first year, he thereby ratifies the lease for the entire term, and cannot demand a higher rent for the balance of the term, and oust the tenant for refusal to pay it.

Commissioners' decision. Appeal from Las Animas county court.

*James M. John*, for appellant. *J. H. Croxton*, for appellee.

*BISSELL*, C. Mitchell instituted these proceedings in forcible entry and detainer against Burkhard, to recover possession of certain premises in Trinidad. The trial

resulted in a judgment in favor of the owner for the possession, and for the rent for the months of November, December, and January. The November rent was found to be \$75, and that for the two succeeding months \$100. This amount of rent was not fixed by any specific agreement. The controversy was as to what, if any, tenancy had resulted, by operation of law, from what had been done by the parties. In June, 1884, Mitchell was the owner of the premises, and at that time was evidently indebted to the firm of John & Gunter in a very considerable sum of money. To secure this indebtedness, and provide means for its payment, he assigned all rents and profits of the property for two years; and by due power authorized them, upon such terms as to price and parties as to them might seem proper, to lease the premises and collect the rents. By some stipulation, which does not appear, Mitchell continued this authority after June, 1886, the date named in the original power. He admits that they had such authority up to August 1, 1887, and concedes that they rented the premises, and collected the rent, by his consent, to that time. Whether there was, in the extension, any specific limitation of time which would, *ex vi termini*, terminate their power on that date, is not shown. Mitchell simply concedes the existence of the power during 1887, shows the liquidation of his debt August 1st, and insists that the power ceased on that date. July 24, 1886, while the authority of John & Gunter was in force, they leased the premises to Burkhard for two years, at a monthly rental of \$40, payable at the end of each month. The tenant went into possession under the lease, and paid his rent to John & Gunter to July 1, 1887. During that time no question was made as to his tenancy, or as to the rental. Whether Mitchell had actual notice of the existence of the lease which had been made by John & Gunter cannot be learned from the record. On the 1st of August, when the obligation to John & Gunter was paid off and the property came back under the owner's control, he went for his rent for July, and was tendered the \$40 stipulated for in the lease. He received the money, but protested that the rent was an inadequate price, and contended that John & Gunter had no authority to lease the premises beyond August 1, 1887. At that time he received full notice of the lease, its duration and terms. Without other or further objection, he continued to receive the rent each month, according to the terms of the agreement which had been made between Burkhard and John & Gunter, till the 1st of November, 1887, when he served the notice to quit, which initiated these proceedings. By this notice he attempted to force the tenant to vacate the premises or pay a rent of \$75 for November. This notice seems to have been abandoned, and another was served a few days later for the same purpose, which fixed the rent at \$100 for the month of December. In rendering judgment the court held the defendant liable to pay the rent named in these two notices, and entered judgment of ouster and for the sum of \$275.

Manifestly, the judgment was entered without a correct conception of the relations and legal rights of the parties. At the time John & Gunter leased the premises to Burkhard they had ample authority to act. Possibly the authority is not to be found in the instrument which originally granted it, but the plaintiff concedes that it continued during the entire year following the date named in the letter of attorney. Whether it was continued by express letter of extension, or by tacit or verbal concession, can make no difference. If the power was conferred, as the plaintiff proved when establishing his own case, the lease made by John & Gunter was operative, and legally binding on the owner of the premises at the time of its execution. The estate was granted, and Burkhard thereby acquired the right to enjoy it for the term named, and at the rental specified. This cannot be disputed, except upon the hypothesis that, as the power was only extended for one year, the lease could not be granted by the firm for a time exceeding the limit named in their authority. This might be true if there was a limit expressed, and the person dealing with the agent had notice of the limitation placed on the general authority, or if he was bound before dealing with him to ascertain what authority the agent had. But the plaintiff failed to show any such restriction on the general authority to rent, which he admits the agent had. It must be conceded to be the law that, if the agent have general authority to lease, his contracts will bind his principal. When it was admitted that John & Gunter had a general authority to lease during the year 1887, when the contract was made, it was incumbent on the plaintiff who proved it to show that the authority was limited as to time, and that the defendant either had notice of the restriction, or was chargeable with knowledge of it. The power of the firm over the matter of leases and rents was apparently absolute. The property was, and for several years had been, under their exclusive control, with the right to lease, collect the rents, and appropriate the money. Such authority is wholly inconsistent with any limitation which would defeat contracts of lease into which they might enter. It is plain, on any theory, that the lease as executed was good from July, 1886, to July, 1887. The proof offered by Mitchell was of a right to lease to August 1, 1887. He made no question that the lease was good to that date. It then was a good contract of lease at \$40 per month for one year. What followed rendered it a good lease for another year, and the original contract of John & Gunter was effectuated, and the defendant was entitled to stay his term out. On the 1st of August, when Mitchell came for the July rent, he was tendered the \$40. He demurred, and protested that he ought to have more rent, but he accepted it. Without protest he took the rent for August, September, and October. The legal result of this conduct is the creation of a new lease for another year at \$40 per month. The original lease of John & Gunter was admittedly good for a year. When the year expired which

terminated the contract, it was capable of legal, as well as contractual, renewal. Assuming that the lease was valid only for the term ending on the 1st of August, if the tenant held over and paid the rent, he became, by virtue of the application of a well-established principle of the law of landlord and tenant, a tenant for a year, upon the same terms and conditions that measured and defined his leasehold estate for the preceding year. *Sears v. Smith*, 3 Colo. 288; *Reithman v. Brandenburg*, 7 Colo. 481, 4 Pac. Rep. 788; *Zippar v. Reppy*, 25 Pac. Rep. 164, (September term, 1890.) It was not possible for Mitchell to receive his rent, and continue the tenancy in the manner he did, without subjecting his premises to the burden of the lease for another year. The plaintiff's conduct was likewise, in legal effect, a ratification of the contract made by his agents. The premises were, for at least a year, in the occupation of the tenant, who was paying the stipulated rent from month to month. Whether this rent was turned over to the principal by the agents, or was applied by them in the discharge of the principal's debt, in either event knowledge of the tenancy, and its terms, must presumably have come to his knowledge long before the 1st of August, 1887. On that date he certainly knew of it, because it is in evidence that it was then shown to him. He continued to receive the rent for at least four months, according to the terms of the contract as made by his agents. The receipts which he gave are in the usual form, and are without restriction or exception of any sort. It does not appear that after the 1st of August he made any objection whatever to the lease, or to the tenancy as asserted by the tenant. According to all reasonable rules, this must be held a ratification of the contract. A principal cannot acquiesce in the unauthorized contract of his agent, accept its benefits, and escape the responsibility of its obligations. In whatever aspect the case is viewed, the contract of lease was a valid one, and afforded a perfect defense to the action. The judgment should be reversed, and the cause remanded.

RICHMOND and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed.

(3 Idaho [Hast.] 61)

O'CONNOR v. LANGDON.

(*Supreme Court of Idaho*. May 12, 1891.)

INSTRUCTIONS—HARMLESS ERROR—REVIEW ON APPEAL—CONFLICTING EVIDENCE.

1. A mere misuse of the conjunctive "and" in the place of the disjunctive "or" in a charge which has clearly and repeatedly correctly stated the law is harmless error, which will not warrant a reversal.

2. Where the evidence is conflicting, the verdict of a jury will not be disturbed.

(*Syllabus by the Court*.)

Appeal from district court, Latah county.

*Reynolds, Buck & Winston*, for appellant. *Poe & Piper*, for respondent.

HUSTON, J. This is an action of claim and delivery for the recovery of two horses or the value thereof. The horses were seized by defendant upon an execution issued upon a judgment recovered in justice's court of Moscow precinct, Latah county, Idaho. Plaintiff claims that the property so seized was exempt under the statutes of Idaho, for the reason that he, the plaintiff, was an actual resident of Idaho at the time of the seizure, and engaged solely in teaming with said team as a means of livelihood. The answer of defendant denies both the actual residence and occupation of plaintiff. The case was tried to a jury, and verdict rendered for plaintiff for recovery of property, and damages for detention. The appeal is from the order of the district judge overruling defendant's motion for a new trial. The errors charged are:

First, error in the charge of the court to the jury, in this: The court charged the jury as follows: "There must be two things that must occur in order that this plaintiff may have his property exempt: (1) He must at the time have been an actual resident of Idaho territory; and (2) he must have been a teamster, using his team habitually as a means of livelihood." This instruction was substantially repeated, at least three times, in the instructions of the court; but it appears that in its excess of repetition the court, evidently by inadvertence, used the word "and" in one case where the word "or" should have been used, to-wit, after stating the law as above given, the court says: "If you find, however, the contrary, that he [the plaintiff] was not an actual resident of this territory, and that he did not use those horses habitually as a means of livelihood," etc. It is the use of the conjunction "and" in place of the disjunction "or" that is charged as error. We cannot think that this mere *lapsus lingue*, occurring in a charge which had repeatedly stated the law of the case correctly, could have misled the jury. If technically error, it was harmless, and will not warrant a reversal.

The second error urged is that the attorney for the plaintiff, in his closing argument to the jury, used the following words: "Gentlemen of the jury: If you could have only seen this young man, the plaintiff, come into my office with tears in his eyes, lamenting the loss of his horses, all that he had in the world, the day of the sale, you would not suspect him of endeavoring to deceive you." It is claimed by appellant's counsel that in making the above statement of facts, of which there was no proof in the testimony, the only evidential statement was as to the horses being "all that plaintiff had in the world," and this fact was testified to by the plaintiff, and was undisputed. The agony alluded to by his counsel may be fairly inferred to have been intended to meet some charge of dishonesty or deception charged to have been attempted by the plaintiff. Without the argument upon both sides before us, it is impossible for us to say what degree of relevance there was. At any rate, the matter is too trifling to warrant a reversal.



The only other error charged by the appellant is that the evidence does not warrant or sustain the verdict. The evidence upon the fact of the occupation of plaintiff was undisputed. The evidence of residence was somewhat conflicting, but we think fully warranted the finding of the jury. Order of the court below overruling motion for new trial is affirmed, with costs to respondent.

SULLIVAN, C. J., and MORGAN, J., concur.

**ADVANCE THRESHER CO. v. WHITESIDE.**

(*Supreme Court of Idaho. May 12, 1891.*)

**FORECLOSURE OF CHATTEL MORTGAGE — ACTION FOR DEFICIENCY.**

The plaintiff held a chattel mortgage given by defendant to secure the payment of three certain promissory notes made by defendant, for purchase price of certain personal property. Default having been made by defendant in the condition of mortgage, plaintiff foreclosed by notice and sale, as provided by statute. The return of the sheriff showed a deficiency of some \$900, to recover which amount plaintiff brings this action. To a complaint setting forth all the details of the transaction, including the foreclosure sale, and report of sheriff showing deficiency, in proper form, defendant enters a general demurrer, which was sustained by the court. *Held*, that the action was properly brought, and that the action of district court, in sustaining demurrer to complaint, was error.

(*Syllabus by the Court.*)

*Forney & Tillinghast*, for appellant. *D. C. Mitchell*, for respondent.

HUSTON, J. This is an appeal from an order and judgment of the district court for the county of Latah, sustaining defendant's demurrer to the complainant's complaint. The facts as they appear from the record are substantially as follows: On the 19th day of September, 1890, at Moscow, Latah county, Idaho, the defendant made and delivered to plaintiff his three promissory notes,—one being for the sum of \$750, payable on the 1st of November, 1890; and the other two being each for the sum of \$725, one payable the 1st day of November, 1891, and the other the 1st day of November, 1892. Said notes were given in payment for a threshing-machine, engine, etc., bought of the appellant by the respondent. Contemporaneous with the execution and delivery of said notes the defendant, for the purpose of securing the payment of the same, made, executed, and delivered to the plaintiff a chattel mortgage, in the usual form, and also a written agreement to which was attached one of the aforesaid notes, by the terms of which agreement the defendant agreed to deliver to the plaintiff certain other security in addition to said chattel mortgage, namely, certain bankable notes, to be taken from farmers for threshing to be done by the defendant to the amount of \$50 for each week from October 8, 1890, to the 1st day of November, 1890. It was also agreed in the said agreement that, in case the additional security mentioned therein was not delivered upon demand made by appellant upon respondent, and upon five days' notice of such de-

mand, and failure upon the part of the respondent to so deliver the said security, the said three promissory notes should become immediately due and payable. The complaint alleges that demand was made and notice given, and that the respondent failed and refused to deliver the security so agreed to be delivered. Default having been made by the defendant in complying with the conditions of the chattel mortgage, the plaintiff proceeded to foreclose the same, as provided by statute; and on the 29th day of October, 1890, sold the property at public auction for the sum of \$1,500. The sheriff, after deducting his fees, paid the balance of the proceeds of such sale to the plaintiff, the mortgagee in said chattel mortgage. There being an unpaid balance due upon the notes and mortgage, after applying the proceeds of the sale aforesaid, the plaintiff brings this action to recover the same. The foregoing facts are set forth in the complaint of the plaintiff, to which the defendant demurs, upon the ground that the same does not state facts sufficient to constitute a cause of action, and from the action of the district court in sustaining such demurrer this appeal is taken. The contention of respondent is that the plaintiff, in bringing his action for the recovery of the deficiency, has mistaken his remedy. The statutes of Idaho provide how chattel mortgages may be foreclosed in this state, namely, either by notice and sale, as was done in the case under consideration, or by action in the district court. When the former course is adopted, the officer making the sale is required to make return upon the affidavit of all his proceedings, and file the same with the clerk of the district court having jurisdiction in the county in which the same was made, all of which was done in the present case; and from the return of the officer so made it appeared that, after applying the proceeds derived from the sale of the mortgaged property upon the mortgage debt, there still remained a deficiency of something over \$900. The statutes of Idaho provide, in the case of foreclosure of a mortgage on real estate, for the docketing of a judgment in favor of the plaintiff, and against the defendant or defendants personally liable for the debt; but this provision does not apply in case of a foreclosure of a chattel mortgage by notice, affidavit, and sale. How, then, was the plaintiff to recover the deficiency? We know of no other proper course, except the one adopted by it. All the rights of the defendant were fully protected. Any defense he might have, or desire to make, to the foreclosure proceedings, was permissible in this action, and we cannot divine what reasonable objection could be raised to it. By the terms of the chattel mortgage and contemporaneous written agreement, upon default in any of the conditions all three notes were to become due. The judgment of the district court is reversed, and the cause remanded, costs to appellant.

SULLIVAN, C. J., and MORGAN, J., concur.

## COMBS v. SLAYTON.

(Supreme Court of Oregon. April 21, 1890.)

## WATER-RIGHTS—IRRIGATION—CONTRACTS FOR USE.

1. An agreement between parties who have settled upon lands in the vicinity of a stream of water capable of being utilized for the purposes of irrigation, as to the appropriation of the water for such purpose, and as to the relative quantity which each shall be entitled to use, where such agreement has been acted upon for a long time by the parties, and a violation of it by any of them would produce irreparable damage to others, will be enforced in a court of equity.

2. Where certain parties settled upon lands as above mentioned, and their lands would have been of little, if any, value without irrigation, and they incorporated in constructing dams and digging ditches for the purpose of conveying the water onto their respective parcels of land in order to irrigate them, *held*, in the absence of direct proof to the contrary, that it was evidence of a tacit agreement between them that each should be entitled to enjoy an equal share of the water which the stream afforded, which a court of equity in a proper case would enforce.

(Syllabus by the Court.)

Appeal from circuit court, Cook county;  
J. H. BIRD, Judge.

George H. Williams, for appellant.  
George W. Barnes, for respondent.

THAYER, C. J. It appears from the pleadings and evidence in this case that the appellant's premises consist of the N. E.  $\frac{1}{4}$  of section 2, the N.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  and the W.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 1, all in township 15 S., range 16 E., Willamette meridian; that he has been the owner of the N. E.  $\frac{1}{4}$  of said section 2 since about the year 1870, and of the N.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  and the W.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of said section 1 since the 12th day of September, 1876, at which last-mentioned time he purchased the same from James McDonald, who was the owner thereof from about the year 1870 to the time of the sale to appellant. The evidence further shows that about the year 1870 a ditch was cut from the north side or right bank of the said creek to a point northerly through a part of the land of said Snoderly, where it intersected a slough or old channel, which extended west through the lands of said Snoderly and the appellant in the same course as the creek, northerly therefrom; that by means of said ditch the water from the creek ran into the said slough, and formed one of the channels referred to in the complaint; that the water from the said slough has been used more or less ever since it was turned into it by the appellant for the purpose of irrigating his land; that about the year 1876 the respondent located and constructed the ditch in question, which is connected at its head with the former ditch, and extends northerly over the lands of Snoderly and of said Wilson for some distance, and from thence in a westerly direction through Wilson's said land across the S.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  and the S.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of section 35 onto the S. E.  $\frac{1}{4}$  of said section 34, the lands of the respondent; that ever since the construction of the last-mentioned ditch the respondent has used the water of said creek for the purpose of irrigating his said lands, with the knowledge of the appellant, who acquiesced in such use except when, in

consequence of the low stage of water in the creek, it interfered with his (appellant's) use thereof; that after the first ditch was constructed, and the waters of the creek were turned into the said slough, they washed out so large a channel that the waters of the entire creek were liable to run through it, and damage the lands over which it extended; that the settlers living in the vicinity thereupon built a dam at the point of connection of the said ditch and creek; that afterwards the respondent built another dam across the ditch about 100 yards below the first one, by means of which he turned the waters into his ditch, and about the same time the appellant built another dam across the slough about 200 yards below the one built by the respondent, by means of which he took the water out to irrigate his lands. The said lands require irrigation in order to insure a reasonable crop, and would be of little value for agricultural purposes without it. The said creek furnishes sufficient water for that purpose until about the 1st of June of each year. The flow from that time diminishes gradually until the latter part of August, when it usually ceases altogether. If the waters of the creek could be justly apportioned among the several land-owners above referred to it would doubtless enable each of them to cultivate his land with profit, and it is evident from the testimony and proofs in the case that such was the understanding among them in the outset. No one seems to have claimed any exclusive right to the water, and each has generally evinced a desire to respect the rights of the others in its use.

In view of the condition of the subject-matter and of the manner in which the several parties interested have treated it, I am convinced that there was a tacit agreement among them that each should be entitled to appropriate a just proportion of the water of the creek for the purpose of irrigating his land. Said parties were doubtless induced to locate where they did in order to secure the benefit of the water of the creek for the purpose mentioned, and the exercise of a liberal policy in extending the privilege was best calculated to influence the greater number of persons to make permanent settlement there, which is an important consideration in the founding of a frontier community. The parties appear to have co-operated in providing facilities for using the water to render their lands productive, and they no doubt intended to afford to each an equitable share of it. None of them could have reasonably supposed that he was acquiring an exclusive right to a definite and certain quantity of the water, or that he would be permitted to use it to the exclusion of the rights of the others in its use for similar purposes. Whether the respondent has appropriated more of the water than a due share thereof does not definitely appear; but he has set up an arbitrary claim to a thousand inches of it, which he insists he has secured by adverse user of a sufficient length of the time to establish a right by prescription. His claim, however, is not supported by the facts and circumstances attending th

affair, and is inconsistent with the acts and conduct of the parties in the premises. He may have been entitled to the amount of water claimed for the purpose of irrigating his lands, but whether or not he was depends entirely upon the quantity which the stream was capable of furnishing. The rights of each of the parties regarding the use of the water are merely relative. Nor was the appellant entitled to an injunction restraining the respondent from diverting and using water from said creek for the purpose of irrigating his lands unless he sought to appropriate more than a just share thereof under the implied arrangement before referred to. There are, however, some items of testimony in the depositions which would indicate that the respondent's right to the use of the water was merely permissive; but a court of equity in such a matter will give effect to the intention of the parties as ascertained from their acts regarding it, and the circumstances connected therewith, where it is not satisfactorily shown by direct evidence. I am fully satisfied in this case that it was the intention of the parties before named, as between themselves, to enjoy equal rights in the use of the waters of the said creek, and that they acted upon such intention in building the said dams and in the construction of said ditches, and that the same should be carried into effect. This court held in *Coffman v. Robbins*, 8 Or. 278, that a parol agreement to divide water which passed through the lands of different persons, each of whom prepared ditches for conducting the water, and took and enjoyed it for a number of years under the agreement, would be upheld and enforced in equity, although the only consideration for the agreement was the digging of the ditches and the taking care of the water. The principle determined in that case is, I think, applicable to this one; and if the said parties were all before the court I should be in favor of rendering such a decree as would enforce it, but we cannot bind persons who have not been made parties to the suit. There is, however, some direct proof in the case, and rather strong inferences that the respondent has been accustomed at times to use more of the said water than he was entitled to upon the basis suggested, and he claims an absolute right to use certain specific amounts, regardless of the amount of the supply. I am of the opinion, therefore, that the circuit court, instead of rendering the decree appealed from, should have decreed that the respondent be restrained and enjoined from using any more of the water than an equal share with the other parties named, whenever there was a sufficient quantity of it in the said stream to fully supply them all. Such a decree can be enforced in the mode pointed out in *Olmsted v. Loomis*, 9 N. Y. 423, and approved by this court in the *City of Salem v. Flouring-Mills Co.*, 12 Or. 387, 7 Pac. Rep. 497, or by any other suitable and practical mode which may be adopted. The contention in *Olmsted v. Loomis* was in regard to the use of water for hydraulic purposes, but I think the principle is equally applicable to a case like the

present one. Under this view the decree appealed from must be reversed, and a decree entered in accordance with the principle above laid down, and the case remanded to the said circuit court with directions to enter such decree as the decree of that court, and enforce it by such mode of procedure as to the said court may seem most suitable, and proper. Neither party will be entitled to costs and disbursements in the suit or upon the appeal, but each is required to pay the costs and disbursements which he has incurred. The costs and disbursements, however, which may be incurred in the enforcement of the decree shall be taxed against the respondent in case he refuses to observe its terms.

(19 Or. 455)

## FAULL V. COOKE

(Supreme Court of Oregon. July 1, 1890.)

PUBLIC LANDS—HOMESTEAD CLAIMANT—TITLE BY RELATION—RIPARIAN RIGHTS—TITLE UNDER EXECUTION SALE—HOMESTEAD EXEMPTION—WATER-RIGHTS.

1. By the act of congress of March 14, 1880, (31 St. 141,) any settler who had or should thereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, was allowed the same time to file his homestead application and perfect his original entry, in the United States land-office, as was allowed to settlers under the pre-emption laws to put their claims on record, and his right relates back to the date of settlement, the same as if he settled under the pre-emption laws.

2. A homestead claimant's riparian rights attach from the date of his settlement, provided he complies with the law, and obtains a patent for the land; and, when such patent is issued, it relates to the date of settlement, and cuts off the right to divert a stream of water running through such homestead.

3. An execution, regular upon its face, emanating from a court of competent jurisdiction, will protect an officer who obeys it; but, when a purchaser claims title under an execution sale, the judgment upon which the execution was issued must be proven.

4. By section 278, Hill's Code, an execution is returnable within 60 days after its receipt by the sheriff; and by section 298 the time may be enlarged 80 days by the consent of the plaintiff indorsed upon the writ.

5. When there has been no levy under an execution, and the return-day has expired, and the writ is *functus officio*, and confers no authority whatever, a levy and sale by virtue of it is a nullity.

6. Under the act of congress granting homesteads to actual settlers on the public lands of the United States, a homestead is not liable to be sold by virtue of an execution issued upon a judgment rendered for a debt contracted before a patent is issued for such homestead. *Clark v. Bayley*, 5 Or. 848, followed.

7. The sheriff in office at the time the certificate is produced and the deed demanded is the proper officer to make the deed, and not the one whose term of office has expired, although he may have made the sale before his office expired.

8. The evidence as to adverse use of water in controversy examined, and held insufficient to prove an adverse user for 10 years.

(Syllabus by the Court.)

Appeal from circuit court, Baker county; JAS. A. FEE, Judge.

C. H. Carey, for appellant. M. L. Olmsted and J. F. Watson, for respondent.

STRAHAN, J. A proper disposition of this case requires that we should notice the sources of title set up by the respective claimants, and in doing so it will be most convenient to first examine the defendant's title. In the year 1869 the lands through which Connor creek flows, and which are described in the defendant's answer, were unsurveyed and unoccupied public lands of the United States. During that year one Christian Hinckler settled upon the same as a homestead, and after the said land had been surveyed, on the 6th day of March, 1883, he made his regular application therefor, alleging his settlement thereon in February or March, 1869. On this application a patent was duly issued by the United States to said Hinckler, dated the 13th day of March, 1885. After Hinckler had perfected his right to said land under the homestead laws of the United States, he died intestate, in Baker county, Or., and John Geiser was duly appointed his administrator. Thereafter such proceedings were had in the county court of Baker county Or., in the administration of said estate, that an order was duly made by said court, by virtue of which order the said real estate was sold by said administrator to the defendant, Cooke, for the sum of \$1,550. This sale was duly confirmed by said court, and on the 5th day of July, 1887, said administrator executed and delivered to the defendant, Cooke, a deed to said premises, together with all the water-rights and privileges, ditches and ditch-rights, and all and singular improvements, tenements, hereditaments, and appurtenances. The evidence tends to show that as early as 1872 Hinckler, commencing on his homestead and near the line, cut a ditch extending nearly the entire length of his claim, by means of which he diverted the waters of Connor creek for the purposes of irrigating his land for agricultural and horticultural purposes, and that this claim is bounded on one side for almost its entire length by Snake river, and that Connor creek flows almost directly across the defendant's land, and empties into said river on said premises, so that there are no riparian owners below the defendant on said creek. In 1874 Hinckler dug another ditch, by which he diverted a portion of the waters of Connor creek, commencing a short distance above his land, by which means he conveyed the water to his land, and for a long distance through the same, and then, again leaving his land, the water was conveyed to a placer mining claim, where the same was used for some time for mining. After the mine was worked out, the water flowing in this ditch was also used by the said Hinckler for irrigating his land. Hinckler's ditches are numbered, respectively, 1 and 2. Ditch numbered 3 taps Connor creek above No. 2, and conveys water to the land of Hill, mentioned in the pleadings. This is an old ditch, but was dug after the ditches numbered 1 and 2, and was repaired and used by Hill some 3 or 4 years ago. The ditch marked "No. 4" on the plat taps Connor creek a long distance above No. 3, and is known as the "Tartar & Huffman Ditch," and was used for a while to con-

vey water to a placer mine in Douglas gulch. It was also constructed after Hinckler had settled upon his homestead, and had diverted the water from Connor creek in both ditches numbered 1 and 2. Whatever right, title, or interest Hinckler had in the land described at the time of his death passed to the defendant by virtue of the deed made by the administrator of Hinckler. It is therefore necessary to determine what rights Hinckler acquired in said land by virtue of his homestead settlement and subsequent compliance with the act of congress granting homesteads to actual settlers upon the public lands of the United States, and the issuance to him of a patent therefor by the United States. Under the third section of the act of congress of March 14, 1880, c. 89, (21 St. 141,) it is provided that "any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land-office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws." In *Larsen v. Navigation Co.*, 23 Pac. Rep. 974, (decided at the present term,) it was held, in effect, that a settlement made by a homestead claimant upon the public lands of the United States, and compliance with act of congress on the subject, segregated the same from the public lands, and cut off intervening claims, and such is the ruling of the land department of the United States. Since the announcement of the opinion in *Larsen v. Navigation Co.*, supra, this case was argued, and our attention has been called to the recent opinion of the supreme court of the United States in *Stur v. Beck*, 10 Sup. Ct. Rep. 350. The opinion of the court in that case is very exhaustive, and fully and conclusively settles the legal question under consideration adversely to the appellant. In that case the identical question, in principle, involved here, was presented; and it was held that a homestead claimant's riparian rights attached from the date of his settlement, provided he complied with the law, and obtained a patent for the land; and that when such patent was issued it related to the date of settlement, and cut off the right to divert a stream of water running through such homestead. But the claimant claims to have a superior right to this water, and he seeks to prove title to same in two ways: *First*, through an ex-sheriff's deed offered in evidence, purporting to convey certain ditches and water-rights of Hinckler to A. J. Lawrence; and, *second*, by prior appropriation and adverse possession of the water for more than 10 years.

2. These claims will therefore be examined. The deed of Ex-Sheriff Boyd, of Baker county, is dated the 24th day of April, 1877. The deed recites that the execution upon which the sale was made was tested the 13th of May, 1866, on a judgment ren-

dered the same day by the circuit court of the state of Oregon for Baker county in favor of Louis Pfeifferberger & Co., and against Christian Hinckler. The date of the levy is not recited in the deed, but it is recited that the sale was made on the 17th day of September, 1874, more than eight years after the execution. The amount of judgment is not mentioned, but the deed recites that the sum of \$300 was realized upon the sale, and it is stated that the sale was confirmed on the 13th day of October, 1875. After reciting the sale of the two ditches running through the Hinckler homestead, before referred to in this opinion, and numbered 1 and 2, the deed undertakes to convey the same to A. J. Lawrence. The respondent takes several objections to this deed. One is that no judgment was offered in evidence, and therefore it is not shown that the execution recited in the deed was legally issued. An execution, regular upon its face, emanating from a court of competent jurisdiction, will protect an officer who obeys it; but the rule is different when a purchaser claims under an execution sale. In such case, it is well settled that a person seeking to recover property, and basing his claim upon an execution sale, must prove the judgment upon which the writ issued. 2 Freem. Ex'ns, § 350; McRae v. Daviner, 8 Or. 63.

3. It is next objected that the execution at the time of sale was dead in the hands of the ex-sheriff; that the official life of the sheriff had terminated; and that the writ, by lapse of time, had ceased to be of any validity for any purpose whatever. This objection must also prevail. By section 278, Hill's Code, an execution is returnable, within 60 days after its receipt by the sheriff, to the clerk's office from whence it issued; and by section 293 this time may be enlarged 30 days by the consent of the plaintiff indorsed upon the writ. In this case it does not appear that the officer had made a levy under the execution while it was still in force. The sole question, therefore, is whether or not a sheriff may hold an execution until long after the return-day, and until his term of office has expired, and then make a levy and sale. No authority was cited upon the argument to uphold such a proceeding, and I think none can be found. On the contrary, such a writ is *functus officio*, and confers no authority whatever, and any attempted levy and sale by virtue of it are nullities. Freem. Ex'ns, 58, 106; Lehr v. Rogers, 8 Smeles & M. 468; Kane v. Preston, 24 Miss. 133; Dale v. Medcalf, 9 Pa. St. 108; Cash v. Tozer, 1 Watts & S. 519.

4. Another difficulty presents itself. The two ditches dug by Hinckler, and which are claimed to have been sold by virtue of this execution, were dug mainly through his homestead. One was used exclusively to irrigate his land, and the other also after a small placer mine had been worked out. Without the use of this water upon the land, it would be of but little value, and could probably never have been occupied as a homestead, or for any agricultural or horticultural purposes. I think, therefore, that we must treat the ditches, and the water in them, flowing over this

homestead, and used for the purpose of irrigating it, as a part of the land itself, and not severable therefrom. In such case, the homestead is exempt from liability for debts contracted prior to the issuing of the patent. Clark v. Bayley, 5 Or. 343.

5. Finally, it is objected that an ex-sheriff has no power in this state to make a deed to property sold on execution. This question appears to have been considered by this court in Moore v. Locks Co., 7 Or. 359, in which the conclusion was reached that the sheriff in office at the time the certificate is produced and the deed demanded is the proper officer to make the deed, and not the one who made the sale, and whose term of office expired. The plaintiff does not use, or seek to use, either one of the Hinckler ditches described in this ex-sheriff's deed, and, so far as I can see, the only object of its introduction was to extinguish Hinckler's right to the water flowing in his ditches, and to transfer the title to the water, as severed and separated from the land, to the plaintiff by mesne conveyances from Lawrence. In other words, it is claimed that by this deed Lawrence acquired this right to the water, and that he, or his successors in interest, might lawfully divert it into other ditches, and take it for their own use and benefit, and that Hinckler's right to the water, whether as riparian owner or first appropriator, thus became vested in Lawrence and his successors in interest. If there were no valid objection to the deed, and the land and water where it flowed had been subject to levy and sale, I doubt very much whether the results claimed by the appellant would have followed. What Lawrence claimed to have acquired by that sale were the ditches across Hinckler's land, and the water in them. I do not see how it gave him any right to the water before it entered the ditches, or conferred upon him the right to go higher up the stream, and there dig ditches of his own, and take the water out at another and different place. But it is unnecessary to decide this question, for the reasons already indicated.

6. The remaining question is whether or not the plaintiff, and those under whom he claims, had acquired a title to this water by adverse user prior to the commencement of this suit. Did the plaintiff, and those under whom he claims, have such open, exclusive, notorious, and continuous adverse use of this water as to bar the rights of the defendant, either as riparian owner or first appropriator of it? On this subject I have carefully read all of the plaintiff's evidence two or three times, to ascertain the real foundation of his claim, and it all rests on the ex-sheriff's deed to Lawrence. One Davis claims to have been in possession of the water in Hinckler's ditches as Lawrence's tenant, and he delivered possession to Tartar & Huffman, from whom the plaintiff seeks to deraign title; but the possession was never exclusive, and it was not continuous. Hinckler, as long as he lived, firmly asserted his right to this water against all claimants, and maintained it with so much firmness that he lost his life in a dif-

difficulty with Davis, growing out of the disputed claims to the water now in controversy. Giving full effect to the evidence on each side, and it appears that for several years no one had the exclusive use of the water,—sometimes one was using it and then another,—but the possession of none of the claimants was continuous, or of such a character as to constitute adverse possession against the others. It was intimated on the argument by the appellant's counsel that the water in controversy ought equitably to be divided between the parties; but I am unable to find in the evidence anything whatever upon which a division might properly be made. Finding no error in the decree of the court below, it must be affirmed.

(30 Or. 485)

STATE V. HORNE.

(*Supreme Court of Oregon. April 14, 1891.*)

INDICTMENT—STRIKING OUT SURPLUSAGE.

All unnecessary words in an indictment may, after judgment, be rejected as surplusage, and, if the indictment is good after striking them out, the conviction must stand.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

V. K. Strode and Sears & Beach, for appellant. T. A. Stephens, Dist. Atty., and W. T. Hume, for the State.

BEAN, J. The defendant was tried, convicted, and sentenced to imprisonment in the penitentiary for the term of 10 years, under an indictment, the charging part of which is as follows: "The said Samuel J. Horne, on the 26th day of August, A. D. 1890, in the county of Multnomah and state of Oregon, did willfully, unlawfully, feloniously, forcibly, and violently make an assault in and upon one Ella Bennett, a female child under the age of fourteen years, by then and there unlawfully, feloniously, forcibly, and violently ravishing and carnally knowing her, the said Ella Bennett, against her will," etc. The contention of appellant is that this indictment charges only the crime of an assault, and that the court erred in sentencing him to imprisonment in the penitentiary. The argument is that the language, "by then and there unlawfully, feloniously, forcibly, and violently ravishing and carnally knowing her, the said Ella Bennett, against her will," is only descriptive of the means by which the assault was committed, and does not charge the crime of rape. No objection was made to the indictment in the court below, but the question is raised here for the first time, and therefore the only question to be considered is, does the indictment sufficiently charge carnal knowledge of the female under the age of fourteen years? By section 1733, Hill's Code, it is provided that, "if any person shall carnally know any female child under the age of fourteen, \* \* \* such person shall be deemed guilty of rape, and, upon conviction thereof, shall be punished," etc. By this section a female under the age of 14 years is conclusively presumed to be incapable of consenting to sexual intercourse, and a man

who has connection with such a female, although she may have in fact consented, is guilty of rape. As carnal knowledge, with or without force, in such case, is rape, it follows that the allegations of force and want of consent in an indictment are mere surplusage, and need not be proved, and, as a consequence, that all the allegations in the indictment before us of the assault by defendant may be rejected, and, if the indictment is good after striking them out, the conviction must stand. *State v. Abrams*, 11 Or. 169, 8 Pac. Rep. 327; *State v. Tom Louey*, 11 Or. 326, 8 Pac. Rep. 353; *State v. Webster*, 39 N. H. 96; *Davis v. State*, 42 Tex. 226. Turning, now, to the indictment, we find it artificially drawn, and containing much unnecessary language; but we think it clearly charges the defendant with carnally knowing Ella Bennett, female child under the age of 14 years, and that is all that is necessary to support a conviction. Sections 1279, 1280, Hill's Code. The indictment seems to have been drawn in a somewhat careless manner, and without regard to the form provided by statute, and that accuracy which should always be used in the preparation of such instruments; but the defendant did not see proper to avail himself in the court below of any defect in the indictment, and we think it is now too late for him to do so. The judgment of the court below will therefore be affirmed.

(46 Kan. 457)

PACIFIC EXP. CO. v. FOLEY.

(*Supreme Court of Kansas. May 9, 1891.*)

CARRIERS OF FREIGHT—LIMITING LIABILITY.

1. Where the receipt or contract of a common carrier contains a stipulation that the company is not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package, or thing for over \$50, unless the just and true value thereof is stated in such receipt, and where the receipt fails to show any value of the box or goods shipped, the receipt or contract, if fairly and voluntarily entered into, will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, when the loss or injury to the box or goods carried results only from slight, common, or ordinary negligence on the part of the carrier, its agents or servants.

2. The case of *Kallman v. Express Co.*, 3 Kan. 205, referred to and commented on.

3. Railroad Co. v. Simpson, 30 Kan. 645, 2 Pac. Rep. 821, distinguished, as the carrier in that case arbitrarily and unfairly fixed in the bill of lading or receipt a limitation on the value of the property shipped.

VALENTINE, J., dissenting.  
(*Syllabus by the Court.*)

Error from district court, Douglas county; A. W. BENSON, Judge.

On the 4th day of November, 1887, Peter T. Foley brought his action against the Pacific Express Company before a justice of the peace of Douglas county to recover \$175, for damages alleged to have been sustained by him in the transportation of a box containing type and electrotype plates from Kansas City, Mo., to Lawrence, in this state, on October 15, 1887, from the A. N. Kellogg Newspaper Company at Kansas City, Mo., by the Pacific Express Company. The following is a

copy of the receipt given by the express company for the box in controversy:

"Read this receipt.

The Pacific Express Company.

"Not negotiable.

"Received from — the following articles, which we undertake to forward to the point nearest to destination reached by this company only, perils of navigation excepted. And it is hereby expressly agreed that the said Pacific Express Company are not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package, or thing for over \$50, unless the just and true value thereof is herein stated, nor for any loss or damage by fire, the acts of God, or of the enemies of the government, the restraint of governments, mobs, riots, insurrections, or pirates, or from any of the dangers incident to a time of war; nor upon any property or thing, unless properly packed and secured for transportation; nor for any fragile fabrics, unless so marked upon the package containing the same; nor upon any fabrics consisting of or contained in glass. If any sum of money, besides the charge for transportation, is to be collected from consignee on delivery of the property described herein, and the same is not paid within thirty days from date hereof, the shipper agrees that this company may return said property to him, at their option, at the expiration of that time, subject to the conditions of this receipt, and that he will pay the charges for transportation both ways, and that the liability of this company for such property, while in its possession, for the purpose of making such collection, shall be that of warehousemen only. And it is further agreed that the said Pacific Express Company shall not be held liable for any claim, of whatsoever nature, arising from this contract, unless such claim shall be presented in writing sixty days from date hereof, in a statement to which this receipt shall be annexed; and the shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or person to whom the Pacific Express Company may intrust or deliver the above-described property for transportation, (which the said Pacific Express Company is hereby authorized to do,) and shall define and limit the liability therefor of such other company or person:

Date, 1887.	Articles.	Value.	Consignee.	Destination.	Receipt by.
Oct. 18.	1 box.		P. T. Foley.	Lawrence, Kansas.	Glass."

On the first page of the receipt book, after the printed words, "Received from," there was written, "A. N. Kellogg N'paper Co.;" and on the following pages nothing was written in the blank after the words, "Received from." Before the commencement of this action, J. K. Johnston, superintendent of the Pacific Express Company, tendered to Mr. Foley for that company \$50, in payment for the damage to the box, but Mr. Foley refused to accept

that amount. Trial had before the justice of the peace on November 8, 1887, and the plaintiff recovered judgment for \$144.55 and interest and costs. The action was appealed to the district court. Trial had before the court with a jury at the February term, 1888. The jury returned a general verdict for the plaintiff for \$144.55, with interest, and also made special findings. Subsequently judgment was rendered upon the general verdict. The defendant excepted, and brings the case here.

A. L. Williams and Chas. Monroe, for plaintiff in error. John Hutchings, for defendant in error.

HORTON, C. J., (after stating the facts as above.) The principal question in this case is, what effect is to be given to the following language of the receipt executed by the express company? "It is hereby expressly agreed that the said Pacific Express Company is not to be held liable for any loss or damage, except as forwarders only; nor for any loss or damage of any box, package, or thing for over \$50, unless the just and true value thereof is herein stated." It appears that the type and electrotype plates were shipped from Kansas City to Lawrence by the A. N. Kellogg Newspaper Company, who, in making the shipment, acted for Peter T. Foley. It also appears that the newspaper company had a receipt-book furnished by the express company, and in the heading to each page were printed conditions, and, among others, the one quoted. The newspaper company, having this book in its possession and control, and using it from day to day, must be presumed to have known of its conditions, and to have shipped with reference to it. In this they acted for the plaintiff, and he must be presumed to have assented to the terms and conditions of the receipt. The jury made the following special findings in answer to questions submitted to them: "Question. Was not the box containing the type and electrotypes in controversy broken while it was still in the car in which it was brought from Kansas City? Answer. It was found broken in the car. Q. If you should find that said box was broken open by any negligence of the company, state what act or thing caused said box to be broken. A. We do not know. Q. Do the jury know where on the journey the box was broken open? If so, state where. A. We do not know. Q. Were not the agents of defendant negligent in taking the box out of the car? A. Yes. Q. Could they not have saved the contents of the box by handling the box carefully when it was taken out of the car? A. Yes, to the best of our knowledge and belief."

The district court, among other things, instructed the jury that "while a common carrier is generally, in the absence of any such limitation, liable absolutely, as an insurer, against all loss except that caused by the act of God and the public enemy, it may limit such liability by special conditions such as contained in this receipt, but such special contract cannot relieve the company from its own negli-



gence. It follows that in this case the company is liable, if at all, not as an insurer, but solely for negligence in the transportation of the property. 'Negligence' is a negative term, implying the want or absence of ordinary care; that is, that care and caution that men of ordinary prudence usually exercise under like circumstances. Whether the defendant company was so negligent, and, if so, whether such negligence caused the injuries complained of, are questions of fact for the jury, to be determined from all the evidence. You should consider the condition of the material when delivered to them; the manner in which it was boxed; the nature of the articles, so far as they could be seen and known by the shipper; the manner in which such property is handled; the condition and circumstances in which it was found at the place of destination; and taking into consideration all the surrounding circumstances and facts proven, and using that ordinary knowledge, observation, and experience in life that men generally possess, you must say whether the loss and injury were attributable to the want of ordinary care and diligence on the part of the express company. If they were, the plaintiff may recover his actual loss; otherwise, he cannot recover beyond the sum of fifty dollars." The express company asked the court to instruct the jury as follows: "(1) The jury are instructed to return a verdict in favor of the plaintiff for the sum of fifty dollars. (2) The agreement in the receipt that defendant will not be liable for more than fifty dollars for any shipment, unless the true value of such shipment is stated in the receipt, is a valid agreement, and relieves the defendant of liability as insurer for all amounts over fifty dollars, leaving it liable in excess of fifty dollars only for gross negligence, and the burden of proving gross negligence is upon the plaintiff."

1. It is settled by the decisions of this court, and by the great weight of authority, that a common carrier cannot stipulate for exemption from responsibility for the negligence of himself or his servants, on grounds of public policy, even by express contract. *Railroad Co. v. Simpson*, 30 Kan. 645, 2 Pac. Rep. 821; *Railroad Co. v. Lockwood*, 17 Wall. 357, and the cases therein cited; 2 Amer. & Eng. Enc. Law, 822. But this is not the question presented by the record in this case. The receipt executed by the express company, and knowingly and voluntarily accepted by the shipper through his agent, expressly provided "that the express company was not to be liable for any loss or damage to the box, for over fifty dollars, if the just and true value thereof was not stated." The true and just value of the box was not stated in the receipt or to the company by the shipper. The trial court very properly instructed the jury "that the shipper must be presumed to have assented to the terms and conditions of the receipt." Two questions are therefore presented for our determination: *First*, May a common carrier limit his liability to an amount stated in a written receipt or special contract, in the event of loss or

injury to the goods or property through ordinary negligence, if such special contract is freely, voluntarily, and fairly entered into by the parties, and such contract is just and reasonable in its terms? *Second*, Did the written receipt or special contract between the shipper and express company in this case limit the liability of the company for loss or injury to the amount of fifty dollars?

The better authorities declare the law to be that the value of the property transported may be agreed upon, and the damage or loss to the property occasioned by the negligence of the company or its servants will be limited to the agreed valuation. The *Hart Case*, 112 U. S. 331, 5 Sup. Ct. Rep. 151, may now be called the leading case in America. Mr. Justice BLATCHFORD, delivering the opinion of the court in that case, said, among other things, that "it is the law of this court that a common carrier may, by special contract, limit his common-law liability, but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants. \* \* \* There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight, on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. \* \* \* The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based upon that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purpose of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." See, also, *Harvey v. Railroad Co.*, 74 Mo. 539; *Brehme v. Dinsmore*, 25 Md. 329; *Railroad Co. v. Sherrod*, 84 Ala. 178, 4 South. Rep. 29; *Duntley v. Railroad*, (N. H., 1890), 20 Atl. Rep. 327; *Magnin v. Dinsmore*, 62 N. Y. 35; *Squire v. Railroad Co.*, 98 Mass. 239-245; *Graves v. Railroad Co.*, 137 Mass. 33; *Hill v. Railroad Co.*, 144 Mass. 284, 10 N. E. Rep. 836; *Falkenau v. Fargo*, 35 N. Y. Super. Ct. 332, 55 N. Y. 642; *Ghormley v. Dinsmore*, 53 N. Y. Super. Ct. 36; *Westcott v. Fargo*, 6 Lans. 328; *Grace v. Adams*, 100 Mass. 505; *Pemberton Co. v. New York Cent. R. Co.*, 104 Mass. 144; *Breese v. Tel-*

egraph Co., 48 N. Y. 182, 189, 141, 142; Railroad Co. v. Payne, (Va., 1890,) 10 S. E. Rep. 749.

As to the second question proposed, we think that the limitation in the written receipt or special contract not to be liable for any loss or damage over \$50, in this case, stands as if the carrier had asked the value of the box and its contents, and had been told by the shipper "that the value was fifty dollars only," or, which is the same thing, had been told by the shipper "that, if loss or damage occurred to the box or its contents, he would not demand over fifty dollars." In *Kallman v. Express Co.*, 3 Kan. 205, it was said that "no value was given in the bill of lading which was delivered to the shipper by the express company, and received by him without objection; thus consenting and agreeing that the plaintiffs should be bound by its terms. If he had desired to make the company responsible for the full value of the goods, he had only to furnish them with the amount, and have it inserted in the bill. But it may be said that the company was bound to make inquiry as to the value of the goods, if they desired to obtain the benefit of this limitation upon their liability. We confess that we are not able to see any good reason for making such a requirement a condition precedent in such case. The company exhibits to the employer the exact condition upon which they will receive his property for carriage, to which he may assent or not, as he may choose. If he assent, we think he should be bound thereby. As in this case, if the real value of the property was \$592.53, the employer, in case of loss, would be as much, nay more, interested in having such value truly stated in the bill of lading or receipt as the company could possibly be in having the value understated. He ought, then, to have made known to the company the true value of the goods, and more especially as the limitation upon the liability of the company was so plainly stated in the receipt." We do not quote this part of the opinion in the above case because it is necessarily conclusive or binding as a prior decision of this court, as, in that case, the trial court granted a new trial. This court affirmed the action of the court below. Much said in the former opinion, outside of affirming the action of the court in granting a new trial, we consider *obiter dictum*. The trial court in that case, in granting the new trial, did not pass upon a pure, simple, and unmixed question of law. This court has decided time and again that "the granting of a new trial is largely in the discretion of the trial court; and where a new trial is given, and the record does not show upon what grounds the court granted such new trial, but the record does show errors upon which the trial court might have granted a new trial, the order granting such trial will not be disturbed." *Barney v. Dudley*, 40 Kan. 247, 19 Pac. Rep. 550; *Howell v. Pugh*, 25 Kan. 98; *City of Sedan v. Church*, 29 Kan. 190. See *Bets v. Land, etc., Co.*, ante, 456, (recently decided.) "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection

with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious." *Cohens v. Virginia*, 6 Wheat. 284, 399, 400. But we have referred to that part of the *Kallman* opinion because the court below charged the jury "that the Kellogg Newspaper Company, having this receipt-book in its possession and control, and using it from day to day, must be presumed to have known of such conditions, and to have shipped with reference to it. In this it acted for the plaintiff, and he must be presumed to have assented to the terms and conditions of the receipt;" and because this part of the charge of the trial court and the part of the opinion quoted from the *Kallman* Case is in accordance with reason, fairness, and justice. This part of the opinion also answers the objection "that the value of the property transported was not agreed upon."

As is forcibly argued by counsel, "the express company took the property, and signed a receipt presented to it by plaintiff's agent. It is true that it was one of a book of receipts furnished by the express company, but the receipts were all in blank, the printed part containing all the regulations that the express company required the shipper to comply with. The blanks were all left for the shipper to fill in any way he pleased; and in whatever way he filled the blanks the express company was bound to receipt for the property covered by the receipt. When the shipper had filled the blank and presented it to the express company for its signature, he was in the attitude of proposing an agreement to the express company for acceptance. The signature of the express company was the completion of the agreement, and the agreement as completed so far as it related to the value of the property, was not a limitation of liability for negligence in any way, but a square agreement that the property presented for carriage and covered by the receipt was only worth fifty dollars." In *Oppenheimer v. Express Co.*, 69 Ill. 62, the facts were about as follows: May and Stern shipped by the United States Express Company a box weighing 25 pounds, from New York city to *Oppenheimer & Co.*, at Chicago, Ill. It contained jewelry of the value of \$3,800. The receipt given by the express company was similar in that case to the receipt given by the Pacific Express Company in this case. The blank for the value of the box and contents was not filled in. But the limitation of \$50 was in the receipt in that case, as in this. The box and its contents were destroyed by fire in the office of the express company at Chicago. *Oppenheimer & Co.* brought an action to recover for the value of the contents of the box. Judgment was rendered in their favor for \$50 only. They appealed. The judgment of the lower court was affirmed by the supreme court of Illinois. In rendering its opinion that court said: "The terms and conditions on which the company received the property for transportation were clearly expressed in the body of the receipt, and

in a way not calculated to escape attention. It must be supposed that these men paid some attention to the transaction of their business, and were reasonably well informed in regard to the nature of their contracts. That they should have been so, doing business with this company for years, handling, filling out, and procuring the execution of these shipping receipts without a knowledge of their general character and effect, it is difficult to believe. They must be held to have had such knowledge. \* \* \* A distinction exists between the effect of those notices by a carrier which seek to discharge him from duties which the law has annexed to his employment, and those, like the one in question, designed simply to insure good faith and fair dealing on the part of his employer,—in the former case, notice alone not being effectual without an assent to the attempted restriction; while in the latter case, notice alone, if brought home to the knowledge of the owner of the property delivered for carriage, will be sufficient." A part of the syllabus of that case reads: "An express company has the right to demand from a consignor such information as will enable it to decide on the proper compensation to charge for the risk, and the degree of care to bestow in discharging its trust; and a limitation of its liability, not to exceed \$50, unless the value of the goods forwarded is truly stated, if brought to the knowledge of the consignor, is reasonable and consistent with public policy." The court finally disposed of the above case upon the ground that there was a "designed suppression of the value of the goods." It was said in the opinion, among other things, that "there was an actual attempt here by the agent of the shippers to fill in this blank space, but, instead of inserting '3,800,' (the value,) a mark or character was inserted inexpressive of any value. This shows that there was a designed suppression of the value of the goods. That was unfair conduct on the part of the shipper of the goods. The effect of such conduct to relieve the carrier from his liability as insurer is asserted in many cases, [here decisions are given.] Had the true value of the goods been disclosed, there would have been an extra charge of \$9.50, increased precautions would have been taken for the safety of the goods, and, as the evidence shows, they would have been saved."

It may be said, in every case, that where a shipper fixes an agreed valuation upon his goods to be transported, or enters into a special contract with the carrier that if his goods are lost or injured he will not demand over \$50, and thereby obtains cheaper rates, he is guilty of fraud, or attempted fraud, if his goods are lost or injured, and he demands for his damages an amount above the valuation or limitation agreed to. If it be true, as the trial court charged the jury, that "the plaintiff must be presumed, under the facts of this case, to have assented to the terms and conditions of the receipt," then, within the better authorities, the limitation of the carrier's liability, not to exceed \$50, was the same as fixing the value of the property

transported at \$50 only, and the limitation of the express company's liability, not to exceed the \$50 stated in the receipt, was reasonable and just. *Boorman v. Express Co.*, 21 Wis. 154, is a case like this. A limitation of \$50 was contained in the receipt. Chief Justice Dixon, writing the opinion, held that "an express company may exempt itself by special contract from liability as insurer; or for the default or negligence of any person to whom the property may be delivered by it, for the performance of any act or duty in respect thereto, off its own routes; or for loss or damage of any package for over \$50, unless the just and true value thereof is stated in the receipt." In *Duntley v. Railroad*, supra, it was decided that "a regulation of a carrier with respect to the transportation of live animals, which fixes the ordinary value of horses, for which it will hold itself responsible in case of loss, at \$200 each, and requires extra compensation for transporting animals of greater value, is reasonable and valid." In *Durgin v. Express Co.*, (N. H., 1890,) 20 Atl. Rep. 828, the receipt was like the one in this case, and limited the liability to \$50. It was held that "a shipper of goods who fills out one of the blank receipts contained in a book previously furnished by an express company for his use, and obtains the signature of the company's agent thereto, upon delivering to him a package for transportation, will be presumed to know the contents of the receipt; and, if he receives such receipt without objection, his assent as to its conditions will, in the absence of fraud, be conclusively presumed." CLARK, J., in delivering the opinion in that case, said: "The receipt signed by the defendant's agent and servant at the time of the delivery of the package was taken by the plaintiff as evidence of the fact and purpose of its delivery, and of the terms and conditions on which the defendants received it. The receipt was contained in a book of blank receipts previously furnished by the defendants for the use of the plaintiff, and the written portions were in his handwriting, and the law presumes that the contents were known to him. The plaintiff understood it to be the shipping contract, and, in the absence of fraud, by receiving it without objection, he was conclusively presumed to assent to its conditions. *Merrill v. Express Co.*, 62 N. H. 514; *Grace v. Adams*, 100 Mass. 505. It is now generally held that the responsibility imposed on the carrier of goods by the common law may be restricted and qualified by express stipulation, where such stipulation is just and reasonable; and a stipulation that the carrier shall be informed as to the value of the goods delivered to him for carriage, as affecting the risk, and the degree of care required, is clearly reasonable. \* \* \* The plaintiff understood that he was securing transportation of the box to New York at a reduced rate, (in fact, at one-fifth of the regular rate,) by calling the value \$50, and assuming a portion of the risk of carriage himself; and, having agreed upon a valuation for the purpose of fixing the express charges, he cannot insist that the goods are of greater value, for the purpose of increasing his claim for

damages for the loss. Nor is it material whether the loss arose from the negligence of the defendants or some other cause. The defendants agreed to respond in a sum not exceeding \$50 in case of loss, and, for the purpose of the contract of transportation between the parties to the contract, the goods had no greater value." See, also, to the same effect, *Squire v. Railroad Co.*, 98 Mass. 239; *Railroad Co. v. Henlein*, 52 Ala. 615; *Magnin v. Dinsmore*, 56 N. Y. 168; *Railroad Co. v. Weakly*, 50 Ark. 397, 8 S. W. Rep. 134. In *Railroad Co. v. Wynn*, (Tenn., Jan. 2, 1890,) 14 S. W. Rep. 311, special contracts for a limitation of the liability of a carrier are not sustained. It is said in that case, among other things, that "to our minds it is perfectly clear that the two kinds of stipulation—that providing for total, and that providing for partial, exemption from liability for the consequences of the carrier's negligence—stand upon the same ground, and must be tested by the same principles. If one can be enforced, the other can; if either be invalid, both must be held to be so,—the same considerations of public policy operating in each case." In our opinion, the reasons stated are wholly untenable. They proceed upon false premises. That court overlooks the power of the shipper to freely and fairly fix a valuation upon his own property. The carrier has the right to make reasonable rates for carriage. A total exemption from the liability on the part of a carrier would not be just or reasonable, and no person, having reason, would willingly and freely contract with a carrier that the property which he wished to have transported was absolutely worthless. The carrier is bound to receive and transport the property of the shipper. The shipper can place his own valuation upon the property delivered by him to the carrier to be transported. The carrier cannot arbitrarily fix any valuation on the property received from the shipper, but may reasonably insist on proper information as to the value of the property which he receives. He ought to have a right to know what it is that he undertakes to carry, and the amount and extent of his risk. Upon the value of the property, the risk incurred, and the distance the property is to be transported, the charges for carriage are fixed. Therefore it would seem to us that a contract fixing the value of the goods delivered to the carrier, or fixing a limitation of damage in case of loss or injury, is clearly reasonable, as affecting the risk and the degree of care required concerning the property to be transported. With the above and foregoing limitations, we cannot conceive how the carrier can evade his duty or nullify the law. Upon the authorities cited, the instructions of the trial court were erroneous, and the instruction prayed for by the express company for limitation as to damages should have been given.

There is nothing appearing in the evidence or the findings of the jury that show, or tend to show, gross negligence, fraud, or intentional wrong upon the part of the express company. In the case of *Railroad Co. v. Simpson*, 30 Kan. 645, 2

Pac. Rep. 821, the limitation was arbitrarily fixed by the carrier without the consent of the shipper. That contract was not just or reasonable, or freely or fairly entered into. It was in violation of public policy. It is unlike this case, because, when the box in controversy was shipped, the shipping clerk of the Kellogg Newspaper Company filled out a receipt, and a man by the name of Glass, a driver for the Pacific Express Company, signed it. No deceit or unfairness was practiced by the express company. In the case of *Telegraph Co. v. Crall*, 38 Kan. 679, 17 Pac. Rep. 309, gross negligence was involved. Whether a telegraph company could exempt itself by contract from ordinary negligence was not passed upon. That question was reserved. We do not think it is necessary to follow all that was stated in *Kallman v. Express Co.*, supra, because, although that decision was made nearly 25 years ago, the question now at issue was not necessarily embraced in that decision, for the reasons heretofore named. The case of *Railroad Co. v. Simpson*, supra, followed *Railroad Co. v. Lockwood*, 17 Wall. 357. This case is referred to and clearly distinguished in the latter case of *Hart v. Railroad Co.*, supra. Again, the box containing the type and plates was shipped from Kansas City, Mo. The receipt executed by the express company was executed and delivered at Kansas City, Mo., to the Kellogg Newspaper Company for P. T. Foley, the plaintiff below. In that state the law declared by the supreme court is that "a contract fairly entered into between carrier and shipper, specifying a fixed sum as the value of the property and limiting the recovery in case of loss to that sum, is binding on the shipper." *Harvey v. Railroad Co.*, 74 Mo. 538. We must assume, so far as this case is concerned, that the parties, including the shipper and the express company, contracted with reference to the law of Missouri. The receipt was signed there, the box was delivered there, and was shipped from Missouri to Kansas. It seems to us that the shipper ought not to complain. If he had desired to insert in the receipt, which the express company was asked to sign, \$144.55 as the full value of the box, or if he had desired to insert any larger amount, he had the option so to do, and if he had inserted the full value of the box and its contents he could have recovered the value. But as the shipper voluntarily limited his loss or damage to the sum of \$50 only, why should he refuse to receive the sum of \$50, which was tendered him by the superintendent of the express company when he presented his claim for damages? The receipt, as executed, was just as he desired and wished it. The damage in case of loss or injury to the box or its contents was liquidated in advance by the voluntary action of the parties. "The limitation as to the damages or value has no tendency, in such a case as this, to exempt from liability for negligence." *Hart v. Railroad Co.*, supra. Generally, the charges for transporting a box or package valued at \$144.50, \$500, or \$1,000 are more than when the value is \$50 only, and if the shipper wishes to pay full charges

and recover full value, in case of loss or injury from negligence, why should he not state to the carrier, or write in the receipt to be signed by the carrier, the full value? We now repeat what was said upon this point in the Kallman Express Co.'s Case, 3 Kan. 205, where the receipt was left blank as to the value, as in this case, but where a limitation was inserted in the receipt in case of loss or damage: "The company exhibits to the employer the exact conditions upon which it will receive his property for carriage, to which he may assent or not, as he may choose. If he assents, we think he should be bound thereby. As in this case, if the real value of the property was \$592.53, the employer, in case of loss, would be as much, nay more, interested in having such value truly stated in the bill of lading or receipt as the company could possibly be in having the value understated. He ought, then, to have made known to the company the true value of the goods, and more especially as the limitation upon the liability of the company was so plainly stated in the receipt." The judgment of the district court will be reversed, and the cause remanded for a new trial.

JOHNSTON, J., concurs.

VALENTINE, J., (*dissenting*.) I think we should follow the decision made in the case of Kallman v. Express Co., 3 Kan. 205—*First*, because it is right; and, *second*, for the following reasons. It was made on February 17, 1865, more than 26 years ago; the courts have been open ever since, and 20 or more sessions of the legislature have intervened, and yet no modification of any of the rules therein enunciated have been made, but all seem to have been acquiesced in; and for these reasons it must be presumed that the parties to this action, and especially the express company, contracted with reference to such rules; and now, to overturn them, and to declare different rules for this case, would virtually be to make a new contract for the parties; and construing the present contract as the contract in that case was construed would render the contract valid, while to construe it as the express company now desires to have it construed would render it void. To construe the contract so as to limit the express company's common-law liability only as an insurer, and only for losses and injuries brought about by other causes than the company's own negligence, fraud, or willful wrongs, would render the contract valid; while if it be construed in such a manner as to reach to the domain of negligence, fraud, and willful wrongs on the part of the express company itself, and to limit the company's liability so that the company would not be liable for losses occasioned by its own negligence, fraud, or willful wrongs, would render the contract to that extent invalid and worthless. It must be remembered that in this case the value of the property transported was not agreed upon. Whether it was worth one cent, one dollar, one hundred dollars, one thousand dollars, or any other sum, greater or less, is left wholly blank.

There seems to have been no thought of fixing, by contract or otherwise, the actual value of the property, or any value, but it was actually worth \$144.55. In this failure to fix the value of the property by contract, this case differs essentially from the case of Hart v. Railroad Co., 112 U. S. 832, 5 Sup. Ct. Rep. 151. There are other distinctions between the present case and those relied on by the express company. For instance, the shippers themselves, in some of the cases relied on by the express company, were guilty of fraud or unfair dealing, as in the case of Oppenheimer v. Express Co., 69 Ill. 62, 68. In that case the shippers delivered to the express company for transportation a certain box containing watches and jewelry of the value of \$3,800, without disclosing its contents or their great value, and paid only \$1.40 for its transportation; while, if they had disclosed its contents and their value, they would have had to pay \$10.90 for its transportation. The receipt which they took from the express company did not state the contents or the value of the goods, but stated, "Contents unknown." The court, in commenting upon these matters, used the following, among other, language: "There was an actual attempt here by the agent of the shippers to fill in this blank space, but, instead of inserting '3,800,' (the value,) a mark or character was inserted inexpressive of any value. This shows that there was a designed suppression of the value of the goods. That was unfair conduct on the part of the shippers of the goods. The effect of such conduct to relieve the carrier from his liability as insurer is asserted in the cases of—[here certain cases are given.] Had the true value of the goods been disclosed, there would have been an extra charge of \$9.50, increased precautions would have been taken for the safety of the goods, and, as the evidence shows, they would have been saved." In this case of Oppenheimer v. Express Co. no pretense of fault or negligence on the part of the express company was imputed, but, on the contrary, it was admitted by the parties that the company was not guilty of any fault or negligence; and in the later case of Railroad Co. v. Chapman, 24 N. E. Rep. 417, 419, (decided by the supreme court of Illinois on May 14, 1890,) it is stated as follows: "In Oppenheimer v. Express Co., 69 Ill. 62, the court held that the contract exempting carriers from liabilities is not to be construed as providing against loss or injury occasioned by actual negligence on their part." Indeed, the case of Oppenheimer v. Express Co. has no application to this present case. In the present case the shipper was not guilty of fraud or unfair dealing, and the express company was unquestionably guilty of culpable negligence. In the case of Bank v. Brown, 9 Wend. 85, 114, et seq., an intended passenger on a steam-boat, without paying extra fare, took with him on the steam-boat as baggage an ordinary traveling trunk containing \$11,250. In a few minutes afterwards the trunk and its contents were removed, and the owner never recovered them. The owners of the steam-boat had no knowledge of the contents of the trunk, nor of their great value,

and it was held that they were not liable for their loss. Other distinctions might be shown between this case and the cases relied on by the express company, if it were thought necessary. The stipulation contained in the receipt given by the express company in the present case, limiting its liability for loss or damage, does not limit its liability, except with respect to an amount in excess of \$50. Up to that amount the express company's liability remains precisely the same as it would be at common law, or as it would be if no contract limiting its liability had ever been made. But for the excess above \$50 the express company claims that it has obtained a boundless immunity from liability; that it has not only obtained an absolute exemption from all liability for all loss or damage above that amount, where the loss or damage has occurred without fault or negligence on its part, but that it has also obtained such an exemption where the loss or damage has been occasioned by its own negligence, or by its own fraud or willful wrongs, including the willful destruction of the property, or the greater wrong of feloniously stealing it. This cannot be correct. The stipulation in such receipt ought to be so construed as to exempt the company from liability for only such loss or damage in excess of \$50 as might be occasioned by the fault or negligence of others, or as might result from some accident, casualty or misfortune over which the company could have no control. I think the weight of authority sustains this view. While a common carrier may make a valid contract exempting himself from his common-law liability as an insurer and for losses occasioned by the acts of others without his fault, or occasioned by such of his own acts only as do not involve any kind of wrong, or occasioned by circumstances over which he has no control, yet he cannot make a valid contract exempting himself from liability for losses occasioned by his own carelessness or negligence or improper acts. Such a contract would be against public policy, and void. I think the contract in the present case should be construed precisely as though it did not attempt to limit the express company's liability at all for losses occasioned by its own negligence or improper conduct, and I would refer to the following authorities in support of this view: *Kallman v. Express Co.*, 3 Kan. 205; *Railroad Co. v. Simpson*, 30 Kan. 645, 2 Pac. Rep. 821; *Railway Co. v. Peavey*, 29 Kan. 169; *Telegraph v. Crall*, 38 Kan. 679, 17 Pac. Rep. 309; *Farnham v. Railroad Co.*, 55 Pa. St. 53; *Express Co. v. Sands*, Id. 140; *Grogan v. Express Co.*, 114 Pa. St. 523, 7 Atl. Rep. 184; *Weiller v. Railroad Co.*, 134 Pa. St. 310, 19 Atl. Rep. 702; *Express Co. v. Moon*, 39 Miss. 822; *Railroad Co. v. Abels*, 60 Miss. 1017; *Express Co. v. Seide*, 67 Miss. 609, 7 South. Rep. 547; *Kirby v. Express Co.*, 2 Mo. App. 370; *McFadden v. Railway Co.*, 92 Mo. 343, 4 S. W. Rep. 639; *Moulton v. Railway Co.*, 31 Minn. 85, 16 N. W. Rep. 497; *The City of Norwich*, 4 Ben. 271; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 469; *Rosenfeld v. Railway Co.*, 103 Ind. 121, 2 N. E. Rep. 344;

*Express Co. v. Harris*, 120 Ind. 73, 21 N. E. Rep. 340; *Railway Co. v. Harris*, 67 Tex. 166, 2 S. W. Rep. 574; *Railway Co. v. Maddox*, 75 Tex. 300, 12 S. W. Rep. 815; *Missouri P. Ry. Co. v. China Manuf'g Co.*, (Tex.) 14 S. W. Rep. 785; *Railway Co. v. Robbins*, (Tex.) Id. 1075; *Erie Dispatch v. Johnson*, 87 Tenn. 490, 11 S. W. Rep. 441; *Railroad Co. v. Wynn*, 88 Tenn. 320, 14 S. W. Rep. 311; *Railroad Co. v. Gilbert*, 88 Tenn. 430, 12 S. W. Rep. 1018; *Black v. Transportation Co.*, 55 Wis. 319, 13 N. W. Rep. 244; *Railroad Co. v. Hopkins*, 41 Ala. 486; *Express Co. v. Stettaners*, 61 Ill. 184; *Railway Co. v. Chapman*, 24 N. E. Rep. 417, 419, (Ill. May 14, 1890); *Judson v. Railroad Corp.*, 6 Allen, 486; *Orndorff v. Express Co.*, 3 Bush, 194; *Express Co. v. Backman*, 28 Ohio St. 144; *Lamb v. Railroad Co.*, 46 N. Y. 271.

In my opinion, notwithstanding the stipulation in the aforesaid receipt, limiting, to some extent, the liability of the express company, the company was still bound, at its peril, to act in good faith, as towards its employer, and to exercise reasonable care and diligence with respect to its employer's goods. There was ample evidence to show negligence on the part of the express company, if not gross negligence. The goods were shipped from Kansas City in good order. When they arrived at their destination, at Lawrence, the box containing them was found broken. With due care, however, they might still have been saved, as is fairly inferable from the evidence, and as was the opinion of the jury according to their findings. The box, however, was turned over by one of the express company's agents, and a piece came out. Afterwards the company's agents attempted to take the box and contents from the express-car in which they were transported, and to put the same on a truck, and in doing so some of the type and some of the electrotype plates fell down between the car and the platform. Afterwards they gathered them up, and put them into a coal scuttle, and took them to a house belonging to the express company, where they remained for some time, and were afterwards removed to the express company's office, where they still remain, so far as is shown. This seems like gross negligence. It was not necessary, however, that gross negligence should have been shown. Ordinary negligence only, or, in other words, a want of ordinary care, was all that was necessary. In the case of *Kallman v. Express Co.*, supra, the following, among other, language, with reference to express companies limiting their common-law liability, is used: "An examination of the authorities bearing upon this point will, we think, show that they may do so, provided, however, that due care and diligence be used in the discharge of their trust. But carriers cannot in this way shield themselves from the consequences of fraud, gross negligence, and want of care. \* \* \* It is only when such carriers act in good faith, and use due care and diligence in and about their business, that the law permits them to have the benefit of limitations like that under consideration." In the case of *Railroad Co. v. Wynn*, supra, the following, among other, language is used by the court:

"The author of American and English Encyclopædia of Law says: 'By the clear weight of authority in England, Canada, the United States, and almost without exception in the states of the Union, the rule has been adopted that the common carrier can make no contract the effect of which will be to exempt him from liability for negligence.' 2 Amer. & Eng. Enc. Law, 822. Is the limitation in the contract before us within the prohibition of this eminently just and generally accepted principle? Manifestly the stipulation does not contemplate total exemption from liability; it only provides for partial or limited exemption. Upon that distinction the nice and important question arises, can a stipulation of the latter character stand before the law when one of the former kind cannot? Or, to state the same question differently, and so as to apply it more directly to the facts of this case, the rule of law being established, as we have seen it is, that the defendant company could not lawfully have contracted with the plaintiff that it would in no event be liable for any part of the value of the mare, if lost or destroyed, can the limitation of its liability to \$100 be upheld in the courts, if it should appear that her death resulted from the negligence of the company, and that she was in fact worth eight times that amount, as the jury found her to be? We unhesitatingly answer, 'No.' The carrier cannot by contract excuse itself from liability for the whole or any part of a loss brought about by its negligence. To our minds, it is perfectly clear that the two kinds of stipulation—that providing for total, and that providing for partial, exemption from liability for the consequences of the carrier's negligence—stand upon the same ground, and must be tested by the same principles. If one can be enforced, the other can; if either be invalid, both must be held to be so,—the same considerations of public policy operating in each case. With great deference for those who may differ with us, we think it entirely illogical and unreasonable to say that the carrier may not absolve itself from liability for the whole value of property lost or destroyed through its negligence, but that it may absolve itself from responsibility for one-half, three-fourths, seven-eighths, nine-tenths, or ninety-hundredths of the loss so occasioned. With great unanimity the authorities say it cannot do the former. If allowed to do the latter, it may thereby substantially evade and nullify the law, which says it shall not do the former, and in that way do indirectly what it is forbidden to do directly. We hold that it can do neither. The requirement of the law has ever been, and is now, that the common carrier shall be diligent and careful in the transportation of its freight, and public policy forbids that it shall throw off that obligation by stipulation for exemption in whole or in part from the consequences of its negligent acts." In the case of *Express Co. v. Seide*, supra, the supreme court of Mississippi decided as follows: "A stipulation in a

receipt given by an express company that, if the value of the goods shipped is not stated by the shipper and specified in the receipt, the holder will not demand more than \$50, for loss or damage, exempts the carrier from greater liability only when the loss did not result from negligence on its part. This is true, although a greater charge is made for carrying packages over \$50 in value, and the shipper fails to state the value, and pays the minimum charge." Part of syllabus. In the case of *Kirby v. Express Co.*, supra, the court of appeals of St. Louis, Mo., decided as follows: "A clause in a contract between an express company and a shipper stated that goods shipped are of the value of \$50, unless their value should be inserted in the contract, and that the company, in case of loss, would not be liable for more than \$50, unless the value was so inserted, and the value of the goods was not inserted. *Held*, that this did not relieve the company from liability for the full value of the goods if lost through its fault, and that a presumption of negligence arose from the mere fact of loss." Part of syllabus. In the case of *McFadden v. Railway Co.*, 92 Mo. 343, 4 S. W. Rep. 689, the supreme court of Missouri decided as follows: "While a shipper may release a common carrier from its obligation as an insurer of his property, yet the carrier cannot, by any kind of stipulation, exempt itself from liability for its own negligence." Part of syllabus. See, also, the other cases above cited, and especially the Pennsylvania cases. I think the judgment of the court below should be affirmed.

*In re DALTON et al.*

(Supreme Court of Kansas. May 9, 1891.)

CONTEMPT OF COURT.

Criticism or contemptuous language in regard to the acts and declarations of the judge of the trial court, embodied in a brief filed in the appellate court, are not in contempt of the trial court.

*Habeas corpus.*

*Jetmore & Jetmore*, for petitioners. *C. J. Peckham*, for respondent.

PER CURIAM. The applicants were charged with contempt by the district court of Cowley county. Said supposed contempt consisted of a criticism of the acts and declarations of the judge and court at a trial of a cause, and were embodied in a brief filed in this court in a cause that was tried in the Cowley county district court, and determined in September, 1890. The case was brought to this court by proceedings in error, filed herein on the 20th day of February, 1891, and the brief containing the contemptuous language was filed in this court on the 12th day of March, 1891. This court has said that, after a case is disposed of in the court in which it originated or is pending, "a court or judge has no power to compel the public, or any individual thereof, attorney or otherwise, to consider his rulings correct, his conduct proper, or even his integrity free from stain, or to punish for contempt any mere criticism or an animadversion thereon, no matter how se-



vere or unjust." In re Pryor, 18 Kan. 72. It is ordered that the petitioners be discharged.

(46 Kan. 254)

*In re THOMPSON et al.*

(Supreme Court of Kansas. May 9, 1891.)

*Habeas corpus.*

S. N. Wood and A. M. Mackey, for petitioners.  
L. B. Bradford and J. H. Pitzer, for respondent.

PER CURIAM. On the authority of *In re Dalton*, ante, 673, (just decided,) and for the same reason, to-wit, that before the criticisms were made the cause had been terminated, and was not pending, the petitioners are discharged.

(46 Kan. 237)

*CITY OF ELLSWORTH v. ROSSITER.*

(Supreme Court of Kansas. May 9, 1891.)

LIABILITIES OF CITIES—COMPENSATION FOR SERVICES—MISJOINDER OF CAUSES.

1. Where R., a civil engineer, and two others, are appointed by a city as a committee to superintend the construction of water-works in and for the city, and R. is appointed because of his knowledge and experience as a civil engineer, and any two of the committee have the authority to act, and they all enter upon the discharge of their duties under the appointment, but they do not all do the same amount of work, and afterwards the work for which they were appointed is all performed and completed, and the city accepts and receives the same, *held*, that R. may then maintain an action against the city for compensation for his own individual services, without joining with him the other two members of the committee as plaintiffs.

2. *Further, held*, that several causes of action were not improperly joined in the action, and that the question whether several causes of action were stated in the petition, and not separately stated and numbered, cannot be raised or presented by a demurrer.

3. In a case such as is mentioned in No. 1 of this syllabus, the members of the committee are not such public officers as are required to perform their services without compensation, where no compensation has previously been provided for; but they are agents and employees of the city, who may recover reasonable compensation for their services after the services have all been performed and accepted by the city.

4. Where services have been fully and completely performed for and at the request of a city, and have been accepted and received by the city, the city is then under legal and moral obligation to pay for the same whatever they are reasonably worth, and whatever irregularities may have intervened in the original employment.

(Syllabus by the Court.)

Error from district court, Ellsworth county; S. O. HINDS, Judge.

Theodore Sternberg, for plaintiff in error. Garver & Bond and Ira E. Lloyd, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Ellsworth county by F. N. Rossiter against the city of Ellsworth to recover compensation for services performed by him at the request of the city in and about the construction of city water-works. A trial was had before the court and a jury, and judgment was rendered in favor of the plaintiff and against the defendant for \$681; and the defendant, as plaintiff in error, brings the case to this court for review.

The only question now presented is with reference to the sufficiency or insufficiency of the plaintiff's petition. This

question was first raised by a demurrer, the grounds of which are as follows: *First*, a defect of parties plaintiff; *second*, several causes of action are improperly joined; *third*, the petition does not state facts sufficient to constitute a cause of action. These grounds of demurrer are the only matters now presented to this court for review, and while we think they are all untenable, yet we shall consider them separately and in their order.

1. The employment of the plaintiff was under a resolution of the mayor and council of the city, which reads, so far as is necessary to quote it, as follows: "*First*. That John L. Bell, F. N. Rossiter, and Charles J. Evans are hereby appointed and constituted a committee of three, for the superintending in every respect the construction and establishing of water-works in said city of Ellsworth, Kan.; and said committee, or a majority thereof, shall have full power to do or perform all such acts and things as may be necessary and proper in and about the erection, operation, alteration, and equipment of any water-works that may be commenced within this city during the year 1885, until the completion of said works, and the acceptance thereof by the council of this city, and to make all necessary and proper contracts in and about the premises for the construction and erection of the same; provided, that committee shall not have power to bind the said city for the payment of any greater sum than the amount of bonds which may be authorized by a vote of the citizens of said city for said purposes." No express contract was made with reference to the amount of the compensation which any one or any two or all the members of the foregoing committee should receive. Indeed, compensation is not mentioned at all, either as joint or several; but, as any two of the committee had full power to do and perform any or all the things for which they were employed, it would seem that the compensation which one might be entitled to receive might be different from or greater or less than that which either of the others might be entitled to receive. In other words, a joint compensation to all or an equal amount to each might not be just. It would therefore seem that any compensation which might be allowed should be a several compensation, and not a joint one. They were not partners, and it does not appear that they had any interest in each other's affairs. The portions of the statutes relating specifically to this question of the joinder of parties plaintiff are sections 35 and 37 of the Civil Code, which read as follows: "Sec. 35. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this article." "Sec. 37. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but, if the consent of one who should have been joined as plaintiff cannot be obtained, he may be made defendant, the reason being stated in the petition." Under these statutes, it is necessary that all

the plaintiffs should have not only an interest in the subject-matter of the action, but also in obtaining the relief demanded. *Jeffers v. Forbes*, 28 Kan. 174; *McGrath v. City of Newton*, 29 Kan. 364, 370, 371, and cases there cited. Now, under the allegations of the present petition, and more clearly under the evidence as it was introduced on the trial of the case, the three members of the aforesaid committee were not entitled to a joint compensation. They were not partners, nor jointly interested "in obtaining the relief demanded," nor were they entitled to an equal amount of the compensation to be paid, or an equal amount of "the relief demanded." The plaintiff, *Rossiter*, did more of the work that was to be done, and was done, than was done by either of the other two, and he is therefore entitled to a greater amount of the compensation to be paid therefor than either of the other two. And he is not interested in the compensation to be paid to either of the other two, nor is either of them interested in the compensation to be paid to him.

2. The next complaint is that there were several causes of action improperly joined, though in the argument it would seem that the real complaint is that there were several causes of action stated in the petition which were not separately stated and numbered. There were certainly not several causes of action improperly joined. We are inclined to think that only one cause of action was stated in the petition; but, even if there were more, still they were all such as might very properly be joined in one petition under the statutes, (Civil Code, § 83; and the objection that there were several causes of action stated in the petition, which were not separately stated and numbered, cannot be raised or presented by a mere demurrer to the petition, (Civil Code, § 89; *Tootie v. Wells*, 39 Kan. 454, 18 Pac. Rep. 692.) This objection was not raised or presented in any other manner than by demurrer.

3. The next ground of complaint is that the petition does not state facts sufficient to constitute a cause of action; but the principal ground upon which this complaint is founded is that *Rossiter* by his employment became a public officer, and, as no compensation for his services was agreed upon or provided for at any time, he cannot now recover anything for his services. We think, however, that *Rossiter* was not a public officer, within the rule that gives no compensation to a public officer, except such as has previously been provided for by some lawful authority for the office which he fills. We think he might more properly be styled an agent or employe of the city for a specific work, and he was both an agent and an employe of the city. He was a civil engineer of large experience, and it was because of his knowledge and experience as a civil engineer that he was employed by the city to do the work required. In the case of *David v. Water Committee*, 14 Or. 98, 12 Pac. Rep. 174, it was held by the supreme court of Oregon that a body of men consisting of 15, who were authorized to purchase or construct and maintain water-works in and for the city of Portland, and who were styled "the water committee,"

were not officers, but were only agents of the city. See, also, the following cases: *Bunn v. People*, 45 Ill. 397; *Butler v. Regents of the University*, 32 Wis. 124, 131; *U. S. v. Maurice*, 2 Brock. 103; *State v. Wilson*, 29 Ohio St. 349. But even if the committee in the present case might be called "officers," in any sense, still we do not think that they were such officers as are required to perform services without compensation, simply because no compensation for their services had previously been specifically provided for.

4. It is also claimed that there were some irregularities in the appointment or employment of the plaintiff, *Rossiter*. In the case of *Fister v. La Rue*, 15 Barb. 323, 324, the following language is used by the court: "It is well settled, at least in this country, that where a person is employed for a corporation, by one assuming to act in its behalf, and goes on and renders the services according to the agreement, with the knowledge of its officers, and without notice that the contract is not recognized as valid and binding, such corporation will be held to have sanctioned and ratified the contract, and be compelled to pay for the services, according to the agreement. Having availed itself of the services and received the benefits, it is bound in conscience to pay, and will not be heard to say that the original agreement was not made by a person legally authorized to contract." See, also, *Butler v. Commissioners*, 15 Kan. 178; *Brown v. City of Atchison*, 39 Kan. 37, 17 Pac. Rep. 465; *Salomon v. U. S.*, 19 Wall. 17; *City of Cincinnati v. Cameron*, 33 Ohio St. 386. As all the services expected or desired of *Rossiter* and his associates have been fully and completely performed, and have been accepted and received by the city, we think the city is now under legal and moral obligation to pay for the same whatever they are reasonably worth, and whatever irregularities may have intervened in the original employment. See, also, the following cases: *Commissioners v. Brewer*, 9 Kan. 307; *Huffman v. Commissioners*, 23 Kan. 281. The judgment of the court below will be affirmed. All the justices concurring.

(46 Kan. 242)

#### RYAN et al. v. CITY OF COLDWATER.

(Supreme Court of Kansas. May 9, 1891.)

#### CITIES — ACTION FOR SERVICES RENDERED — LIABILITIES.

Where a plaintiff in an action against a city alleges in his petition that he made a filling in one of the public streets of such city to the extent of 2,200 yards, of the value of \$220, with the knowledge, consent, and direction of the city, and asks for a judgment against the city for \$220, he states a cause of action against the city for that amount.

(Syllabus by the Court.)

Error from district court, Comanche county; C. W. ELLIS, Judge.

*W. A. Taylor*, for plaintiffs in error. *T. E. Chambers*, for defendant in error.

VALENTINE, J. This was an action brought before a justice of the peace of Comanche county by Drew Ryan and George Schwirsberger against the city of Coldwater, to recover \$220 for work done upon a certain street in that city. The case was afterwards taken to the district court,

and in that court the plaintiffs amended their bill of particulars so as to make it read, omitting caption and signature, as follows: "Plaintiffs for cause of action allege that defendant is a municipal corporation created by the laws of the state of Kansas; that as such corporation defendant did by ordinance approved on the 16th day of August, 1886, provide a tax of ten mills on the dollar, on all the taxable real estate within the corporate limits of said city of Coldwater, the defendant in this case, for the purpose of grading, opening, widening, improving, etc., all streets, avenues, etc., in said city; that, as such corporation, defendant did, by resolution approved by the mayor and council of said city, defendant, on the 27th day of July, 1887, provide for surveying and grading all streets within the limits of said city, defendant; that in pursuance of said resolution, on Main street in said city, was established a grade, which said grade was by resolution of the mayor and council of said city adopted and approved on the 20th day of December, 1887; that plaintiffs herein, with the knowledge, consent, and direction of defendant herein, did between the day of —, 1887, and the 8th day of November, 1887, do certain filling and work on West Main street, between Central and Brooklyn avenues, in said city, in compliance with the grade as established aforesaid, an account of said filling and work being herewith attached, marked 'Exhibit A,' and made a part hereof; that plaintiffs did on the 3d day of December, 1887, present to the city council of the city of Coldwater, the defendant, a full account of the items of their said claim, the same being duly verified by the oath of George Schwrisberger, one of the plaintiffs herein; that said account was reasonable, correct, and just, which said claim, so presented, defendant refused to allow; that said filling and work is worth the sum of two hundred and twenty (\$220) dollars; that said amount of two hundred and twenty (\$220) dollars is due, and wholly unpaid. Wherefore plaintiffs ask judgment in the sum of two hundred and twenty (\$220) dollars, with interest at the rate of 7 per cent. per annum from the 8th day of November, 1887, and costs of this suit." Exhibit A reads as follows: "November 8th, 1887. City of Coldwater, Dr., to Drew Ryan and George Schwrisberger, Cr.: To 2,200 yards of filling on West Main street, between Central and Brooklyn avenues, in said city, at 10 cents per yard, \$220.00. Due, \$220 00." The defendant demurred to this amended bill of particulars, upon the ground that it did not state facts sufficient to constitute a cause of action, and the court sustained the demurrer; and, to reverse this ruling of the district court, the plaintiffs, as plaintiffs in error, bring the case to this court.

We think the court below erred. In Kansas, all improvements of the public streets of a city, and all changes to be made therein, are wholly and entirely within the control of the city itself. No individual person has any right to disturb the surface of any street of a city in the slightest manner whatever, except with the consent of the city, or except as he might do so in

some proper mode of travel or transportation. In the present case the plaintiffs made a certain filling on West Main street, of the city of Coldwater, to the extent of 2,200 yards. While it might be presumed, in the absence of anything to the contrary, that they did this with the knowledge and consent and by the direction of the city, yet they have not relied upon presumptions merely, but have so alleged the same in direct terms in their petition; and as the work has already been done, completed, finished, we think the city is presumptively liable therefor. (*City of Ellsworth v. Rossiter*, ante, 674, just decided;) and, if the city has any defense, it devolves upon the city to so state it. We think the plaintiffs' petition states a cause of action, and therefore the order and judgment of the district court sustaining the demurrer thereto will be reversed, and the cause remanded for further proceedings.

All the justices concurring.

(45 Kan. 390)

#### STATE V. HODGES.

(*Supreme Court of Kansas. Feb. 7, 1891.*)

CONTINUANCE IN CRIMINAL CASE—DILIGENCE—INDICTMENT—JOINDER OF OFFENSES—EMBEZZLEMENT—EVIDENCE—SEPARATION OF JURY—SENTENCE.

1. The defendant, in a criminal prosecution for embezzlement, made an application for a continuance, upon the ground that it was necessary for him, in order to prepare for his defense, to make an inspection of certain books, records, and papers in the custody of the receiver of the State Bank of Irving, and the court overruled the application. *Held*, under the circumstances of the case, that the defendant did not exercise sufficient diligence to obtain an inspection of such books, records, and papers, and that no error was committed in refusing the application.

2. Several separate and distinct felonies may be charged in separate counts of one and the same information, where all the offenses charged are of the same general character, requiring the same mode of trial, the same kind of evidence, and the same kind of punishment; and the defendant may be tried upon all the several counts at one and the same time,—all resting in the sound judicial discretion of the trial court.

3. Where a criminal information charges in one count an actual embezzlement, and also charges that the same property was made way with and secreted by the defendant with the intent to embezzle and convert the same to his own use, *held*, that the information is not bad for duplicity.

4. The evidence examined, and *held* that, although evidence relevant and competent to prove one charge, but not relevant or competent as to the other charges, was introduced, and although other evidence not competent to prove any charge was also introduced, yet no material error in this respect was committed by the trial court.

5. At the close of the trial, and near night, the jury retired to consider as to their verdict, and under the direction of the trial court, given before they retired, in the presence of the defendant and counsel on both sides, and without objection, the jury, after agreeing upon their verdict during the night, reduced the verdict to writing, and inclosed it in a sealed envelope, and then separated until the meeting of the court the next morning, when they returned the verdict into court, and the envelope was there opened, and the verdict read to the jury, and they were asked if that was their verdict, and they answered in the affirmative, and the verdict was *held* valid. *Held*, that no material error, if any error at all, was committed in this respect by the trial court.

6. The defendant was found guilty, and the court sentenced him, upon each of four separate counts of the information, to imprisonment in the penitentiary, prescribing that the imprisonment under one count should commence at the expiration of the imprisonment under another count, and the time of the imprisonment in the aggregate exceeded by one year the time for which the defendant could have been sentenced upon one count alone. *Held not error.*

(*Syllabus by the Court.*)

Appeal from district court, Marshall county; R. B. SPILLMAN, Judge.

Cal. T. Mann, John V. Coon, and W. J. Gregg, for appellant. L. B. Kellogg, Atty. Gen., E. A. Berry, W. A. Calderhead, and J. A. Broughten, for the State.

VALENTINE, J. This was a criminal prosecution upon information, in which the defendant, Ira M. Hodges, was charged in eight separate counts with the commission of eight separate and distinct embezzlements of property belonging to the State Bank of Irving, a banking corporation, as officer, cashier, and secretary of such corporation. A trial was had before the court and a jury, and at the close of the evidence on the part of the state the prosecution elected to dismiss the prosecution as to the eighth count, and to proceed with the trial upon only the other seven counts, as follows: Upon the first six counts upon the charges therein contained of actual embezzlement; and upon the seventh count upon the charge of taking, making way with, and secreting a certain diamond pin, with the intent to convert the same to the defendant's own use. And the prosecution also elected to rely for a conviction upon a separate and single transaction, as shown by the evidence, for each separate count of the information. At the close of the trial the jury found the defendant guilty upon the first six counts, and not guilty as to the seventh; and the court sentenced the defendant to imprisonment in the penitentiary for terms aggregating six years upon first, third, fourth, and fifth counts only, as follows: Upon the first count for three years, and upon each of the other three counts for one year; and the defendant was not sentenced at all upon the second or sixth count, nor upon any other count except the first, third, fourth, and fifth. The defendant now brings the case to this court for review.

1. The first alleged ground of error is that the court below erred in refusing to grant the defendant a continuance. The ground for the continuance was that the defendant, in order to prepare for his defense, needed to make an inspection of certain books, records, and papers belonging to the State Bank of Irving, which books, records, and papers were and had been for a long time in the custody of W. W. Armstrong, who was the receiver of said bank; that the defendant had not been able to procure such books, records, and papers. The offenses with which the defendant was charged and found guilty were charged to have been committed, and were in fact committed, during the month of November, 1899. When this prosecution was commenced is not shown, but it was probably commenced soon after the time

of the alleged commission of the offenses. The information, however, was not filed until May 3, 1899, and this application for a continuance was made on May 8, 1899. Now, if these books, records, and papers should be considered as being in the custody of the prosecution, which they were not, then the defendant's remedy to obtain an inspection or copies of them was under section 209 of the Criminal Code, and sections 368 and 369 of the Civil Code. But if they should be considered as being in the custody of W. W. Armstrong, the receiver, as in fact they were, then the defendant could have procured an inspection or copies of them by merely applying to the court or judge for an order to that effect upon the receiver. And of course the defendant had the power to obtain them as evidence at the trial by merely causing a *subpoena duces tecum* to be issued for them. Civil Code, § 825. But he took no legal steps to compel the production of the books, records, and papers for his inspection, or to procure copies of them prior to his application for a continuance, and therefore we would think that he did not exercise sufficient diligence. The whole matter, however, was largely within the discretion of the trial court, and we cannot say that such discretion was abused. Many of the books, records, and papers of the bank, and possibly all, were present at the trial, and there is no pretense that any of them needed by the defendant were absent.

2. The next ground of alleged error has reference to a supposed error in the information in charging in one and the same instrument, though in separate counts, several separate and distinct felonies, and in the court's requiring the defendant to be tried for all of such felonies in one and the same trial. Now, there can certainly be no such substantial error in this as will require a reversal of the judgment of the court below, provided, of course, that only one offense is charged in each of the several counts of the information. Several separate and distinct felonies may be charged in separate counts of one and the same information, where all of the offenses charged are of the same general character, requiring the same mode of trial, the same kind of evidence, and the same kind of punishment. Whart. Crim. Pl. & Pr. § 285 et seq., and cases there cited; 1 Bish. Crim. Proc. (3d Ed.) §§ 424, 450, 451; 4 Amer. & Eng. Enc. Law, 754-756; State v. Bancroft, 22 Kan. 170; State v. Chandler, 31 Kan. 201, 1 Pac. Rep. 787; State v. Goodwin, 33 Kan. 538, 6 Pac. Rep. 899; State v. Fisher, 37 Kan. 404, 15 Pac. Rep. 606. The defendant may be tried upon all the several counts of the information at one and the same time and in one trial, but all this rests in the sound judicial discretion of the trial court. In some cases the trial court might, without committing material error, quash such an information; or it might require the state to elect upon which one or more of the several counts it would proceed to trial or rely for a verdict; but we cannot say that in this case the court abused its discretion or committed any material error.

3. The next alleged ground of error is

that each count of the information charged two separate and distinct offenses. The first count of the information charges as follows: That the defendant, as officer, cashier, and secretary of the State Bank of Irving, a corporation, doing a general banking business at Irving, was intrusted by the corporation with the safe-keeping, custody, control, and disbursement of the moneys belonging to the bank; and that he, as such officer, cashier, and secretary, on the 8th day of November, 1889, certain moneys belonging to the bank in his hands, of the value of \$1,500, "did then and there fraudulently and feloniously convert to his own use and embezzle, with intent to feloniously embezzle the same, and then and there did feloniously make way with and secrete, with intent the said money and property fraudulently and feloniously to embezzle and convert to his own use, without the assent of the said corporation, his employer." All the other counts are substantially in the same form. Now, as a general rule, the charging of two or more distinct offenses in the same count of an information, which in criminal pleading is denominated "duplicity," is not to be tolerated; but we do not think that the present information is subject to any such objection. It is often the case that one felony of considerable magnitude may include within itself other offenses of less magnitude, and then all may be charged in one count; as, for instance, the offense of murder in the first degree, the greater offense, may be charged in one count of an information, although by so doing several smaller offenses are also charged in the same count of the information. And in all cases an offense may be set forth in a single count of an information, although such offense may include the smaller offense, an attempt to commit the principal offense. Sections 121 and 122 of the Criminal Code read as follows: "Sec. 121. Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or an attempt to commit the offense. Sec. 122. Upon the trial of an indictment for a felony, the defendant may be found guilty of any other felony or misdemeanor necessarily included in that with which he is charged in the indictment or information." Section 283 of the act relating to crimes and punishments makes an attempt to commit an offense an offense of itself, and, so far as it is necessary to quote such section, it reads as follows: "Sec. 283. Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, upon conviction thereof, shall, in cases where no provision is made by law for the punishment of such attempt, be punished as follows," etc. And Mr. Wharton, in his *Precedents of Indictments*, gives the form of an indictment for embezzlement, which includes, among others, the following words: A. B., the defendant, "fraudulently and feloniously did take, make way

with, and secrete, and did embezzle and convert, to his own use, without the assent of the said C. D., his master and employer, the said "embezzled property, etc. See, also, 1 Bish. Crim. Proc. (3d Ed.) §§ 436, 443; 4 Amer. & Eng. Enc. Law, 756; *State v. Lillie*, 21 Kan. 728; *State v. Blakesley*, 43 Kan. 250, 23 Pac. Rep. 570.

As we understand, it is claimed that the present information is not good, for the reason that each count first charges the crime of actual embezzlement, and then charges a second offense, by charging that the defendant made way with the same property, and secreted it with the intent to embezzle and convert the same to his own use. This certainly does not render the information bad, for all these charges could have been shown under the single charge of actual embezzlement; for, if a person commits the offense of actual embezzlement, he must commit all the rest above specified. He cannot commit the offense of actual embezzlement without also attempting and intending to commit such offense, and he cannot commit the offense without also converting the property of his employer in his hands, and which he embezzles, to his own use, and without also attempting and intending to so convert it. All that was material in the aforesaid charge was included in the one charge of actual embezzlement. Besides, in the present case, before the defendant was called upon to introduce any evidence, the state elected to rely for a conviction upon the single charge of actual embezzlement and of the embezzlement of a particular thing; and this election was as to each count, and the defendant was convicted upon this election, and upon this election only. What we have said with reference to the first count may also be said with reference to all the other counts upon which the defendant was convicted.

4. The next question presented is with regard to the introduction of evidence. It is claimed that the court below erred in permitting the prosecution to introduce incompetent and irrelevant evidence, to the prejudice of the substantial rights of the defendant; and again, the question is presented whether two or more criminal charges can be included in one and the same information, though in separate counts, and tried upon a single trial. It is claimed that they cannot, for the reason that evidence competent to prove one charge would necessarily be irrelevant and incompetent as to the other charges, and that the introduction of such evidence would be prejudicial to the substantial rights of the defendant. Of course, the first part of this claim is generally true, and the last part of the same is sometimes true; but where the last part is true, the court, in its discretion, will require that a separate trial shall be had upon each separate charge. We do not think that the rights of the defendant were improperly prejudiced in the present case. Undoubtedly the court and the jury understood perfectly well for what purpose each item of the evidence was introduced; and the jury did not use the evidence introduced to prove one charge for the pur-

pose of sustaining some other charge. This question, however, was sufficiently considered in the consideration of the question whether charges for separate and distinct felonies could be united in separate counts of one information. There was some other evidence introduced which was irrelevant and incompetent to prove any of the charges, the most of which, however, after being introduced, was expressly withdrawn by the court from the jury; and we cannot think that the defendant's substantial rights were prejudicially affected by any of such evidence. All the evidence was intended to show the defendant's transactions in connection with the bank. And nothing was introduced to show that he had acted, in any respect, in any worse manner as to the affairs of the bank than he had acted in doing the very things of which the jury found him to be guilty, and of which he was unquestionably guilty.

5. The next complaint of the defendant is that the jury were permitted to separate after the trial, and before they had rendered their verdict. The facts were these: The trial was closed just before the adjournment for the day, on May 14, 1890, at 8 o'clock in the evening. Before the adjournment the court instructed the jury that, if they should agree upon a verdict before the meeting of the court on the next morning, they might reduce their verdict to writing, inclose it in a sealed envelope, and then separate until the meeting of the court the next morning, and then return the verdict into court; and the court also properly admonished the jury with regard to their conduct during the separation. The jury in fact agreed upon a verdict during the night, reduced it to writing, inclosed it in a sealed envelope, then separated, and on the next morning returned it into court, where the envelope was opened and the verdict read to the jury, and they were asked if that was their verdict, and they answered in the affirmative. No objection to the above was interposed by the defendant or his counsel, although they, as well as the counsel for the state, were present in the court when it all occurred. Certainly no material error, if any error at all, was committed in this. See *Crim. Code*, § 235; *State v. Muir*, 32 Kan. 481, 4 Pac. Rep. 812; *Bishop v. Mugler*, 33 Kan. 145, 5 Pac. Rep. 756.

6. Complaint is also made that the court below erred in rendering a cumulative sentence. The court below sentenced the defendant upon four different charges, set forth in four separate counts of the information, to imprisonment in the penitentiary for six years in the aggregate, which was one year more than the defendant could have been sentenced for upon any one of such charges. We think there was no error in this. *Criminal Code*, § 250; *State v. Carlyle*, 33 Kan. 716, 7 Pac. Rep. 623; *State v. Chandler*, 31 Kan. 201, 1 Pac. Rep. 787. If a defendant in a criminal prosecution can be tried upon an information charging in separate counts several separate and distinct felonies, he may certainly be convicted and sentenced upon each of such counts upon which he

is convicted; and, where the sentence upon each count is for imprisonment in the penitentiary, the imprisonment may, under section 250 of the Criminal Code, be cumulative, and the imprisonment under one count may commence at the expiration of the imprisonment under another count. We think no material error has been committed in this case, and the judgment of the court below will be affirmed.

All the justices concurring.

(45 Kan. 397)

STATE v. EMMONS.

(*Supreme Court of Kansas*. Feb. 7, 1891.)

Appeal from district court, Marshall county; R. B. SPILLMAN, Judge.

*Cal. T. Mann, J. H. Gillpatrick, John V. Coon, and W. J. Gregg*, for appellant. *L. B. Kellogg, Atty. Gen., W. A. Calderhead, E. A. Berry, and J. A. Broughten*, for the State.

PER CURIAM. The facts of this case, and the questions of law involved therein, are substantially the same as those in the case of the *State v. Hodges*, ante, 676, (just decided,) and this case will be decided upon the authority of that case.

(46 Kan. 245)

RYAN v. MADDEN et al.

(*Supreme Court of Kansas*. April 11, 1891.)

RECORD ON APPEAL—PLEADINGS—CERTIFICATE OF JUDGE.

1. Where there is attached to a petition in error a case made, in which are found what purport to be copies of the pleadings and proceedings in the cause, but which are not specifically referred to and identified by marks or numbers, and there is attached to the case made a certificate of the judge and the attesting signature and seal of the clerk, the presumption will be that the copies of the pleadings and proceedings therein are what they purport to be, and that all were included in the case made when it was served upon the defendants and settled and signed by the judge.

2. The sufficiency of the evidence to sustain the verdict cannot be examined unless the record properly shows that all the evidence is preserved.

3. A general exception to a charge embracing various propositions of law is insufficient to bring before the court anything except the general scope and effect of the charge. If a party objects to any particular proposition which it contains he should point out the same, and take an exception thereto.

(*Syllabus by the Court*.)

Error from district court, Chase county; FRANK DOSTER, Judge.

*Thomas H. Grisham, S. N. Wood, and A. M. Mackey*, for plaintiff in error. *F. P. Cochran and C. N. Sterry*, for defendant in error.

JOHNSTON, J. This was an action of ejectment to recover possession of a tract of land in Chase county. The verdict and judgment were given in favor of the defendants, and the plaintiff alleges error. The defendants challenge the sufficiency of the record, and claim that there is nothing here for review, for the reason that the pleadings and proceedings now found within the case are not specifically marked and identified. There is attached to the petition in error what is termed a "case made," in which there is, first, a brief recital of the different proceedings in the trial, which are referred to as being "here-to attached," without special designa-

tion. Then follows what purport to be copies of pleadings, evidence, instructions, verdict, motion for a new trial, and judgment; and at the end of all these is a stipulation of both parties as to the time of settling the case, which is followed by the certificate of the judge. In this state of the record there can be no question but that the pleadings and proceedings are what they purport to be, and a fair presumption is that all were included in the case made when it was served upon the defendants and settled and signed by the judge. While the case is here for review, we are unable to examine the points contended for by plaintiff in error. One of these is that the evidence is insufficient to sustain the verdict and judgment; and the other, that the jury were improperly instructed in a certain particular. The sufficiency of the evidence cannot be examined unless it properly appears that all the testimony is included in the record. There is a recital at the beginning of the case made that "the plaintiff, to maintain the issues on his part, offered his evidence and rested; and the defendants, in order to maintain the issues on their part, offered all their evidence and rested; all of which evidence is hereto attached." An inspection of the record, however, shows that after the defendants had rested testimony was offered by each in rebuttal, and still more on surrebuttal. There is no statement at the end of the testimony showing that the case made contains all that was offered. There is in the record a certificate by the official stenographer that what precedes it is a full and correct transcript of the testimony in the case; but it is not within the province of the stenographer to determine whether a case made contains all the evidence or not, or to settle the truthfulness of the statements included therein. *Railroad Co. v. Grimes*, 38 Kan. 241, 16 Pac. Rep. 472. We also find that there is considerable testimony in the record which follows the certificate of the stenographer. A statement is included in the certificate of the judge who settled the case to the effect that the case contains all the evidence that was introduced on the trial, but such a statement was improperly included in the certificate, and is ineffectual to accomplish the purposes intended. *Eddy v. Weaver*, 37 Kan. 540, 15 Pac. Rep. 492; *Hill v. Bank*, 42 Kan. 361, 22 Pac. Rep. 324. The first recital in the case made is to the effect that the case includes the evidence offered by each party before they rested,—necessarily excludes that which was afterwards introduced. This was evidently deemed to be insufficient by the plaintiff in error, as he attempted to supplement it by the certificate of the official stenographer, and later by another certificate of the judge. We conclude that the record fails to properly show that all the evidence is preserved, and hence, under the authorities cited, we cannot say that the verdict is without support.

The other objection is that the court did not fully and correctly state the law in respect to transactions between attorney and client. It may be first remarked that no other or additional instructions were requested by the plaintiff. If the plain-

tiff desired fuller instructions given upon any question in the case, he should have asked the court for such instructions; and, failing in this, he has no cause to complain. *State v. Pfefferle*, 36 Kan. 90, 12 Pac. Rep. 406; *Phinney v. Bronson*, 43 Kan. 451, 23 Pac. Rep. 624. The plaintiff objects to a single proposition in the charge that was given, but his objection is unavailing because no sufficient exception was taken. The only exception taken is found in one of the preliminary recitals in the case made, and is as follows: "After both sides had rested their case the court of his own motion proceeded to instruct the jury; a copy of said instruction is hereto attached; to which the plaintiff at the time excepted." The charge contains several propositions of law, only one of which is challenged; but instead of pointing out to the district court the objectionable proposition, and excepting to the giving of the same, the plaintiff was content to take a general exception to the entire charge. This is insufficient, and brings up for review only the general scope and meaning of the charge. It is ineffectual to present the objection made by the plaintiff. *Wheeler v. Joy*, 15 Kan. 390; *Hentig v. Loan, etc., Co.*, 28 Kan. 617; *State v. Wilgus*, 32 Kan. 126, 4 Pac. Rep. 218. We find nothing in the record which warrants a reversal of the judgment. It may be proper to remark that the question who has the title to the property at present has not received any consideration. The judgment of the district court will be affirmed. All the justices concurring.

(46 Kan. 376)

**FARMERS' & MERCHANTS' BANK OF LAWYER CITY v. BANK OF GLEN ELDER.**

(Supreme Court of Kansas. May 9, 1891.)

**CHATTEL MORTGAGES—VALIDITY AFTER ONE YEAR—RENEWAL.**

1. Every chattel mortgage filed as required by the provisions of the statute relating to mortgages of personal property is void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith after the expiration of one year after the filing thereof, unless within 30 days next preceding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit exhibiting the interest of the mortgagee in the property at the time last aforesaid, claimed by virtue of such mortgage, and, if said mortgage is to secure the payment of money, the amount yet due and unpaid. Such affidavit shall be attached to and filed with the instrument or copy on file to which it relates. Paragraph 3905, Gen. St. 1889.

2. *Howard v. Bank*, 44 Kan. —, 24 Pac. Rep. 983, followed.

3. A subsequent mortgagee, who becomes such before the expiration of the year from the first filing of a prior chattel mortgage, cannot take advantage of an omission to renew the chattel mortgage within the year.

(Syllabus by the Court.)

Error from district court, Mitchell county; CLARK A. SMITH, Judge.

*Kelley & Thorp*, for plaintiff in error.  
*A. H. Ellis*, for defendant in error.

HORTON, C. J. Replevin for a horse and a cow of the value of \$70, brought originally before a justice of the peace by the



Bank of Glen Elder against the Farmers' & Merchants' Bank of Cawker City. An appeal was taken to the district court. In that court the plaintiff below was permitted to amend his bill of particulars twice. To the last amended bill of particulars or petition the defendant below filed a general denial. Upon the trial, at the close of the plaintiff's evidence, the defendant filed a demurrer, for the reason that it failed to prove a cause of action. The court sustained the demurrer, but allowed the plaintiff to reopen the case, and introduce further evidence. When the plaintiff finally rested, the defendant for a second time demurred to the evidence, but the demurrer was overruled. The jury returned a verdict for the plaintiff. Subsequently the court entered a judgment that the plaintiff recover \$75.70 as his interest in the property in controversy, and also its costs. The defendant below excepted, and complains of the judgment rendered.

It is urged that the trial court erred in permitting the plaintiff below to finally amend its bill of particulars so as to charge the Farmers' & Merchants' Bank of Cawker City as a copartnership composed of U. G. Paris and F. M. Owen, instead of a corporation, as originally alleged. "Discretion is largely vested in a trial court to allow amendments to pleadings, and such amendments will not be grounds for error unless it is shown that there was a flagrant abuse of discretion." *Stith v. Fullinwider*, 40 Kan. 73, 19 Pac. Rep. 314; *Carr v. Catlin*, 13 Kan. 393; *Board v. Campbell*, 17 Kan. 537. The district court also has power, in the furtherance of justice, to permit the amendment of a petition by striking out one name and inserting another, when it is shown that the first name was used by mistake. *Bank v. Tappan*, 6 Kan. 456; *City of Atchison v. Twine*, 9 Kan. 350; *Hanlin v. Baxter*, 20 Kan. 134; *Weaver v. Young*, 37 Kan. 70, 14 Pac. Rep. 458. The trial court, in its discretion, had the power, after sustaining the first demurrer to the evidence, to reopen the case, and permit further evidence to be introduced. Section 139, Civil Code; *Cook v. Ottawa University*, 14 Kan. 548; *Railroad Co. v. Dryden*, 17 Kan. 278. It is further urged that the trial court erred in overruling the objection to the introduction of any evidence under the second amended bill of particulars or petition. It is said that there was no allegation of any demand for the property prior to the commencement of the action. The defendant upon the trial attempted to show title in itself, and the right of possession incident thereto, under a chattel mortgage dated the 8th of March, 1886, and which was attempted to be renewed the 31st of March, 1887; therefore no proof of demand and refusal was required. *Raper v. Harrison*, 37 Kan. 243, 15 Pac. Rep. 219; *Bogle v. Gordon*, 39 Kan. 81, 17 Pac. Rep. 857; *Machine Co. v. Mann*, 42 Kan. 372, 22 Pac. Rep. 417. The bill of particulars or petition, however, as amended, stated that the plaintiff below claimed special ownership of the property under a mortgage executed by R. H. Mattern to the plaintiff through J. C. McNer-

ney, the cashier of the plaintiff. The amended pleading also alleged that R. H. Mattern, at the time that he executed the chattel mortgage, was the absolute owner of the property described therein, and had the lawful authority to mortgage and incumber the same; that the debt secured by the mortgage had become due and payable, and the mortgagor was in default; that the plaintiff was entitled to the immediate possession of the property; that the defendant wrongfully, unlawfully, and unjustly detained the same from the plaintiff, and wholly deprived the plaintiff from all use and benefit thereof. These allegations were sufficient, as against the general objection to the introduction of any evidence, to show that the detention of the property by the defendant was wrongful, and a demand and refusal might have been properly offered in evidence, if it were necessary, under *Raper v. Harrison*, supra, to establish a demand and refusal. If the amended pleadings were not sufficiently specific they could have been amended on motion of the defendant below.

It is finally urged that the trial court erroneously instructed the jury as follows: "That in no event can the defendant prevail in this action on account or by virtue of any rights claimed to have accrued to it under and by virtue of the chattel mortgage offered in evidence. Such chattel mortgage of defendant, not having been shown by the evidence to have been renewed, as is required by law, is of no force as to the plaintiff's mortgage, if any mortgage plaintiff had upon the property in controversy." Upon the same ground the trial court withdrew from the consideration of the jury the renewal affidavit of the chattel mortgage of the 8th of March, 1886, but filed March 10, 1886. This renewal is referred to in the record as "Exhibit H," and was filed March 31, 1887, more than a year after the filing of the mortgage of March 10, 1886. One mortgage of the plaintiff below was filed April 17, 1886, and the other mortgage, called "Exhibit A," was filed May 12, 1886. Both of these mortgages were subsequent to the mortgage of defendant below of March 10, 1886. The instruction was erroneous under the authority of *Howard v. Bank*, 44 Kan. —, 24 Pac. Rep. 983. It was said in that case that "a subsequent mortgagee with notice of prior mortgage is not a subsequent mortgagee in good faith under paragraph 3905 of the General Statutes of 1889. The words 'subsequent purchasers' and 'subsequent mortgagees in good faith,' in paragraph 3905, mean only purchasers and mortgagees who purchased or took their mortgages after the expiration of the year from the filing of the mortgage." *Jones, Mortg.* (3d Ed.) § 293, states the rule in the same way: "Purchasers or mortgagees who become such before the expiration of the year from the first filing cannot take advantage of an omission to refile the mortgage. Such purchasers or mortgagees have notice of the existing mortgage, and take title subject to it. The statute was intended to prevent imposition upon them, and not to relieve

them from incumbrances valid against them when they acquired their own title. They stand in the same position the mortgagor was in when they took their title from him." See the authorities there cited. The decisions in Michigan and Ohio are contrary to this rule, but the great weight of authority is as stated in the prior decision of this court. Again, paragraph 3906, Gen. St. 1889, reads: "If such affidavit be made and filed before any purchase of such mortgaged property shall be made, or other mortgage deposited, or lien obtained thereon, in good faith, it shall be as valid to continue in effect such mortgage as if the same had been made and filed within the period above provided." It was also said in the Howard Case, *supra*, that paragraph 3905, Gen. St. 1889, "does not include intermediate purchasers or mortgagees. This construction is based upon reason. He who purchases after the year has expired during which a mortgage remains in force has a right, in the absence of the renewal affidavit, to suppose the mortgage has been paid, even though not released on the record; but he who purchases before the year expires takes with notice of the mortgage and the rights of the mortgagee under the same." Therefore the plaintiff below, having taken a second chattel mortgage soon after the filing of the first mortgage, was not a subsequent mortgagee in good faith, so as to have a prior lien to the first mortgage, although the first mortgage was not properly renewed within the year.

Upon the oral argument the sufficiency of the record was challenged, and the claim was made that there is nothing here for review. We must decide in favor of the sufficiency of the record. In *Ryan v. Madden*, ante, 679, (recently decided,) it was ruled that "where there is attached to a petition in error a case made, in which are found what purports to be copies of the pleadings and proceedings in the cause, but which are not specifically referred to and identified by marks or numbers, and there is attached to the case made a certificate of the judge and the attesting signature and seal of the clerk, the presumption will be that the copies of the pleadings and proceedings therein are what they purport to be, and that all were included in the case made when it was served upon the defendants, settled and signed by the judge." The judgment of the district court will be reversed, and cause remanded for a new trial. All the justices concurring.

(46 Kan. 260)

ATCHISON, T. & S. F. R. CO. v. LONG.

(Supreme Court of Kansas. April 11, 1891.)

NEW TRIAL—VERDICT—SPECIAL FINDINGS.

When a jury returns answers to special questions which are essential to a recovery, but in fact unsupported by any evidence, the trial court should sustain a motion for a new trial.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Butler county; T. O. SHINN, Judge.

George R. Peck, A. A. Hurd, and Robert

Dunlap, for plaintiff in error. Redden & Schumacher, for defendant in error.

GREEN, C. On the morning of March 4, 1888, the plaintiff below purchased a ticket at Topeka of the agent of the defendant below, as he claims, to Emporia, for which he paid \$1.85; the distance being a fraction over 61 miles. He entered one of the cars in defendant's passenger train, which left Topeka some time after midnight. The car in which he took his seat as a passenger contained 15 or 20 persons. After the train left Topeka, the collector passed through the car, and took up plaintiff's ticket, but did not give him a check. As the train approached the station of Reading, the collector came along the aisle, and touched the plaintiff on the knee. The train stopped at Reading, and one passenger got off. After the train had started, the collector came to the plaintiff, and asked where he was going. He answered, "Emporia." The collector then asked him for a ticket, or his fare to Emporia. The plaintiff replied that he had given him his ticket, and paid his fare. The collector told him that his ticket read to Reading, and that he had not received a ticket to Emporia from him. The plaintiff insisted that he had. The collector then informed the plaintiff that he would have to pay his fare to Emporia, or get off. The plaintiff said that he would not do either, unless compelled to. Thereupon the collector left him, and was gone some time, when he returned with the conductor, who asked him if he was going to pay his fare. The plaintiff said: "I have paid once, and I do not propose to pay again." The conductor then informed the plaintiff that he would have to get off. The plaintiff answered him: "I will not get off, unless I am made to get off." The conductor pulled the bell-cord, and stopped the train. He then took hold of the plaintiff by the shoulder, and the plaintiff walked ahead of the conductor, collector, and brakeman to the front door of the car and until he reached the steps to the platform, when he observed that the weather was quite cold, and that it was snowing pretty hard. He then concluded to pay his fare. He stated that he would not get off, and walked back to the door, when the conductor said: "Damn you," or "God damn you, why did you not do that before I stopped the train?" This remark was made on the platform of the car. To this interrogation the plaintiff answered "that was his business." The plaintiff then paid the conductor 60 cents—the fare from Reading to Emporia—under protest, as he claimed, and which he characterized at the time as "highway robbery," and continued his journey to the latter place. The plaintiff brought his action in the district court of Butler county against the defendant for expelling him from its cars in the night, and refusing him permission to ride upon its train without paying additional and illegal charges, and placing him in the ignominious position of being put off the train of the defendant, which was filled with passengers; all to his damage in the sum of \$1,000. For a second cause of action, he demanded judgment for the 60

cents extorted from him to permit him to continue his journey, and the further sum of \$50 damages. A trial was had on the 18th day of October, 1888, and the jury returned a verdict in favor of the plaintiff for the sum of \$500.60. The following are the special findings returned with the general verdict: "(1) How much was the plaintiff damaged by the acts of the defendant or its employees? Answer. \$500.60. (2) Do you allow anything for injury to plaintiff's feelings, and, if so, how much? A. Yes; \$100. (3) Did the conductor or collector or brakeman use any violence towards the plaintiff at the time referred to? A. Yes. (4) How much do you allow plaintiff by reason of the violence used by the conductor, collector, or brakeman? A. \$50. (5) How much do you allow plaintiff for pecuniary loss? A. \$0.60. (6) How much do you allow plaintiff for loss of time? A. Nothing. (7) How much do you allow plaintiff for exemplary damages? A. \$150. (8) How much do you allow plaintiff for expenses and attorney fees in prosecuting this case? A. \$200. (9) How much do you allow plaintiff for inconvenience in going from his seat to the platform of the car and back again? A. Nothing. (10) Was it not the custom of the collector, Smith, to give a check to passengers for the large towns upon taking a ticket, and not to check passengers for the small towns like Reading? A. Yes. (11) Did plaintiff receive a check from the collector for the town of Emporia? A. No. (12) Did not the collector and conductor act in good faith, and with an honest belief that the plaintiff had not paid his fare from Reading to Emporia? A. No. (13) Did the conductor and collector, or either of them, act in wanton manner towards the plaintiff? and, if yes, state how. A. Yes; the collector, by not showing him the ticket, if it was for Reading and not Emporia, and convincing him of that fact; and the conductor, by forcibly putting him out of the car without investigating the case."

It is contended by the plaintiff in error that the third special finding of the jury is wholly unsupported by the evidence, and is untrue. The evidence of the plaintiff himself shows very clearly that no violence was used. Regarding this matter, he testified as follows: "Question. Who took hold of you? Answer. The conductor. Q. What did he say when he took hold of you? A. He said, 'You will have to get off.' Q. You say he spoke in an ordinary tone? A. He did not speak very loud. Q. And you went along to the door? A. Yes, sir. Q. You did not resist? A. No, sir. Q. You did not struggle any? A. No, sir; I did not. Q. Made no struggle? A. No, sir. Q. He did not use any violence in getting you to the door? A. No, sir; no great violence. Q. When you were out on the platform, he did not use any violence? A. No, sir. Q. You stepped down on the steps? A. Yes, sir. Q. They did not push you off, nor attempt to push you off? A. No, sir. \* \* \* Q. Was you angry? A. I was a little angry, but I kept my temper. Q. You kept cool? A. Yes, sir. Q. Did the collector say anything to you other than you have told

the jury? A. No, sir; he didn't. He was very mild, sir, the collector was. Q. Was the brakeman there? A. Yes, sir. Q. What did he say, if anything? A. I don't think he opened his mouth. \* \* \* Q. They did not strike you? A. No, sir. Q. Nor push you? A. No, sir; only just pushed me a little ahead. I can tell you there was no violence used at all by the conductor. I don't claim any violence. I did not give them a chance. I knew, if I did resist, there would be violence. Q. You did not resist, and hence there was not any? A. No, sir; I did not resist."

We think, too, special findings 12 and 13 are unsupported by the evidence in this case. The collector seemed to have acted in good faith, and upon the honest belief that the ticket he received was to Reading. He stated that it read to Reading. The passenger, it seems, had not examined it, and did not know whether it read to Emporia or not. Each party, we think, acted upon his honest belief and conviction,—the passenger, that he had purchased a ticket to Emporia, because he had called for, and paid the price demanded by the agent of the railroad company for, a ticket to the latter place; the collector acted upon his judgment that the ticket he received from the passenger was to Reading, for the reason that it "read to Reading." What, then, was the duty of the collector, under the circumstances? Should he have relied upon the statement of the passenger, or been governed by the ticket? The latter rule has been adopted by the greater weight of authorities, and has been recognized by this court in the case of *Railroad Co. v. Gants*, 38 Kan. 608, 17 Pac. Rep. 54. In *Frederick v. Railroad Co.*, 37 Mich. 346, MARSTON, J., said: "There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon, as the evidence of his right to the seat he claims." The collector acted upon this rule, and from the evidence of the plaintiff himself it does not appear that any violence was used by the trainmen.

The special findings of the jury numbered 3, 12, and 13 being unsupported by any evidence, it is recommended that the judgment be reversed, and the cause remanded to the district court with instructions to grant a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 708)

STEWART v. HOVEY et al.

(Supreme Court of Kansas. Jan. 10, 1891.)

IMPROVEMENT OF COUNTY ROAD—PETITION—ESTOPPEL—COLLECTION OF ASSESSMENT—INJUNCTION.

1. Under chapter 214, Laws 1887, "An act providing for the improvement of county roads," the petition required by section 1 must be signed by a majority of the resident landholders within one-half mile on either side of a regularly laid out road within the terminal points mentioned,

or the board of county commissioners acquire no jurisdiction to order the improvement prayed for.

2. A landholder who signed a petition for the improvement of a county road under chapter 214, Laws 1887, is not estopped from asserting a jurisdictional defect in the assessment proceedings by the act of signing.

(*Syllabus by Simpson, C.*)

ON REHEARING.

1. Although section 253 of the Civil Code gives an enlarged or additional remedy to the taxpayer, yet, if the tax or assessment is illegal, and it is shown that the principles of estoppel apply against the tax-payer, the jurisdiction of the court under the statute is to be exercised upon equitable principles, and the tax-payer, to succeed, must exhibit a case in which, upon the merits, he is entitled to the equitable relief demanded.

2. A land-owner who voluntarily invokes for his benefit the provisions of chapter 214, Sess. Laws 1887, for the purpose of improving a county road contiguous to his land; signed, circulated, and presented a petition under the provisions of that statute to the board of county commissioners, and asked for the improvement subsequently made; lives in the immediate vicinity of the improvement during its entire progress; is present upon the work at different times; knows that the petition is insufficient under the statute, and the improvement greatly enhances the value of his property, much in excess of any tax or assessment attempted to be imposed,—is not entitled to an injunction to restrain the collection of such tax or special assessment, although the improvement is made without any authority whatever. A party cannot invite and encourage a wrong, and then ask a court of equity to protect him by an injunction from the consequences of that wrong.

(*Syllabus by the Court.*)

Commissioners' decision. Error from district court, Wyandotte county; O. L. MILLER, Judge.

*Hutchings & Keplinger*, for plaintiff in error. *Winfield Freeman, A. L. Berger*, and *Scroggs & Gibson*, for defendants in error.

SIMPSON, C. This is an action brought under section 253 of the Code by the plaintiff, Martin Stewart, to enjoin the collection of certain special taxes levied on his land by pretended authority of chapter 214 of the Laws of 1887, to pay the costs of grading and paving a county road known as "Quindaro Boulevard." The facts in this case are identical with those in the case of *Barker v. Hovey*, 44 Kan. —, ante, 585, 591, except that Martin Stewart, the plaintiff in this case, signed the petition for the improvement, while Thomas J. Barker, the plaintiff in the other case, did not sign such petition. This case was tried at the same time with the *Barker Case*, and the trial court made the following special findings of fact and separate conclusions of law in addition to those made in the *Barker Case*, but all the special findings of fact in the *Barker Case*, so far as they affect the interests of this plaintiff in error, are applicable to this case. Findings of fact: "(15) The plaintiff, Martin Stewart, lived in the immediate vicinity of the work during its entire progress, and was present upon the work at different times. He signed the petition presented to the county board, and himself circulated it and filed it with the board. He knew the contents of the

petition, and that a majority of the resident landholders within the half-mile limit had not signed the petition, but acted under the advice of Mr. Cree, the then county attorney, 'that it was not necessary to have resident property holders as signers;' he presented and filed the petition, and asked that the improvements be made, and he knew that his property would be taxed for said improvement. The plaintiff knew at the time they were doing the work that one-inch cypress plank was being used, and complained to the commissioners about using one-inch instead of two-inch plank, and at the time the apportionment was made he filed a protest against the cost being taxed to him. (16) The property of the plaintiff lies contiguous to the improved road, and was greatly enhanced in value by reason of the improvement, much in excess of the tax imposed upon him for the improvement." Conclusions of law: "(1) The petition for the improvement of Quindaro boulevard was void. (2) The plaintiff is estopped from setting up the invalidity of the acts of the county commissioners or the assessment. (3) The temporary injunction is dissolved." It will be seen that the only difference in the two cases is this: Stewart, this plaintiff in error, signed the petition for the improvement of the boulevard, while Barker did not. The trial court was probably solely controlled by this additional fact in reaching the conclusion that Stewart was estopped from asserting the invalidity of the assessment.

1. It may be conceded, for the purposes of this case, that by signing the petition for the improvement of the road Stewart is estopped from pleading any mere irregularities or omissions in the assessment proceedings. Indeed, he could be estopped in various ways from asserting these. We have held in the *Barker Case* that, in order to give the board of county commissioners power to order the improvement, the petition therefor must be signed by a majority of the resident landholders within the termini mentioned. If this is not done, the whole proceeding is void and without authority. Can a resident landholder, by signing a petition that does not contain the signatures of the requisite majority, by that act give the board power to assess his property? Can the individual act of the resident landholder confer a power that the law withholds? The rule that want of jurisdiction over the subject-matter cannot be waived we believe to be of universal application to all kinds of legal proceedings, whether such proceedings are conducted in strictly judicial, or in quasi-judicial tribunals. Hawes, Jur. §§ 9, 10, 11, 12, and decisions cited in foot-notes. In ordinary actions prosecuted under our Code, an objection to the jurisdiction of the court either over the person or subject-matter of the action is not waived by failure to plead it. Section 91, Civil Code. The general principle that a tax-payer is not estopped by silence, failure to bring suit, or knowledge of jurisdictional defects, from contesting the validity of a special assessment on the ground of lack of power or jurisdiction in the tribunal attempting to make such assess-

ment over the subject-matter, has often been decided, but we find only a few reported cases wherein the precise question in this case has been discussed and decided. A very recent case is that of *McLauren v. City of Grand Forks*, (Dak.) 43 N. W. Rep. 710, in which owners of lots situate on a street had signed a petition to have the street graded, and then sought to enjoin the collection of the special assessment made in payment of the grade. The court say: "Nor are the plaintiffs estopped from taking advantage of the invalidity of the tax certificates or the illegality of the proceedings. They did not, by merely petitioning the council to grade the street, waive the rights which they had under the statute; they did not assume to do so in their petition; they asked simply that the street be graded. It is not to be presumed that by such request they intended that such improvement should be made without reference to the provisions of the law under which it could only be made legally. On the contrary, the presumption, if any could be indulged in or was necessary, would be that the defendants should take such proceedings as were necessary under the law to be done for the grading of the street; not that the law be disregarded." This opinion then cites the following cases in support of that view: *In re Sharp*, 15 Amer. Rep. 415; *Tone v. Columbus*, 3 Amer. & Eng. Corp. Cas. 644; *Steckert v. City of Saginaw*, 22 Mich. 104; *Martin v. Zellerbach*, 38 Cal. 300. The case of *Ruhland v. Town of Hazel Green*, 55 Wis. 664, 13 N. W. Rep. 877, holds that "the board of supervisors of a town can acquire and retain jurisdiction of the proceeding to lay out, vacate, or alter a highway only by a strict compliance with the statutory requirements; and no consent or waiver by any person can confer such jurisdiction, or estop such person from questioning the validity of the proceeding, where there has been a failure to comply with the statute in any particular in which the public generally is interested." To like effect are the following Wisconsin cases: *Williams v. Holmes*, 2 Wis. 129; *Austin v. Allen*, 6 Wis. 134; *Damp v. Town of Dane*, 29 Wis. 419; *State v. Castle*, 44 Wis. 670. To hold otherwise would be to say that, in every instance in which a landholder signs a petition to locate a public highway or grade a street, or improve a county road, his assent thereby is expressly given to the exercise of power by the tribunal ordering the improvement that is not conferred by the statute, and that all usurpations of authority, or omissions and refusals of the tribunal to do those necessary and essential things required by the statute, are expressly waived as to him by his signature. We prefer to follow the rule indicated by the cases cited, and hold that Stewart was not estopped by the act of signing the petition for the improvement of the boulevard to now assert and show that the board of county commissioners, by reason of the defective petition, never acquired jurisdiction over the subject-matter. It is recommended that the judgment of the district court of Wyandotte county be reversed, and a new trial granted.

PER CURIAM. It is so ordered; all the justices concurring.

#### ON REHEARING.

HORTON, C. J. In the former opinion handed down in this case, prepared by SIMPSON, C., it was asserted that Martin Stewart, the resident land-owner, who signed the petition for the improvement of the county road complained of, was not estopped by his acts or conduct from successfully prosecuting his action of injunction to restrain the collection of the special taxes levied on his land to pay the cost of grading and paving the county road known as the "Quindaro Boulevard." We have re-examined that opinion and various decisions affecting the question involved, and we are now of the opinion, without passing upon the constitutionality of the statute, that facts are disclosed in the record which amount to an estoppel against Stewart. The special facts found by the trial court show that Stewart lived in the immediate vicinity of the work during its entire progress; that he was present upon the work at different times; that he signed the petition presented to the county board, and circulated and filed it with the board; that he knew the contents of the petition; that he knew a majority of the resident landholders within the half-mile limit had not signed the petition; that he presented the petition to the board, and asked that the improvement be made; that he knew of the fatal defect in the petition; that he knew that his property would be taxed for the improvement; that he knew at the time the work was being done that one-inch cypress plank was being used therefor; that he complained to the commissioners about using one-inch instead of two-inch plank; that at the time the apportionment was made he filed a protest against the cost being taxed to him; that his property lies contiguous to the improved road, and was greatly enhanced in value by reason of the improvement, much in excess of the tax imposed upon him for the improvement. In *Sleeper v. Bullen*, 6 Kan. 300, it was decided that "a contract made by the city council under chapter 70, Laws 1867, for grading a street in Leavenworth city, without a sufficient petition having first been presented to the council, is, and all the proceedings under such contract are, void as against the lot-owners. A lot-owner who has notice of all the proceedings and makes no objection, but, on the contrary, encourages the contractors to do the grading, and tells them that they shall be paid therefor, is not entitled to an order of injunction to restrain the collection of a special tax levied on his lots to pay for said grading." In *Lee v. Tillotson*, 24 Wend. 337, it was held in New York that "a party may waive a constitutional as well as a statute provision made for his own benefit. The contrary argument would deprive a criminal of the power to plead guilty, on the ground that the constitution had secured him a trial by jury." In *Ferguson v. Landram*, 5 Bush. 230, it was said: "Upon what principle of exalted equity shall a man be permitted to re-

ceive a valuable consideration through a statute, procured by his own consent, or subsequently sanctioned by him, or from which he derives an interest and consideration, and then keep the consideration and repudiate the statute as unconstitutional?" In *Daniels v. Tearney*, 102 U. S. 415, it was also said that "it is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that, where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect. \* \* \* The principle of estoppel thus applied has its foundation in a wise and salutary policy. It is a means of repose. It promotes fair dealing. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice where nothing else known to our jurisprudence can, by its operation, secure those ends. Like the statute of limitations, it is a conservator, and without it society could not well go on." "A party is, as a general rule, not estopped to deny the constitutionality of the statute which assumes to confer authority to order improvements and direct assessments by a mere failure to actively oppose improvements which he knows are being made. This is obviously the correct rule, for without a valid statute there can be no jurisdiction, and parties are incapable of conferring jurisdiction of the subject, although they may confer jurisdiction of the person. But when the doctrine is pressed further there is much difficulty, for the rule as now established by the weight of authority is that a party who procures, or actively aids in procuring, the enactment of an unconstitutional statute and accepts benefit under it cannot question its validity. It would require a very clear and strong case to warrant the application of this rule to street assessments, and yet such a case is conceivable. The fact that such a rule exists proves that the courts will carry the principle of estoppel to great lengths in the interests of justice, and proves, also, that the courts which confine the operation of the principle of estoppel in assessment cases to mere irregularities have gone astray." *Elliott, Roads & S.* 422; *State v. Mitchell*, 31 Ohio St. 529; *Burlington v. Gilbert*, 31 Iowa, 356; *Motz v. Detroit*, 18 Mich. 526. That "the principles of estoppel apply where the proceedings are questioned on the ground of the unconstitutionality of the statute under which they are had, as well as where they are sought to be impeached upon other grounds," is not an open question. See *Counterman v. Dublin Tp.*, 38 Ohio St. 515; *Tone v. Columbus*, 39 Ohio St. 281, 308; *State v. Mitchell*, *supra*. Under the decision in *Sleeper v. Bullen*, *supra*, the special taxes levied for grading were held illegal, and it was further held that the city had no legal right to sell the lots of

*Sleeper*, yet *Sleeper* was denied an injunction in that case because he had encouraged the contractors to do the grading. See, also, *Ritchie v. City of South Topeka*, 38 Kan. 368, 16 Pac. Rep. 332. This case is unlike *Barker v. Hovey*, ante, 585, (recently decided,) because in that case *Barker* refused to sign the petition for the improvement when it was presented to him, and is also unlike the case of *Hovey v. Barker*, ante, 591, because in that case it was sought to estop *Barker* by mere silence and inaction. Here *Stewart* instituted the proceedings which led to the improvement and the assessment complained of. He was a willing and active consenting party in the whole matter. Whether, therefore, the tax be legally valid or not, there is no good ground upon his part for claiming the interposition of a court of equity by its extraordinary process of injunction to stay the collection of the tax against his property. *Tone v. Columbus*, 39 Ohio St. 281, and cases there cited; *Cooley, Tax'n*, p. 578.

It is claimed, however, that this is a statutory action, having been brought under section 253 of the Civil Code, and therefore that it is not a suit in equity. Ohio has a statute somewhat similar. It was said in *Steeze v. Oviatt*, 24 Ohio St. 248, that "the act of May 1, 1856, (*Swan & C. St. 1151*) gives to the courts jurisdiction to restrain the collection of taxes illegally assessed; but the jurisdiction thus conferred is an equitable jurisdiction, and is to be exercised upon equitable principles. Proceeding under the statute, the party complaining is not required to show a case of threatened irreparable injury, or the absence of a remedy by ordinary legal proceedings; but he must exhibit a case in which, upon the merits, he is entitled to the equitable relief demanded." This case was followed in *Stephen v. Daniels*, 27 Ohio St. 527. It is there stated: "That this is a statute creating new statutory rights of action, not theretofore existing, is, in the opinion of a majority of the court, quite clear. \* \* \* The taxpayer, stripped of any valuable or practical remedy for the injuries inflicted under color of law and by authority of the state, was almost powerless. To provide a proper remedy was the object of this law. It was a legislative recognition of a fundamental duty enjoined by the constitution of the state, that, while the power to tax was essential to government, the duty of protecting the citizen from illegal exactions under the name of taxes, and under the forms of law, was not to be forgotten or neglected. It being, therefore, remedial in its character, it should receive that construction, if the words will reasonably admit, that will effect the manifest intention of the legislature, and remedy the evil. It gives a remedy by injunction, on the application of a single person taxed, when none existed before. In his application he need not aver and show, as under ordinary rules in equity, that great or irreparable injury is about to be done for which he has no adequate remedy at law, but only that the tax is illegal which is about to be assessed or collected. *Steeze*

v. Oviatt, 24 Ohio St. 253. It thus becomes apparent that a new equitable remedy was given by this statute." In *Tone v. Columbus*, supra, it was said: "Under section 24 of the act the city council had no right to authorize the improvement until such two-thirds of the owners had petitioned the council for the privileges of the act. We have no doubt that this requirement of the law may be waived by the owners, or that they may by their acts, and under circumstances by their inaction, estop themselves from alleging its failure." See, also, *City of Ottawa v. Barney*, 10 Kan. 270. In that case, Mr. Justice BREWER said: "It alleges that the assessment actually made upon one lot was \$184.80, while a legal assessment would not have exceeded \$50, and that a similar proposition existed as to the other lots. It nowhere alleges payment or tender of the amount due under such legal assessment. He who seeks equity must do equity. The plaintiffs below admit they owe something, but deny that they owe all that has been assessed. Before injunction will lie under these circumstances, they must pay or tender what they owe." (*City of Lawrence v. Killam*, 11 Kan. 499. Both of these cases were decided by this court after section 253 of the Civil Code had been adopted. We must therefore conclude that, although section 253 of the Civil Code gives an enlarged or additional remedy to the tax-payer, yet, if the tax or assessment is illegal, and it is shown that the principles of estoppel apply against the tax-payer, the jurisdiction of the court under the statute is to be exercised upon equitable principles, and the tax-payer, to succeed, must exhibit a case, in which, upon the merits, he is entitled to the equitable relief demanded. *Steele v. Oviatt*, supra. We now decide, upon the facts found, that the motion for a rehearing be granted, that the judgment of reversal heretofore entered be set aside, and that the judgment of the district court must be affirmed. All the justices concurring.

(46 Kan. 370)

#### CHICAGO, K. & W. R. CO. v. BLEVINS.

(*Supreme Court of Kansas*. April 11, 1891.)

#### INJURY TO RAILROAD EMPLOYEE—DEFECTIVE TOOLS.

1. As between a railway company and its employees, the railway company is required to exercise reasonable and ordinary diligence in furnishing to its employees reasonably safe tools with which to perform the work committed to them.

2. As between the railway company and its employees, the company is negligent in furnishing to its employees defective and dangerous tools to work with, where it has notice of the defects, or could by the exercise of ordinary diligence have discovered such defects.

3. Evidence examined, and held sufficient to sustain the findings and verdict.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Wilson county; L. STILLWELL, Judge.

*George R. Peck, A. A. Hurd, and Robert Dunlap*, for plaintiff in error. *S. S. Kirkpatrick*, for defendant in error.

STRANG, C. Action for damages. On the last day of November, 1888, the defend-

ant, Blevins, a bridge carpenter, was working for the plaintiff on a bridge on its right of way over Fall river, in Wilson county, Kan. It became necessary for some one to go up on the top of the structure to put certain timbers, called "corbles," in place. The defendant went up to assist in doing this work. It was necessary to drive the timbers to place; and one Murray, having charge of that immediate work for the plaintiff, handed Blevins a wooden maul with which to drive the corbles into position. Blevins received the maul, and, striking the outside corble on its side, drove it to its side position, and then turned to drive it endways to place. He struck the timber once on the end all right, but when he delivered the second blow he lost his balance, and fell some 30 feet, seriously and dangerously injuring his spine and hip, from the effects of which he is still badly crippled, with no prospect of recovery. The defendant claims that he was thrown off his balance by the rebound of the maul he was using, and that the rebound was caused by the unsafe and dangerous condition of the maul furnished him by the company for the work he was at the time doing. He says the maul had a cracked and crooked handle in it, and had become so badly worn and battered that it was uneven on the surface, which, when the blow was struck with it, caused it to glance and rebound in such a way as to jerk him over and off his balance, causing him to fall. This cause was three times tried in the district court. The first trial resulted in a verdict for \$10,000 in favor of the plaintiff below, which was set aside by the trial court as excessive; at the second trial the jury disagreed; and the last trial resulted in a verdict for the plaintiff for \$5,000. The jury also returned a special verdict, consisting of answers to a large number of questions submitted to them by the court on behalf of the defendant. Defendant moved for judgment for costs on the special verdict, notwithstanding the general verdict. Motion overruled. Motion for a new trial heard and overruled.

The first and most important question raised by the plaintiff in error is whether the verdict is sustained by the evidence. That this is one of those cases into which the element of doubt largely enters, so far as the merits of the case are concerned, is evidenced by the fact that it was three times tried in the court below. The court in which the case was tried is presided over by a learned and careful judge; and the history of the trial in the court below shows that he did not hesitate, in the exercise of his authority, to protect the rights of the plaintiff in error when he thought they had been trampled upon by the jury trying the case. These things should count for something in favor of the judgment when this court is reviewing a close case like the present. The jury trying the case returned a general verdict, and also found specially the existence of certain facts, among which are the following: "Was the man Murray also a foreman, under Carter, who had general supervision of the work? Answer. Yes. Did the plaintiff, pursuant to the directions



of Carter and Murray, go upon the pier of defendant's bridge for the purpose of assisting in the adjustment of the corble block? A. Yes. Did Murray, one of the defendant's foremen, while the plaintiff was standing upon the pier, procure and hand to him the maul referred to in the evidence for the purpose of adjusting this timber? A. Yes. Did the plaintiff, in obedience to the directions of Murray, proceed to strike the corble blocks with the maul handed to him by Murray? A. Yes. Did the uneven face of this maul, when it came in contact with the end of the timber, bound to one side, and cause Blevins to lose his balance and fall from the bridge? A. Yes. Was the defendant in great haste for the completion of this bridge? A. Yes. Was the maul which caused the plaintiff to fall a defective and dangerous tool to work with? A. Yes. Did Blevins know of the uneven face of this maul and dangerous condition at the time that he used it? A. No. Did Carter, the foreman of the defendant, have notice of the defective and dangerous condition of this maul, or could the defendant by the exercise of ordinary care have discovered its dangerous condition? A. Yes. Was the work on the bridge where the plaintiff was employed being done about as usual on the day of the plaintiff's alleged injuries? A. No; they were hurried. Did the plaintiff use great care when he was using the maul just before he fell? A. Yes. What acts of negligence, if any, was the defendant guilty of, causing plaintiff to fall? A. Neglecting to furnish suitable maul. What caused the plaintiff to fall? A. By defendant furnishing him with a defective tool. Could the plaintiff by ordinary care have discovered the condition of the maul and handle at the time he used it? A. No. If you answer the above in the negative, state fully what prevented him from so discovering the condition of the maul. A. Lack of time to consider." The liability of the railroad company depends—*First*, upon the negligence of its agents; and, *secondly*, upon the absence of contributory negligence on the part of Blevins. The negligence of the railroad company, if any, consists solely in furnishing Blevins with an unsafe tool with which to perform the work he was directed to do by the agent of the company, and in the performance of which he was engaged when he suffered the injury complained of. Upon this question the findings of the jury are very strong against the company. The twelfth question submitted to the jury by the plaintiff below, and the answer thereto, are as follows: "Did the uneven face of this maul, when it came in contact with the end of the timber, bound to one side, and cause Blevins to lose his balance and fall from the bridge? A. Yes." While question 15 and answer read as follows: "Was the maul which caused the plaintiff to fall a defective and dangerous tool to work with? A. Yes." The answers to other questions show that Murray procured the maul, and gave it to Blevins to use in driving the corbles to place. They also show that Murray knew, or could have known, by the exercise of ordinary care, of the dangerous condition of the maul. It necessarily fol-

lows, then, that if these findings are supported by evidence the railroad company was guilty of negligence.

The plaintiff testified as follows, in relation to his fall: "Question. After you got it adjusted, you struck it upon the end? Answer. Where, I don't recollect. It seems to me there was one or two licks—I wouldn't be positive as to that—that I struck upon the end. I don't know whether it was one or two. I can't call to mind now. It was not over two licks, I am satisfied. Q. What was the result of the strike? A. Well, the maul rebounded when I struck, and jerked me. I was standing with my face in this direction, and the maul rolled with me to the right, and jerked me off. I fell down in there somewhere upon the breakwater." Dick Yaney, a witness for the plaintiff below, testified as follows: "He stepped round, and turned as though he was going to hit it, and upon that he made a second lick. The maul bounced and rolled,—bounced in his hands,—and threw him off his balance head foremost down. Question. Which way did the maul spring when it rolled? Answer. To the right. Q. He struck it, and, the second lick he struck, the maul swung to the right? A. Yes, sir. Q. And threw him off? A. Yes, sir." It would seem as though this and other evidence like it in the record was sufficient to support the finding that the maul, in the condition it was in at the time it was given Blevins for use by him in driving the corbles to place, was an unsafe tool to use, especially in the dangerous position in which he was required to use it, and that the company was guilty of negligence in handing it to Blevins to be used by him in the position occupied by him at the time.

Was the plaintiff below guilty of contributory negligence? Upon this branch of the case the findings of the jury, or a part of them, are as follows: "Did Blevins know of the uneven face of this maul and dangerous condition at the time he used it? Answer. No. Was the defendant not in great haste for the completion of this bridge? A. Yes. Was the work on the bridge being done about as usual on the day of the plaintiff's alleged injuries? A. No; they were hurried. Did the plaintiff use great care when he was using the maul just before he fell? A. Yes. Could the plaintiff by ordinary care have discovered the condition of the maul and handle at the time he used it? A. No. If you answer the above in the negative, state fully what prevented him from so discovering the condition of the maul. A. Lack of time to consider." These findings clearly exonerate Blevins from any contributory negligence. Are they justified under the evidence? There is no evidence showing that Blevins was, in fact, careless or negligent. He himself testified as follows upon this question: "Question. In using that maul and driving the timbers, what degree of care did you use? Answer. I used all the care that I could. I did not want to be crippled." Blevins also testifies that he had never seen the maul before it was handed to him to use at the time he fell, except as it lay on the dump,

15 to 20 feet away; that he did not inspect it when handed to him; noticed the edges of the maul were battered some, but did not see the face of the maul, and did not know it was uneven. He says the work that morning was under more of a rush than usual, because Mr. Carter, the bridge boss, wanted to get to raise the timbers that he was hurried, and did not stop to inspect the face of the maul. The law requires employes to use ordinary care to discover whether or not the tools furnished them by the master are such as can be used with safety, especially when the defects are obvious. But whether an employe has used ordinary care or not in a given case must be determined after an examination of the surrounding circumstances and conditions at the time its exercise is required. What will be held sufficient care under some circumstances will not under others. So, in this case, while there does not seem to have been a great degree of care exercised by Blevins, yet when we consider that the maul was handed him by the representative of the railroad company, which gave him a right to suppose it was safe; that he was in a high and dangerous position, which limited his opportunities for the inspection of the maul; and that the work at the time was being rushed so that he was hurried, and his opportunity for inspection of the maul thus interfered with,—we do not care to say he did not exercise ordinary care under the circumstances.

The plaintiff in error complains of the latter part of the third general instruction given to the jury. We have examined this instruction, and, taken as a whole, we do not think it is erroneous. It is therefore recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 285)

REDDEN v. METZGER *et al.*

(Supreme Court of Kansas. April 11, 1891.)

EJECTMENT—RES ADJUDICATA.

Where, upon the trial of an action of ejectment to recover a quarter section of land, it appeared that in a foreclosure suit in another county the defendant had answered and set up his title to the same land under a tax-deed executed since the date of the mortgage, and in the trial of such foreclosure suit the court found that the defendant had a valid tax-deed, and was the owner and in the actual possession of such land, and that no other party to the suit had any lien thereon, and then rendered a judgment against the mortgagor, and decreed that certain lands be ordered sold to satisfy said mortgage, but did not include the land claimed by the defendant under his tax-deed, *held*, that such special finding of fact in favor of the defendant became a part of and was included in the judgment and decree in the foreclosure suit, and the same became *res adjudicata* as to the parties to the action and all persons claiming under them.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

A. L. Redden and H. H. Harris, for plaintiff in error. Johnson, Martin & Keeler and G. A. Huron, for defendants in error.

v.26p.no.10—44

GREEN, C. This was an action of ejectment, brought by the plaintiff in error against the defendants in error, in the district court of Shawnee county, to recover the S. E.  $\frac{1}{4}$  of section 11, in township 10, of range 16. The defendants set up a claim of title under a certain tax-deed, and also alleged that the question of the defendant's title had been finally adjudicated in a suit commenced in the district court of Leavenworth county, and set up such decree and judgment as being *res adjudicata*. The case was tried by the court without a jury, and judgment rendered in favor of the defendants. It seems that George R. Hines was the owner of the undivided half of this land on the 1st day of July, 1873. In October of the same year he conveyed his interest to W. H. Carson, who deeded to Harrison C. Hines, and he sold the same to the plaintiff in error on the 18th day of August, 1884. The defendants' claim to the land is based upon the possession of Eli W. Metzger on March 1, 1883, under a certain tax-deed, and a foreclosure suit commenced by W. J. Buchan, as trustee, in the district court of Leavenworth county, on the 7th day of March, 1883, against George C. Hines, Harrison C. Hines, Eli W. Metzger, et al., to foreclose a mortgage executed by George R. Hines and wife on the property in controversy, and several other tracts in Leavenworth, Shawnee, and other counties. In this foreclosure case, summons was served upon Harrison C. Hines and George R. Hines in Jefferson county on the 13th day of March, 1883, by the under-sheriff of the county, but in making his return he signed it, "Sheriff of Leavenworth County, Kansas, by W. S. Van Cleave, Under-Sheriff." The summons being from the latter county, the officer had doubtless neglected to erase the printed matter on the summons. On the 24th day of December, 1886, and upon proper notice to the plaintiff, but without the knowledge of the original defendants named, the sheriff's return, by leave of the court, was amended so as to conform to the facts, and was signed by George Davis, sheriff of Jefferson county, by W. S. Van Cleave, under-sheriff. The defendants Hines made default. Metzger, by his answer, alleged that he was the owner of this quarter section of land in controversy by virtue of a tax-deed made subsequent to the mortgage, and that therefore the land was not subject to the mortgage. In the trial of this case in the district court of Leavenworth county, on the 5th day of July, 1884, the following finding of fact, with others, was made: "That the defendant Eli W. Metzger has a valid tax-deed of the south-east quarter of 11, township 10, range 16, in Shawnee county, Kansas, and is the owner and is in the actual possession thereof, and that no other party to this suit has any lien thereon." The contention of the plaintiff in error is that the district court of Leavenworth county rendered no judgment whatever upon this finding, and therefore nothing was settled in that case so far as the rights of the parties to this suit are concerned; that no person is bound by any litigation until there is a final judg-

ment; that until a court renders a judgment upon a verdict of the jury, or its own findings, it is always susceptible of further investigation and of further litigation. It is conceded by the defendants in error that plaintiff in error has shown such a title to the undivided half of this land sued for as would prevail, but for the fact that it has been extinguished by the foreclosure proceedings in the district court of Leavenworth county, and that the tax-deed through which the defendants in error obtained title is voidable, upon the evidence offered by the plaintiff in error, provided he is not estopped by a former adjudication from attacking the validity of this tax-deed. This concession materially simplifies the case, so that the question of a former adjudication becomes the controlling one here.

A final judgment and decree were rendered in the foreclosure proceedings in the district court of Leavenworth county. A personal judgment was rendered against George K. Hines, and in favor of W. J. Buchan, as trustee, and certain lands were ordered sold to satisfy that judgment, but the land in controversy was not included in this decree. The question, then, which this case presents, is this: Did the special finding in favor of Ell Metzger, concerning this land, become a part of, and was it included in, the judgment and decree finally rendered by the district court of Leavenworth county? If it did, the question must be answered in favor of the defendants; if it did not enter into the final determination of the case, nothing was settled by this finding. It is true, as counsel for plaintiff in error contends, that no man should be bound by any litigation until there is a final judgment; but in this case there was a final decree, and our judgment is that the finding was considered in rendering this decree, for the reason that the land claimed by Metzger was not included with the other tracts of land to be sold. This land was described in the mortgage. The plaintiff in the foreclosure suit asked that it be sold, with the other lands, to satisfy the mortgage. The defendant Metzger answered that he was the owner by virtue of a tax-deed. The ownership of this land thus became one of the issuable questions to be settled, and, as the holder of such title, he had the right to make full defense. *Bradley v. Parkhurst*, 20 Kan. 462; *Pattie v. Willson*, 25 Kan. 326. The record shows a trial and finding in favor of Metzger, and this finding was confirmed by the judgment of foreclosure of the mortgage as to the other tracts of land described in the plaintiff's petition, which excepted this land so found to belong to him. This decree, we think, necessarily affirmed the finding that Metzger had a valid tax-deed, that he was the owner and in the actual possession of the land in controversy, and that no other parties to the foreclosure suit had any liens upon the same. The rule of *res adjudicata* applies as well to facts settled and adjudicated as to causes of action. *Whitaker v. Hawley*, 30 Kan. 326, 1 Pac. Rep. 508. The judgment of a court of competent jurisdiction is conclusive on the parties as to

all points directly involved in it, and necessarily determined. *Shirland v. Bank*, (Iowa,) 21 N. W. Rep. 200; *Freem. Judgm.* § 249. "When a fact has been once determined in the course of a judicial proceeding, and a final judgment has been rendered in accordance therewith, it cannot be again litigated between the same parties without virtually impeaching the correctness of the former decision, which, from motives of public policy, the law does not permit to be done. The estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps, or the ground-work upon which it must have been founded. It is allowable to reason back from a judgment to the basis on which it stands, upon the obvious principle that where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion." *Burien v. Shannon*, 99 Mass. 200; *Board v. Railroad Co.*, 24 Wis. 124; *Freem. Judgm.* § 257; *Wells, Res. Adj.* § 226; 1 *Herm. Estop.* § 111. Counsel for plaintiff in error relies upon the case of *Auld v. Smith*, 23 Kan. 65, where this court said: "A thing contained in the findings or verdict, but not included in or confirmed by the judgment, cannot be considered as an adjudication, or used as evidence, unless some other ground can be found for its use than merely that it is contained in such findings or verdict." Our view of this case does not conflict with the principle there decided. We think the judgment rendered in the foreclosure suit in Leavenworth county was in accordance with the special finding in favor of Metzger; and the fact that the record affirmatively shows that the land that he set up a title to in his answer was not included in the decree of foreclosure is evidence that the special finding must have entered into and become a part of such decree. We recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 396)

SOLLENBERGER *et al.* v. STEPHENS.

(*Supreme Court of Kansas.* May 9, 1891.)

ACTION ON NOTE—WANT OF CONSIDERATION—BURDEN OF PROOF.

In an action brought by the payee, as the plaintiff, to recover the amount of a promissory note, which is admitted to have been executed and delivered by the defendant to the plaintiff, the burden of proof to defeat the note, or any part of the same, is upon the defendant to establish that the note was without consideration, or that there was a failure of a part of the consideration thereof.

(*Syllabus by the Court.*)

Error from district court, Rooks county; LOUIS K. PRATT, Judge.

*W. B. Ham*, for plaintiffs in error. *M. C. Reville*, for defendant in error.

HORTON, C. J. This was an action in the court below upon a promissory note executed by James H. and John L. Sollenberger to Robert L. Stephens, on August 19, 1886, for \$700, with 10 per cent. inter-

est, payable January 1, 1887. There was a credit upon the note of \$77. The defendants answered that James H. Sollenberger was of unsound mind, and incapable of managing his own business; that Robert L. Stephens, during a part of 1885 and 1886, acted as his attorney in fact in selling town lots in Woodston, Rooks county, and also in transacting his business; that a settlement was made between the parties on the 19th of August, 1886; that the note in controversy was then executed, but that such settlement was unfair and unjust, because Stephens made a fraudulent statement concerning his receipts and expenditures while transacting the business for James H. Sollenberger. Trial had before the court with a jury. The jury returned a verdict in favor of Stephens, and against James H. and John L. Sollenberger, for \$500. Judgment was entered accordingly, and the defendants excepted, and bring the case here. It appears from the evidence that James H. Sollenberger was a person of weak mind; that no account of his business transaction between Stephens and James H. Sollenberger had been kept by Sollenberger; and that at the time of the settlement, and the execution of the note sued on, James H. Sollenberger, and the parties who assisted him at the settlement, were compelled to rely upon the statements and accounts of Stephens. It is claimed that the court erred in instructing the jury that the burden was upon the defendants to prove that Stephens had failed to render a full account of his trust. At the time the settlement was made between Stephens and James H. Sollenberger, James H. was represented by C. W. Smith as his attorney, and by his brother, John L. Sollenberger, who was then acting as his attorney in fact. Robert L. Stephens was a farmer, but assisted in locating the depot of the Missouri Pacific Railroad upon James H. Sollenberger's land at Woodston, and after such location carried on the business of a real-estate agent. After the settlement between the parties was agreed to, C. W. Smith, as the attorney of James H. Sollenberger, drew up a written settlement, which was signed. The \$700 embraced in the promissory note were allowed Stephens in the settlement for his services as attorney in fact and agent for James H. Sollenberger. He claimed that he had rendered service for nearly 14 months. Upon the pleadings, the burden of proof was upon the defendants below to establish the truth of the allegations of their answer. The settlement and compromise of the 19th of August, 1886, was in writing, signed by R. L. Stephens and James H. Sollenberger. This was witnessed by M. C. Reville, the attorney of R. L. Stephens, and C. W. Smith, the attorney of James H. Sollenberger. The note was executed and delivered to Stephens by James H. Sollenberger and his brother, John L. Sollenberger, in accordance with the terms of the written settlement and compromise. The execution of the note was admitted, and to defeat the same, or any part thereof, it was necessary to prove the allegations of the answer. Therefore the court committed no error in instructing the jury

that the burden of proof in this regard was upon the defendants. There are various other alleged errors complained of, but an examination of the record does not convince us that the trial court committed any error material or prejudicial to the rights of the defendants. No material evidence was rejected. The consideration mentioned in the deeds taken by Stephens was fully explained, and to all appearances the trial was fair. The court below expressly instructed the jury that if Stephens acted fraudulently in the settlement, or misrepresented things to James H. and John L. Sollenberger, or C. W. Smith, the attorney, the notes should be defeated, or the amount thereof reduced, according to the facts in the case. If Stephens had made a settlement alone with James H. Sollenberger, we could readily understand, in view of his weak-minded condition, that such a settlement would be worthless. But at the time the settlement was made James H. Sollenberger was well represented by his brother, John L. Sollenberger, and by C. W. Smith, his attorney. Under all the circumstances of the case, we do not perceive any good reason for granting a new trial. The judgment of the district court will be affirmed. All the justices concurring

(46 Kan. 409)

## PATMOR V. ROMBAUER.

(Supreme Court of Kansas. May 9, 1891.)

## ACTION ON CONTRACT — PLEADING — EVIDENCE — LIMITATION.

1. The petition in this case examined, and held that it states a cause of action, and that the demurrer thereto was properly overruled.
2. The evidence examined, and held sufficient to support the verdict and findings of the jury.
3. Record examined, and held that, under the contract sued on, the action accrued in favor of Rombauer when he sold his stock in the Pittsburg Coal Company, and that the statute of limitations commenced to run at that time, and would run in three years, and had not, therefore, run at the commencement of this action.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Crawford county; GEORGE CHANDLER, Judge.

John T. Voss, Ed Van Gundy, and W. C. Webb, for plaintiff in error. W. C. Perry, for defendant in error.

STRANG, C. In May, 1883, the Pittsburg Coal Company was a corporation doing business in Crawford county, Kan. At that time it was heavily in debt, and very greatly embarrassed, so much so that it was likely to go into the hands of a receiver. The stock of the company consisted of 2,000 shares of \$100 each, and was owned principally by C. Wood Davis, R. G. Rombauer, and James Patmor and wife. The holdings of Davis, Rombauer, and Patmor, including that of his wife, was about equal. These parties were all anxious to sell out, as it had become manifest to them that they could not carry the business of the company along, and to sell out was the only means whereby they could save anything to themselves, and also get rid of a very heavy debt, amounting to nearly \$60,000. Rombauer was the

secretary and treasurer of the company, and the negotiation of a sale seems to have been left principally to him. He finally arranged to sell two-thirds of the stock to Col. E. H. Brown. Upon the basis of the liabilities of the company being \$53,000, Brown was to pay \$24,000 for two-thirds of the stock. If the liabilities exceeded \$53,000, such excess to be deducted from the \$24,000 to be paid by Brown. The liabilities were found to amount to about \$59,000, and the sum paid by Brown was something over \$20,000. Rombauer, plaintiff below, claims that Brown would not purchase the Davis and Patmor stock, unless he (Rombauer) would retain his stock, and remain a member of the company, and in charge of its business. He also claims that he reported the sale, with its condition, to Davis and Patmor, and told them he could not consent to the arrangement to hold his stock and remain in, unless he was protected, because he was afraid he would be frozen out and get nothing for his stock; and that Davis and Patmor then agreed that, if he would go ahead and close the sale on the terms and conditions reported, and let them have the proceeds of the present sale, that whenever he could sell his stock, if it did not bring as much as they were getting for theirs, they would make up to him the deficiency, so that he should receive one-third of what the whole stock sold for. Rombauer says he assented to that, and closed the trade; that Davis and Patmor received something over \$10,000 each for their stock; that he sold his stock as soon as he could, and for the best price he could get for it, \$7,000; that thereupon Davis and Patmor each owed him \$1,035 on said agreement. Patmor did not pay, and this suit was brought to recover that amount and accrued interest. The defendant below demurred to the petition in the case, which was overruled. He then answered by general denial, and also pleaded the statute of limitations. A reply was filed containing a general denial. The case was tried to the court and a jury January 12, 1888. The defendant below demurred to the evidence of the plaintiff, which was overruled. The jury returned a general verdict for the plaintiff below for \$1,173.68, and also made the following special findings: "The defendant asks the court to require the jury to answer the following questions in case their general verdict is in favor of the plaintiff: (1) Did the plaintiff and the defendant enter into an agreement of the kind and character set out in the plaintiff's petition? Answer. Yes. (2) Was said agreement reduced to writing, or did it rest in parol? A. In parol. (3) When and where was said agreement entered into? A. In May, 1883, at Pittsburgh, Kan. (4) Who was present when said agreement was entered into? A. C. W. Davis. (5) Was the Pittsburgh Coal Company in great difficulties financially? A. Yes. (6) Was its stock of little practicable value? A. Yes. (7) What was the value of the Pittsburgh Coal Company's property on May 7, 1883? A. From \$75,000 to \$85,000. (8) What was the total amount of the said Pittsburgh Coal Company's indebtedness

on May 7, 1883? A. Between fifty-five and sixty thousand dollars. (9) In what sum do you find the assets to exceed the liabilities of said coal company on May 7, 1883? A. From \$25,000 to \$35,000. (10) What moved the plaintiff to remain in said coal company after May 7, 1883? What was the cause of his doing so? A. To protect his interest. (11) Was the contract between the plaintiff and defendant (if any was made) entered into prior to or after May 7, 1883? A. Prior. (12) On what day did the plaintiff sell to E. H. Brown the holding of stock of Patmor and Davis? A. On or about May 7, 1883. (13) When was Patmor and Davis to pay any sum of money on said contract? A. No time set. (14) Was there any particular time when they or either of them was to pay said money, or any part thereof? A. Yes; when plaintiff sold his interest. (15) Was it or any part thereof to be paid within one year from the day on which the Patmor and Davis stock was sold to E. H. Brown? (Refused, and excepted to by the defendant.) (16) Was it to be paid at some remote and indefinite time? A. Yes. (17) At and after the time the Davis and Patmor stock was sold to Brown did plaintiff hold the same position in the Pittsburgh Coal Company that he had theretofore held? A. Yes." Motion for new trial was made and overruled. Motion to set aside the special findings of the jury overruled.

The plaintiff in error contends here that the demurrer to the petition in the court below should have been sustained. He says the petition is defective in not stating that the stock was not at any time prior to February 27, 1886, of any greater value than \$7,000. Under the contract alleged, and proved to the satisfaction of the jury, we do not think it was necessary to allege that the stock of Rombauer was not, at any time prior to his sale of the same to Brown, of a greater value than \$7,000. As we understand the contract, and as the jury evidently understood it, Rombauer was to get out as soon as he could, and for the best price he could, exercising his own judgment in so doing. He was not bound to wait for a raise in the value of the stock, nor was he compelled to accept the first offer made him therefor, if he thought he could do better. He was simply bound to act in good faith with Davis and Patmor in selling out, and there is no allegation of any fraud or want of good faith on his part. The evidence shows, however, that in point of fact he sold at the first and only opportunity he had to sell. That opportunity did not occur for 18 months after the sale of the Davis and Patmor stock, and then he sold to Brown, the only person likely to want to buy. It is argued that, at the time Rombauer sold his stock to Brown, the stock was worth more than it was when the Davis and Patmor stock was sold, and that he accepted a less price for his than he got for theirs. It must be remembered, however, that in the mean time, during the interval between the sales of stock, the Pittsburgh Coal Company had been reorganized and became the Pittsburgh & Midway Coal Company, and there

is nothing in the evidence to show how Rombauer was protected, so far as his interest in the old company was concerned, when the reorganization took place. His stock may have been affected adversely by such reorganization, and been worth less than before. His interest may have been so affected that he thought the best thing he could do was to sell for what he could get.

It is said that the petition failed to state that Rombauer had complied with the terms of the contract himself. While the petition does not in so many words contain such an allegation, it yet shows that he had done what was required of him. He was to sell the stock of Davis & Patmor, retain his, and remain in the company for the time, and sell out as soon as he could, and the best he could. The petition alleges these things. We think the demurrer was properly overruled. The demurrer to the evidence was also properly overruled. The plaintiff had sustained his allegation in relation to the agreement by his own and Davis' evidence; had proved the sale of the Davis and Patmor stock, and the amount realized therefor; and thus shown that under the agreement Patmor was indebted to him in the sum claimed. Was the plaintiff below entitled to recover, under the evidence? For the purpose of arguing that he was not, counsel for plaintiff in error say the contract that Patmor is alleged to have made is nothing short of marvelous. We do not think there is anything marvelous or wonderful about the contract. It was not very definite in some of its provisions, and depended somewhat more than contracts usually do upon the honor of the contracting parties, to be carried out in good faith. But the contracting parties were friends, and partners in business, and evidently had a business confidence in each other; and when this is taken into consideration, together with the nature and character of the transaction, and the situation of the parties at the time with respect to their business, the contract appears natural enough. But, if there was anything marvelous about it, it did not entirely grow out of Mr. Patmor's credulity. It is no more marvelous that he should have made such a contract with Rombauer than that Rombauer should have made such a contract with him. According to the evidence, Patmor got over \$10,000 for what he expressed an emphatic willingness to sell for \$4,000, if he could get out of the business. It follows, then, that if Rombauer had got nothing for his stock, and Davis and Patmor still performed the contract Rombauer says they made with him, they would each realize some \$2,000 more than the amount they were willing to sell for; so it was a winning deal for them, in any event. But, then, the question is not whether the contract was a marvelous one or not, but was there a contract of the kind Rombauer avers was made between them? The jury have settled this question for all parties. They return a general verdict for the plaintiff, and support it with a special finding directly in point. The first question asked and answered by the jury reads as follows: "Did

the plaintiff and defendant enter into an agreement of the kind and character set out in the plaintiff's petition?" To which question the jury say, "Yes." The jury also settled another question that is discussed by counsel for plaintiff in error. They say, in answer to the eleventh question, that the agreement entered into between plaintiff and defendant, set out in the petition in the lower court, was made prior to May 7, 1883, and therefore prior to the sale by Rombauer of the stock of Davis and Patmor to Brown; for in answer to the twelfth finding they say the sale to Brown was on the 7th of May, 1883. We think, under the whole evidence, the sale to Brown and the agreement between plaintiff and defendant were practically contemporaneous. We think the court below was right in its instructions touching the question of the statute of limitations. The statute commenced to run from the time when the cause of action accrued in favor of Rombauer, which was upon the sale of his stock to Brown, and would run in three years. It had not run at the commencement of this suit. We have read the instructions through, and, taken as a whole, we think they are fair and good law. It is true there is a good deal of them, but then it is better to have some law to spare than to have too little, if the surplus is innocent of harm, as we think it was in this case. It is recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 270)

ABERNATHY FURNITURE CO. v. ARMSTRONG.

(Supreme Court of Kansas. May 9, 1891.)

ATTACHMENT—PREFERENCE OF CREDITORS.

If a debtor, in good faith, prefers some creditors to others, either by making payments, or transferring his property, or giving chattel mortgages, this is not, of itself, ground for the issuing of an attachment against the debtor. *Tootle v. Coldwell*, 30 Kan. 125, 1 Pac. Rep. 329.

(Syllabus by the Court.)

Error from district court, Osage county; R. B. SPILLMAN, Judge.

W. A. Madaris and Ellis Lewis, for plaintiff in error. L. T. Wilson, for defendant in error.

HORTON, C. J. The error alleged in this case is that the trial court erred in discharging the attachment. The question is one of fact, and the testimony wholly by affidavits. It is apparent that on the 12th day of December, 1887, E. M. Armstrong gave a statement, signed by himself, to the Abernathy Furniture Company, that he had property, goods, and merchandise of the value of \$8,147, and that his debts were only \$142. It is also clearly apparent that this statement was untrue, and at that time he owed his father \$4,000 on account of a farm which he had purchased from him. The statement of the value of his property was also greatly above its true value. This attachment, however, was obtained upon the ground that E. M. Armstrong had sold, assigned,

and disposed of his property, and was about to sell, assign, and dispose of his property, with the fraudulent intent to hinder, cheat, and delay his creditors. It was not obtained upon the ground that he had fraudulently contracted the debt, or fraudulently incurred any liability or obligation. Therefore the written statement given to the furniture company does not figure very much in this case. It is also apparent that, before the attachment was levied, E. M. Armstrong had sold, transferred, and mortgaged all of his property for the purpose of paying *bona fide* debts. This he had the right to do. It was said in *Tootle v. Coldwell*, 30 Kan. 125, 134, 1 Pac. Rep. 329, "that a debtor, even in failing circumstances, may prefer creditors, if the same is done in good faith; and this, not only in the form of actual payment of money to the particular creditors preferred, but also in the form of the sale or appropriation of property, or the giving of chattel mortgages, to such creditors." There is a great conflict in the affidavits, but it is clearly shown by the affidavits upon the part of the defense that the indebtedness of James G. Armstrong, E. M. Jamison, and the other creditors who were secured, was all *bona fide* indebtedness. E. M. Armstrong had the right under the law to prefer the creditors which he did prefer, if the same was done in good faith. The evidence shows this to be the case. All of the creditors were paid, excepting the plaintiffs and others having claims amounting to about \$900. The order and judgment of the district court must be affirmed. All the justices concurring.

(46 Kan. 307)

#### MILLER V. WEEKS.

(Supreme Court of Kansas. May 9, 1891.)

##### EXEMPTION—TOOLS AND STOCK IN TRADE.

Tinners' tools and stock in trade necessary to carry on the trade of a tinner, and used for that purpose, and being the only means of support for the owner and his family, are exempt from seizure and forced sale under the eighth subdivision of section 3 of the exemption laws.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Dickinson county; M. B. NICHOLSON, Judge.

*Garver & Bond*, for plaintiff in error. *J. H. Mahan*, for defendant in error.

SIMPSON, C. In an action brought by the Richards & Conover Hardware Company against Joseph Weeks, an attachment was issued out of the district court of Dickinson county, and Miller, the sheriff, levied the order of attachment upon a certain stock of hardware, together with tinners' tools and materials, as the property of Weeks. This action in replevin was commenced by Weeks against the sheriff to recover possession of the tinners' tools and materials, they being claimed as exempt to him by virtue of the eighth subdivision of section 3 of the exemption law. The cause was tried by a jury, who returned a general verdict for Weeks, fixing the value of the tools and materials at \$500. They also answered special in-

terrogatories as follows: "(1) At the time plaintiff made the assignment to S. G. Cooke, was his principal business that of a hardware and agricultural implement dealer? Answer. It was the principal branch of his business. (2) Did Weeks, prior to the making of his assignment, and up to that time, depend principally upon his hardware and agricultural implement business for the support of himself and family? A. He relied upon all as one business. (3) Was Weeks at the time of said assignment a practical tinner? A. No. (4) Were the tools in question used in the hardware and implement business of plaintiff? A. Yes, in connection with his business. (5) Did the hardware and implement business of plaintiff consist principally in the buying and selling of goods already manufactured, and did the tinware and so forth made in plaintiff's shop constitute only a small percentage of the goods sold in the entire business of plaintiff? A. The tinware was the smaller part of his business. (6) Was the tinning business of plaintiff carried on independently of his hardware business? A. No. Q. Was the sheet iron business of plaintiff carried on independently of his hardware business? A. No. Q. Was the business of making tinware and sheet-iron ware run in connection with the hardware business at the time the assignment was made, or was it at that time a separate business? A. All parts of his business was run in connection. Q. After making the assignment, did the plaintiff have any other means of support except his tin-work and sheet-iron work? A. No." A motion for a new trial was overruled, and the cause brought here for review. The only question discussed or urged by counsel for plaintiff in error is whether the tools and stock in trade are exempt under the facts presented. It is shown by the record that, after Weeks had made an assignment of his hardware stock for the benefit of his creditors, he immediately went to work at the tinning business, and was actually engaged at tin-work when the levy was made. He had no other means of support for himself and family than that derived from his tin-work. While he was not a good, practical tinner, skilled in all branches of such work, yet he had before the assignment worked some at the business, and had personally used the tools, and at the time the levy was made was engaged in putting a tin roof upon a building. The jury find specially that after he made an assignment of his hardware stock his tin-shop was his only means of support. With this state of facts we have been unable to distinguish this case from that of *Bliss v. Vedder*, 34 Kan. 57, 7 Pac. Rep. 599. Indeed, we think the case is a stronger one for the claimant than the one cited, because of the fact that after the assignment his tools and stock in trade were the only means of livelihood for himself and family. In the case in 34 Kan. and 7 Pac. Rep., *Bliss*, the claimant of the exemption, was engaged in editing and publishing a weekly newspaper, was engaged in job printing in partnership with one Crosby, and was engaged in the loan,



land, and insurance business with one Mudgett. The business he was engaged in with Mudgett was entirely disconnected with and dissimilar to his printing business. Bliss was not a practical printer, but to some extent used the printing-press and type through the agency of employees. In this case the sole work of the claimant of the exemption at the time of the levy was in his tin-shop, and there is no conflict in the evidence but that the proceeds of such work performed by himself was his sole means of support. It was agreed by the parties in open court that the value of the property involved in this action is as follows: The value of the tools, \$300, and the value of the stock in trade, \$200. For the reason that at the time of the levy he was actually engaged in the tin-work business, and it was the only means of support he had for himself and family, we hold that the tools and stock in trade were exempt. It is recommended that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 300)

LEROY & C. V. A. L. R. CO. *et al.* v. SMALL.

(Supreme Court of Kansas. May 9, 1891.)

AMENDMENT OF PLEADINGS—RAILROAD RIGHT OF WAY—DAMAGES.

1. The allowing of amendments to pleadings by the trial court is very largely within its discretion, and so much so that it is very seldom that a reviewing court can say that error has been committed in such cases. The reviewing court cannot do so, unless it can say that the trial court has abused its discretion.

2. Where a railroad company authorizes its contractors employed by it to construct its railroad to procure the right of way for it, which they are to do at their own expense, and the contractors, through their agent, in the name of the railroad company, procure a right of way through the plaintiff's premises by contract, and afterwards, by reason of such contract, procure only nominal damages to be assessed by the condemnation commissioners for such right of way, and this assessment of damages is all done without the knowledge or consent of the owner, and the railroad is constructed by the contractors, and afterwards operated by the railroad company, but it fails to fulfill the contract, *held*, that the owner may recover substantial damages from the railroad company, if it elects to retain the right of way.

(Syllabus by the Court.)

Error from district court, Wilson county; L. STILLWELL, Judge.

J. H. Richards and C. S. Reed, for plaintiff in error. S. S. Kirkpatrick, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Wilson county by O. V. Small against the Leroy & Caney Valley Air-Line Railroad Company and the Missouri Pacific Railway Company, in which the plaintiff alleged, among other things, that the defendants had constructed their railroad across his land under a contract; that they had not fulfilled their contract, but had committed a breach thereof; that they had procured condemnation proceedings to be instituted and carried on to consummation without his knowledge, in which he was allowed only

nominal damages; that he had received no compensation for his losses; and asked that the condemnation proceedings be set aside, and for general relief. The case was tried before the court without a jury, and judgment was rendered in favor of the plaintiff, and against the defendants, that they should pay him the sum of \$1,200 within 60 days, or relinquish their right of way; or, if they should do neither, then that the plaintiff should recover of and from the defendants the sum of \$1,200; and the defendants, as plaintiffs in error, bring the case to this court for review. It appears from the pleadings and the evidence, among other things, that the Leroy & Caney Valley Air-Line Railroad Company was organized in 1885 for the purpose of constructing a line of railroad from a certain point in Wilson county to Elgin, in Chautauqua county. The company was composed entirely of persons living along the line of the proposed railroad. Some time afterwards a committee was sent by the company to New York city, which, in pursuance of their authority, succeeded in procuring the Missouri Pacific Railway Company and one Warren H. Loss to enter into a written contract with this new company for the purpose of constructing this new line of railroad. By the terms of the contract, Loss was the contractor to construct the railroad, and was also to procure the right of way for the railroad companies, at his own expense. Afterwards he assigned all his rights and interests under the contract to Simmons & Sidell, a partnership firm composed of James A. Simmons and Cornelius V. Sidell, who afterwards constructed the railroad under the contract. Prior, however, to their construction of the railroad, they employed Isaac Hudson to procure the right of way through Wilson county. Commissioners were also appointed to procure the right of way through that county by virtue of condemnation proceedings. Hudson afterwards, for the contractors and the railroad companies, entered into the contract sued on, which was and is a contract with the plaintiff, Small, and his wife for a right of way through Small's premises. Upon the face of this contract, Small and wife were the parties of the first part, and the Leroy & Caney Valley Air-Line Railroad Company was the party of the second part, and the right of way was procured for such railroad company. The contract, however, was not signed by either of the railroad companies, nor by Hudson, nor by the contractors, but only by Small and wife. The commissioners appointed to procure the right of way were instructed by Hudson, on account of said contract with Small and wife, to assess only nominal damages for the right of way through Small's land, and through other lands where similar contracts had been entered into between Hudson and the owners of the lands; and the commissioners in fact assessed only nominal damages for the right of way through Small's land, to-wit, \$1 for one quarter section of land, \$1 for a half quarter section of land and \$80 for another half quarter section of land, and nothing for the remainder. Small

had no knowledge of this assessment until after it was too late to take an appeal, and therefore never took an appeal. The railroad was afterwards constructed by the contractors, and is now operated by the railroad companies. The Leroy & Caney Valley Air-Line Railroad Company was and is the nominal owner thereof, but the Missouri Pacific Railway Company was and is the real owner thereof.

The first alleged error is the ruling of the court below, refusing to strike from the files the plaintiff's amended petition. This amended petition had been filed upon leave of the court previously given, but it is claimed that it is a departure from the original petition. It is not such a departure, however, from the original petition as to make it objectionable; besides, the allowing of amendments to pleadings by the trial court is very largely within its discretion, and so much so that it is very seldom that a reviewing court can say that error has been committed in such cases. The reviewing court cannot do so unless it can say that the trial court has abused its discretion. We cannot say so in this case.

There are various other complaints made concerning the various rulings of the court below, but they do not require any separate or special consideration. Grouping the most of them together, we think they amount substantially to this: It is claimed that, as the contract with Small and wife for the right of way through his premises was not signed by either of the railroad companies, nor filed for record in the office of the register of deeds, nor made by any direct agent of either of the railroad companies, but only by an agent of the contractors, it cannot affect any of their rights or interests in the least. It was alleged, however, in the plaintiff's petition that the contract was executed between the plaintiff, Small, and the Leroy & Caney Valley Air-Line Railroad Company, and this allegation was not denied by any one under oath, and therefore it must be taken as true. Civil Code, § 108. Besides, the argument proves too much; for if Hudson and the contractors had no authority to procure the right of way for the railroad companies by any direct contract with the owner of the land through which the railroad was constructed, then Hudson and the contractors would have no authority to procure the right of way in any other manner for the railroad companies; and as the whole of the right of way through Small's land, and through all the other lands in Wilson county, was procured only through the intervention of Hudson and the contractors, the railroad companies would not have and have not any right of way through the plaintiff's (Small's) lands, or through any other person's lands. The evidence shows that Hudson and the contractors did everything in procuring the right of way, that procured by virtue of condemnation proceedings as well as that procured by contract. The contractors and Hudson were really the agents of the railroad companies to procure the right of way, and the railroad companies are bound by their

agents' acts. And, if they are so bound,—that is, if they are bound by the acts of the contractors and Hudson in procuring their right of way,—then the judgment of the court below is correct. But, if they are not so bound, still the judgment is correct; for, if they are not bound, then they can take no benefits from the acts of Hudson and the contractors in procuring the right of way for the railroad companies, and in that event they have obtained no right of way through the plaintiff's (Small's) premises, neither by contract nor by condemnation proceedings; and as they have actually constructed their railroad through such premises, and are now operating the same, they are still liable for the resulting damages, and this makes the judgment of the court below correct. We think it is correct upon the view that the railroad companies are bound by the acts of Hudson and the contractors. It cannot be possible that a railroad company, with its contractors and their agent, can, by the methods resorted to in the present case, procure a right of way through a man's land for nothing. Such is not the constitutional or statutory mode of procuring a right of way, and we do not think that it can be upheld. We do not think that there is anything further in this case that requires consideration or comment. The judgment of the court below will be affirmed. All the justices concurring.

(46 Kan. 352)

CUNNINGHAM V. MARTIN.

(Supreme Court of Kansas. May 9, 1891.)

EXCHANGE—RIGHT TO POSSESSION.

Where M., the owner of a tract of land, and C., the owner of a horse, exchange the one for the other, M. executing to C. a warranty deed for the land, and C. executing to M. an absolute bill of sale for the horse, giving to M. in terms the right to the immediate possession of the horse, *held*, that M. at once becomes the owner of the horse, and entitled to the immediate possession thereof; and where M. afterwards obtains the possession of the horse, and C. then commences an action of replevin therefor, *held*, that in such action C. cannot show by parol testimony that the contract was that C. was to retain the possession of the horse until M. should furnish to C. an abstract of title for the land.

(Syllabus by the Court.)

Error from district court, Allen county; L. STILLWELL, Judge.  
*Knight & Foust*, for plaintiff in error.  
*Benton & Scott*, for defendant in error.

VALENTINE, J. This was an action of replevin, brought in the district court of Allen county by G. D. Cunningham against Lyman C. Martin for the recovery of a certain stallion known by the name of "Hercules." A trial was commenced before the court and a jury, and at the close of the plaintiff's evidence the defendant demurred thereto upon the ground that it did not prove any cause of action, and the court sustained the demurrer, and rendered judgment in favor of the defendant and against the plaintiff; and, to reverse this judgment, the plaintiff, as plaintiff in error, brings the case to this court. It appears from the evidence that on June 20, 1887, the

plaintiff, Cunningham, owned the horse in controversy, and the defendant, Martin, owned a certain tract of land consisting of 80 acres in Chautauqua county, subject, however, to a certain \$300 mortgage and the taxes for that year. They entered into a contract for the exchange of the horse and the land, the one for the other, and for this purpose Martin executed a general warranty deed to Cunningham for the land, except as to said mortgage and taxes, and Cunningham executed to Martin a bill of sale for the horse; and each of these instruments was duly delivered. Afterwards Martin sent a written order by a young Mr. Conner, requesting Cunningham to deliver the horse to Conner, the bearer of the order, which Cunningham refused to do; and Martin then went to Cunningham's premises, and took the horse, Cunningham being absent at the time, but some of his family being present. Cunningham then commenced this action of replevin against Martin to recover the horse. The aforesaid bill of sale and written order read as follows: Bill of sale: "Humboldt, Kansas, June 20, 1887. For value received I have this day sold my bay stallion 'Hercules' to L. C. Martin, and received payment in full, and agree to keep said horse free of cost for the said Martin until September first, or deliver him at any time he or any one may call for him with an order from the said Martin. G. D. CUNNINGHAM." Order: "Cherryvale, Kan., July 20, '87. Mr. Cunningham: You will please let bearer have the horse 'Hercules' on this order, and oblige L. C. MARTIN." On the trial Cunningham testified, in substance, that, under the contract entered into between himself and Martin, he (Cunningham) was to retain the possession of the horse until Martin should furnish to him a certain abstract of title, which Martin had never done. Martin claimed otherwise, however, and that he never agreed to let Cunningham retain the possession of the horse, except as stated in the bill of sale; and he relied for his proof as to this upon the facts of the case, as developed by the plaintiff's evidence and the written instruments; and the court below, upon the demurrer to the plaintiff's evidence, decided in favor of Martin, and against Cunningham. It would seem to us that the decision of the court below is correct. The deed for the land was a general warranty deed, except as above stated, and was executed and delivered, thereby transferring immediately and absolutely all Martin's interest in the land to Cunningham; and the bill of sale was also of such a character as to transfer at once and absolutely all of Cunningham's title and right of possession in and to the horse to Martin, and to authorize Martin to take the possession of the horse at any time when he might choose to do so, and this bill of sale was delivered at once to Martin. We think the facts of the case, including the bill of sale, prove conclusively that the title to the horse in question and the right to the possession thereof had been transferred absolutely to Martin, and that Martin was entitled to his possession when this action was commenced, and therefore we think the decision

of the court below was and is correct. The judgment of the court below will be affirmed. All the justices concurring.

(46 Kan. 323)

CITY OF FT. SCOTT v. CANFIELD.

(Supreme Court of Kansas. May 9, 1891.)

DEFECTIVE SIDEWALKS—EVIDENCE.

Certain alleged errors with regard to offers to introduce evidence, and the court's refusal to permit such evidence to be introduced, examined, and held, that no material error was committed.

(Syllabus by the Court.)

Error from district court, Bourbon county; C. O. FRENCH, Judge.

E. F. Ware and Ira D. Bronson, for plaintiff in error. Bawden & Coon, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Bourbon county by David C. Canfield against the city of Ft. Scott to recover damages for personal injuries alleged to have been sustained by him by reason of a defective sidewalk. A trial was had before the court and a jury, which resulted in a verdict and judgment in favor of the plaintiff and against the defendant for \$1,000 damages; and the defendant, as plaintiff in error, brings the case to this court for review. Two questions only are presented by the plaintiff in error for consideration by this court, and they are as follows: (1) During the trial, and while G. R. Leslie, the street commissioner, was testifying as a witness on behalf of the defendant, it was shown that the plaintiff did some work for the city in putting down some cross-walks; that he did his work well, but that he was a "little slow." As to what kind of cross-walks these were the record is silent. The record then shows as follows: "Defendant here offered to prove by this witness that where the material is furnished that hit-and-miss sidewalks are put down at a customary price here in the city, at a cent a foot, and that a good workman would put down over 150 feet, except in some instances where one may be able to put down 200 feet, and earn \$2.00. Plaintiff's objection to this offer was sustained. To which defendant duly excepted and excepts." (2) The record also shows that during the trial, and while Canfield was testifying as a witness on his own behalf, the following occurred: "Plaintiff hereupon offered to show that the street commissioner, in a conversation with Mr. Canfield, stated to him that he had knowledge of the dilapidated condition of the sidewalk, and had been wanting to repair it some time before that, but couldn't get the order to do so. The offer was overruled and denied." This is complained of by the city, defendant below, as "misconduct of plaintiff during the trial." With reference to the first claim of error, it is not shown what "hit-and-miss sidewalks" are, or that the witness ever saw a sidewalk of that kind, or that he knew what the cost of such a sidewalk was or would be, or that he knew how much of such a sidewalk a good workman could put down; and, although he was a street commis-

stoner, still we should not assume without proof that he knew everything. We cannot say that any material error was committed by the court below in its refusal to grant the defendant's offer to introduce this evidence. The second claim of error does not require any comment. The judgment of the court below will be affirmed. All the justices concurring.

(46 Kan. 248)

**KANSAS CITY & T. RY. CO. v. VICKROY.**

(*Supreme Court of Kansas.* May 9, 1891.)

**EMINENT DOMAIN—COMPENSATION—OPINION EVIDENCE.**

1. The case of *Railway Co. v. Splitlog*, 45 Kan. —, 25 Pac. Rep. 202, referred to and followed.

2. In appeals from the awards of commissioners in condemnation proceedings, opinions as to the value of property should be confined to the property in question, unless on cross-examination, for the purpose of testing the knowledge and competency of the witness, the value of adjoining property is inquired of.

(*Syllabus by the Court.*)

Error from district court, Wyandotte county; O. L. MILLER, Judge.

*M. A. Low* and *W. F. Evans*, for plaintiff in error. *Thos. P. Fenlon*, *T. S. Brown*, and *John A. Hale*, for defendant in error.

PER CURIAM. Thomas Vickroy appealed from an award made by commissioners to lay off and condemn a right of way through his premises in Wyandotte county for the Kansas City & Topeka Railway Company. The award made by the commissioners was as follows:

Amount of land taken, 3 90-100 acres.	
Value of land taken.....	\$29,850
Amount of damages to land not taken.....	2,500
House.....	450
Total.....	\$32,800

The jury returned a verdict for Vickroy, and assessed his damages at \$49,525.50. They valued the land actually taken for a right of way at \$10,000 per acre, and upon this they allowed interest amounting to \$2,425.50. They allowed \$7,500 as damages to the land not taken. The trial court rendered judgment upon the verdict of the jury, of which the railway company complains. The tract of land out of which the right of way was appropriated is acre property, amounting to about 15 acres. It is in the town of Armourdale. No part of the tract has ever been platted as a part of or as an addition to the town. The tract is 990 feet long by 666 feet wide. The right of way was condemned out of the northern portion of the tract, leaving a strip of land about 136 feet wide on the north and a strip about 350 feet wide on the south side of the right of way. It was claimed by the plaintiff below that the market value of the strip of land north of the right of way was depreciated by the appropriation, and the jury so found. No claim was made for damages to the land south of the right of way, the plaintiff having testified that that part of the land sustained no damage or injury. The north side of the property is bounded by a large tract of unsettled and unimproved

land, belonging to the Union Pacific Railroad Company. The south side is bounded by acre property, subdivided into blocks, and on the east and west are alleys 15 feet wide. On the east and west of the alleys the land has been platted into lots. The land was called by the owner "a farm on a small scale." On the north strip, above the right of way, is a frame house, the main building of which is 36x20 feet, with an L addition 15x20 feet,—a two-story building. The house cost about \$1,900. Upon the trial the plaintiff below, over the objections and exceptions of the railway company, introduced evidence showing the market value of the lots adjoining and also adjacent to the tract of land upon the east and west sides thereof. These lots were on different streets of Armourdale. Some of the lots were upon business streets, with business houses upon them; others were residence lots, improved. Some of the lots were near the tract of land through which the right of way was taken, and others were several hundred feet away. Some of the lots were on Kansas avenue, the principal business street of Armourdale, and about 300 feet south of the tract of land. The plaintiff also offered evidence of the number of lots that his tract of land could be divided into, the size of the lots, and the value of the lots, if the tract were platted and subdivided. Among other evidence of this kind was the following: Thomas Vickroy: "Question. How many lots of the size of the lots that you have estimated to be worth from \$1,250 to \$1,800 could be made out of your property, per acre? By Mr. Hutchings. We object to that as incompetent, irrelevant, immaterial, and cross-examination of the witness. By the Court. Has not been shown to know anything about it, or that he has had any experience in plating. Q. By Mr. Fenlon. You know the size of these lots, do you? Answer. Yes. Q. Taking the size of these lots, how many would constitute an acre? (Objected to by defendant's counsel on grounds last before stated. Objection overruled by the court. Defendant duly excepted.) A. Ten; it will make ten lots out of an acre."

In *Railway Co. v. Splitlog*, 45 Kan. —, 25 Pac. Rep. 202, it was said, in a case very much like this, that, "while there is a want of harmony in the authorities, we think the weight of authority holds that where expert witnesses are called to testify as to value in damage cases, or where, under the exception to the general rule that none but experts may give opinions, non-expert witnesses, familiar with the subject of the controversy, are permitted to give opinions as to values, such evidence—that is, such opinions as to values—should be confined to the market value of the property in controversy in all cases where witnesses can be obtained who are familiar therewith. \* \* \* Witnesses testifying as to the value of such land may consider any use to which the ground may be presently put in forming their opinions as to its value, and its surroundings may be shown to the jury, its nearness to or distance from a town, village, or city, or other improvements that tend to affect its value; but the jury are to value the land

as a whole in the condition in which it was when taken. They have nothing to do with its subdivision into lots or blocks. They may consider its location, and the effect its location has upon its value as a whole; but the evidence as to how many lots it would make, and what they would sell for after the subdivision, is wholly improper." The principle announced in that decision controls this. As already decided by this court, opinions as to the value of property in such cases as this should be confined to the property in question, unless on cross-examination, for the purpose of testing the knowledge and competency of the witness, the value of adjoining property is inquired of. *Lewis, Em. Dom. § 435; Wyman v. Railroad Co., 13 Metc. (Mass.) 316.*

Among other of the cogent reasons why the foregoing evidence referred to should have been rejected, is that such evidence introduced into the case collateral issues as to the value of lots, improved or unimproved, near by and also distant from the tract of land in controversy. Further, in this case, Thomas Vickroy, R. B. Armstrong, George W. Betts, and others testified that they knew the market value of the tract of land from which the right of way was taken, and also testified as to its market value; hence there was no difficulty in finding witnesses who could testify as to the value of the property. Exceptional evidence was not needed. The trial court attempted to correct by its instructions the error into which it fell, but it did not expressly withdraw from the consideration of the jury the erroneous evidence commented upon; hence the errors were not cured. Counsel for plaintiff below refer to *Railroad Co. v. Chapman, 38 Kan. 307, 16 Pac. Rep. 695; Railroad Co. v. Ehret, 41 Kan. 23, 20 Pac. Rep. 533; Railroad Co. v. Cosper, 42 Kan. 561, 22 Pac. Rep. 634*; and several other similar decisions of this court. These decisions do not conflict with the recent opinion handed down in *Railway Co. v. Splitlog, supra*. In all of these decisions the witnesses testified as to the value of the land in controversy. They did not testify as to the specific value of adjoining farms or adjacent farms, or adjoining lots or adjacent lots, or other farms or lots in the vicinity. In the *Chapman Case*, unlike this case, the property had no market value. But even in that case it was said: "Where property has a market value the rule is strict, and requires only that value to be shown; but where it is shown that the property is without a market value, then the law allows the next best evidence to be given to ascertain its value. The property, then, may be compared with other property; its value may be determined by persons who are shown to be judges, or who have knowledge of the values of real estate in that vicinity; and their opinions may be given of the value of the property [in question,] which in this case was the best evidence it was possible to secure." We approve all that was said in the *Chapman Case*, and all of the other decisions of this court referred to, concerning opinion evidence as to the value of the property taken or injured; but those cases do not

reach the *Splitlog* or this case. We expressly affirm all that was said by Mr. Justice BREWER in *Railway Co. v. Paul, 28 Kan. 816*: "The values of real estate, especially in localities where there are few changes in property, are not so absolutely certain, and cannot be determined with absolute exactness, and in respect to them the testimony of witnesses partakes largely of the nature of opinions, and yet, from the necessities of the case, it has come to be recognized that such testimony is competent. It is the best that, in the nature of things can be obtained; for a description by a witness of the locality of any given tract, its improvements and surroundings, would ordinarily throw little light upon the question of its value. So many things enter into and affect such value that a witness would be unable to describe them all, or even to comprehend them all fully. Hence it has become pretty generally established that a witness who testifies that he is acquainted with the values of real estate in the locality may give his opinion as to the value of any particular tract" in question. If the rule thus stated had been followed in the introduction of the evidence in this case, and the witnesses who resided in the vicinity of the tract of land appropriated or injured, and who were familiarly acquainted with the tract, its location, advantages, character, etc., had merely testified to the value of the land taken, and the value of the land not taken before and since the injury of which complaint is made, there would not have been any ground for reversal upon the matters commented upon. The judgment of the district court will be reversed, and cause remanded for a new trial.

(46 Kan. 275)

## DUIGENAN v. CLAUS.

(Supreme Court of Kansas. May 9, 1891.)

REVIEW ON APPEAL—FAILURE TO MOVE FOR NEW TRIAL—ASSIGNMENT OF ERRORS.

Errors occurring during the trial cannot be considered by the supreme court unless a motion for a new trial, founded upon and including such errors, has been made by the complaining party, and acted upon by the trial court, and its ruling excepted to, and afterwards assigned for error in the supreme court.

(Syllabus by the Court.)

Error from district court, Marshall county; E. HUTCHINSON, Judge.

W. A. Calderhead, for plaintiff in error.  
J. A. Broughton, for defendant in error.

VALENTINE, J. All the matters and things complained of as errors in this case are such as occurred during the trial in the court below. At the close of the trial in that court the jury found in favor of the defendant and against the plaintiff. The plaintiff then moved for a new trial, setting forth in his motion various grounds, including the rulings now complained of. This motion was heard by the court and overruled, and no exception was taken to the ruling. Judgment was then rendered in favor of the defendant and against the plaintiff for costs, and the plaintiff, as plaintiff in error, brings the case to this court for review; but he does

not assign the ruling of the court below upon his motion for a new trial as error, and therefore it is claimed by the defendant in error that there is nothing presented by the petition in error for review in this court. Under the decisions of this court this claim of the defendant in error is correct. *Carson v. Funk*, 27 Kan. 524; *Clark v. Schnur*, 40 Kan. 72, 19 Pac. Rep. 327; *Landauer v. Hoagland*, 41 Kan. 520, 21 Pac. Rep. 645; *Bank v. Jaffray*, 41 Kan. 691, 19 Pac. Rep. 628; *City of McPherson v. Manning*, 43 Kan. 129, 23 Pac. Rep. 109. Errors occurring during the trial cannot be considered by the supreme court unless a motion for a new trial, founded upon and including such errors, has been made by the complaining party, and acted upon by the trial court, and its ruling excepted to, and afterwards assigned for error in the supreme court. In connection with the cases above cited, see, also, *Buettinger v. Hurley*, 34 Kan. 585, 9 Pac. Rep. 197. The judgment of the court below will be affirmed. All the justices concurring.

(46 Kan. 278)

**STUDEBAKER *et al.* v. RYAN.**

(Supreme Court of Kansas. May 9, 1891.)

**INDORSEMENT OF NOTE—NOTICE OF NON-PAYMENT.**

W. and R. entered into a written contract whereby W. was to furnish to R. wagons for R., to sell upon commission, with the privilege of taking promissory notes for the wagons, but upon blanks furnished by W. and indorsed by R., "waiving protest, notice of protest, and non-payment." In their final settlement R. delivered to W. two promissory notes executed by B. to R., not taken upon blanks furnished by W., nor for wagons, nor for any property in which W. had any interest, nor were they indorsed, "waiving protest, notice of protest, and non-payment," but were indorsed merely with the name of R. Afterwards the notes became due, and were not paid by the makers thereof, and no notice of non-payment was given to R. Held, that R., after the failure to give notice of non-payment, was not liable upon the notes.

(Syllabus by the Court.)

Error from district court, Norton county; LOUIS K. PRATT, Judge.

F. M. Jeffrey, for plaintiff in error. E. W. Norlin, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Norton county by John S. Welch under the firm name of Studebaker & Welch, against O. J. Burwell, James E. Burwell, and C. M. Ryan, on two promissory notes, each executed on March 17, 1886, by O. J. Burwell and James E. Burwell, payable to the order of C. M. Ryan,—one for \$119, due in six months, and the other for \$112, due in three months, and each indorsed on the back with the name of C. M. Ryan. Ryan made the defense that he was only an indorser, and that he was relieved from all liability on the notes for the reason that no proper demand for payment or protest was ever made, and no notice of non-payment was ever given to him. The plaintiff admitted the facts of this defense, but claimed, and now claims, that they were not and are not material and not applicable to this case for the reason that a special agreement in writing had previously been entered into between him

and Ryan, whereby he was relieved from making any demand or protest, or from giving any notice of non-payment. The aforesaid written agreement between the plaintiff and Ryan provided, among other things, that the plaintiff should furnish to Ryan a lot of wagons, to be sold by Ryan on commission at Lenora, Kan., and that Ryan might take promissory notes therefor, payable not to exceed six months after the date of sale, with interest at 10 per cent.; and that all the notes should be taken upon blanks furnished by the plaintiff, with the following stipulation by Ryan that he "will indorse them waiving protest, notice of protest, and non-payment, and should any of said notes not be paid at maturity, I agree to pay them within thirty days thereafter." The case was tried before the court without a jury, and on the trial it was shown that the notes in controversy were not taken upon blanks furnished by the plaintiff, nor for wagons, nor for any property in which the plaintiff had any interest; nor were they indorsed, "Waiving protest, notice of protest, and non-payment;" but they were taken for a span of horses belonging to Ryan, and sold by him to the Burwells, and they were indorsed merely with Ryan's name, and they were then transferred by such indorsement and by delivery by Ryan to the plaintiff in final settlement of their affairs. The court below held upon these facts that Ryan was not liable upon the notes, because they were not given in pursuance of the aforesaid contract, and because no proper notice of non-payment was ever given to Ryan, and rendered judgment in favor of Ryan and against the plaintiff for costs; and to reverse this judgment the plaintiff, as plaintiff in error, brings the case to this court for review. No special findings of fact were made by the court below, and upon the evidence we cannot reverse its judgment. The judgment of the court below will therefore be affirmed. All the justices concurring.

(46 Kan. 454)

**HODGDEN *et al.* v. LARKIN.<sup>1</sup>**

(Supreme Court of Kansas. May 9, 1891.)

**REVIEW ON APPEAL—WEIGHT OF EVIDENCE.**

Where the trial court has sanctioned and approved the special findings and verdict of the jury, and rendered judgment thereon, the supreme court will not set the same aside, if there is evidence to support such special findings and verdict.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Ellsworth county; S. O. HINDS, Judge.

Ira E. Lloyd, for plaintiffs in error. Lafferty & McMillan, for defendant in error.

GREEN, C. Arthur Larkin sued the plaintiffs in error upon a promissory note of \$100, due October 1, 1885, and an account for \$9.85. The defendants alleged that they constituted the firm of Perry Hodgden & Co., and that the plaintiff was indebted to them in the sum of \$198.85, upon an account for merchandise purchased of them. The plaintiff insisted that most of the items of this account had been settled

by crediting the same to the account of C. F. Clark, who, it was claimed, was a member of the firm of Perry Hodgden & Co., and that these credits had been ratified by the defendants. The plaintiff obtained a judgment in justice's court, and the case was appealed to the district court of Ellsworth county, where it was again tried, and the jury returned a verdict in favor of the plaintiff for the sum of \$26.44. It is claimed that this verdict is contrary to the evidence and the instructions of the court; that the special findings settled every fact in favor of the defendants, and, according to these special findings and the instructions of the court, they should have had judgment for the amount claimed of \$198. Obviously the jury found for the plaintiff upon the theory that there had been a ratification by the defendants of these credits to Clark, by the plaintiff, upon his account. The court below instructed the jury that, if they should find from the evidence that the plaintiff had entered into a contract with C. F. Clark, in good faith, believing Clark to be a member of the firm of Perry Hodgden & Co., or authorized to act for the firm, and that the goods for which the defendants claimed an offset were purchased of the firm by the plaintiff in accordance with that contract, and the contract was in any way ratified by Perry Hodgden, he would be bound by such ratification. With others, the jury returned the following special questions and answers: "Question. Was the arrangement by which the plaintiff applied the goods purchased from Perry Hodgden & Co. to the payment of the indebtedness of C. F. Clark to him, made and entered into between C. F. Clark and Arthur Larkin? Answer. Yes. Q. Did Perry Hodgden and Phoebe Hodgden know of the arrangement, if any was made, between C. F. Clark and A. Larkin, and did they consent to such arrangement? A. Yes; to a certain extent."

Ratification is the controlling question in this case. The business of the defendants seemed to have been conducted by Perry Hodgden and Clark. Mrs. Hodgden was not consulted. It was agreed that two listers were to be credited on Clark's account with the plaintiff, amounting to \$70. It seemed to have been conceded, upon the trial, that the plaintiff owed the defendants \$32 for a feed-cutter; that when the plaintiff purchased a Studebaker wagon of the defendants, on the 15th day of October, 1886, for \$60, the defendants owed the plaintiff \$44.60 for merchandise, which would leave a balance due them on the wagon of \$15.40. Other items were claimed by the defendants, which, with those mentioned, amounted to over \$100, which the jury evidently allowed them. The plaintiff, in his bill of particulars, asked judgment for \$127.10. We cannot tell, from an examination of the evidence, just how the jury arrived at the verdict in this case, but there seemed to have been some evidence to support the special findings and verdict. Perry Hodgden knew, on the 9th of April, 1886, that C. F. Clark had an account with the plaintiff, and consented that the two listers might be cred-

ited on that account. He also knew that the plaintiff purchased goods through Clark, from the firm of Perry Hodgden & Co., after that. The plaintiff testified that, when he purchased the Studebaker wagon, Hodgden told him to credit his account with the wagon, and assigned as a reason that Clark had been credited with some goods, and he wanted his account credited with this wagon, and that he did so. Perry Hodgden testified that he talked to Clark about his selling the wagon to the plaintiff, and asked him if he took a note, and he stated that he did not; that he just charged it on the book; that Larkin said that Hodgden owed him, and that he would turn it on the account. The next morning after this conversation he went to Larkin's store, and asked about Clark's indebtedness to Larkin, and said that he then objected to Clark having credit for the wagon; and also admitted that he made inquiry as to where a road-cart, which had been previously purchased, had been credited; but there was no evidence to indicate that he made any objection to its being credited to Clark. This road-cart was bought in May, and the Studebaker wagon was charged to Larkin on the 14th of October; so Hodgden must have known of this transaction when he went to Larkin's store to see about the wagon. It is true that the evidence is quite conflicting in this case, but we cannot say that there is no evidence to support the findings and verdict; and we do not feel justified in setting aside the judgment, after it has received the sanction and approval of the trial court. We recommend that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 231)

#### HENTIG v. REDDEN.

(*Supreme Court of Kansas. May 9, 1891.*)

#### RES ADJUDICATA — EJECTMENT — PLEADING — AFTER-ACQUIRED TITLE.

1. A judgment or decree of a court of competent jurisdiction is not only final as to the subject-matter, but also as to every other matter which the parties might have litigated in the case, and which they might have had decided.

2. Where a judgment is rendered in this state for the plaintiff in an action in the nature of ejectment, the title which he recovers is thereby established as against the defendant.

3. Where an action in the nature of ejectment is pending between parties, and the defendant, during the pendency of the action, obtains a new or another title, this title, to be of any benefit, must be asserted in that action before judgment is rendered against the defendant.

(*Syllabus by the Court.*)

Error from district court, Jackson county; ROBERT CROZIER, Judge.

*F. G. Hentig and Lloyd D. Simpson, for plaintiff in error. Redden & Schumacher, for defendant in error.*

HORTON, C. J. This was an action in the court below, brought on the 18th day of July, 1887, by Mrs. A. J. Hentig against J. W. Redden, asking that her title to four certain lots on Clay street in the city of Topeka be quieted, and that the defend-



ant be forever barred from asserting any claim or interest to said lots or any part thereof. The defendant filed an answer, containing a general denial, and also the plea of *res adjudicata*. The place of trial of the action was transferred from the district court of Shawnee county to the district court of Jackson county. Trial was there had before the court without a jury. No special findings were requested or made by the trial court, but the court, after hearing the evidence and the arguments, made a general finding in favor of the defendant and against the plaintiff. Of this judgment, plaintiff complains.

We need refer only to the plea of *res adjudicata*, and the evidence offered in support thereof. Prior to March 1, 1878, J. J. Puterbaugh, of Logansport Ind., was the owner of the lots in controversy. On March 1, 1878, Puterbaugh, then residing in Logansport, Ind., made an assignment of certain real and personal property to Thomas H. Bringhurst, in trust for the benefit of his creditors. The lots in dispute were not mentioned in the deed of assignment. On the 22d of August, 1883, J. J. Puterbaugh and wife sold and conveyed by quitclaim deed to J. W. Redden, for the consideration of \$120, the lots described in the petition. On the 2d day of August, 1878, Thomas H. Bringhurst sold and conveyed by quitclaim deed to Charles S. Puterbaugh, of Cass county, Ind., the lots for the consideration of \$9. On the 25th day of September, 1883, Thomas H. Bringhurst sold and conveyed the same lots to Mrs. A. J. Hentig by quitclaim deed for the consideration of \$1. On the 18th day of May, 1887, Charles S. Puterbaugh sold and conveyed to Mrs. A. J. Hentig the same lots by quitclaim deed for the consideration of \$10. There is also evidence that he executed to Mrs. Hentig a prior deed, intending to convey these lots, in 1883. On October 1, 1883, J. W. Redden brought his action against Mrs. A. J. Hentig in the district court of Shawnee county in the nature of ejectment to recover the possession of the same lots. Mrs. A. J. Hentig, in her answer in that case, alleged that J. J. Puterbaugh, prior to the execution of his deed of August 22, 1883, to J. W. Redden, had sold and assigned all of his real and personal property to James H. Bringhurst, in trust for the benefit of his creditors. She further answered that she was the owner and in the possession of the lots by virtue of a tax-deed. Hentig v. Redden, 35 Kan. 471, 11 Pac. Rep. 398.

Upon the trial Charles S. Puterbaugh testified as follows: "Question. Was it at public or private sale that you bought these lots? Answer. Public sale. Q. Was your father, Jacob J. Puterbaugh, present at that sale? A. If all his real estate was sold at one sale, he was present; if not, I am not sure. Q. What was the price at which the lots were sold to you by the assignee? A. One dollar each, I think. Q. Did you pay for them? A. Yes, sir. \* \* \* Q. When did you make the first deed to Mrs. A. J. Hentig? A. I think it was in 1883 I made the first deed to Mrs. A. J. Hentig. Q. Did she pay you for those lots? A. Yes, sir; she gave me two hundred dollars, I believe. Q. Did

you make her a deed for it? A. Yes, sir. Q. What became of that deed? A. Sent it to her. I have never seen it since, to the best of my knowledge. Q. Did you sell those lots and convey them in that deed by the same description as that used by the assignee in his conveyance to you? A. I believe I did, not knowing there was an error in the deed of assignment. Q. What became of that assignment? A. I sent it to her. \* \* \* Q. Did you get any money for the second deed you made? A. Yes, sir; I did. Q. How much money did you get that time? A. Ten dollars. Q. How did you come to make this second deed? A. Some time in 1886 Hentig wrote me, claiming there was some error in the deed, and asked for a quitclaim later, in 1887. He sent to Judge Nelson a quitclaim deed for me to execute, which I did."

J. W. Redden testified on the trial, among other things, as follows: "Were you present in the court-room in Topeka, Shawnee county, Kansas, when the case of J. W. Redden vs. Hentig was on trial, which involved the title to this same property? Answer. I was. Question. An action of ejectment of this same property? A. Yes, sir. Q. Did you see F. G. Hentig there? A. I did. Q. What statement did he make then in your presence or hearing relative to his wife then having a deed from Bringhurst or Charles Puterbaugh for the property in controversy? A. Mr. Hentig had in his hand a paper that he said, I think, (he addressed the conversation to Mr. Harris,) was a deed from Charles S. Puterbaugh to A. J. Hentig for these lots in controversy; but he did not propose to offer it in evidence at that time. He had thought of doing it, but he would not. Q. What was the first name of the Puterbaugh that he said the deed was from? A. Charles S. Puterbaugh.—I think it was S. Q. When was this conversation? A. My recollection now is that it was in the trial of the case in the spring of 1885. Q. At the time the case was being tried, and before the trial was over with, and before judgment was rendered? A. Yes, sir; during the progress of the case."

H. H. Harris testified: "Were you present at the trial of the case of J. W. Redden vs. A. J. Hentig in Shawnee county when the title of this property was in dispute? Answer. Yes, sir. Question. When was that? A. February, 1885. Q. Did you see F. G. Hentig at that time? A. Yes; he appeared for himself and his wife. Q. He was also a witness? A. Yes, sir. Q. What statement did he make about his wife having a deed from Charles S. Puterbaugh? A. After we had submitted the evidence upon each side, and submitted to the court, (Judge MARTIN, who was trying it *pro tem.*) Mr. Hentig got up and pulled a paper out of his pocket that looked like a deed, and says to me: 'There is a deed to my wife for those lots, but I do not propose to try that title now; I am trying the tax-title.' I wondered why he did not offer it, and immediately turned around to Dr. Redden, and told him it was a surprise to me that he had such a deed. I did not know why he did not offer it. Q. If Mr. Hentig made any state-

ment as to whom that deed was from, state what it was. A. He said it was a deed from Charles S. Puterbaugh to his wife, Mrs. A. J. Hentig, the plaintiff in this suit. Q. For what lots? A. For lots number 408, 410, 412, and 414 Clay street, Topeka, Kansas."

Upon rebuttal F. G. Hentig testified that the statements of J. W. Redden and H. H. Harris were incorrect, and that he never had any deed from Charles S. Puterbaugh to his wife in his possession until long after the trial of Redden v. Hentig, referred to; that the only deed his wife ever had from Charles S. Puterbaugh was dated July 9, 1887.

The judgment of February 18, 1885, rendered in the case of J. W. Redden v. Mrs. A. J. Hentig, recites, among other things, as follows: "The court finds that at the commencement of this suit the plaintiff, J. W. Redden, was the owner in fee-simple of lots 408, 410, 412, and 414 on Clay street in the city of Topeka, Kansas, and is such owner now, and that all the material allegations in the petition are true. (2) The court further finds that Mrs. A. J. Hentig is in possession under two tax-deeds,—one recorded May 9, 1877, and the other September 30, 1882,—both issued on the tax-sale of 1874 for the taxes of 1873. (3) That said tax-sale was void, first, because there was an unlawful combination of bidders at the sale, which prevented competition, and because the sale was made for illegal costs charged against the lots."

Under the general finding of the trial court we must assume that Mrs. A. J. Hentig had in her possession a deed from Charles S. Puterbaugh during the trial of the former case of J. W. Redden v. Mrs. A. J. Hentig in the month of February, 1885. It is possible that Dr. Redden and Mr. Harris were mistaken as to what deed Mr. Hentig exhibited, and, therefore, that the trial court was led into error; but upon the evidence presented we cannot now interfere or disturb the finding. There was sufficient evidence to support it, and the trial court's finding is conclusive. Therefore, under the evidence and the general finding of the trial court, we think its judgment must be affirmed, as the plea of *res adjudicata* was fully sustained. It has been said several times by this court, and also by many other courts, that "a judgment or decree of a court of competent jurisdiction is not only final as to the subject-matter, but also as to every other matter which the parties might have litigated in the case, and which they might have had decided." Under the provisions of the Civil Code an action in the nature of ejectment, like the former case of J. W. Redden v. Mrs. A. J. Hentig, settles the title between the parties in favor of the one recovering the judgment. *Hurd v. Commissioners*, 40 Kan. 92, 19 Pac. Rep. 325; *Barrows v. Kindred*, 4 Wall. 403; *Mahoney v. Middleton*, 41 Cal. 41; *Marvin v. Dennison*, 1 Blatchf. 159; *Edwards v. Roys*, 18 Vt. 473; *Reed v. Douglas*, (Iowa,) 37 N. W. Rep. 181. This court, in *Commissioners v. Welsh*, 40 Kan. 770, 20 Pac. Rep. 483, said "that a general finding of title in the plaintiff—consequently, of no title in the defendant—is a conclusive and bind-

ing decision against the defendant on the question of title, from whatever source it may be derived, and forever estops him from asserting a claim of title which existed at the time of the decree." If Mrs. Hentig had in her possession the deed from Charles S. Puterbaugh for the lots during the pendency of the former action of Redden against herself, (as we are bound to assume she did have from the finding of the trial court, (she could have offered that deed in evidence for what it was worth to sustain her title and her right of possession. If necessary, she could have filed a supplemental answer. The law does not favor a multiplicity of suits, and, where all matters in controversy between parties as to the title or possession of real estate might be finally ended in one action, the law requires that this should be done. Parties cannot try title to real estate by piecemeal in separate and independent actions upon separate deeds or chains of title, when they have in their possession during the trial separate and different deeds. If the deed from Charles S. Puterbaugh to Mrs. Hentig, executed in 1883, did not, on account of a mistake of the parties, contain a proper description of the lots, yet, if Charles S. Puterbaugh had any title or interest therein, that title or interest was transferred to Mrs. Hentig in equity, if not in law, and therefore she ought to have asserted in the former action the deed which she first obtained from Puterbaugh. If Mrs. Hentig had obtained a new and distinct title to the lots after the final judgment in the former action, then that judgment would not have been *res adjudicata* against her. But that is not this case. Under the finding of the trial court she obtained her new and distinct title to the lots pending the former action. It was not used in that action. It was too late to use this title after the final judgment in the former action. The judgment of the district court will be affirmed. All the justices concurring.

(46 Kan. 324)

GALE SULKY HARROW MANUF'G CO. v. MOORE.

(Supreme Court of Kansas. May 9, 1891.)

RESCISSIION OF SALE—BREACH OF WARRANTY—DAMAGES.

1. To rescind a contract for the purchase of a chattel the property purchased should be returned or offered to be returned within a reasonable time, unless it is of no value to either party; and it is held that the testimony in the present case is insufficient to sustain a finding of rescission.

2. Where a seeder is purchased on a warranty and damage is claimed by reason of a breach of the conditions of the warranty, in that it fails to cover the seed that is sown, which results in a loss not only of the seed, but also of the use of the land on which it is sown, the purchaser will be entitled to recover for the loss that occurs while he makes a reasonable test of the fitness of the seeder to perform the work for which he purchased it; but after he ascertains that it will not do the work, and is wasting the seed, he should desist from its further use, and cannot enhance his damages by sowing crop after crop with the seeder, when he knows that the seed sown is wasted, and the use of the land on which it is sown will be lost.

8. The testimony examined, and found to be insufficient to sustain the findings of the jury.

(Syllabus by the Court.)

Error from district court, Harper county; J. T. HERRICK, Judge.

Shepard, Grove & Shepard, for plaintiff in error. Sam S. Sisson, for defendant in error.

JOHNSTON, J. This action was brought upon a promissory note given by the defendant to the plaintiff for the purchase price of a Gale sulky harrow and seeder. The note was executed June 8, 1885, for \$65, and was payable September 1, 1886. The execution of the note was admitted, but the defendant claimed that the implement was sold with a warranty that it was well adapted to the work of seeding ground; that the material and workmanship of the same was first-class in every particular; and that it would do the work in a satisfactory and farmer-like manner. He alleged that the representations were untrue; that the implement was inferior in quality, unfit for the purposes for which it was purchased, and wholly worthless. He alleges that he gave plaintiff due notice of the failure of the machine, and that it is now on his farm subject solely and exclusively to the order of the plaintiff. There is a further allegation that by reason of the breach of the warranty the defendant suffered damages to the extent of \$405. The trial of the case resulted in a verdict in favor of the defendant, and the plaintiff complains here that the evidence is insufficient to sustain the verdict or the special findings that were made; that the findings are indefinite and inconsistent, and that the instructions were erroneous. The record shows that Moore purchased the implement in June, 1885; that he seeded 40 acres in wheat with it in the fall of 1885, 16 acres of oats in the spring of 1886, and about 65 acres of wheat in the fall of 1886. Plaintiff claims that the evidence of defendant was wholly insufficient to sustain the claim of rescission, and, therefore, that its demurrer to the evidence should have been sustained. The jury found that Moore rescinded his contract, but not until after the note became due, and the payment of the same was demanded. If the defendant had relied solely on the single defense of rescission we would be inclined to agree with the contention of plaintiff that the defense was insufficient, and that the findings warranted a judgment in its favor. If Moore desired to rescind it was his duty to place plaintiff *in statu quo* as nearly as possible, and therefore he should have returned or offered to return the implement, unless it was wholly worthless to both parties. From the testimony it cannot be said that it was valueless; and neither can it be said that there was a rescission. "In order, however, that the purchaser be entitled to rescind the contract, he must return the property, or offer to return it, within a reasonable time. He cannot retain and use the property, and at the same time say he repudiates and rescinds the contract of the purchase." *Cookingham v. Dusa*, 41 Kan. 229, 21 Pac. Rep. 95. See, also, *Aultman v. Mickey*, 41 Kan. 348,

21 Pac. Rep. 254; *Weybrick v. Harris*, 31 Kan. 92, 1 Pac. Rep. 271. The defendant used the implement for seeding through three seasons, without giving notice to plaintiff that it was defective or insufficient, and without returning or offering to return it. Indeed, he continued to use it up to and after the maturity of the note; and the jury find that the offer to return was not made until payment was demanded. He first seeded 40 acres in wheat in 1885, which was all the wheat sown on his farm for that year, then in the spring of 1886 he used the same implement for sowing his oats, and used no other; and afterwards, in the fall of 1886, he used it for seeding 65 acres of wheat, although he says it had been shown to be defective and worthless. He claimed that it did not properly cover the seed, but left the greater part of it exposed upon the surface of the ground. This defect, if it existed, was a patent one, which the defendant, who used the implement, must have seen and known from the beginning. Within the authorities cited, it must be held that the continued use of the implement after learning of the alleged defects should be regarded as a waiver of defendant's right to rescind, and that the offer to return was not made within a reasonable time. If this was the sole defense, it might be said that judgment should go for the plaintiff; but as damages are claimed for a breach of the conditions of the warranty, we must look further. It may be said, however, that the testimony is insufficient to sustain a finding of rescission. To sustain his claim of damages testimony was offered as to the quantity and value of the seed used, each seeding for three seasons; that most of the same was wasted by the defective seeder; that but little of the seed was covered or grew, and that he lost the use of the land on which the seed was sown. It was further shown that the defendant operated the implement the greater part of the time, and he testified that he noticed its defective operation, and that it covered scarcely any of the seed, but left it exposed on top of the ground. Notwithstanding this fact the jury specially find that the defect in the seeder "was not easily seen." This finding is in conflict with the testimony of the defendant. According to his statements the defect was an obvious one, and he describes the appearance of the ground after the seeder passed over it, leaving the greater part of the seed on the surface. He testified that three-fourths of the wheat was uncovered, and he thought that 99-100 of the oats were left on the top of the ground. This would be so manifest a defect that it could not be overlooked by any one; and besides, he says that the defect in the seeder became worse, and its operation less satisfactory, from the beginning. Much of the testimony that was offered in regard to damages suffered by him throughout the three seasons was given over objection, and should have been excluded. He could not enhance his damages by sowing crop after crop with the seeder, when he knew that the seed sown and the land on which it was sown would be wasted. If the defects are such as are claimed by the defendant, they were so apparent

parent that he must have become aware of them within a day or two after beginning its use. If it was defective he would be entitled to recover for the loss that occurred while he made a reasonable test of the fitness of the implement to perform the work for which he purchased it; but after he ascertained that it would not do the work, and was wasting the seed, he should have ceased its use, and cannot recover for the loss of seed, labor, or land which was used or employed after that time. There is a singular inconsistency between the claims of defects made by defendant and his conduct in continuing to use the seeder season after season, not discarding it until a payment of the purchase price was demanded. When he saw three-fourths of the seed wheat uncovered and wasted in 1885, it is strange that he continued the use of the seeder until 40 acres were sown; and after he saw that only a little of the seed thus sown germinated, and that the crop was a failure, it is strange that he should sow his oats crop with it in the spring of 1886, and stranger still that, after seeing that 90-100 of the oats were left on top of the ground, and that both the oats crop and the preceding wheat crop were failures from the defects in the seeder, he should use it again in the fall of 1886 for seeding about 65 acres in wheat, when no change or repair had been made of the implement. The testimony of losses occurring from seeding after the defendant had a reasonable time to ascertain the unfitness of the implement, and learned that it was worthless, should have been rejected. Although errors are assigned on the instructions given by the court, we think the plaintiff in error has no cause to complain. The charge of the court fairly presented the case to the jury, but for the errors pointed out there should be a reversal of the judgment, and a new trial. That will be the judgment of this court. All the justices concurring.

(46 Kan. 405)

## GREINER v. FULTON.

(Supreme Court of Kansas. May 9, 1891.)

## TOWN-SITE LOTS—RECOVERY OF POSSESSION.

A party who has actually occupied and improved a lot on a town-site, entered under sections 2387-2389, Rev. St. U. S., need not necessarily be an actual resident of such town-site, to entitle him to recover possession of such lot. If he is a *bona fide* occupant of a portion of the town-site, he has a right to have his possession protected.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Seward county; A. J. AB-BOTT, Judge.

P. P. Hillerman and Painter & Ross, for plaintiff in error. S. N. Wood, for defendant in error.

GREEN, C. This action was brought by the plaintiff in error, in the district court of Seward county, to recover the possession of lot 1, in block 44, in the city of Springfield. The plaintiff in error claimed to be the equitable owner of the premises, which were a part of the Springfield town-site, which was located and laid out, on the public lands of the United States,

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some time before the 9th day of November, 1885. The lot in question had been previously occupied by John Kauble, who had made some improvements thereon. On the day named Kauble sold the improvements, and his right to the possession of the premises, to the plaintiff, who entered into possession of the same, and erected a dug-out, which was habitable, and continued to hold possession, through a tenant, until ousted by the defendant below, about the 6th day of April, 1886. It seems that there were no other improvements upon this lot at the time the plaintiff purchased the same, except those of Kauble; neither was there any one claiming the premises adversely to him. In June, 1886, the probate judge made application to the United States land-office for a patent to the town-site, in trust for the occupants, according to their respective interest, and the final entry was made and recorded in the office of the register of deeds of Seward county in 1887. The court below found "that the plaintiff never was and never became, prior to the application and final entry of the town-site for a United States patent, an actual resident on the town-site of Springfield, Seward county, Kan., or any part thereof; and that the plaintiff did not contribute to the making of final proof on the town-site;" and sustained the demurrer of the defendant to the evidence, and rendered judgment against the plaintiff for costs. The plaintiff in error brings the case here. The contest, in this case, arises out of rival claims to a lot in a town-site, upon government land, and the trial court seemed to have sustained the demurrer to the evidence, upon the ground that occupancy and residence were both prerequisite conditions to obtain title under the provisions of sections 2387, 2388, and 2389 of the Revised Statutes of the United States, and chapter 109 of the Compiled Laws of 1885. The language of section 2387 of the Revised Statutes is: "Whenever any portion of the public lands have been or may be settled upon and occupied as a town-site, not subject to entry under the agricultural pre-emption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge for the county court for the county in which such town is situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests." The supreme court of Minnesota has construed this section of the Revised Statutes: "The language of the pre-emption act of 1841 is essentially different from that of the municipal pre-emption act of 1844. The former is limited as to the age of the person entitled to its benefits; as to his nativity; requires the party to make settlement 'in person,' and to 'inhabit and improve the same,' and 'erect a dwelling thereon;' prohibits him from leaving his own land to make settlement on the government land; and also from owning 320 acres at the time of making his pre-emption. On all of these points the act of 1844 is silent, and where the pre-

emption right has been so carefully guarded in the one case, and in another and subsequent act all these restrictions are omitted, it would certainly be a strange construction to hold that they must be supplied by implication. It is true, both acts speak of a settlement; but the act of 1844 defines what settlement is intended, viz., 'Settled upon and occupied as a town-site;' while the previous act, both in terms and in the construction which the department has placed upon it, limits the settlement to agricultural purposes. Nor, going outside the letter of the statute, do we find any authority, in the reason of the case, for placing such construction upon the act as was given by the court below. The object and idea of settling and building a town is not for the purpose of agriculture, but for that of trade. And, being used for purposes of trade, it cannot (at least only to a limited extent) be used for cultivation of the soil. And this idea was evidently entertained by congress in framing the law of 1844, in the use of the language, "and therefore not subject to entry under the existing pre-emption laws." The intent was to provide for cases to which no law then in existence applied. As the object of the settlement and occupancy of a town-site is totally different from that of a settlement under the act of 1841, no legitimate inference can be drawn that the particular manner or requisites of settlement and occupancy in each case must be the same. And the requisites of the act of 1844, as to settlement and occupancy, are complied with, when these are such as to attain the object in view, namely, the use of the land as a town-site, for purposes of trade, commerce, or manufactures. It is obvious that such a settlement need not necessarily be in person, nor require any cultivation of the soil." *Leech v. Ranch*, 3 Minn. 448, (Gil. 332.) In a very recent case, involving the question of a town-site trust, and the duty of the probate judge, under the same act of congress, this court has said: "The occupants of the town-site, whoever they may have been, were the equitable owners of the land settled upon and occupied, and they were entitled to a conveyance from the probate judge. Their rights were fixed by the act of congress, and the legislature was powerless to prescribe a rule which would give the land and lots to others than the occupants thereof. The provisions of the legislative act mainly conform to the act of congress, but, so far as they may conflict with that act, they must be held to be void. If the town company was an occupant of any portion of the town-site it was entitled to a conveyance of its respective interest." *Investment Co. v. Munson*, 44 Kan. —, 24 Pac. Rep. 977. This decision clearly recognizes the right of an occupant to a title. It could hardly be claimed that a town company could become a resident, yet it said it would be entitled to a conveyance. See, also, *Winfield Town Co. v. Maris*, 11 Kan. 128; *Independence Town Co. v. De Long*, Id. 153; *Sherry v. Sampson*, Id. 611; *Carson v. Smith*, 12 Minn. 546, (Gil. 458;); *Cook v. Rice*, 2 Colo. 131; *Clayton v. Spencer*, Id. 378; *Adams v. Binkley*, 4 Colo. 247; May-

or of *Aspen v. Aspen Town & Land Co.*, 10 Colo. 191, 15 Pac. Rep. 794, and 16 Pac. Rep. 160. There was some evidence, upon the part of the plaintiff, to indicate that he had, in good faith, occupied the premises in question, and that the defendant had ousted him of that possession. The court should not have sustained the demurrer to the evidence. We recommend a reversal of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 400)

BLISS *et al.* v. COUCH, Sheriff.

(Supreme Court of Kansas. May 9, 1891.)

FRAUDULENT CONVEYANCE — CHATTEL MORTGAGE TO SECURE DEBT.

1. If a bona fide creditor, by his vigilance, obtains the first lien and prior right to all the property of his debtor, owned at the time a chattel mortgage is executed to secure him, it is the exercise of an undoubted right which he has, and the law will protect him in the advantage thereby secured. *Randall v. Shaw*, 28 Kan. 419; *Tootle v. Coldwell*, 30 Kan. 125-134, 1 Pac. Rep. 329.

2. The evidence in this case examined, and held not to establish that the chattel mortgage in dispute is fraudulent or void.

(Syllabus by the Court.)

Error from district court, Harper county; J. T. HERRICK, Judge.

*Samuel Dalton*, for plaintiffs in error. *Shepard, Grove & Shepard*, for defendant in error.

HORTON, C. J. This was an action in the court below brought by C. A. Bliss, E. S. Bliss, and B. F. Wood, partners doing business under the firm name of Bliss & Wood, against I. P. Couch, as sheriff of Harper county, in replevin, to recover the possession of certain merchandise, goods, and chattels, of the value of \$3,000. Trial by the court without a jury, and finding in favor of I. P. Couch, as sheriff, and judgment for the amount of an execution in his possession, as such sheriff, of \$396.20. The facts in this case are substantially as follows: On the 15th day of March, 1886, U. E. Millsapugh, Robert Highman, and J. F. Millsapugh, comprising the firm of Millsapugh, Highman & Co., made, executed, and delivered to C. A. Bliss, E. S. Bliss, and B. F. Wood, comprising the firm of Bliss & Wood, a chattel mortgage on all the goods and merchandise owned by them in Attica. The mortgage was given to secure the payment of \$3,518.59. The indebtedness was evidenced by four promissory notes,—one for \$1,000, dated January 1, 1886, due in three months from its date; one note for \$800, dated January 1, 1886, due in four months from its date; one note for \$1,000, dated January 1, 1886, due in six months from its date; and one note for \$645, dated February 13, 1886, due in ten days from its date,—all bearing interest at the rate of 12 per cent. per annum, from their respective dates, and all signed by the firm of Millsapugh, Highman & Co., and payable to the firm of Bliss & Wood. The chattel mortgage provided that Bliss & Wood might appoint the firm of Millsapugh, Highman & Co. agents to make sale of the goods and merchandise in the

ordinary course of trade, and to keep an accurate account of such sales, and to forward such accounts and proceeds of all sales, less the expenses of carrying on the business, to the firm of Bliss & Wood, at Winfield, in this state, on the first of each and every month after the date of the chattel mortgage until the indebtedness was fully paid. This mortgage was filed for record on the 16th day of March, 1886. On the same day Bliss & Wood took possession of the property, under and by virtue of the mortgage, and appointed Millsbaugh, Highman & Co. their agents to sell and dispose of the property in the usual course of trade, and to account to the firm of Bliss & Wood for the money realized on account of the sales of the property, less what was actually necessary to pay running expenses, and less what was necessary to be used in purchasing such staple articles as were essential and necessary to have, to keep the stock up, so as to meet the demands of the trade. The note calling for the sum of \$645, and interest on same, was paid, and credits, amounting to the sum of \$267, were made upon the note calling for the sum of \$900, with money realized from the sale of the goods described in the chattel mortgage. Bliss & Wood held the possession of the mortgaged property from the 16th day of March, 1886, to the 3d day of December, 1886, at which time I. P. Couch took possession of the property, under and by virtue of an execution issued out of the district court of Harper county, at the instance of Smith & Co., creditors of Millsbaugh, Highman & Co. The execution was dated on the 12th day of November, 1886. It is contended that there is no evidence to sustain the general finding of the court in favor of I. P. Couch, the sheriff. We have carefully examined the record, and do not find that there is any evidence tending to show that the chattel mortgage executed by Millsbaugh, Highman & Co. to Bliss & Wood was fraudulent or void. It appears from all the evidence that the mortgage was given to secure the payment of a *bona fide* indebtedness for flour. In *Frankhouser v. Ellett*, 22 Kan. 147, a majority of the court decided "that the statute authorizes a stipulation in a chattel mortgage for a retention of the possession by the mortgagor, and that a possession retained in accordance with the terms of such mortgage is not, when duly filed, *per se* fraudulent, or even *prima facie* evidence of fraud, as against creditors and subsequent purchasers." A majority of the court further decided in that case "that the mortgagor, if he may keep the possession, may as well make the sales as a stranger. He acts in that respect as a *quasi* agent, at least, of the mortgagee, and as such agent and salesman is entitled to compensation for his services." *Swiggett v. Dodson*, 38 Kan. 702, 17 Pac. Rep. 594; *Rankine v. Greer*, 38 Kan. 343, 16 Pac. Rep. 680. We know that "fraud is rarely susceptible of positive proof, for the obvious reason that it does not cry aloud in the streets, nor proclaim its iniquitous purposes from the housetops. Its vermiculations are chiefly traceable by covered tracks and studious con-

cealments." Notwithstanding this general doctrine, fraud is never presumed, but must be established by some evidence. If a creditor of a mortgagor assails the mortgage or transfer for fraud, the burden of proof rests upon him. *Baughman v. Penn*, 33 Kan. 504, 6 Pac. Rep. 890. In *Long v. West*, 31 Kan. 293, 1 Pac. Rep. 545, it was decided that, "in the absence of evidence to the contrary, honesty and fair dealing in all transactions are always presumed; and if any person claims that there was fraud in any transaction it devolves upon such person to prove the fraud, and it does not devolve upon the party charged with committing the fraud to prove that the transaction was honest and *bona fide*." Although Millsbaugh, Highman & Co. were insolvent at the time of the execution of the chattel mortgage to Bliss & Wood, they had the right to prefer Bliss & Wood as creditors, if the same was done in good faith. *Arn v. Hoerseman*, 26 Kan. 413; *Randall v. Shaw*, 28 Kan. 419; *Avery v. Eastes*, 18 Kan. 505; *Bishop v. Jones*, 28 Kan. 680; *McPike v. Atwell*, 34 Kan. 142, 8 Pac. Rep. 118; *Cuendet v. Lahmer*, 16 Kan. 527. It was decided in *Randall v. Shaw*, 28 Kan. 419, "that the vigilant creditor is entitled to the advantages secured by his watchfulness and attention to his own interest."

There was some evidence introduced upon the trial on the part of the defendant below showing that the members of the firm of Millsbaugh, Highman & Co. were brothers-in-law of E. S. Bliss; that other mortgages were also executed by Millsbaugh, Highman & Co. to Bliss & Wood to secure the same indebtedness embraced in the chattel mortgage; that a mortgage by Millsbaugh, Highman & Co., to secure E. S. Bliss as a surety, had been paid, but not released; that after this action was commenced, Bliss & Wood traded off the stock of goods for a farm worth about \$4,000. But we do not think that any of these things, or these altogether, with some other matters that were presented upon the trial, establish that the chattel mortgage of Millsbaugh, Highman & Co. to Bliss & Wood was given without consideration, or was fraudulent. We think it was proper for the trial court to admit evidence of everything connected with the possession of the property under the chattel mortgage, and the sale and transfer of the goods by Bliss & Wood, as throwing light on the transactions between the parties to the chattel mortgage. But all of the mortgages, given to secure the indebtedness existing from Millsbaugh, Highman & Co. to Bliss & Wood, were not excessive in value, and the amount of the indebtedness in the mortgages was not exaggerated or overvalued. It is possible that, upon a new trial, something may develop the *mala fides* of the transactions between Millsbaugh, Highman & Co. and Bliss & Wood, but, upon the evidence presented in this record, we cannot see how the chattel mortgage can be defeated or set aside. If Bliss & Wood have received, under their mortgage, more than sufficient proceeds to pay their indebtedness, they may be held to account to the creditors for any overplus. It is claimed upon

the part of plaintiff below that I. P. Couch, as sheriff, did not have in his possession the goods and merchandise in dispute at the time that the last order of delivery was issued and served. He did have, however, the actual possession of the goods when the petition was filed, and when the first summons and the first order of delivery were issued. These were set aside on account of the irregularities and *alias* orders issued. On January 27, 1887, the court directed the goods and merchandise to be turned over to the defendant below. He did not file any disclaimer, but attempted to show title in himself, and the right of possession incident thereto, under an execution properly issued and placed in his hands. Therefore no proof of demand or refusal was required. *Raper v. Harrison*, 37 Kan. 243, 15 Pac. Rep. 219; *Bogle v. Gordon*, 39 Kan. 31, 17 Pac. Rep. 857; *Machine Co. v. Mann*, 42 Kan. 372, 22 Pac. Rep. 417; section 184, Civil Code; *Morrill v. Douglass*, 14 Kan. 293; *Higbee v. McMillan*, 18 Kan. 133. The judgment of the district court will be reversed, and cause remanded for a new trial.

(46 Kan. 314)

**PHELPS & BIGELOW WINDMILL CO. v. BUCHANAN.**

(Supreme Court of Kansas. May 9, 1891.)

REVIEW ON APPEAL—GENERAL AND SPECIAL VERDICT.

1. When error is apparent in the final judgment the case may be reviewed in this court without a motion for a new trial.

2. Where there is a conflict between the general and special verdicts the latter must prevail.

3. The record in this case examined, and held, that the motion of the plaintiff for judgment on the special findings of the jury and the pleadings in the case should have been sustained, and judgment entered in favor of the plaintiff for the full amount of its claim.

(Syllabus by *Strang, C.*)

Commissioners' decision. Error from district court, Crawford county; *GEORGE CHANDLER*, Judge.

*D. B. Van Syckle*, for plaintiff in error. *John T. Voss*, for defendant in error.

**STRANG, C.** November 7, 1887, the plaintiff company commenced its action in the district court of Crawford county, to foreclose a lien and recover the value of a certain windmill furnished and erected by the plaintiff upon the land of the defendant. The amount claimed was \$221.28. Defendant alleges in his answer that the windmill entirely failed to perform the services for which it was erected, and that there was therefore no consideration for the claim sued on. Plaintiff replied the general denial. The case was tried by the court and a jury, which rendered a general verdict for the plaintiff for \$98.44, and also made the following special findings of fact: "Question 1. Did the windmill placed on A. Buchanan's premises work well for a period of 30 days after November 24, 1886? Answer. Did not. Q. 2. Did the defendant, A. Buchanan, notify plaintiff December 12, 1886, (or within 30 days from November 24, 1886,) that said windmill did not work well? A. Yes, he did. Q. 3. If yea, did plaintiff fix or cause

to be fixed said windmill, after receiving said notice, and within 30 days after receiving said notice? A. Yes, he did. Q. 4. Did plaintiff or its agents 'remedy the defects' in said windmill within thirty days, (if there were any such defects,) so that said windmill would run well? A. Yes. Q. 5. Was the order [set out in plaintiff's petition] presented to defendant, A. Buchanan, prior to the commencement of this action by the plaintiff herein? A. Yes. Q. 6. Did the defendant, A. Buchanan, refuse to execute notes mentioned in plaintiff's petition prior to the commencement of this action? If so, why? A. He did, because he claimed the mill did not work well. Q. 7. Did defendant, A. Buchanan, fail and neglect to execute said notes after he had been requested to do so by the plaintiff? If so, why? A. He did, because he claimed the mill would not work well. Q. 8. Was said mill built according to the contract set out in plaintiff's petition? A. Yes, in its material construction." The plaintiff, ignoring the general verdict, moved the court for judgment on the special verdict for the amount of its claim as shown in its petition. The court sustained the motion for judgment on the findings to the extent of the amount returned by the jury in the general verdict, which was a practical denial of the motion of the plaintiff. No motion for new trial was filed, but the plaintiff comes to this court, and alleges that the court below erred in not sustaining its motion for the full amount of its claim. The defendant says this case cannot be reviewed by this court because the plaintiff filed no motion for new trial. We think the error, if any there is, is apparent upon the face of the judgment, and therefore no motion for a new trial was necessary to a review of the question here. *Lender v. Caldwell*, 4 Kan. 339; *Dutton v. Hobson*, 7 Kan. 196; *Sawyer v. Bryson*, 10 Kan. 199; *Coburn v. Weed*, 12 Kan. 182; *Stapleton v. Orr*, 43 Kan. 170, 23 Pac. Rep. 109. Was there any error committed in this case by the trial court? The petition in the case alleged that the defendant was indebted to the plaintiff upon a written order for a windmill and fixtures and the erection of the same in the sum of \$221.28. The defendant, in his answer, admitted the execution of the order sued on, but claimed the mill failed to perform the work for which it was erected, and was therefore useless and of no value. The jury in the general verdict say they find the issues in favor of the plaintiff and against the defendant, and then assess the amount of the plaintiff's recovery at \$98.44. This verdict carries with it a finding in the plaintiff's favor upon all questions at issue, except, perhaps, as to the value of the mill erected. The order admitted to have been executed by the defendant expressly fixes the value of the improvement, the mill and fixtures, at \$221.28. It is true the order required the company, upon notice within 30 days of the failure of the mill to work well, to make it so work. The jury found specially that the mill was constructed in accordance with the terms of the contract, and that, while the mill did not work well



at first, the company, upon notice, remedied the defects therein, after which it did work well. Considering the pleadings in the case and these findings together, we think the plaintiff was entitled to a judgment for the full amount of its claim, and that the refusal of the court to sustain the plaintiff's motion for judgment in such amount was error. It is therefore recommended that the district court be directed to modify its judgment so as to give the plaintiff judgment for the full amount of its claim and a foreclosure of its lien.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 329)

CULVER v. MOESER *et al.*

(*Supreme Court of Kansas. May 9, 1891.*)

REVIEW ON APPEAL.

A general finding of a trial court, in an action of ejectment, a jury having been waived, will not be disturbed by this court, where there is some evidence to sustain such a finding.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Cowley county; M. G. TROUP, Judge.

S. D. Pryor, for plaintiff in error. Case & Beach, for defendants in error.

SIMPSON, C. Action in ejectment to recover a quarter section of land in Cowley county. Both sides claim title through one N. L. F. Monroe, who, in the month of December, 1879, made a conveyance thereof to Margie Young. It is claimed that the sole consideration for this conveyance was paid by William Young, the husband of Margie Young, and that he caused the deed to be made to her to defraud his creditors; that the said William Young, at the time this conveyance was made, was indebted to several persons, and among them to the firm of Morehead, Young & Co., who recovered a judgment against William Young in the district court of Shawnee county on the 18th day of May, 1875, and on the 14th day of February, 1880, a transcript of which judgment was duly filed in the office of and with the clerk of the district court of Cowley county, and became a lien on all the lands and real estate of William Young in that county, and particularly the land in controversy; that an execution was issued on said judgment, and said land sold to George W. Crane, who received a sheriff's deed therefor on the 11th day of June, 1880; that Crane sold and conveyed said land to one H. L. Barker on the 21st day of June, 1880, who took possession of the same; that Barker sold said land and conveyed it to Marion Culver on the 2d day of December, 1881, and since that time two-thirds of said land has been conveyed to this plaintiff in error, John Culver, and Adilene Tully and Marion Culver are the owners of the other third; that these parties have been in the actual, open, and notorious possession of this land, claiming to be the owners thereof, ever since the 21st day of June, 1880; that more than six years have elapsed since the recording of said sheriff's deed to said land.

John Culver filed a supplemental answer, alleging that since this action was commenced he had become the sole owner of the land in controversy. Margie Young conveyed this land to Thomas W. Cochrane; Cochrane conveyed it to William P. Wilson; Wilson conveyed it by quitclaim to I. E. H. Moeser; Margie Young conveyed to Cochrane 19th February, 1880; Cochrane conveyed to Wilson, 7th May, 1881; Wilson conveyed to Moeser, 20th November, 1884. A jury was waived, and a trial had to the court, and a general finding for the defendant in error was made, and judgment entered in her favor. A motion for a new trial was overruled, and the case is here for review.

The sole contention of counsel for the plaintiff in error here is that on the evidence produced at the trial the plaintiff in error was clearly entitled to a judgment in his favor, and that there is no evidence to sustain the judgment rendered. Counsel overlook the fact that there is not a particle of evidence tending to connect Margie Young with the judgment of Morehead, Young & Co., or with an attempt to defraud the creditors of her husband, or with any knowledge of the gambling transaction in which her husband participated, until this action is commenced, by an apparently innocent purchaser, to recover the possession of the land; and in the mean time Margie Young has conveyed to Cochrane, Cochrane has conveyed to Wilson, and Wilson to Mrs. Moeser, the defendant in error, with no hint in the evidence that either Cochrane, Wilson, or the defendant in error had notice or knowledge of the gambling transaction, or of the attempt on the part of Young to defraud his creditors; and all the time there was nothing in the record in any manner connecting Margie Young with the judgment and sale of this land to satisfy the claim of Morehead, Young & Co. The first subdivision of section 16 of the Code has no application to the facts in this case, so far as this defendant in error is concerned. She is not the execution debtor or his heir, nor does she claim under him, but she claims by virtue of the title held by Margie Young; whereas, the judgment on which the land was sold was not rendered against Margie Young, but against William B. Young, her husband. If this conveyance was made to Margie Young, the consideration having been paid by her husband, and the title was put in her name to defraud his creditors, and Mrs. Moeser knew these facts at the time she bought the land, then there would be force in the claim; but there is no evidence showing notice to or knowledge by either Cochrane, Wilson, or the defendant in error of these facts. It is partially shown that the sole consideration for the conveyance by Monroe to Margie Young was a gambling debt due from Monroe to William Young, but this is not shown to have been known to Cochrane, who bought from Mrs. Young, or to Wilson, who bought from Cochrane, or to the defendant in error, who bought from Wilson. There is no legal view that can be taken of the facts disclosed by this record that would justify a reversal of the cause. It

is recommended that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 415)

CHICAGO, K. & W. R. CO. v. TOWNSHIP OF OZARK *et al.*<sup>1</sup>

(*Supreme Court of Kansas. May 9, 1891.*)

RAILROAD AID BONDS — AMOUNT — VALIDITY OF ELECTION — POWERS OF TOWN OFFICERS.

1. Where an election has been held in a township authorizing a subscription to the capital stock of a railroad company to the amount of \$18,000, and authorizing the issuing of a like amount of township bonds to the railroad company in payment for such stock, but three days prior to the election it was agreed between a portion of the electors of the township and certain agents of the railroad company that if the election should be in the affirmative the amount of the subscription and of the bonds to be issued should be only \$10,000, and the election resulted in an affirmative vote, authorizing a subscription to be made and bonds to be issued in the amount of \$18,000, but immediately afterwards, in a proceeding instituted by a tax-payer and an elector of the township, the officers and the railroad company were enjoined from making a subscription or issuing or receiving an amount of bonds exceeding \$10,000, and the subscription was then made for \$10,000, and the railroad company accepted the subscription, and relinquished all claim to an amount of bonds above that amount, and afterwards the railroad was built, and all the other conditions imposed upon the railroad company by the proposition voted upon were complied with and fulfilled by the railroad company in pursuance of such election and of such subscription, *held*, that the railroad company is entitled to the bonds of the township to the amount of \$10,000.

2. Where an election is pending in a township for the purpose of authorizing a subscription to the capital stock of a railroad company, and the issuing of bonds in payment therefor to the amount of \$18,000, and while the election is pending a portion of the electors and certain agents of the railroad company agree that if the election should result favorably to the subscription and the issuing of the bonds the amount of each should be only \$10,000 instead of \$18,000, *held*, that such an agreement is not in effect or tantamount to a bribe to the voters, and will not necessarily render the election wholly invalid.

3. When authority is given to the officers of a public corporation by an election or otherwise to issue a certain amount of the bonds of the corporation, the officers will have the power and the right, whenever there is a sufficient reason therefor, to issue a less amount of the bonds of the corporation.

(*Syllabus by the Court.*)

Error from district court, Anderson county; A. W. BENSON, Judge.

This was an action brought in the district court of Anderson county by the township of Ozark against the Colony, Neosho Falls & Western Railroad Company, the Southern Kansas Railway Company, H. K. Winants, H. A. Bearly, and S. A. Herriman, the county commissioners, and A. D. McFadden, the county clerk, of said county, to enjoin the defendants from issuing or accepting certain township bonds. It afterwards appearing that the Chicago, Kansas & Western Railroad Company had, by the consolidation of various railroad companies, succeeded to all the rights of the Colony, Neosho Falls & Western Railroad Company and of other

companies, the plaintiff amended its petition, making the Chicago, Kansas & Western Railroad Company a party defendant, and praying for the same relief against it as it had previously prayed for against the other railroad companies. The Chicago, Kansas & Western Railroad Company then answered, and the case was dismissed as to the Southern Kansas Railway Company. The case was tried before the court without a jury, and the court made special findings of fact and conclusions of law as follows:

"Findings of fact: (1) The plaintiff is, and was at the times hereinafter referred to, a municipal township of Anderson county. The defendant the Colony, Neosho Falls & Western Railroad Company was duly organized and incorporated as a railway corporation of this state on the 27th day of November, 1885, to construct, operate, and maintain a line of railroad from a point at or near Colony, in the plaintiff township, south-westerly into Allen, Woodson, and other counties. The Chicago, Kansas & Western Railroad Company was organized and incorporated under the laws of this state on the 21st day of November, 1885, to construct, operate, and maintain certain lines of railroad in its charter mentioned, and on the 31st day of May, 1886, it succeeded by consolidation to all the rights, privileges, and immunities, and to the property, estate, and franchises, of said Colony, Neosho Falls & Western Railroad Company. (2) On the 11th day of January, 1886, pursuant to a petition therefor duly presented and in all things proper and sufficient, the board of county commissioners of this county duly convened, and made an order, as provided by law in such cases, for an election to be had, held in said township on the 15th day of February, 1886, upon the proposition to subscribe to the capital stock of the said Colony, Neosho Falls & Western Railroad Company, and to issue the bonds of the township in payment therefor to the amount of \$18,000. Due and legal proclamation and notice of said election was given, the call therefor being as set out in the petition, and the election was held accordingly, resulting in a vote of 193 for and 137 against said proposition, as shown by an official canvass of said votes duly made and declared by said board on the 19th day of February, 1886. (3) On the 4th day of January, 1886, the said Colony, Neosho Falls & Western Railroad Company deposited in a bank at Colony, aforesaid, the sum of \$75, to be used to pay the expenses of said election in Ozark township if the proposition was carried, but to be returned to the railroad company if it was defeated. (4) On the 12th day of February, 1886, after full discussion and deliberation by the people upon said proposition, it became apparent to and was generally believed by the citizens of the township, and by the railroad company as well, that said proposition would be defeated as it then stood. Thereupon, on the evening of that day, the president, secretary, and treasurer, and board of directors held a meeting at Colony, together with about fifty citizens of that city and

<sup>1</sup>Petition for rehearing pending.

two farmers of the township, residing outside of the city, to consider the situation. In response to inquiries from the officers of the company, it was the unanimous expression of the opinion of the citizens that the proposition as it then stood would be defeated. A vote, however, was taken by the citizens present upon the question of voting \$10,000 instead of \$18,000, and it was carried with only one dissenting vote. Thereupon the treasurer of the company, in the presence of the other officers and directors, stated in substance that, having heard of the probable defeat and failure of the pending proposition, the company was about to change or amend their charter so as to submit another point on the Southern Kansas Railway instead of Colony, but that the company would take a less sum than \$18,000, rather than suffer the delay and start anew; that the executive committee was present with power to act, and, if the sense of the meeting was in favor of \$10,000, and the people would go on and vote the \$18,000 proposition, as it stood, the company would relinquish all over \$10,000, and issue therefor that amount of stock, and file such relinquishment with the county clerk. The meeting assenting to this, the company executed a paper relinquishing such excess, and reserving the right to issue stock to the amount of the bonds to be received, viz., \$10,000. The official act of the company constituting such relinquishment is set out in full in the circular copied into the petition, and was filed in the county clerk's office February 18, 1886. The said officers and directors, acting in conjunction with said citizens' meeting, caused the legal opinion also contained in said circular to be obtained, and immediately published said circular, and circulated it generally and thoroughly in said township prior to said election. It was mailed to every voter, so far as their names could be ascertained, and posted at the polls and in other public places. It was received and read by and otherwise came to the notice of all, or nearly all, the voters. It seems to have been well understood, and acted upon in good faith, as a modification of the pending proposition. The object, purpose, and intent of the company in taking such action was to influence the voters of the township in favor of said proposition, and to cause the same to be carried. The effect of such action and publication and reading thereof was to change the sentiment of the voters so as to carry said proposition, and but for such action and publication the proposition would have been defeated. (5) After the official canvass of said vote the board of county commissioners ordered the county clerk to make, and the county clerk did make accordingly, a subscription upon the books of said railroad company to the capital stock of said company for shares to the amount of \$10,000, and likewise ordered the chairman of said board to make, and, with the county clerk, to seal, sign, and deliver, the bonds of said township to a like amount, upon the conditions and payable as stated in the said proposition. The

subscription was made by the county clerk as directed, and the proper officers were ready, willing, and about to issue said bonds when this suit was brought and the injunction allowed. (6) On the 1st day of March, 1887, the railroad of the Colony, Neosho Falls & Western Railroad Company was built from the depot of the Southern Kansas Railway in Colony within 2,000 feet of the north line of said town, as stated in the proposition, to a point beyond the east line of Woodson county, and the road was in operation and cars running thereon on regular schedule time. The engine, however, backed up from the western terminus to Colony, there being no turn-table at said terminus; and trains were so operated until the road was completed to Yates Center. The track was not surfaced up all the way on the 1st of March, but that was partly done, and was finished on the 1st of June following. There is a deep cut, some 600 feet in length, and at the deepest place 19 feet in depth, on the line a little south of Colony. This was not cut wide enough prior to March 1, 1887, so that in thawing and freezing the banks caved somewhat, so as to fill up the ditches along the track. These ditches were cleaned out, and the cut was widened, in the spring of 1888. The running of trains, however, was not impeded, but they have been operated regularly since February 25, 1887, and so I conclude that the road was built and operated substantially according to the terms of the proposition. (7) On the 19th of February, 1886, a suit was brought in this court by one J. W. Schuessler, a tax-payer of said township, who alleged in his petition against said railroad company and against the county commissioners and county clerk, defendants therein, the making of said petition and order, and the holding of said election, and the action of said company hereinbefore stated, providing for a reduction of the subscription to \$10,000, and averred that the board was about to issue \$18,000 in bonds so voted, whereupon a temporary injunction was allowed. Afterwards, by consent of the parties plaintiff and said county commissioners and clerk, the suit having been dismissed by the plaintiff as to the railroad company, the judge at chambers dissolved said injunction, and allowed another temporary injunction restraining the board and clerk from issuing more than \$10,000 in amount of said bonds, and from subscribing for more than \$10,000 in amount to the capital stock of said company. Nothing further was done in said action. This order was made March 29, 1886. The board had not ordered nor had the clerk subscribed for said stock prior to the allowance of said temporary injunction, and did not do so solely because of said first injunction. After the order of the district judge last above stated said board did order and said clerk did make the subscription for \$10,000 of said stock as hereinbefore stated. The said Colony, Neosho Falls & Western Railroad Company has not, nor has its successor, the Chicago, Kansas & Western Railroad Company, ever claimed in any manner more than said \$10,000 in bonds since the relinquishment of February

12, 1886, but said companies treat the same as valid and binding."

"Conclusions of law: (1) A petition of two-fifths of the tax-payers, designating the amount of stock to be taken, the order for and notice of the election for such amount, and a majority vote therefor, are conditions precedent to a valid municipal subscription for stock in a railroad corporation. (2) The county commissioners are the agents of the township to make such subscription, when so authorized. Such agency is, however, special and limited, depending upon the express assent of the voters, and such assent can only be given in the manner prescribed by law. (3) When a railway company, pending a vote by the township to subscribe to its capital stock, in order to secure a majority for the proposition, which otherwise would be defeated, relinquishes a part of the bonds proposed to be voted for such stock, reserving, however, a corresponding part of the stock, and the election is carried by such means, a subscription made for a part of the stock so voted is void. The township, as a contracting party, has a right to determine what amount of stock it will subscribe, and to determine it in the manner prescribed by the statute. No mere understanding with the voters, however general, can vary the result of an election. (4) The subscription being void, and the company having full knowledge of all the facts making it void, the doctrine of equitable estoppel has no application, although the railroad was built as provided in the proposition. (5) It follows that the bonds demanded in payment of such subscription should not be issued. (6) Judgment for a perpetual injunction will be rendered accordingly as prayed for by the plaintiff."

Upon the foregoing findings and conclusions the court below rendered judgment in favor of the plaintiff and against the defendants, perpetually enjoining the defendants from issuing, delivering, accepting, or receiving any of the aforesaid bonds. The Chicago, Kansas & Western Railroad Company, which is the successor to all the rights of the other defendant railroad companies, brings the case to this court for review, making Ozark township, the county commissioners, and the county clerk defendants in error.

*Geo. R. Peck, A. A. Hurd, and Robt. Dunlap*, for plaintiff in error. *James D. Snoddy*, for defendants in error.

**VALENTINE, J.,** (after stating the facts as above.) The court below, in rendering judgment in this case, delivered the following opinion, to-wit: "This is an action to restrain the issuance of bonds claimed to have been voted by Ozark township to pay for stock in the Colony, Neosho Falls & Western Railroad Company. It is conceded that a proper petition was presented, the order made, notice given, and the election held according to law. It appeared, however, that three days before the day named for the election the voters of the township and the railroad company alike became convinced that the proposition, which was for a

\$18,000, and the issuance of bonds therefor, would be lost, but it was believed that a less sum could be voted. Thereupon, as the result of a meeting of the board of directors with some fifty citizens of the township, the company offered, if the proposition was carried, to, and did, relinquish its claim to all but \$10,000 of the bonds, reserving the right to issue only that amount of stock. Such offer and relinquishment, duly executed by the proper officers of the company, was thereupon published, posted, and mailed to the voters, who were thereby induced to and did vote for the bonds, so that the proposition was carried. But for such action it would have been defeated. The company filed its relinquishment to such excess with the county clerk. The board duly canvassed the vote, declared the proposition carried, and ordered the clerk to subscribe for \$10,000 only of said stock, upon the terms and conditions stated in the petition, order, and notice, which was done. The company, having built its road as provided in the proposition, offered to deliver the proper certificates for \$10,000 of said stock, and demanded the issuance and delivery of the bonds. No claim is made to the \$8,000 excess, but the relinquishment thereof is treated as valid and effectual by both parties. The exact question, then, is whether upon a petition, order, notice, and election under the act in question, (Comp. Laws, 1885, pp. 783, 784,) authorizing a subscription for a certain amount of stock, a township can be legally compelled to accept and pay for a less amount under the circumstances appearing in this case. The sole authority for such subscription is the statute, and section 69 provides: 'Before such subscription \* \* \* shall be made, the question shall first be submitted to the qualified electors of the township at a special or general election, as \* \* \* specified in the petition, which petition shall also designate the railroad company and the amount of stock proposed to be taken.' The next section requires that such petition shall be presented, the board convened, and the order made, 'embracing the terms and conditions set forth in the petition.' Manifestly, the presentation of such a petition, signed by two-fifths of the resident tax-payers, is a condition precedent to the order of the board, and the order for and the affirmative vote upon the proposition so submitted are conditions precedent to the subscription. The commissioners are the agents of the township. Railroad, etc., Co. v. Davis Co., 6 Kan. 256; Railroad Co. v. Douglas Co., 18 Kan. 169; Turner v. Woodson Co., 27 Kan. 314. But such agency is special and limited, and rests upon the express assent of the voters. Lewis v. Bourbon Co., 12 Kan. 186. The preliminary steps constitute the authority of the commissioners to make the subscription, which is the contract. Railroad, etc., Co. v. Davis Co., supra. The vital question is whether the subscription is valid, and this must depend upon the power of the commissioners to make it under the existing facts. That power we have seen 'rests upon the express assent of the voters,' and that assent must be

shown in the manner provided by law. There must, of course, be a valid election, authorizing, not a subscription, but the subscription actually made. *Railroad Co. v. Miami Co.*, 12 Kan. 230; *Lewis v. Bourbon Co.*, Id. 188. And before the election there must be a petition, not for a proposition to subscribe generally, but designating 'the amount of stock proposed to be taken;' and then thirty days' notice must be given. A less time invalidates the bonds that may be voted. *George v. Oxford Tp.*, 16 Kan. 72. A special election, as the court says in the case last cited, 'depends for its validity upon being legally called, and upon legal and proper notice thereof being given.' Now, if we attempt to uphold this subscription upon the argument that the reduction of the amount by the company, accepted and acted upon in good faith by the voters, was equivalent to a change in the proposition, we are met by the difficulty already indicated by the citation of authorities, viz., that there was no petition, order, or notice for an election upon such a modified proposition, all of which steps are jurisdictional. Besides, the people had only two days' notice upon which to consider and discuss the grave matter of placing a lien upon all the taxable property of the township. They had already discussed, and, it appears, condemned, the pending proposition. Who shall say that they might not have repudiated this new and modified one, had time for deliberation and discussion been given? But, passing over all questions as to the petition and notice, the election itself, when canvassed in any manner known to the law, did not authorize the subscription made. The will of the voter must be determined from the ballot. Its language must govern when the terms used are such as to make known his will beyond a reasonable doubt. *Clark v. Montgomery Co.*, 33 Kan. 202, 6 Pac. Rep. 311. It cannot be that the terms used, taken in connection with the proposition submitted, plain and certain as they were in the case, can be varied or contradicted by any prior understanding of the voters, however general, that their ballots should be held to mean something different. If elections are to depend upon such loose and uncertain considerations, then a government resting upon the ballot is indeed precarious. Nor can this subscription be upheld upon the proposition that the greater includes the less. Possibly that might be urged if this was a donation or gift merely, but it is not. This was an attempt to subscribe for stock in a railroad company, and to pay therefor, as any other subscriber, dollar for dollar. It was a business venture, which, however hazardous, the township might engage in, provided lawful methods were observed. If A. offers to take stock in a corporation to a given amount, which offer is accepted, can he be legally compelled to take and pay for a less amount? Every man has a right to determine the quantity of any commodity he will buy, and the seller may not be allowed to coerce him into taking less. And a township contracting for stock in a railroad company is after all only a con-

tracting party, and, being charged with the liabilities, it must have the corresponding rights of any other. So, here, this township had the right to determine what amount of stock it would take, and it could only determine it in the way provided by law. Solemn legal formalities, carefully designed to protect the taxpayer against the improvident assumption of grievous burdens by the voters, are not to be lightly set aside by the resolutions of a casual meeting of citizens. This is a government of laws. It is free because it rests on the consent of the governed; but that consent must be given by certain well-defined methods sanctioned by law. The vast volume of municipal debt incurred in aid of railroad building is a sufficient reminder that the legal barriers against the hasty assumption of such burdens are none too strong, and certainly should not be weakened by judicial interpretation. The conclusion is that the subscription in question was made without lawful authority, and is void.

"It is urged, however, with great earnestness, and with reference to numerous authorities, that the township is estopped from denying the validity of the subscription, the road having been built in reliance upon it. The law of equitable estoppel, however, cannot be invoked, for two reasons: *First*, the subscription, which is the contract, being void, no legal rights in favor of a party to it can be founded upon it, (*Sheldon v. Donohoe*, 40 Kan. 346, 19 Pac. Rep. 901;) and, *second*, because the railroad company had full knowledge that the preliminary steps did not warrant the commissioners in making the subscription. The company did not build its road right fully relying upon the validity of the subscription, for it initiated and carried out the very proceedings that made the subscription void. *Bigelow, Estop.* pp. 466, 467; *Bernstein v. Smith*, 10 Kan. 60; *People v. Cline*, 68 Ill. 394. After all it seems that the simple inquiry is whether the forms of law have been complied with so far as to make a valid contract. If they have, it should be sustained; if they have not, it must fall. The court cannot make and then enforce a contract. Certain solemn forms of procedure have been prescribed to protect the tax-payers, that nothing be done without their consent. These are all the protection the taxpayer has, and should not be frittered away by judicial construction. So says our supreme court in substance in *Lewis v. Bourbon Co.*, 12 Kan. 188. It must be remembered that this is not a case where the municipality has received the fruit of another's labor or expenditure, and refuses to pay therefor, although retaining and enjoying such fruits, as in *Sleeper v. Bullen*, 6 Kan. 300. Nor is it the case of part performance by one and acceptance by another. The company owns its road. It has parted with nothing which the township has received. The township has accepted and appropriated none of its materials or labor. The road was not built for the township, but for the company. It was built presumably for profit, as a legitimate business enterprise, and now the township declines to accept and pay for

the stock offered, for the reason that it never contracted to do so. Railroad Co. v. Thompson, 24 Kan. 170. "The injunction against the issuance of the bonds should be made perpetual."

The paramount question presented in this case is substantially as follows: Where an election has been held in a township authorizing a subscription to the capital stock of a railroad company to the amount of \$18,000, and authorizing the issuing of a like amount of township bonds to the railroad company in payment for such stock, but three days prior to the election it was agreed between a portion of the electors of the township and certain agents of the railroad company that, if the election should be in the affirmative, the amount of the subscription and of the bonds to be issued should be only \$10,000, and the election resulted in an affirmative vote, authorizing a subscription to be made and bonds to be issued in the amount of \$18,000, but immediately afterwards, in a proceeding instituted by a tax-payer and an elector of the township, the officers and the railroad company were enjoined from making a subscription or issuing or receiving an amount of bonds exceeding \$10,000, and the subscription was then made for \$10,000, and the railroad company accepted the subscription and relinquished all claim to an amount of bonds above that amount, and afterwards the railroad was built and all the other conditions imposed upon the railroad company by the proposition voted upon were complied with and fulfilled by the railroad company in pursuance of such election and of such subscription, is the railroad company entitled to the bonds of the township to the amount of \$10,000? We think this question must be answered in the affirmative. It is contended, however, by the township that the aforesaid agreement between a portion of the electors of the township and the agents of the railroad company that, if the election should result favorably to the subscription and the issuing of the bonds, the amount of the subscription and the bonds should be only \$10,000, instead of \$18,000, was in effect or tantamount to a bribe to the voters, which rendered the election absolutely and wholly invalid. There certainly cannot be anything in this, and it does not appear that the court below so held. It is also claimed that the election was not an election at all for any purpose, for the following reasons: *First*, it is claimed that it was not an election for a subscription and bonds to the amount of \$18,000, for the reason that a portion of the electors and the agents of the railroad company agreed otherwise; and, *second*, it is claimed that it was not an election for a subscription and bonds in the amount of \$10,000, or any other amount less than \$18,000, for the reason that no valid election was ever called, ordered, or provided for for any less amount than \$18,000. Now, we think the election was in fact an election, and that *prima facie*, and upon the records of the county and township, it was an election for a subscription and bonds to the amount of \$18,000, but in all fairness and justice it was an election for

a subscription and bonds in a sum not exceeding \$10,000. We think the election was valid, to the extent at least of authorizing a subscription and the issuing of bonds to the amount of \$10,000; or, in other words, it was not wholly void. It is also claimed that there cannot in any case be a subscription made or bonds issued for any less amount than that actually voted for by the electors of the township. This certainly cannot be true, as has already been held by this court in the case of Turner v. Commissioners, 27 Kan. 314. This question has also been virtually decided in the same way by the supreme court of Alabama. Winter v. City Council, 65 Ala. 403. This last case cited is as nearly in point, as nearly applicable, as nearly analogous, to the present case, as it could well be, and we know of no authority to the contrary; and the principle enunciated in the cases cited is substantially that, when authority is given to the officers of a public corporation, by an election or otherwise, to issue a certain amount of the bonds of the corporation, the officers will have the power and the right, whenever there is a sufficient reason therefor, to issue a less amount of the bonds of the corporation. This, we think, is good law; and we think there was and is ample reason for the issuing of Ozark township bonds to the amount of \$10,000 instead of \$18,000. Besides, it is evidently greatly more to the interest of Ozark township that only \$10,000 in amount of its bonds should be issued than that the whole amount of \$18,000 of its bonds should be issued. The township has by the election and subscription procured the railroad to be built, and has obtained all that it expected to obtain from the railroad company. The railroad has been built and equipped in accordance with the election and subscription, and it is now to the interest of the township that as small an amount of its bonds should be issued as is possible. The stock of the railroad company is probably worth but little, and the issuing of the bonds for such stock is virtually a donation. This is nearly always the case in similar transactions, and all well-informed persons know it. Undoubtedly the railroad company would be perfectly willing to issue to the township \$18,000 of its stock if it could thereby procure a like amount of the township bonds. Such a thing would be very much like giving nothing for something. The object of the law in permitting public corporations to subscribe for stock in railroad companies, and to issue their bonds in payment therefor, is not intended as a business transaction like that consummated by an individual when he purchases stock and pays therefor in money or in something else. It is merely for the purpose of procuring greater facilities for travel and transportation for the general public, which is always considered as a public purpose, and not merely as a private purpose, enterprise, or business transaction. The act itself, authorizing counties, townships, and municipal corporations to subscribe for stock in and to issue bonds to railroad companies, is entitled "An act to enable counties, townships, and cities to

aid in the construction of railroads," etc. Laws 1876, c. 107. This shows that the main object of the act was to enable counties, townships and cities "to aid in the construction of railroads," and was not to permit such corporations to engage in such transactions as a mere business venture, or as an investment in stocks, or a speculation in bonds and stocks. Twenty years ago it was said by this court in the case of Leavenworth Co. v. Miller, 7 Kan. 528, 529, 532, among other things, as follows: "If a railroad company is purely a private corporation, and if the construction and operation thereof is purely a private purpose, neither the government nor any municipal corporation has any right to become a stockholder therein. Governments were not organized for the purpose of engaging in private enterprises or private business, but only for the transaction and promotion of public affairs. Even if the purchase of stock in a railroad company should be a paying transaction as an investment, (which, unfortunately for counties and municipal corporations, it is not,) still a governmental organization would have no right, for that reason alone, to engage in it, for governmental organizations are not created for purposes of speculation, nor are they created for the purpose of enriching the organization as such, but only for the purpose of promoting the general welfare of the individual members thereof as citizens. The increased facility for travel and transportation is the main object in the creation of railroads, and this it is which constitutes a railroad a public purpose. All other benefits, though belonging of right to the public, are simply incidental." Pages 528, 529. "The opening of hotels, the running of stage-coaches, hacks, drays, etc., have never been considered as incumbent upon governments. Governments have never undertaken to keep hotel, run stage-coaches, etc.; and it has never been considered that there was any moral or legal obligation resting upon them to do so. But the duty of opening highways, canals, and other like improvements for the accommodation of travel and commerce has always been considered most binding upon all governments." Page 532. In the case of Winter v. City Council, above cited, the supreme court of Alabama used the following, among other, language: "We do not discover that the city council varied the propositions which were submitted to and approved by the voters at the election. The proposition was, when fairly construed, that the city should extend aid to the railroad company, by the issue of its bonds, to an amount not exceeding one million of dollars, which were to be employed in building and equipping the road. It was not pecuniary gain, nor any of the advantages which would accrue to an individual from membership in the railroad company, that formed a motive or inducement for clothing the city with the power to aid in the construction of the road. The benefits which would result to the commerce and industry of the city, the increased facilities of access to it, were the purposes for which the power was conferred. If these could be secured without

involving the city in a debt of one million of dollars, it was not only within the power, but it was the duty, of the city council to secure them for the least practicable sum. The power to create the larger included the power to create the lesser debt. *Omne majus continet in se minus.*" Page 416. The sovereign power of eminent domain is always exercised in favor of railroads, because they are considered as public purposes, as instruments of commerce and of travel and transportation, and not because of any stock which might be held in them by any public corporation. We do not think that the agreement between a portion of the electors of Ozark township and the agents of the railroad company prior to the election, or anything else that occurred prior or subsequent to the election, will so invalidate the election or so destroy the rights or claims of the railroad company that it may not demand and receive the bonds of Ozark township up to the amount of \$10,000; and we so decide without reference to any question of estoppel or of *res adjudicata*; and we might here say that the railroad company claims under both. It claims that, as the township permitted the railroad company to construct and equip its railroad upon the faith of the aforesaid election and subscription, the township is now estopped from claiming that either the election or the subscription is void; and that, as the injunction suit between the aforesaid tax-payer and elector of Ozark township and the railroad company and the officers whose duty it might be to make the subscription and to issue the bonds of the township resulted in the granting of an injunction restraining the subscription and the issuing of the bonds only to the extent of the excess over and above \$10,000, and permitting the officers to make the subscription, and to issue the bonds to the amount of \$10,000, and permitting the railroad company to accept and receive such an amount of the township bonds, all the substantial questions presented in this case were virtually adjudicated in and by that case, and have become *res adjudicata*. The judgment of the court below will be reversed, and the cause remanded, with the order that judgment be rendered in favor of the defendants below and against the plaintiff below. All the justices concurring.

(46 Kan. 332)

SHERMAN CENTER TOWN CO. v. RUSSELL.  
(Supreme Court of Arkansas. May 9, 1891.)

## TOWN-SITE COMPANIES—CONTRACTS.

1. Town Co. v. Swigart, 43 Kan. 292, 23 Pac. Rep. 569, and Town Co. v. Morris, 43 Kan. 282, 23 Pac. Rep. 569, followed.

2. A contract, entered into by a town company, incorporated "for the purchasing of lands, the surveying and platting of town-sites and selling town lots and other lands," in which it was agreed that if R. would remove a bank, barn, and restaurant located elsewhere to the town-site, the town company would convey to him certain lots in the town, and pay him the sum of \$1,000, tends directly to enhance the value of the remaining property of the corporation, and is not necessarily *ultra vires*.

(Syllabus by the Court.)



Error from district court, Sherman county; LOUIS K. PRATT, Judge.

*Hardy & Stirling*, for plaintiff in error.  
*J. W. Servis*, for defendant in error.

JOHNSTON, J. The Sherman Center Town Company entered into a contract with C. P. Russell, in which it was agreed that if Russell would remove his bank, barn, and restaurant from Voltaire, and establish them in Sherman Center, the company would convey to him certain lots in the town of Sherman Center, and pay the sum of \$1,000. There were other details included in the contract that it is unnecessary to mention. Russell brought an action against the company, alleging that he had fully performed the contract on his part, but that the company had failed to pay him the consideration named, and he asked for judgment for \$1,000. The company alleges and contend that the contract was not authorized by the board of directors, and that it had no authority under its charter to make the same. The main contentions of the company before this court are that the contract was *ultra vires*, and entered into without the authority of the directors of the company. The contract is executed in the name of the company, signed by its president and secretary, with the seal of the company attached. It appears that no formal resolution or order was made by the board of directors authorizing the president and secretary to execute the contract, but a majority of them lived at Sherman Center, and executed and carried out a great number of contracts of a like character. Means were furnished by the company to carry out the contracts thus made, and it received and enjoyed the benefits to be derived from the acts and agreements of the officers. The officers appear to be vested with authority to execute contracts and manage the business affairs of the corporation, and they acted openly and publicly as the agents of the company, with the knowledge and acquiescence of the directors. Under the authority of *Town Co. v. Swigart*, 43 Kan. 292, 23 Pac. Rep. 569, the company cannot escape liability on the contract on account of a want of authority from the company to the officers to make the same. See, also, *University of Builders v. Martin*, 39 Kan. 750, 18 Pac. Rep. 941. There is another claim, that the provision of the charter that "the indebtedness of the company shall not exceed \$500 at any time" limits the powers of the corporation, and renders void the obligation to pay \$1,000. This provision has been the subject of consideration by the court, and it was determined that it is to be regarded as a by-law of the company, directory only, and not such a provision as will annul the contract, where the corporation has enjoyed the benefits of the same. *Town Co. v. Morris*, 43 Kan. 282, 23 Pac. Rep. 569. The plaintiff in error also insists that the contract is not within the objects of the corporation, and is *ultra vires*. The town company was incorporated for "the purchasing of lands, the surveying and platting of town-sites, and selling town lots and other lands." The corporation may exercise not only

the powers expressly enumerated in its charter, if they are authorized by law, but "may enter into any obligation or contract essential to the transaction of its ordinary affairs," and incidental to the exercise of the powers expressly enumerated. Gen. St. 1889, par. 1167. The company is not restricted to the mere purchase and sale of lots, but may doubtless enter into contracts which would directly tend to promote the prosperity of the town, and enhance the value of the lots remaining unsold. To this end they may expend money for the advertising of the property, the making of improvements on a part of the same, may contract for the erection of school buildings and other improvements, the direct and proximate tendency of which will be to attract people to the town, and make the property of the company more desirable and salable. The location of Russell, with his bank, his barn, and restaurant, at the town of Sherman Center no doubt tended directly and proximately to build up the town, and give it prestige in that community, thus enhancing the value of the remaining lots and promoting the legitimate objects of the corporation. In *Whetstone v. Ottawa University*, 13 Kan. 320, the question arose whether the Ottawa Town Company could donate the property of the corporation to the Ottawa University for the purpose of erecting a school-building outside of the limits of the town of Ottawa, and more than one-fourth of a mile outside of the limits of the property and the land owned by the town company. Justice BREWER, who pronounced the judgment of the court, remarked that "the town-site companies are neither novel nor rare in Kansas. Every county has been the home of several, and the manner of their working, and the means employed to accomplish their purposes, are familiar to us all. Nor is Kansas peculiar in this respect. Every western state is full of them. They are private corporations, organized for the purposes of gain. They take real estate, lay it off in lots and blocks, streets, and alleys, induce people to settle and purchase, and by the sale of lots make their profits." \* \* \* If by the donation of one lot they can double the value of the remainder, is not the one lot used directly to accomplish the legitimate object of the corporation? If by donating one hundred lots to the county they can secure the county-seat and the erection of county buildings, are they not furthering the very purpose of building up a town? \* \* \* The purpose of securing improvements on the town-site is not simply that the improvements be there, but that thereby the property the corporation has to sell may be enhanced in value; and, if the lots were donated to secure the erection of a hospital or school at a remote place, as suggested by counsel, there would be no resultant benefit to the corporation of enhanced value of its unsold lots. It seems to us that this must be the test: If the direct and proximate tendency of the improvements sought to be obtained by the donation is the building up of the town and the enhanced value of the remaining property of the corporation, the donation

is not *ultra vires*." The discussion in that case furnishes a strong argument that the contract in question was within the powers of the corporation, and that the money expended to bring new buildings and establish new business enterprises in the town directly tended to accomplish the purposes of the corporation. We are of opinion that the contract was not *ultra vires*. But, even if it were not fully authorized, the company is hardly in a position to invoke the application of that doctrine. Russell had performed the contract on his part. His buildings and business have been removed to Sherman Center, and he has united with the town company in building up the town and in augmenting the value of the company's property. These considerations and advantages have been received by the company, and it continues to enjoy the benefits of the contract performed on its behalf by Russell. The company has joined with Russell in the execution of the contract, and officers of the company furnished men and machinery and assisted in moving the buildings. They executed conveyance to Russell for the lots which they agreed to convey to him, and he, acting in good faith, has done all that was required of him. After the transaction has been carried out, and the company has had the benefits of performance by Russell, they cannot in justice be allowed to repudiate the transaction, although it may have been in excess of authority. *Town Co. v. Morris*, supra; *Mor. Priv. Corp.* §§ 632, 634. Some other objections are made, which are not deemed to be material, and, on an examination of the entire record, we find no prejudicial error. The judgment of the district court will be affirmed. All the justices concurring.

(46 Kan. 354)

SHERMAN CENTER TOWN CO. v. LEONARD.

(Supreme Court of Kansas. May 9, 1891.)

BREACH OF CONTRACT — MEASURE OF DAMAGES — EVIDENCE.

1. Where a party contracted with the owner to move his hotel from the town of L. to the town of S., and refused to carry out the contract, the prospective profit which the owner would have possibly gained if the building had been removed is not the measure of damages; but, upon the refusal of the contractor, it was the duty of the owner to have the hotel removed at once; and, where the contractor had been paid for the removal, the owner would ordinarily recover, as damages for the breach, only the necessary expenses of removing the building, and of avoiding the consequences of the other's wrong.

2. Where a party seeks redress for the wrong of another, the law requires that he shall do whatever he reasonably can, and improve all reasonable opportunities, to avoid the consequences and to lessen the injury.

3. Damages cannot be established by the statement of a witness giving in the lump the damages which he thinks the plaintiff has sustained. *Town Co. v. Morris*, 39 Kan. 877, 18 Pac. Rep. 280.

(Syllabus by the Court.)

Error from district court, Sherman county; LOUIS K. PRATT, Judge.

*Hardy & Stirling*, for plaintiff in error. *John E. Bagley and J. W. Lewis*, for defendant in error.

JOHNSTON, J. Thomas P. Leonard recovered a judgment for \$600 against the Sherman Center Town Company as damages for the breach of a contract. Leonard owned a hotel in Itasca, and Sherman Center, which was three miles away, was a candidate for county-seat of Sherman county. The town company, desiring to increase the population and influence of Sherman Center and strengthen its candidacy, held out inducements to the citizens of the surrounding towns to remove their buildings and establish themselves in business in Sherman Center, and unite in an effort to make that town the county-seat of the county. Accordingly they entered into an agreement with Leonard by which Leonard was to join them in building up the town, and remove his hotel from Itasca, in consideration of which the company was to convey to him certain lots in Sherman Center, and provide at their own expense men and machinery to remove the hotel, and place it over a cellar of equal size, and on a foundation of a similar kind, as it was then resting upon in Itasca. The plaintiff alleged that the company had failed and refused to remove the hotel in accordance with the terms of the contract; that the other buildings which were then situated in Itasca have been removed to Sherman Center, and the town of Itasca has become depopulated, and the business of hotel-keeping of no value; and that the hotel now stands alone, with no town nearer to it than Sherman Center, which is nearly three miles distant. He further alleged that it was a large and well-furnished hotel, and that the cost of its construction and the furniture contained therein was about \$4,500. It is alleged that the cost of removal would be about the sum of \$800, and that he suffered damages by the refusal of the company to comply with the contract in the sum of \$1,200. He therefore asked judgment for \$2,000. The company by its answer denies the execution of the contract, or that it is authorized by its charter to enter into the contract alleged to have been made.

There are several errors assigned by the company, but only one of them requires attention. It appears that the company has conveyed the lots to Leonard, as stipulated in the contract, but the hotel has not been removed, and, according to plaintiff's testimony, the non-removal is owing to the refusal of the company to furnish the men and machinery for that purpose, although frequent demands have been made upon them. In the course of the trial the plaintiff testified that, by reason of the removal of the people and their buildings from other towns, Sherman Center became a flourishing place of several hundred people, where he could have profitably carried on the hotel business, but that the town of Itasca was practically abandoned, so that he is without business, and simply remains at the hotel to protect the goods and furniture therein. In order to prove the extent of his injury, the following question was asked and allowed by the court over the objection of the defendant: "State, as near as you can, what would have been

your profits, or what your damages was, in other words, by reason of the non-fulfillment of this contract,—not moving your hotel and establishing your business at Sherman Center." Another question which was allowed, over objection, was: "State what the damage was by reason of them not moving your hotel to Sherman Center, as they agreed to, in money." He answered that the loss or profits would have been \$150 a month, and that the total damage sustained by reason of not having the hotel located at Sherman Center, besides the cost of moving the building, was from \$1,200 to \$1,500, and that it would cost about \$800 to move the building. The questions asked were objectionable, and the testimony given was inadmissible, upon two grounds: First, the questions were objectionable because they did not call for specific facts, but permitted the witness to state a mere opinion, giving in the lump the amount of damages thought to be sustained. It is the function of the court or jury trying the case to determine from evidence properly presented what the amount of damages sustained is, and, while it might be very convenient for the plaintiff to permit him and his witnesses to give the damages suffered in a lump, it would be a very unsafe practice to allow them to state the amount of damages supposed to be sustained, without regard to the facts or knowledge upon which their opinions were based. It is well settled that the practice is not permissible. *Roberts v. Commissioners*, 21 Kan. 248; *Railroad Co. v. Kuhn*, 38 Kan. 675, 17 Pac. Rep. 322; *Town Co. v. Morris*, 39 Kan. 377, 18 Pac. Rep. 230; *Railway Co. v. Neiman*, 45 Kan. —, ante, 22. Then, again, the prospective profits that he lost by the breach of the contract are too remote, uncertain, and speculative to be recoverable. Who can tell what the future gains of the hotel business would have been in Sherman Center, if he had moved there? His past profits in Itasca were not shown, and there is no testimony of the gains of others established in the same business at Sherman Center. How, then, does Leonard know that the profits would have been \$150 per month? The gains to be derived from the business depended upon many contingencies other than the mere removal of his hotel to that place. The growth of the town; the location of the county-seat there or at another town near by; the immigration and travel; the competition in the hotel business; the price of provisions and the cost of help; the general reputation of the house; and the popularity of the landlord with the traveling public and the people of that community,—are suggested as some of the considerations that would affect the anticipated benefits. Where the breach of a contract results in the loss of definite profits, which are ascertainable, and were within the contemplation of the contracting parties, they may generally be recovered; but the prospective profits do not furnish the correct measure of damages in the present case. Aside from the remote, conjectural, and speculative character of the anticipated benefits, it cannot be said

that the loss of them is the direct and unavoidable consequence of the breach. The plaintiff could not sit idle an indefinite length of time, and safely count on the recovery of \$150 per month as damages. If there was a breach of the contract, it was his duty, upon learning of it, to at once remove the building, or employ others to do so, and charge the cost of the removal to the town company. The law requires that the injured party shall do whatever he reasonably can, and improve all reasonable opportunities to lessen the injury. From the testimony it appears that Leonard could have procured others to move the hotel; and in such a case the ordinary measure of damages is the cost of removal, and the reasonable expenses of avoiding the consequence of the defendant's wrong. *Railway Co. v. Muhlman*, 17 Kan. 224; *Loker v. Damon*, 17 Pick. 284; 1 Sedg. Dam. 165, and cases cited. Counsel for plaintiff in error say that no more than the cost of removal was allowed by the court; but the admission of the objectionable evidence, against the opposition of the plaintiff in error, would indicate that the court adopted an incorrect measure of damages, and did not limit the recovery to the expense of the removal. The liability of the plaintiff in error for any loss is not conceded. It is shown in the testimony that soon after the time for the removal of the building the people of Sherman Center abandoned the attempt to obtain the county-seat, and all or nearly all of them moved to another place. It is claimed by plaintiff in error that Leonard objected to the removal of his building until the question of the location of the county-seat was settled. He testified at the trial that he did not intend to move the building to Sherman Center, and that he would not move the building at all, until the county-seat was permanently located. If the non-removal of the building was due to the fault of Leonard, he is not entitled to recover anything. This is a disputed question of fact, which must be settled on another trial. For the error of the court in admitting testimony the judgment of the court below will be reversed, and cause remanded for a new trial. All the justices concurring.

(46 Kan. 312)

## WALKER V. STATE INS. CO.

(Supreme Court of Kansas. May 9, 1891.)

## APPLICATION FOR INSURANCE—PAROL EVIDENCE.

Where an application for insurance has been reduced to writing, and the applicant has had an opportunity to read the same, but signs it without reading it, and there is no fraud practiced, and the applicant afterwards receives the policy of insurance based upon such application, and retains it for several months without objection, he cannot, in an action brought upon a note given for the premium on such policy, vary or contradict the statements in the written application by parol evidence.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Elk county; M. G. TROUP, Judge.

A. M. Jackson, for plaintiff in error.

*Glasscock & Car and Thos. H. Bain, for defendant in error.*

GREEN, C. This was an action on a promissory note executed on the 9th day of April, 1886, by Phillip Walker to the State Insurance Company, of Des Moines, Iowa, for \$51.50, and due April 1, 1887, given in payment of the premium on an insurance policy. The case came on appeal to the district court of Elk county, where it was tried, and judgment was rendered in favor of the defendant in error. The defense sought to be made by the maker of the note was that there was a failure of consideration, and fraud and deceit practiced in the procurement of the note; that the insurance policy was to cover some stock which the defendant below had, but was not in fact included in the application for the policy; that the agents of the company had him sign the application which they had filled out, without reading it; that the policy did not insure the property which he requested the agents to have insured. It is claimed that the court erred in not permitting the defendant below to introduce evidence tending to contradict the application which he had signed. There is no question raised but what the policy was in accordance with the application. The defendant stated upon the trial that he took the application in his hands to read, but he was ashamed to say that he signed it without reading it, and his only excuse was that he did not have a desirable opportunity to read it. There is no pretense but what the defendant could have read the application before he attached his signature to it, if he had desired to do so. The application itself cautioned him to read it before signing it, to see that each question was fully and truthfully answered. There was no fraud shown in the procurement of the application, and the statement of counsel is not borne out by the record that the consideration of the note had wholly failed. It was in evidence that the defendant received his policy, and retained it for some months before he made any objection to it. On the 31st day of January, 1887, he wrote to the company about having his policy canceled, but said nothing about the fraud practiced upon him by the agents; and again, on February 7, 1887, he wrote the company that he would pay short rates on his policy, and to figure it up so he could obtain a cancellation. This was a recognition of the policy, and showed some consideration for the note. The court properly excluded the evidence by which it was attempted to vary and contradict the statements of the written application. We recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 397)

STEWART v. BODLEY.

(Supreme Court of Kansas. May 9, 1891.)

SUMMONS FROM JUSTICE'S COURT—SERVICE OF DEFECTIVE COPY—VALIDITY OF JUDGMENT.

Where a summons is issued by a justice of the peace, and served by a constable by leaving,

at the usual place of residence of the defendant, a paper which is a copy of the original summons, with the exception that the name of the constable is signed to the copy in the place of the name of the justice of the peace, but the indorsement upon the copy contains the name of the justice issuing the same, held, that such mistake in the copy of the summons does not render a judgment entered upon such service void, but only voidable.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Harper county; J. T. HERICK, Judge.

*Shepard, Grove & Shepard, for plaintiff in error. George E. McMahan, for defendant in error.*

GREEN, C. On the 21st day of May, 1886, William M. Duncan sued E. J. Stewart, before A. R. BLACKBURN, a justice of the peace of Harper county, to recover the sum of \$58 for services rendered. The justice of the peace issued a summons which was regular upon its face, and delivered it to C. M. Bodley, a constable. The summons was returned with the indorsement that service had been made by copy left at the residence of the defendant. On the return-day the defendant made no appearance, and judgment was rendered in favor of the plaintiff for the amount claimed. On the following day an execution was issued on said judgment and delivered to Bodley, as constable, which was levied upon the property in controversy in this action. On the 12th of June the plaintiff in error brought an action in replevin against Bodley and Stewart to recover the property taken on execution. The defendants in this replevin suit gave a redelivery bond, retained possession of the property, and it was sold under the execution. This replevin action was never tried, but was continued from term to term until June, 1887, when it was dismissed by the plaintiff without prejudice. This action was commenced in the district court of Harper county on the 19th day of July, 1887, to recover the value of the property sold upon execution by Bodley as constable. The defendant answered, and set up three defenses: *First*, a general denial; *second*, justification under the execution; and, *third*, the replevin action. The plaintiff demurred to the third ground, which was sustained by the court. The plaintiff then filed a reply to the second defense, denying the judgment, and alleged that Bodley did not serve a copy of the summons upon the plaintiff, but made a false return; that the copy left at the residence of Stewart was signed by C. M. Bodley, justice of the peace; and that no appearance was made by Stewart. It was further alleged that Bodley knew that said return was false. The case was tried by the court, and resulted in a finding and judgment for the defendant, and the plaintiff brings the case here for review.

The assignment of error is that the court should not have overruled the plaintiff's demurrer to the evidence of the defendant, and this raises the question as to whether or not the judgment rendered in the case of Duncan v. Stewart, before A. R. BLACKBURN, justice of the peace, was void. This is the main question in the

case. If the judgment was rendered without service it was void. To determine the question of service we must consider what was left at the usual place of residence of the defendant. The summons issued by the justice of the peace was regular. The copy served was signed by the constable, instead of the justice of the peace. It was addressed to Bodley, as constable, and contained the indorsement that, if the defendant failed to appear, judgment would be taken for the sum of \$58, with interest at the rate of 7 per cent. per annum from the 21st day of May, 1886, and costs of suit, and signed by A. R. Blackburn, justice of the peace. It could be seen at a glance that Bodley could not have been the justice of the peace and constable too; that his signature to the copy must have been a clerical error. The defendant served lived in the same township where the officers resided, and would be presumed to know who they were; and the fact that the name of the justice of the peace did appear in one place upon the copy, and that the process was addressed to Bodley, was sufficient to inform him that he had been sued. There is no question but what the service would have been set aside if a motion had been made for that purpose; but we are not prepared to say that the judgment was absolutely void, but might have been set aside in a direct proceeding. We conclude, therefore, that the service made upon E. J. Stewart in the original suit was only voidable, and not void. See *Bassett v. Mitchell*, 40 Kan. 549, 20 Pac. Rep. 192; *Friend v. Green*, 43 Kan. 167, 23 Pac. Rep. 98. Holding, as we do, that the judgment rendered in favor of Duncan and against Stewart was not void, but only voidable, there was no error in the trial of this action in the court below, and we therefore recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(48 Kan. 341)

#### COATES V. SULAU.

(Supreme Court of Kansas. May 9, 1891.)

##### IMPEACHMENT OF WITNESS—GENERAL REPUTATION.

1. Where the answers of impeaching witnesses show that they understood the questions in a general sense, and the answers also show that they relate to the general reputation of the witness sought to be impeached, the omission of the word "general" from the question will not render the evidence of such witnesses incompetent.

2. Where a witness sought to be impeached has within a few months changed his residence from one state to another it is not error to permit witnesses, who knew him a long time in his former place of residence, to testify as to his reputation for truth and veracity there.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Wyandotte county; O. L. MILLER, Judge.

J. W. Jenkins, for plaintiff in error. C. F. Mussey, Jr., and Wm. H. Pope, for defendant in error.

STRANG, C. This was an action on a promissory note for \$131, alleged to have been given by the defendant below to the plaintiff below in final settlement of a

contract for building a house. Action was begun before a justice of the peace. Defendant admitted the giving of the note, but claimed it was not given on final settlement of said contract, but was given before any settlement was had upon said contract, for the purpose of making a payment on said contract. And the defendant below further claimed that when he came to look over his receipts for money paid on said contract, together with some offsets he had against it, he found he had overpaid the plaintiff, including the note sued on, in the sum of \$21.50, and that the plaintiff below actually owed him, over and above the amount of the note sued on, the said sum of \$21.50. Judgment was rendered by the justice in favor of the defendant below for the sum of \$21.50 and costs. Plaintiff appealed to the district court, where the case was tried by the court and a jury, resulting in a verdict and judgment for the plaintiff below for the amount of his note, \$138.20. Motion for new trial was overruled. Coates brings the case here for review.

The plaintiff in error first complains of the character of the impeaching testimony offered by the plaintiff below, and received in evidence in the case over his objection. He asserts that such evidence was not competent; the question put to the impeaching witnesses did not call for the general reputation of the defendant below as to truth and veracity. The question would have been better if the word "general" had been used in framing it, but the answers show that each of the several witnesses understood the question as calling for the general reputation of the defendant below. The answers of the several witnesses were much alike, except that some of them added that in a matter in which Coates had a pecuniary interest they would not believe him under oath. Each of the witnesses answered substantially as follows: "I am well acquainted with Coates' reputation in this community for truth and veracity." They speak of his reputation in the community. That means in the whole community, and is as general as reputation can be. "Reputation" is what is said of one. "General reputation" is what is said of one by the people in general in the neighborhood or community where he resides, and where, therefore, the people are acquainted with him. We think the evidence sufficiently general in its character. Where the answers show the questions are understood in a general sense by the witnesses, and the answers themselves are sufficiently general, the fact that the word "general" is omitted in framing the question will not render the evidence incompetent.

The plaintiff also alleges that impeaching evidence must be confined to the present character of the witness. Coates lived for many years in Cumminsville, which is now the Twenty-Fifth ward of Cincinnati, Ohio. He left there, and came to Kansas City, Kan., and at the time of the trial had lived there a few months,—less than a year. The evidence complained of was as to his reputation at his old home in Cincinnati; and it is objected that it was incompetent, for the reason that such evi-

dence must be confined to the present character of the witness; and it is alleged that Coates had no present character at Cincinnati, because he left there several months before. We do not think this position of the plaintiff tenable. The evidence related to Coates' character in the community and among the people where he had lived a long time, and from whom he had been absent but a few months. He had not lived in Kansas City long enough to have a reputation there; and, if such evidence is needed, we think it proper to seek it from among his old neighbors, among whom he had lived until recently before the trial. If it could not be got there it could not be got anywhere until he had lived in a new community long enough to have a reputation there. The fact that a person has moved away from a community in which he has lived a long time, when his change of residence is recent, does not render the evidence of his old neighbors as to his reputation incompetent. There is no arbitrary, iron-clad rule in relation to such evidence. It must depend largely upon the circumstances of the particular case. Sometimes it may be sought some distance away both in point of time and space. The plaintiff also says such evidence must be confined to the reputation of the witness "in the neighborhood,—his reputation among his neighbors." That is exactly what was done in this case. The impeaching witnesses all lived in the same neighborhood in which Coates lived for years before moving to Kansas. We do not think any substantial error was committed in the admission of the impeaching testimony. The jury would have been justified in returning the verdict they did without any of the impeaching testimony. It is true Coates says he did not owe the note; "that at the time he executed it, he supposed he owed Sulau the money, but that when he got home and looked up his receipts he found he did not." This was in Cincinnati. And yet when the first note came due it went to protest, and afterwards he made the note sued on to take up the first. After he came to Kansas he wrote back, acknowledging the debt, and promising to pay it. These facts are so inconsistent with the claim that he did not owe the note that the jury were justified in rendering a verdict against him for the amount of the note on his own evidence, taken in connection with his former acts relating to the transaction. Complaint is made of the admission of the evidence of A. G. Cutler and Charles Stork, who testified in explanation of the written plans and specifications,—a part of the building contract. They gave no evidence by way of contradiction of anything in the plans and specifications. Their evidence was simply explanatory of the plans and specifications, and was exactly the same kind of evidence that was introduced by the defendant below by the witness Martin. That the plans and specifications were ambiguous, and were subject to explanation, is manifest from the fact that the witness Martin finally admitted he could not tell from them how many gables were contemplated thereby. We see no error in connection with

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this complaint. It is recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 435)

SIMPSON v. CITY OF KANSAS CITY *et al.*

(*Supreme Court of Kansas. May 10, 1890.*)

CITIES — OPENING STREETS — ASSESSMENTS — LOTS AND BLOCKS.

Where a petition for opening and grading a portion of a street is presented to the mayor and city council of a city of the first class, under the proviso to section 4 of chapter 99 of the Laws of 1887, and all the necessary steps are taken to have said street opened and graded, the mayor and city council may assess and apportion the cost of such improvement against the lots and parcels of land abutting on the improved portion of said street, and said assessment may be made on each block separately, as a taxing district.

(*Syllabus by Green, C.*)

#### ON REHEARING.

1. Where the charter of a city provides that the streets may be graded at the expense of the abutting land-owners, and the mayor and council are given power, in the language of the proviso to section 4, c. 99, Sess. Laws 1887, (paragraph 557, Gen. St. 1889,) "to assess the cost of such improvement against the lots and parcels of land abutting on such streets so improved," the whole length of the street embraced in the petition of a majority of the resident property owners and improved is one taxing district, and the part so improved is not to be divided into blocks, and each block made liable for the improvement in front thereof.

2. Section 14, c. 63, Sess. Laws 1888, (paragraph 1077, Gen. St. 1889,) concerning the grading of streets, avenues, and alleys in consolidated cities, is repealed by section 4, c. 99, Sess. Laws 1887, (paragraph 557, Gen. St. 1889.)

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Wyandotte county; O. L. MILLER, Judge.

*Alden & McGrew*, for plaintiff in error.  
*L. W. Keplinger*, for defendant in error.

GREEN, C. On the 10th day of July, 1889, a petition signed by a majority of the resident property owners of a majority of the front feet on that portion of Reynolds avenue between Fifth and Tenth streets, in the city of Kansas City, was presented to the council of said city, asking to have said avenue opened and graded, at the cost of the owners of the land fronting upon that portion of said avenue between Fifth and Tenth streets, as provided in section 4, c. 99, Laws 1887. This petition was by the mayor and council ordered spread upon the journal, and on August 6, 1889, the mayor and city council passed an ordinance providing for the grading of Reynolds avenue between Fifth and Tenth streets. Section 1 of said ordinance provides "that in pursuance of a petition of a majority of the resident property owners of a majority of the front feet abutting on Reynolds avenue between Fifth street and Tenth street, which petition was by a majority of the council-elect, on the 30th day of July, 1889, ordered spread upon the journal of said council, it is hereby declared

necessary to grade said Reynolds avenue between Fifth street and Tenth street the full width of said avenue, and said grading is hereby ordered to be done; the cost thereof to be assessed against the lots and parcels of land abutting on such avenue so improved." This ordinance was duly approved and published; and afterwards, in pursuance of the petition and ordinance mentioned, said city caused Reynolds avenue to be graded between Fifth street and Tenth street. After the completion of the grade, and for the purpose of making assessments for the cost thereof against the lots and parcels of land abutting on such street improved, the mayor and city council appointed three disinterested appraisers to assess the value of all the lots and pieces of land abutting on the avenue between the limits named, and the lots and pieces of land were appraised, and report made to the mayor and council of the value and of the appraisal, which was accepted and approved by the mayor and council, and adopted as a basis for apportioning and assessing the cost of said improvements against the lots and parcels of land abutting on that portion of the avenue so improved. It is claimed upon the part of the plaintiff in error that in making the apportionment of the cost of grading the mayor and city council wrongfully and unlawfully apportioned and assessed against the lands of said plaintiff the sum of \$6,034.86, being \$3,173.49 in excess of the amount that should have been assessed thereon. The plaintiff in error tendered payment of the amount of \$2,862.37, which it is claimed is all the plaintiff in error's property was chargeable with. This was refused, and the plaintiff brought this action in the district court of Wyandotte county to restrain the defendants from proceeding to collect the additional amount assessed against said land. Application was made for a temporary injunction, which was refused. To reverse the judgment of the court below, the plaintiff files a petition in error in this court.

It is claimed upon the part of the plaintiff in error that the assessments for the cost of grading this portion of Reynolds avenue should have been made upon all the lots and parcels of land abutting upon said avenue so improved, as indicated in the proviso in section 4 of chapter 99 of the Session Laws of 1887, and that under this proviso the whole street improved was the taxing district. The real question for our determination in this case is the proper method of apportioning special assessments for opening and grading streets in cities of the first class, organized in the first instance under chapter 63 of the Session Laws of 1886. The petition presented to the mayor and city council asked that this portion of Reynolds avenue be opened and graded as provided in section 4, c. 99, Laws 1887, being "An act to incorporate and regulate cities of the first class, and to repeal all prior acts," approved March 5, 1887. We shall assume that under this petition the owners of the real estate abutting on Reynolds avenue between Fifth and Tenth streets asked that this portion of said avenue be opened

and graded in accordance with the authority conferred in said section 4, that the petition was valid, and that all the jurisdictional and initiatory steps were taken by the city government to confer the necessary jurisdiction in order to have the improvements made as prayed for. Was the city council authorized to make the assessments for such improvements upon each block as a separate taxing district, or should the assessments have been made, as contended for by the plaintiff in error, upon that portion of the street improved, as a taxing district? To arrive at the true intent and meaning of this law,—which, we must confess, is somewhat obscure,—we may be permitted to go back of the proviso to the body of the section for a fair interpretation of the section as an entirety. The first clause of the section provides: "For opening, widening, extending and grading any street, lane, alley, or avenue, and for doing all excavating and grading necessary for the same, and for all improvements of the squares and areas formed by the crossing of streets, and for building culverts, bridges, viaducts, and all crossings of streets, alleys, and avenues, the cost or contract price thereof shall be paid out of the general improvement fund, except as otherwise provided by law; and for all paving, macadamizing, curbing, and guttering of the streets and alleys the assessments shall be made for the full cost thereof on each block separately." The proviso reads: "That in case a petition of a majority of the resident property owners of a majority of the front feet on any street, or part thereof, shall petition the mayor and council to grade any street, and to grade and pave the intersections thereof, at the cost of the owners of the lands fronting upon the street described in the petition, and if such petition shall be ordered spread upon the journal of the council by a majority of the council-elect, the mayor and council shall thereafter have power to assess the cost of such improvement against the lots and parcels of land abutting on such street so improved abutting property." Now, an improvement made under this proviso necessarily contemplates some paving. It says, "shall petition the mayor and council to grade any street, and to grade and pave the intersections thereof, at the cost of the owners," etc. Is it not intended that the street may be paved, also, under the authority of this proviso? Why should the intersections be paved, and not the balance of the street? This proviso gives the mayor and council power to assess the cost of such improvements. What improvements? Necessarily, grading any street, and grading and paving the intersections thereof, which, under the authority of this section, may be assessed upon each block separately, as a taxing district. We think this proviso is susceptible of this interpretation. But conceding that the method of the assessment is not plainly marked out and defined, would not the mayor and city council be authorized to adopt such a method, in making the assessment for the improvements prayed for, as would be fair, just, and equitable



to all? Judge Dillon, in his work on Municipal Corporations, (section 94,) says: "Power to do an act is often conferred upon municipal corporations in general terms, without being accompanied by any prescribed mode of exercising it. In such cases the common council or governing body necessarily have, to a greater or less extent, a discretion as to the manner in which the power shall be used. This discretion cannot be judicially interfered with or questioned, except where the power is exceeded, or fraud is imputed and shown, or there is a manifest invasion of private rights. Thus, where the law or charter confers upon the city council or local legislature power to determine upon the expediency or necessity of measures relating to the local government, their judgment upon matters thus committed to them, while acting within the scope of their authority, cannot be controlled by the courts. In such case the decision of the proper corporate officers is, in the absence of fraud, final and conclusive, unless they transcend their powers. Thus, for example, if a city has power to grade streets, the courts will not inquire into the necessity of the exercise of it, or the refusal to exercise it, nor whether a particular grade adopted, or a particular mode of executing the grade, is judicious." *Express Co. v. St. Joseph*, 66 Mo. 680; *Farrar v. City of St. Louis*, 80 Mo. 393; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. Rep. 781. A city has large discretion as to the opening, grading, and repairing of streets, in respect to the time, manner, and cost of the same. In the exercise of such power, it will not be controlled by the courts, unless there is great abuse, operating oppressively upon individuals. *Bush v. City of Carbondale*, 78 Ill. 74. A city intrusted with power to make improvements must be allowed some discretion in the manner of making them, unless it appears from the charter power that a particular method has been prescribed. The rule is well settled that where a municipality is clothed with certain powers, and is not confined to a particular method, but has the discretion and the choice of methods, a plain case of abuse must be shown, to warrant an injunction against the corporation. *Page v. City of St. Louis*, 20 Mo. 136. No such abuse is shown in this case. The original act, under which this city was organized, expressly authorized this method of special assessments; and, as indicated, we are of the opinion that the section under consideration permitted the very method adopted by the city government, and we cannot say that it is unjust, or that the power has been abused in any manner.

Taking the whole section together, we think the mayor and city council had the authority to make the special assessments in the manner ordered; that the court below committed no error in refusing to grant the preliminary injunction; and we would recommend that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

## ON REHEARING.

SIMPSON, C. A motion for a rehearing was filed in this case, that among other causes assigned for a reversal of the judgment below alleges the following: "It had escaped the attention of the court and counsel for plaintiff in error, until after the argument, that the amendment contained in the Laws of 1887 was borrowed from a state whose supreme court has construed it at least twice, as claimed by counsel for plaintiff in error." It is also claimed "that the court inadvertently applied the principle of construction and power of legislative bodies as set forth in *Farrar v. City of St. Louis*, 80 Mo. 393, and cases referred to, while it will be apparent on a reconsideration that the court of the state from which the rule was borrowed shows that the rule of apportionment—the front foot—is provided by the law, and any change by the council makes the proceedings null and void." Again, it is urged "that the court inadvertently overlooked the fact that the proviso and amendment of 1887, providing for grading on a petition, is to be construed independently, or as modifying all the previous laws on the same subject, as this court has decided in another case." The petition for the grading of Reynolds avenue from Fifth street to Tenth street asked that the grading be done as provided in section 4 of the act of the legislature entitled "An act to amend sections eight, nine, eleven, thirteen, fourteen, etc., of an act entitled 'An act to incorporate and regulate cities of the first class, and to repeal all prior acts,' etc., approved March 5, 1887." It was stipulated and admitted on the hearing below that the defendant city was formed by the consolidation of the former cities of Wyandotte, Kansas City, Kansas, and Armourdale, in April, 1886, under the provisions of an act of the legislature of the state of Kansas entitled "An act to provide for the consolidation of cities," approved February 11, 1886, and an act amendatory thereto, approved February 18, 1886. This petition to grade the street was filed in July, 1889; and at that time section 13, or paragraph 557, Gen. St. 1889, was in force, and read as follows: "Sec. 18. For opening, widening, extending, and grading any street, lane, alley, or avenue, and for doing all excavating and grading necessary for the same, and for all improvements of the squares and areas formed by the crossing of streets, and for building culverts, bridges, viaducts, and all crossings of streets, alleys, and avenues, the cost or contract price thereof shall be paid out of the general improvement fund, except as otherwise provided by law; and for all paving, macadamizing, curbing, and guttering of the streets and alleys the assessments shall be made for the full cost thereof on each block separately; on all lots and pieces of ground to the center of the block on either side of such street or avenue, the distance improved or to be improved, or on the lots or pieces of ground abutting on such alley, according to the assessed value of the lots or pieces of

ground, without regard to the buildings or improvements thereon, which value shall be ascertained by three disinterested appraisers appointed by the mayor and council. It shall be the duty of said appraisers, within ten days after being notified of their appointment, to proceed to appraise such lots and pieces of land as may be designated by the council, after having taken and subscribed an oath to make a true and impartial appraisement, which appraisement shall be returned to the city council at its first meeting after the same shall have been completed. When said appraisement is returned, the mayor and council shall appoint a time for holding a special session, on some day to be fixed by them, to hear any complaint that may be made as to the valuation of any lot or piece of ground appraised as aforesaid, a notice of which special session shall be given by the mayor in the official paper of the city; and said mayor and council, at said special session, shall alter the valuation of any lot or piece of ground, if in their opinion the same has been appraised too high or too low: provided, that in case a petition of a majority of the resident property owners of a majority of the front feet on any street, or part thereof, shall petition the mayor and council to grade any street, and to grade and pave the intersections thereof, at the cost of the owners of the lands fronting upon the street described in the petition, and if such petition shall be ordered spread upon the journal of the council by a majority of the council-elect, the mayor and council shall thereafter have power to assess the cost of such improvements against the lots and parcels of land abutting on such street so improved abutting property." Paragraph 1077 was also, it is claimed, in force, and it reads as follows: "The grading of all streets, avenues, and alleys in said consolidated city, after such consolidation, shall be borne by the property abutting thereon, and the assessments for the payment thereof shall be made on each block separately, in the same manner and with like effect as is provided by the law governing cities of the first class for paving, macadamizing, curbing, and guttering the streets."

It is claimed by the city that the assessments for the grading were made under paragraph 1077, as this was a consolidated city; while it is claimed by the plaintiff in error that these assessments must be governed by the proviso contained in paragraph 557. The opinion heretofore rendered affirmed the judgment below by a construction of the proviso to paragraph 557, Gen. St. 1889; the theory of the decision being that the proviso did not expressly state a rule for apportionment, and, the one adopted being fair, just, and equitable, the court would not interfere. Under the authorities cited by counsel for plaintiff in error, we have serious doubts as to this proposition, and are strongly inclined to the belief that the proviso does fix a rule of apportionment. In the case of *City of Lexington v. McQuillan's Heirs*, 9 Dana, 513, the charter of the city gave the mayor and council authority to grade

and macadamize streets and alleys of said city at the cost and expense of the lot-owners fronting such streets or alleys, and they shall apportion the cost and expense of grading and macadamizing equally on the lot-holders. In the year 1886 the council graded and macadamized Main street, from the intersection of High to Maxwell streets, and distributed the cost thereof among the owners of lots on each of the squares opposite to and adjoining the improvement thus made. McQuillan's heirs being owners of a lot on the corner of Main and High streets, the city council assessed against them, as their portion of the cost of the work, the sum of \$509.92, that being one-half the amount charged for grading and paving opposite to their ground. This sum greatly exceeded the proportionate cost of the entire work done opposite to the lots of ground, respectively, in the same square, in consequence of a deep cut and a stone-wall made opposite to the lot of McQuillan's heirs, and they resisted the payment of the amount so assessed against them. One of the questions discussed in the opinion is as to the rule of apportionment, and the court, by Chief Justice ROBERTSON, say: "It is manifest that this section of the charter prescribes a distribution of the entire cost of grading and paving a street to the whole extent of the square among the owners of the ground in that square, according to some principle of equity, and that it did not intend to authorize the exaction from any such proprietor of the cost of construction opposite to and co-extensive with the front of his lot, when the cost of that portion of the work had exceeded the average charge upon the whole square. And it seems to us, also, that the rule of equality prescribed by the legislature is the territorial extent, and not the value, of each lot of ground. This is the test of the authority given to a portion of the owners of the grounds in any one square to renovation of the street and sidewalks opposite such square at the cost of all the owners of ground in it. Had the *ad valorem* principle been adopted, the owner of a comparatively small piece of ground, expensively improved, might control the other owners of ground in the same square, and impose on the majority a heavy burden against their consent, and possibly against their interest. And as the extent of each proprietor's front on the street is the criterion of authority given to a part of them to control the whole, and impose a common burden, it is altogether reasonable to infer that the aggregate responsibility should be, and was intended to be, distributed according to the same principle. Then, as the amount assessed against McQuillan's heirs is admitted to be much greater than their portion of the cost of the work opposite the whole square distributed among the several owners of the ground therein, according to the rule prescribed by the statute, the circuit judge did not err in enjoining the coercive collection of the assessment as thus illegally made." This is equivalent to saying that under the section of the

charter the whole square is a taxing district, and the legal mode of assessment is to ascertain the cost of the improvement of the square, and apportion that cost equally to the lot-owners in proportion to the frontage of their respective lots on the square.

In the case of *City of Louisville v. Hyatt*, 2 B. Mon. 177, it appears that section 9 of the charter of that city is the same as section 11 of the charter of the city of Lexington, construed in the case cited from 9 Dana. It is said in the Louisville case, in reference to that section, "that, in distributing the burden of the entire cost of improvement, each lot-holder on the square divided by the graded street should be required to pay, not one-half the cost of the grade opposite his ground, but his adequate portion of the whole cost, estimated according to the relative extent of his lot on the street."

In the case of *State v. City of Portage*, 12 Wis. 562, it will be seen that the charter of the city provided that, upon the application of two-thirds of the owners of lots on a street, the council shall have power to have such street graded, and, for the purpose of defraying the cost, to levy and collect a special tax on the lots abutting on such street in proportion to the size or front of such lots, respectively. The city passed an ordinance requiring a certain street to be graded, and directed that each lot should be charged with the work done in front thereof. This ordinance the court held void, as being repugnant to the charter: PAINE, J., saying: "That all that part of the ordinance which provided that each lot or part of a lot should be chargeable with all the work done in front of it is repugnant to the provisions of the charter on that subject can admit of no question. The charter evidently requires that, when any street is ordered to be graded, the section so ordered to be improved shall, for the purposes of taxation, be treated as a whole, and that, when the whole amount of tax to be raised for that work is ascertained, it shall be equalized and divided among the various lots chargeable therefor, according to their front or size. This, it is obvious, is an entirely different principle of assessment from that which charges each lot with the entire expense of the improvement in front of it, and seems to avoid much of the inequality and injustice of the latter system. But it is the latter which is provided for in the ordinance under which the contract is let, and that part of it is of course void."

The cases of *Williams v. Mayor*, 2 Mich. 560, and *Woodbridge v. City of Detroit*, 8 Mich. 274, construing provisions in the charter of the city of Detroit similar to the proviso we are now considering, apart from their value as to the necessity of a just and reasonable rule for the apportionment of the cost of a public improvement, will be found in their general trend in harmony with the cases we have already cited. The general rule deduced from these earlier cases is that, where the grading of a street is to be paid for by the owners of lots abutting on the improved street, the whole length of the street so graded is to be considered as one taxing district, and

the individual owner of a lot or lots so abutting is required to pay his fair proportion of the cost of the grading along the whole line of street improved; not the cost of grading of his lot or lots, or of the block in which his lot or lots may be situate, but his proportionate part of the cost of grading the entire distance improved. This principle was distinctly recognized by this court in the case of *Parker v. Challis*, 9 Kan. 107. The charter of the city of Atchison expressly provided that the city council should have power to make sidewalks, and, "for making and repairing sidewalks, the assessments shall be made on all lots or pieces of ground abutting on the improvement according to the front foot thereof." In January, 1869, the city council by ordinance required the owners of lots on 17 different streets to build sidewalks. Challis owned seven lots in a block fronting on Kansas avenue in said city. He resisted the collection of the special assessment made for the construction of the sidewalk in front of his lots, principally on the ground "that the city had no authority to make assessments for building sidewalks on said various streets upon all the lots on said streets fronting on said sidewalks; the power existing only to assess lots on each street for the sidewalks built thereon;" and this was the finding and judgment of the district court of Atchison county. It will be seen from this statement that the question was whether the whole distance of all the streets ordered to be improved was the taxing district, or whether each street was a separate and distinct taxing district. Among the facts shown on the trial below was that some of the streets on which sidewalks were ordered to be built were not graded, and that portions of said sidewalk, by reason of the uneven condition of the streets, were necessarily built on posts, in some cases five feet high. On error to this court it was said by BREWER, J.: "The power to make sidewalks is here given absolutely and without limitation. When and upon what streets they shall be made is committed to the discretion of the mayor and council. This discretion is not limited to a single street. They may sidewalk the whole city at once, and by a single contract. But the right to assess the lots fronting on the improvement to pay for the same is co-extensive with the power to make it. True, as urged, a sidewalk on one street may cost more than a sidewalk on another street, and, if both be united in one contract and one assessment, the owner of a lot on the latter street may have to pay more than if his street only was sidewalked; but the same is true not only of two streets, but also of two blocks on the same street, or of two lots in the same block. Still, there is no injustice in apportioning the entire cost of a sidewalk upon the several lots fronting it. The value of a sidewalk depends greatly upon its extent. \* \* \* It seems to the writer of this opinion that this case is a clear recognition of the principle that where the charter of a city provides that the streets may be graded at the expense of the abutting land-owners, and the council is given

power, in the language of the proviso to section 4, c. 99, Laws 1887, "to assess the costs of such improvement against the lots and parcels of land abutting on such street so improved," the whole length of the street so improved is one taxing district, and that it is not to be divided into blocks, and each block made liable for the improvement in front thereof.

In the case of *City of Lawrence v. Killam*, 11 Kan. 499, it was conceded in the briefs of counsel for both sides "that the statute does not charge the property with the cost of building the walk in front of the lots, but the entire improvement—all the walk directed to be built—is to be assessed to the abutting property according to the front foot thereof;" and with this concession the question was whether the assessment was illegal because it did not average a wide walk with a narrow one.

The case of *Hines v. City of Leavenworth*, 8 Kan. 186, is instructive because of the change in the rule of apportionment during the progress of the improvement. In June, 1863, the city passed an ordinance providing for the improvement of streets, the third section of which provided: "For the purpose of making such improvements, a special tax shall be levied and collected upon adjacent real estate, extending to the center of the block on either side of the improvements." While the work was in progress, the legislature passed an act amending the act incorporating cities, by which several methods were prescribed for levying taxes for the improvement of streets, and, among others, a levy according to the area of the abutting property, and providing that this method shall apply to improvements now being made. The city passed an ordinance in pursuance to the amended charter. The city engineer made another assessment of the cost of the work according to the area of the lots. *Hines et al.* attacked the validity of the assessments, they being owners of lots abutting on the improved streets, on the ground that the law under which the assessment was made was not applicable; that the law was unconstitutional, in that the rate of assessment authorized was not equal and uniform. The court, after affirming the constitutionality of the amended act, and declaring its application to the improvements then in progress, says: "The cost of the improvement must be assessed against the adjacent property. The charge must extend back to the middle of the block. It must be levied in one of three prescribed ways, and in proportion to the cost of the whole improvement." This is the only equitable construction that can be given to the statute under consideration. Special assessments are made upon the assumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of property peculiarly situated as regards the contemplated expenditure. *Cooley, Tax'n*, 606.

The principle is that "when certain persons are so placed as to have a common interest among themselves, but in common with the rest of the community, laws may be justly made providing that under suitable and equitable regulations those

common interests shall be managed so those who enjoy the benefits shall equally bear the burden." *SHAW, C. J.*, in *Wright v. Boston*, 9 Cush. 233. In *Palmer v. Stumph*, 29 Ind. 329, an assessment is spoken of as "being the adjustment of the shares of a contribution to be made by several towards a common object, according to the benefit received." In this state assessments by benefits are made by appraisers, who value the property included in the district to be improved, and apportion the cost thereof in proportion to such valuation. This is a legislative requirement, and in the opinion of Judge Cooley in his work on *Taxation* is the most equal and just method. The legislature must determine over what territory the benefits must be diffused, because this is an undoubted and necessary power pertaining to all matters of taxation. The whole subject of taxing districts belongs to the legislature. *Cooley, Tax'n*, 640. See, especially, the case of *Sinton v. Ashbury*, 41 Cal. 525. Property can only be assessed for local improvement on the principle of benefits received by the property from the construction of the work, and the benefits must be imposed on the property proportionately. *Crawford v. People*, 82 Ill. 557. It is equally within the power of the legislature to prescribe one district over which the whole cost of the improvement shall be spread, or to make separate districts for the improvement along the several blocks, (*Creighton v. Scott*, 14 Ohio St. 438;) but when once prescribed the levy must embrace all the property within the district, and to omit any would defeat the rule of apportionment, (*Hassan v. Rochester*, 67 N. Y. 528; *In re Churchill*, 82 N. Y. 288; *People v. McCune*, 57 Cal. 153.) Whatever rule of apportionment is adopted, it must be just and equitable; and this is a question for the courts. Judge Dillon, in his work on *Municipal Corporations*, states that there has been a diversity of opinion in the courts as to whether a law compelling owners of lots to pay the entire cost of the improvement in front of their lots, instead of their proportion of the cost of the entire work, is constitutional; but the later adjudications seem to be that, where this rule is expressly commanded by the statute, it will be upheld. The learned author further says "that in his judgment the one right in principle, and most just in its practical workings, is that 'the assessment be made upon all the property specially benefited by the particular improvement, according to the exceptional benefit each lot or parcel of property actually and separately receives.'" Page 934, § 761, subsec. 5. This is the sole object of our statute requiring each and every lot or parcel of ground to be appraised, excluding improvements thereon, so that each naked lot can bear its proper proportion of the cost made in improving the block in which it is situated, or the entire distance on the street improved. These cases establish the rule that, when the legislature establishes the extent of the taxing district, it cannot be lessened or divided by the council, but that body must act in strict compliance

with the terms of the power delegated. If, under this proviso, the extent of the improved street is the taxing district, the council must not depart therefrom, and say that each block must be separately taxed for the improvement made in its front, as that is establishing a different rule for the apportionment of the cost of the work.

From these decisions it inevitably follows that, without some express legislative sanction, the true rule is that the whole property to be improved constitutes a single taxing district, and the owner of a lot abutting on the improved street is required to pay that portion of the cost of the improvement that the valuation of his lot bears to the valuation of all the lots or parcels of ground subject to assessment in the taxing district. This rule is changed by the legislature in respect to paving, macadamizing, curbing, and guttering streets in cities of the first class, and each block separately made a taxing district for these purposes; but, as we think, the rule applies to the proviso we are considering. An examination of section 4, c. 99, Laws 1887, will disclose that the first eight lines of the section provides for opening, widening, extending, and grading streets, and for other improvements, and for doing the work thereof, and that the cost thereof shall be paid out of the general improvement fund, except as otherwise provided by law. And then follows the provision that for all paving, macadamizing, curbing, and guttering of streets and alleys the assessments shall be made for the full cost thereof on each block separately. Then follows provisions for appraisalment, and notice, and hearing complaints of the appraisalment. Then comes this proviso: "That in case a petition of a majority of the resident property owners or a majority of the front feet on any street, or part thereof, shall petition the mayor and council to grade the street at the cost of the owners of land fronting on the street described in the petition, and if such petition be ordered spread upon the journal of the council-elect, the mayor and council shall thereafter have power to assess the cost of such improvement against the lots and parcels of land abutting on such street so improved." The council have power originally, without petition from lot-owners, to order a street graded, and to pay for such improvement out of the general improvement fund. If the council refuse or neglect to order a particular street, or part of a street, graded, the proviso gives the resident lot-owners who have a majority of the front feet on a street the right to have the street graded on certain conditions; but in such a case the cost of grading must be apportioned to the lots and parcels of land abutting on the graded street. This proviso, then, gave a right not granted by the body of the section. The council cannot pay the cost of paving, macadamizing, curbing, and guttering streets out of the general improvement fund; for the full cost of such an improvement must be assessed against each block separately thus improved. If this proviso intended that the grading of

a part of a street petitioned for should be paid for in the same manner as paving, macadamizing, curbing, and guttering is, why does it contain the word, "to assess the cost against the lots or parcels of land abutting on such street?" Or why did it not say, "by each block separately?" Because the intent of the legislature was to provide a different rule of apportionment from that made in the body of the section. We use the words "proviso" because it has crept in the case on the argument, in the briefs; but this is not a proviso in the technical sense, but a separate and independent clause in the section, giving a right to petitioners not hereinbefore enjoyed. It seems to us to be an irresistible conclusion, coming to the mind instantly, and without mental effort, on the first reading of the section, that the legislature had made separate and distinct rules of apportionment for the cost of paving streets and grading streets. We have endeavored by numerous citations to show that the true construction of the language used in the concluding clause of the section is that the whole length of the street improved is the taxing district, and not each block separately. No construction of the proviso is admissible that will make it mean the same as the body of the section, because, in the nature of things, the proviso is intended to cover ground not within the balance of the section, or else there would be no reason for its existence. If the legislature intended that the cost of grading a street on the petition of the lot-owners whose property abutted; that each separate block should pay only for the grading in its immediate front, as in paving, macadamizing, curbing, and guttering,—the word "grading" would have occurred in connection with the other improvements. It is evident that a different rule of apportionment was provided for grading, and hence the legislature did establish a rule of apportionment, and the common council of the city had no discretion to exercise. Any other construction renders the concluding part of the section meaningless.

There must be special authority by law conferred upon the city council to make the assessments. The ordinary grant to municipal corporations to levy taxes for municipal purposes will not justify other than ordinary taxes. The power to make assessments is exceptional, and must be strictly construed. *Cooley, Tax'n*, 609; *Hitchcock v. Galveston*, 96 U. S. 341. The method of apportionment is a legislative question, and in every act providing for a local improvement a method of apportionment of the cost must be provided. We hold in this case that the legislature did fix the method of apportionment with reference to this particular improvement. But it is said that this amendment to the law, made in 1887, has no application to this city, because, as appears from the record, it is a city formed by the consolidation of the cities of Kansas City, Wyandotte, and Armourdale, under the provisions of an act of the legislature that took effect on the 12th day of February, 1886, entitled "An act to provide for the consol-

idation of cities," commencing with paragraph 1064, Gen. St. 1889. We have referred heretofore to paragraph 1077 of this act, and we are asked now to say that this assessment, having been made in conformity to that section, is good. This raises questions both as to the validity and application of the paragraph. It is a very doubtful question whether it was constitutional or not; not because of its special legislation, but for the reason that the subject-matter of the section does not seem to be embraced in the title to the act in which it is found. The legislature has power to consolidate cities, and to prescribe the rules and conditions upon which such consolidation shall take place; and every section of the act that can, by fair inference, be held to be an incident to the power to consolidate, or a condition of such consolidation, may be said to be fairly expressed by the title. But it is difficult for the ordinary mind to realize how a particular manner of apportioning the cost of grading streets in a consolidated city can be held to be a condition, or to be embraced within the meaning of the title of this act. There are no words used in this title that would suggest to the most acute mind that it contained provisions about grading streets. The strong inclination is to regard it as void. A clearer question is presented of its repeal. We think it is repealed by the act we are considering, that was passed at the session of the legislature in 1887, and took effect on the 12th day of March; not expressly repealed, but by necessary implication, because of their antagonism, and because it is impossible to reconcile them. After these enumerated cities were consolidated, and formed Kansas City, Kan., that city became one of the first class, and is to be governed in all respects by the laws regulating cities of the first class. Every act passed by the legislature in respect to matters affecting cities of the first class has the same application to that as to any other city of the class in the state. It cannot be maintained that the act providing for the consolidation of cities is in the nature of a contract, whose obligations cannot be changed by legislation. An act of the legislature prescribing a different method and rule of apportioning the cost of a local improvement than the rule expressed in the act consolidating cities, so conflicting that the two cannot be reconciled, and one or the other must fall, must necessarily have the effect to repeal the prior one, or that prior one must be invested with some unusual attribute to obviate that result. We regard the act to provide for the consolidation of cities as a general law of uniform operation, that operates on cities already in existence, and will operate on those that grow in the future; that is, subject to amendment or repeal like any other general law upon the statute book. If the later act of the legislature is in actual conflict with one of its provisions or sections, that provision or section must go, for the same reason that applies to all repeals by implication. Hence we say that this assessment by the separate block cannot be upheld by the section of the act

under which this city became a consolidated one. Without there are strongly coercive reasons, it ought not to be held that we have two statutes in force in this state prescribing different methods for the apportionment of the cost of a local improvement in a city of the first class; and every consideration of public policy, as well as the uniformity of our legislation, demands the declaration that, when the act of consolidation became complete, Kansas City was subjected to all the provisions of our statute regulating and governing cities of the first class, as if created in the usual statutory method, and all amendments made to such laws applied to that municipality as well as all others of that class.

It follows that the motion for rehearing is sustained, and the judgment of the court below reversed, for the sole reason that there is a rule of apportionment prescribed by the legislature making the whole distance on the street to be improved the taxing district. The petition and ordinance are valid, and probably the only thing required is a new apportionment and assessment of each lot or parcel of ground abutting on the graded street, so that it pays its proper proportion of the whole cost of the grading.

**PER CURIAM.** It is so ordered; all the justices concurring.

(46 Kan. 304)

**JOHNSON V. KEELER et al.**

(Supreme Court of Kansas. May 9, 1891.)

**ENFORCEMENT OF MECHANICS' LIENS — PARTIES — WITHDRAWAL OF SUIT.**

1. In an action to foreclose a mechanic's lien, all lienholders and incumbancers should be made parties, and a lienholder who is not made a party in the first instance is entitled, upon application, to come in at any time before final judgment, and, by an answer in the nature of a cross-petition, set forth his claim of lien, and ask to have the same foreclosed.

2. In such a case his right to proceed to a final determination of his lien will not be defeated, where the plaintiff's petition is held upon demurrer to be insufficient, or where there is a compromise or withdrawal of any claim for a lien by the plaintiff or other lienholder who is a party in the action.

(Syllabus by the Court.)

Error from district court, Finney county; A. J. ABBOTT, Judge.

H. R. Boyd, for plaintiff in error. Hopkins & Hoskinson, for defendants in error.

JOHNSTON, J. Keeler & Hudson contracted to build a house for Benjamin H. Barr, and purchased building material for that purpose of the Western Lumber Company. Failing to pay for the material, the lumber company filed a statement and claimed a lien on the property improved. Thereafter the lumber company brought an action against the contractors and the owner to recover what was due from the contractors and to foreclose their lien. Subsequently John Johnson, who had also furnished material to the contractors for the same building, which had not been paid for, and who had duly filed and claimed a lien, applied to the court to be made a party to the action.

brought by the lumber company, and to have his lien on, and interest in, the property determined. This application was heard by the court and granted on May 31, 1888, and Johnson filed an answer in the nature of a cross-bill, setting forth the sale of the material for use in the construction of the house, and that it was so used by the contractors; that there was still due thereon the sum of \$76.50; that a statement for a subcontractor's lien had been filed, which was set out at length; and he asked for a judgment against the contractors for the amount due, and that it be declared a prior and paramount lien to that of the lumber company upon the premises of Barr. On June 1, 1888, a demurrer, filed by Barr to the petition of the lumber company, was sustained by the court, upon the ground that the statement filed by the company for a subcontractor's lien was insufficient to authorize a lien against the property of Barr. Proceedings in error were instituted in this court by the lumber company, and the ruling of the district court was reversed. *Cunningham v. Barr*, 45 Kan. —, 25 Pac. Rep. 533. After the demurrer of the lumber company was sustained, and on June 18, 1888, the defendants Barr and Keeler & Hudson filed separate motions to strike the answer or cross-petition of Johnson from the files, and to dismiss it because the pleading was unwarranted by the Code, and the court had no jurisdiction to hear and determine the matters therein stated. These motions were sustained, and Johnson complains of the ruling.

The action of the court in dismissing the cross-petition of Johnson cannot be sustained. He was a proper party in the action, and his pleading set forth a cause of action and right to affirmative relief. He had an interest in the subject of the controversy, and his presence was necessary to a complete determination of the same. The statute relating to the foreclosure of mechanics' liens expressly provides that all persons whose liens are filed as the statute provides and all incumbrancers shall be made parties, and therefore Johnson should have been made a party, in the first instance. Laws 1871, c. 97, § 5. As this was not done, it was proper to grant his application, and permit him to come in and have his claim and lien adjudicated. Indeed, if he had begun an independent proceeding, it would have been proper for the court, under the mechanic's lien law, to have consolidated the actions, and tried them as a single case. The fact that what is termed a "cross-petition" is not expressly authorized by the Code seems to have been relied on as a ground for dismissal. The name of the pleading is unimportant. The defendant may file an answer in the nature of a cross-petition, setting forth a statement of his right to affirmative relief. Civil Code, § 94. "The answer of the defendant setting up his claim is what formerly was a cross-petition in name, and in effect is still the same, although called an 'answer.' The reply his co-defendants may make to it is in legal effect an answer, although called by a different name. And

all this is within the spirit of the Code, and a mere difference about names ought not to operate to defeat it." *Kimball v. Connor*, 8 Kan. 414. See, also, *Sharon Town Co. v. Morris*, 39 Kan. 377, 18 Pac. Rep. 230; Civil Code, §§ 36, 41, 42. Neither did the action of the court, in sustaining Barr's demurrer to the petition of the lumber company, work a discontinuance of the action, nor warrant the dismissal of Johnson's cross-petition. In the first place, as has been seen, that was an erroneous decision; but if it had been correctly decided, and there had been a voluntary withdrawal of the claim of lien by the lumber company, it would not have prejudiced the right of Johnson to proceed with the foreclosure of his lien. After he came in and filed his pleading, the other parties were bound to take notice of his claim, and of every subsequent step taken in the action. He is properly before the court, asking affirmative relief, and the compromise settlement or withdrawal of a claim by another lienholder or incumbrancer who is a party to the action should not and will not defeat him in proceeding with the action to a final determination of the matters involved. *Venable v. Dutch*, 37 Kan. 515, 15 Pac. Rep. 520; *Worrell v. Wade's Heirs*, 17 Iowa, 96; *King v. Thorp*, 21 Iowa, 67. The judgment of the district court will be reversed, and the cause remanded for a new trial.

All the justices concurring.

(46 Kan. 283)

PARKER v. RICHOLSON, Sheriff, et al.<sup>1</sup>

(Supreme Court of Kansas. May 9, 1891.)

BURDEN OF PROOF—HARMLESS ERROR.

1. When at the trial a party voluntarily assumes the burden of proof, it is not cause for the reversal by this court of a judgment rendered against him that the burden of proof was cast by the pleadings on the other party.

2. The admission of immaterial evidence is not cause for reversal.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Elk county; M. G. TROUP, Judge.

*Mechem & Smart*, for plaintiff in error.  
*R. H. Nichols*, for defendant in error.

SIMPSON, C. R. S. Parker commenced an action in replevin in the district court of Elk county against Richolson and H. and Winfield Baird, claiming that he had a special interest in and the right to the immediate possession of certain horses described in a chattel mortgage made by H. Baird to W. D. Parker on the 11th day of March, 1887, to secure a promissory note for \$700 of that date, payable on or before the 18th of December, 1890, with 10 per cent. interest, payable annually, made by Baird, and in favor of W. D. Parker, and assigned by W. D. Parker to R. S. Parker on the 9th day of February, 1888; that said chattel mortgage was renewed by affidavit, as provided by law, and kept in force and effect. Richolson and other parties defendant filed a general denial, and a jury was waived, and a trial had

<sup>1</sup>Petition for rehearing pending.



by the court that resulted in a general finding and judgment in favor of the defendants in error. Certain judgment creditors of W. D. Parker, by proceedings in aid of execution, procured the appointment of Richolson as receiver of the property of Parker, and the mortgaged chattels, for the recovery of which this suit was brought, were in the possession of the receiver. At the trial the sole question of fact was as to the ownership of the note and chattel mortgage executed by H. Baird to W. D. Parker. The plaintiff in error claimed to be the owner by virtue of a purchase from his father, W. D. Parker; while on the other side the creditors of W. D. Parker claimed that he was the owner, and that his son was aiding him in an attempt to defraud his creditors. Whatever may be the technical construction of the pleadings, the case was tried by both sides upon the theory that the main question was whether the note and chattel mortgage was the property of the father or the son, and upon this issue the plaintiff in error voluntarily assumed the affirmative. It is now too late to complain of the order of trial, the burden of proof, or the condition of the pleadings. The renewal affidavit made by W. D. Parker, the notice of sale in which he described himself as mortgagee, his continued possession of the note and chattel mortgage, his apparent complete control and exclusive management of the entire business, are enough to enable us to say that there is some evidence to sustain the general finding of the trial court. Complaint is made of the admission of the proceedings in aid of execution before the probate court, but it is a glittering generality, and does not specifically point out particular parts as erroneous. A part of these proceedings were an absolute necessity, so far as Richolson was concerned, because by them alone was he connected with this controversy. These proceedings were admissible to show the official character of Richolson, his right to the possession of the mortgaged property, and to fix his status in the litigation. They may not have been the best or the original evidence of the indebtedness of Parker, the father, or to establish some other facts, but, being admissible to establish necessary things, we are not to infer that they were used for other things prejudicial to this plaintiff in error, without some showing to that effect. Again, the material and controlling fact was as to the ownership of the note and chattel mortgage. All other facts were subordinate, and perhaps immaterial, and hence we say that all parts of the transcript of the supplemental proceedings in aid of execution, except such as showed the appointment of the receiver and his authority to take possession of the mortgaged property, were, under the theory of the trial court, immaterial. As we have said, there is evidence sufficient to sustain the general finding, and we can only recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

# BERKLEY v. TOOTLE et al.

(Supreme Court of Kansas. May 9, 1891.)

## CHattel Mortgage by Partnership—VALIDITY.

An existing *bona fide* indebtedness may be secured by chattel mortgage duly executed by the individuals composing a partnership, of which the husband is a member, to the wife, notwithstanding the fact that the firm has been sued, and its creditors are about to levy upon the firm property.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Decatur county; LOUIS K. PRATT, Judge.

S. D. Decker, for plaintiff in error. Wilson & Hays, for defendant in error.

GREEN, C. R. J. Berkley sued J. E. Bebb, sheriff of Decatur county, in replevin, to recover a stock of goods claimed by her under a chattel mortgage executed by J. M. Berkley, her husband, and P. A. Kahnman, doing business under the firm name of Berkley & Kahnman, and P. A. Kahnman & Co., upon a stock of boots, shoes, rubber goods, tools, sewing-machines, fixtures and furniture in a building known as the "Blue Front," in Oberlin, given to secure the payment of \$3,500, and dated and filed for record on the 27th day of December, 1887. Subsequently the stock was levied upon by the sheriff for certain execution and attachment creditors of Berkley & Kahnman, and before the trial commenced the creditors were substituted for the sheriff as defendants. The action was tried to the court on the 27th day of April, 1888, in Decatur county, and resulted in a general finding and judgment for the defendants; and the plaintiff in error brings the case here, claiming error. It is insisted that there was no evidence to support the findings and judgment of the trial court; that there was no fraud shown in the execution of the chattel mortgage by J. M. Berkley and P. A. Kahnman; and that there was an existing and valid debt to support the mortgage. It seems from the evidence that J. M. Berkley had executed a note to his wife for the sum of \$2,190, on the 30th day of March, 1875, and that this money came from her father's estate; that on the 15th day of December, 1886, J. M. Berkley executed another note for \$2,500, in place of the other note, which had been mislaid, and delivered the same to his wife; and that he afterwards gave his wife a note for \$1,000, which had been executed by P. A. Kahnman to him on the 1st day of June, 1887, for money that the plaintiff had given her husband, and he had loaned it to Kahnman to go into business with him. This money also came from her father's estate. This last note had a credit of \$263, on September 1, 1887. According to the plaintiff's testimony, the mortgage was given to secure the payment of these two notes. We do not know upon what theory the court below decided this case, and have not been furnished with a brief upon the part of the defendants in error, and hence are not advised as to their position in regard to this transaction. It is obvious from the examination of the evidence which we have

made, that there was a *bona fide* and existing indebtedness from Berkley & Kahan to the plaintiff. Now, it would seem that if such indebtedness existed at the time the chattel mortgage was executed the firm would have the right to secure the plaintiff. This court has said: "The weight of authority seems to be that mere insolvency, where no actual fraud intervenes, will not deprive the partners of their legal control over the property and of the right to dispose of the same as they may choose; and where the separate creditor purchases from the firm in good faith, and the individual indebtedness is a fair price for the property purchased, such purchase cannot of itself be held fraudulent as against the general creditors of the firm." *Woodmansie v. Holcomb*, 34 Kan. 35, 7 Pac. Rep. 603, and authorities there cited. While the relation existing between the parties called for a more critical examination of the dealings between them than if two of the parties had not been husband and wife, still, if the evidence clearly established an existing and *bona fide* debt to the wife, she would have the same right as any other individual creditor to have her debt secured. The debtors would have the undoubted legal right to prefer her as a creditor, even if the giving of the security would have the effect to consume the property thus pledged in satisfaction of her debt. *Monroe v. May*, 9 Kan. 473; *Kennedy v. Powell*, 34 Kan. 22, 7 Pac. Rep. 606; *Chapman v. Summerfield*, 36 Kan. 610, 14 Pac. Rep. 235. We recommend a reversal of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 272)

MISSOURI PAC. RY. CO. v. KOCHER.

(Supreme Court of Kansas. May 9, 1891.)

RAILROAD COMPANIES—KILLING STOCK—FENCES.

1. Railroad Co. v. *Griffis*, 28 Kan. 539, followed.

2. Where an action is brought against a railway company under chapter 94, Laws 1874, (para. 1252-1257, Gen. St. 1889,) for damages for stock killed at a place where the road is not inclosed with a good and lawful fence, the company may show as a defense that the stock was killed at a crossing of the road used and traveled by the public as a highway, although not established or regularly laid out by the county authorities.

(Syllabus by the Court.)

Error from district court, Chautauqua county; M. G. TROUP, Judge.

J. H. Richards and C. E. Benton, for plaintiff in error. J. Milton and J. V. Beekman, for defendant in error.

HORTON, C. J. In this case there was some evidence tending to show that the animal was injured at the crossing of a road over the track and right of way. The railroad company attempted to show that this crossing was used and traveled by the public as a highway, and therefore that the company was not bound to fence or inclose such crossing. The trial court refused to receive most of this evidence, and also refused to submit the question to the jury whether the animal was killed at a

crossing used by the public. This was error, and material error. It was decided in *Railroad Co. v. Griffis*, 28 Kan. 539, that a railroad company is not liable under chapter 9, Laws 1874, for stock killed at the crossing of a road used and traveled by the public as a highway, though the crossing and route thus traveled is in fact not a regularly laid out and established highway. See, also, 13 Amer. & Eng. R. Cas. 532, 533, and cases there cited. In a note to the principal case it is stated that "the true test whether or not a railroad company is bound to fence at a particular point is whether there is a practical user of the land at such point as a public place, either as a highway or otherwise. This is irrespective of the questions of dedication, statutory appropriation," etc. The judgment of the district court will be reversed, and the case remanded for a new trial. All the justices concurring.

(46 Kan. 337)

CHICAGO, K. & W. R. CO. v. EASLEY.

(Supreme Court of Kansas. May 9, 1891.)

EMINENT DOMAIN—COMPENSATION—TO WHOM PAYABLE—EVIDENCE OF INTEREST.

1. Where commissioners in a railroad right-of-way proceeding award damages for injuries to a tract of land to a certain land and cattle company as the owner thereof, and also allow nominal damages to another party for injuries to the same land, and the latter appeals from such award to the district court, before he can recover damages in said court he must show that he had some interest in the land over which the right of way was condemned, at the time of the condemnation proceedings.

2. Record in this case examined, and held, that no competent evidence was offered by the plaintiff to show he had any interest in the land when the right of way was appropriated by the railroad company.

3. Where a party, seeking to recover damages to a farm consisting of 160 acres, puts a witness on the stand to prove his damages, and the witness says he cannot set a value on 80 acres of the land, and does not know the market value of the other 80, but says it is in his judgment worth \$30 per acre, it is error to permit him, over the objection of the adverse party, to state how much less the whole farm was worth immediately after the appropriation of the right of way across it by the railroad company than it was immediately before such right of way was appropriated.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Barber county; LOREN EDWARDS, Judge pro tem.

Geo. R. Peck, A. A. Hurd, and Robt. Dunlap, for plaintiff in error. W. S. Denton, for defendant in error.

STRANG, C. This was an appeal from the report of condemnation commissioners in a railroad right-of-way proceeding. The commissioners awarded the legal representatives of the Ohio Land & Cattle Company the sum of \$272 as damages for injuries to the tract of land, damages for injuries to which the defendant, J. R. Easley, is now claiming, and also allowed said J. R. Easley the sum of one dollar as damages to the same. Easley appealed, and the case was tried before the court and a jury, February 27, 1887. The jury returned a general verdict, awarding

damages to the defendant in the sum of \$427.33, and also made certain special findings, which they returned with the general verdict. The railroad company moved for a new trial, which motion was overruled. The defendant in error challenges the record in this court, but we think it is sufficient as a bill of exceptions, and therefore it is unnecessary to look further into the matters alleged against it. The company says the defendant is not entitled to any damages, because he failed to show any title to or possession of the land at the time of the condemnation proceedings. There is but little evidence in the record upon this question, and perhaps none which may be said to be competent testimony, and, unfortunately for the defendant in error herein, what little there is seems to be against him. McNeal, a witness called by the defendant in error to establish his ownership and possession of the land, testified that the land belonged to Easley; that, while he did not live on it, he was possessed of it. He also testified that he had control of the place for Easley, as far as his knowledge of it was concerned. The statement that the place belonged to Easley was not competent evidence to prove Easley's ownership of the land, and the evasive statement that, "while he did not live upon the land, he was possessed of it," does not prove possession of the land by Easley; and the statement that the witness had control of the land for Easley, "so far as his knowledge of the place was concerned," does not prove anything. He may not have had any knowledge of the place, and, judging from the character of his evidence, he did not have much knowledge of it. But later on in his testimony he was asked how long Easley had had possession of the place, and his final answer is, "My remembrance would be something like six months since it was deeded back to him." This evidence, if it was competent to prove ownership, would show that the land was deeded to Easley six months after the condemnation proceedings were had. Another witness testifies that Easley sold the land about a year before the trial, which, if it proved anything, would, in connection with McNeal's evidence and the report of the condemnation commissioners, show that Easley sold the land to the Ohio Land & Cattle Company before the condemnation proceedings, and that it was deeded back to him six months after the condemnation proceedings were had, and that in the mean time he had no interest, or but a slight interest, at most, in the land. However, it is unnecessary to speculate as to what interest Easley had in the land. He did not show by any competent evidence that he had any ownership in or the possession of the land. Failing to show any interest in the land that was subject to injury, he could not recover any damages.

The next error assigned grows out of the action of the court in overruling plaintiff's objection to testimony, and in refusing to strike it out after it was in. C. W. Pease was called as a witness by the plaintiff below to prove the amount of

his damages. The witness says he could not tell anything about the value of one 80 of the farm, and as to the other 80 said: "I would only have to say, in regard to that, I do not know what it would sell for. I would have to use my own opinion, my own judgment, in regard to what I considered the value of it. I have never heard it offered for sale, or any body make any offers on it. Would have to use my own opinion with regard to what it was worth afterwards; but what was the real market value I would not know." He gave it as his opinion that this 80 was worth \$20 per acre. He was then asked, "Were you acquainted with the value of land in that neighborhood similar to that, about that time?" and answered, "I know what has been offered and asked for land." The following question was then put to him: "How much less, taking into consideration the inconvenience, if any, by reason of the railroad company running its right of way through there, was it worth immediately after the appropriation of the railroad's right of way through it than it was immediately before the railroad had appropriated the land? (Objected to as irrelevant, incompetent, and immaterial, and for the further reason that it has not been shown that the witness was competent to answer. Overruled.) I consider the value less \$800 on that place, that is, on the entire farm." The admission of this evidence was probably erroneous, within the case of *Railroad Co. v. Kuhn*, 38 Kan. 675, 17 Pac. Rep. 322, and the case of *Railroad Co. v. Muller*, (Kan.) 25 Pac. Rep. 210. But it certainly was erroneous, for the reason that the witness had shown he was not qualified to testify. He testified that he could put no value on one 80, and as to the other 80 it was his opinion it was worth \$20 per acre; but that as to the market value he did not know what it was, and he would have to use his own judgment in fixing the value; and yet he is permitted to tell how much less in value the whole farm was, after the appropriation of the right of way over said land by the railroad company, than it was before the appropriation of such right of way was made. This was error. There are other assignments of error, but we do not think it necessary to notice them. It is recommended that the judgment of the district court be reversed, and the cause remanded for new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 276)

ROGERS v. HODGSON *et al.*<sup>1</sup>

(Supreme Court of Kansas. May 9, 1891.)

AMENDMENT OF PLEADING — DEMURRER TO EVIDENCE — WEIGHT AND SUFFICIENCY.

1. The filing of amendatory and supplemental pleadings rests largely within the discretion of the trial court, and, unless there is a clear abuse of that discretion, its ruling will not be reversed.

2. In case of a demurrer to plaintiff's evidence the court cannot weigh conflicting testimony, but must view that which is given in the light most favorable to the plaintiff, and allow all reasonable inferences in his favor, and, unless

on for rehearing pending.

all that is offered fails to establish his case or some material fact in issue in the case, the demurrer should be overruled.

8. The evidence in the case examined, and held to be sufficient as against an attack made by a demurrer.

(Syllabus by the Court.)

Error from district court, Harvey county; L. Houk, Judge.

*Brown & Kline*, for plaintiff in error.  
*Bowman & Bucher*, for defendant in error.

JOHNSTON, J. On May 12, 1888, G. W. Rogers brought an action against R. W. Hodgson, M. S. Hodgson, Cynthia A. Shafer, and H. Shafer, to recover upon a note, and to foreclose a mortgage which was given to secure the same. The note was for \$2,500, and was executed on May 1, 1886, by Hodgson and wife to Smedley Darlington, due in five years, with 7 per cent. interest, payable semi-annually, according to the terms of 10 semi-annual coupons of \$87.50 each, attached to the note, due on the 1st days of May and November of each year. He alleged that Smedley Darlington sold and assigned the note and mortgage to the plaintiff, who is now the owner and holder of the same. It is further averred that the mortgage given to secure the payment of the note provided that, if any coupon remained due and unpaid more than 30 days after it became due, the whole debt should then become due, and bear 12 per cent. interest from date. The plaintiff further says that the interest coupons maturing November 1, 1886, and May 1, 1887, were paid, but that the coupon maturing November 1, 1887, was not paid at the time the same became due, nor for more than 30 days thereafter, and was still due and unpaid; and that the interest coupon maturing May 1, 1888, was past due and unpaid. There is a further allegation that the conditions of the mortgage were broken by the failure to pay the taxes on the premises and to keep the property insured. On account of these defaults the plaintiff alleges that he has elected to exercise his option to declare the whole sum due and payable, according to the terms of the note and mortgage. He asks for a personal judgment against the defendants Hodgson and wife for the sum of \$2,500, with interest thereon at the rate of 12 per cent. per annum from May 1, 1886, less the two interest coupons which have been paid as above stated; and also for a decree foreclosing the mortgage. The defendants filed a joint answer, admitting the execution of the note and mortgage; denying the assignment of the same by Darlington to the plaintiff; alleging that the coupon due November 1, 1887, was paid to Darlington before the pretended assignment, and alleging an offer to pay the coupon of May 1, 1888, within 30 days after the same became due, at the place where it was made payable, and that within the same time they offered to pay the last-named coupon to plaintiff, but that it was refused; alleging that the agent of Darlington, who negotiated the loan, agreed that no insurance need be taken out on the premises, and waived that condition of the mortgage, and that W. E. Brown, who purchased the premises from Hodg-

son on April 23, 1887, assumed the payment of the mortgage note and coupons mentioned, but that afterwards he combined with the defendant, J. T. Axtell, and one A. B. Gilbert to injure and defraud the defendant, and in pursuance thereof they obtained possession of the note and mortgage from Darlington upon the pretense of the payment of the same by said Brown, and that they did not in any sense obtain an assignment from Darlington to Rogers; that subsequently W. E. Brown entered into an agreement to reconvey the premises to Hodgson, free and clear of all incumbrances, except that Hodgson was to pay the note and the balance of the unmatured coupons as they became due, but with the distinct agreement that no forfeiture of any of the terms and conditions of the note and mortgage had occurred. It is further alleged that no part of the note is due, nor are any of the coupons due except the one maturing May 1, 1888, and that payment of that had been tendered. On December 21, 1888, the plaintiff asked leave to file a supplemental petition, alleging in substance that since the commencement of this action the defendant had allowed the interest coupon due May 1, 1888, to remain unpaid more than 30 days after its maturity, and had failed to pay the taxes which were due December 20, 1888, and had allowed the interest coupon due November 1, 1888, to remain unpaid for more than 30 days after its maturity, and had still allowed the buildings on the premises to remain uninsured, and that for these reasons, in addition to those set up in the original petition, the whole amount of the debt had become due. The court denied the application to file the supplemental petition, and upon the trial which was afterwards had a demurrer was sustained by the court to the plaintiff's evidence. The plaintiff excepted to the rulings of the court in denying the application to file the supplemental petition, and in sustaining the demurrer to the plaintiff's evidence. By the supplemental petition offered the plaintiff undertook to allege such defaults as would entitle him to recover 12 per cent. interest from the date of the mortgage, instead of the 7 per cent. rate stipulated therein. By the conditions of the mortgage a default in the payment of any interest for more than 30 days after the same became due gave the holder the option to declare the whole amount due, and to collect interest thereon at 12 per cent. from the date of the note. In the petition filed he alleged a default in the payment of the interest due November 1, 1887, and that the same was still due and unpaid when the action was brought on May 12, 1888. He also alleged that the coupon due on May 1, 1888, was past due and still unpaid. More than six months after the commencement of the suit, and just before the trial, he asked to file a supplemental petition, alleging the non-payment of the coupons due on May and November, 1888, for more than 30 days after the maturity of the same, and the continued failure to procure insurance, as well as the non-payment of the taxes for the year 1888. These amendatory provisions related only to the right of the plaintiff

to declare the whole amount due, and to collect the additional rate of interest on the note and mortgage. If there had been no default before the commencement of the action the plaintiff would hardly be entitled to enlarge his action by a supplemental petition setting forth subsequent defaults or grounds of forfeiture which did not exist at the commencement of the suit; but if a part of the amount claimed in the petition was due and unpaid at the commencement of the action, it would seem that the plaintiff would be entitled to set up any facts occurring since the commencement of the action showing that a greater or that the entire amount was due and unpaid. The Code provides that "either party may be allowed, on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer, or reply, alleging facts material to the case, occurring after the former petition, answer, or reply." Section 144. The action was brought on May 12, 1888, and the coupon, which was due 12 days prior to that time, had remained unpaid for more than 30 days after its maturity, which by the terms of the mortgage gave the plaintiff the option to elect to declare the whole amount due. The supplemental petition offered also alleged that the taxes which were due December 20, 1888, were unpaid; and that also constituted a ground of forfeiture, and a cause for declaring the whole amount due. As the plaintiff was claiming a personal judgment for the entire principal, and all the interest due thereon, as well as the additional rate, where there was a default of more than 30 days the court would have been warranted in allowing the supplemental petition to be filed alleging additional defaults, which would entitle the plaintiff to recover a greater amount. However, the filing of amendatory and supplemental pleadings rests very largely in the discretion of the court, and unless there is a clear abuse of discretion its ruling will not be reversed. *Tefft v. Fiery*, 22 Kan. 753. We cannot hold that the refusal of the court is such an abuse of discretion as constitutes a ground of reversal.

The next assignment is the ruling of the court in sustaining the defendants' demurrer to the plaintiff's evidence. It is contended by the defendants in error that the coupon which became due on November 1, 1887, had been paid, and that there was no default on account of the non-payment of the taxes or the failure to insure the buildings on the premises. The proof strongly tends to show, and we think would be amply sufficient to sustain a verdict or finding, that at the commencement of the action no defaults had occurred which gave the plaintiff the right to elect to declare the whole amount due. It leads us to think that there was a payment of the coupon due November 1, 1887, and that the taxes due December 20, 1888, were paid by the party holding the legal title to the premises at the time the taxes were due. The tax-receipt and the coupon of November, 1887, were both surrendered to the owner of the mortgaged premises prior to the commencement of the action. The testimony in regard to the payment

and surrender of this coupon, as well as the payment of the taxes, is inconsistent with forfeiture. Neither does it appear that there was any forfeiture by reason of the non-insurance of the property. No provision is contained in the mortgage note with reference to insurance, and the one contained in the mortgage provides that the buildings will be insured by the mortgagors at their own expense, with the loss payable to the mortgagee; and, instead of reciting that the failure to do so shall be a ground of forfeiture, it provides that, in the event of the failure of the mortgagors, the mortgagee may procure such insurance and collect the cost thereof from the mortgagors, and that the mortgage shall stand as security for the insurance. Besides, the testimony offered tends strongly to show that the mortgagee and his agent did not desire or demand insurance, and, if they had a right to demand the same, that there had been a waiver of such right. If the decision of the district court had been a finding at the final submission of the case that no defaults had occurred prior to May, 1888, we would readily yield our concurrence and declare that the testimony offered fully warranted the finding; but it is not so clear that a demurrer to the evidence should have been sustained. "A demurrer to the evidence admits every fact and conclusion which the evidence most favorably to the other party tends to prove." *Christie v. Barnes*, 33 Kan. 317, 6 Pac. Rep. 599. In such a case the court cannot weigh conflicting evidence, but must view that which is given in the light most favorable to the plaintiff, and unless all that is offered fails to establish his case, or some material fact in issue in the case, the court should overrule the demurrer. *Railroad Co. v. Foster*, 39 Kan. 329, 18 Pac. Rep. 285, and cases there cited. We are inclined to the opinion that under these rules the demurrer should have been overruled. It certainly should as to the coupon note due May 1, 1888, that was past due when the action was commenced, and defendants admitted that it was still unpaid. In any event, plaintiff was entitled to a judgment for the amount of that coupon and the costs of the action. It is true, as contended, that the plaintiff claimed more than that, and that he claimed the amount of principal and interest at the advanced rate, but it appears that he set out the principal mortgage note in his petition, and all the coupon notes that were unpaid, and he asked a personal judgment for the amount of the principal, together with all interest due thereon. The coupon note maturing May 1, 1888, was recited at length, and the plaintiff alleged that it was past due and was still unpaid. Even if the principal note was not due when the suit was begun, and no defaults had occurred which authorized the plaintiff to declare the whole amount due, still he was entitled to recover that which was due, and this was fairly included within the allegations of his petition. There was some testimony relating to a tender of the amount of this coupon, but there was no offer to confess judgment, and the tender, if any was made, did not include the costs

of the proceeding. Guided by the rules referred to in relation to a demurrer to the evidence, we cannot say that a sufficient tender was made, or that the demurrer should have been sustained. The facts of the case, as indicated by the record, are such that we would have been pleased to have affirmed the judgment if it could have been done under the rules of law, but we feel compelled to hold that the demurrer should have been overruled. The judgment of the district court will be reversed and the cause remanded for a new trial.

All the justices concurring.

ENGSTROM *et al.* v. TYLER.

(*Supreme Court of Kansas. May 9, 1891.*)

ACTION FOR RENT—EVICTION AS A DEFENSE.

1. Where an action is brought by a landlord to recover of his tenant rent for a stated time, an answer of the tenant alleging that during the term of the lease the landlord entered the premises and took possession thereof, leased them to various parties, and collected and retained therefrom, states a defense to at least a part of the landlord's claim for rent.

2. The amended answer in this case states a defense to the cause of action set up in the plaintiff's bill of particulars, or to at least a portion of it, and therefore the demurrer to said answer ought to have been overruled.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, McPherson county; FRANK DOSTER, Judge.

Frank G. White, for plaintiffs in error. Simpson & Bowker, for defendant in error.

STRANG, C. Emma J. Tyler commenced this action before a justice of the peace in McPherson county to recover \$135 and interest thereon, for rent alleged to be due her from the defendants below. The case was tried before a justice, resulting in a judgment for the plaintiff in the sum of \$136.57. From this judgment the defendants therein appealed to the district court, where they filed an answer to the plaintiff's bill of particulars. A demurrer was interposed to such answer, and by the court sustained. Afterwards the defendants filed an amended answer, to which the plaintiff below again demurred. This second demurrer was also sustained. To the ruling of the court sustaining this demurrer the defendants below objected and saved an exception, and the case comes here for review of the ruling on said demurrer. The amended answer filed in the court below reads as follows: "Defendants say that they deny that they are indebted to the plaintiff in the amount sued for, or in any other sum of money whatsoever, for the following reasons: Prior to August 1, 1888, the date when the installment of rent herein sued for is alleged to have fallen due, defendants fully and completely abandoned and vacated the premises described in the plaintiff's bill of particulars, and released all claims of possession or right to them, and plaintiff resumed possession and control of said premises, leased them to various and diverse parties, collecting and retaining the rent for the same in all respects the same

as she did before the date of the alleged lease to the defendants, and has at all times since assumed and retained full and complete control of the premises; and defendants allege that by reason of the vacation of the premises by them, and reoccupying and control of them by the plaintiff, a cancellation of said lease was then and there perfected by operation of law." While this answer is not well drawn, yet we think it states a cause of defense, at least to some part of the plaintiff's claim, and should have been held good as against a demurrer. It is therefore recommended that the judgment of the court below be reversed, and cause remanded for further proceedings.

PER CURIAM. It is so ordered; all the justices concurring.

BRANT *et al.* v. JOHNSON.

(*Supreme Court of Kansas. May 9, 1891.*)

PROMISE TO PAY DEBT OF ANOTHER — PRINCIPAL AND AGENT—CONTRACT.

1. A verbal promise to pay the debt of another is within the statutes of fraud, unless it is, in effect, substituted for the original liability.

2. A letter of instructions from one agent to another cannot be construed into a contract between the principal and a third party respecting the business referred to in the letter.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Franklin county; A. W. BENSON, Judge.

John W. Deford, for plaintiff in error. Mechem & Smart, for defendant in error.

SIMPSON, C. Brant & Beachy sued D. P. Johnson in the district court of Franklin county, alleging, substantially, that they were partners conducting a real-estate agency at Ottawa, in said county. That on the 19th day of March, 1883, they made a contract with Edwin E. Wilson by which Wilson employed them to sell seven tracts of land lying in said county for the sum of \$22,252, and, if they sold at that price, they were to receive 3 per cent. commission, and were to make no charges for expenses. That, if all the land should be sold within six months, they were entitled to the amount realized in excess of \$21,000. If the total amount realized by a sale within six months shall be \$500, or more in excess of \$22,252, then their commission was to be 6 per cent. of the gross sales, and no more. If not sold within six months, but within one year, then the commission shall be 4½ per cent. If any of the property should remain unsold after one year, or if the land did not sell for \$22,252, the commissions and charges of every kind shall not be in excess of 3 per cent. Brant & Beachy were to take charge of and lease the land, but no lease to interfere with the sale. On the 10th day of May, 1883, an additional contract was made between the parties, wherein it was provided that the amount of \$814 is due Brant & Beachy when that sum shall have been derived from the sale of the real estate known as the "Hamilton Lands," in Franklin county, subject

to a payment, out of the proceeds of said sale, of \$1,500 due Hamilton. On the 26th day of December, 1883, Brant & Beachy entered into a contract with one W. A. Clark that recited that the previous contracts with Wilson were made for Clark, Underwood & Co., and for convenience in business Wilson had conveyed to Clark the lands mentioned in the original contract, who holds the same for Clark, Underwood & Co.; that said conveyance shall not be considered a breach of the original contract; and that Brant & Beachy shall continue to handle the lands upon the terms agreed upon; the firm of Underwood, Clark & Co., however, to have the full benefit of and be subject to any agreements in existence between Wilson and Brant & Beachy in relation to said lands, the same having been made by Wilson for Underwood, Clark & Co. It is then alleged that Clark mortgaged these lands to D. P. Johnson to secure the payment of \$20,000 due from Underwood, Clark & Co. In said mortgage it was agreed that, at any time that a sale was made of any part of the land at fair prices, the said Johnson, on receiving the purchase price of the land sold, should credit it on the notes, and release the tract sold from the operation of the mortgage. On the 15th day of May, 1884, it was further agreed between Clark and Brant & Beachy that, in consideration of the sale of the balance of the Hamilton lands to Fickenger at the price of \$8,500, the said Brant & Beachy are to receive as total commissions the sum of \$365, there being the sum of \$814 to be paid Brant & Beachy out of the sale to Fickenger; Brant & Beachy representing that the proceeds of rent in their hands amount to \$300. That on the 25th day of September, 1884, the said D. P. Johnson, through his agent, the Goodin Bank of Ottawa, duly authorized, promised, and specially agreed with Brant & Beachy that if they would complete the sale to Fickenger, or his assignee, Kerr, and to David Fogle, that, as soon as the proceeds of said sale were paid, the sum due them would be paid by his agent, the bank, or by himself. That they did complete said sales, the one to Fogle for \$4,800, and the other to Kerr for \$8,500, which sums were paid to the Goodin Bank. That Johnson refused to pay, and they ask judgment against him for \$978.64, with interest from May 1, 1885. Johnson answered, denying generally, and for a second defense pleads the statute of limitations, and for a third defense alleges that heretofore, in a certain action in the district court of Franklin county, wherein these plaintiffs brought an action against W. A. Clark, defendant, the identical fund of \$1,100 mentioned in the petition (being the balance of the proceeds of the sales to Fogle and Kerr remaining on deposit in the Goodin Bank) was attached as the property of Clark; that thereupon this defendant filed an interplea in said action, claiming said funds as his, and the plaintiffs filed a reply to said interplea, denying the claim set up therein, and setting forth the same facts which are now set up in this petition as the foundation of their action, and praying judgment therein against the defend-

ant. Said action came on for trial, and was tried upon the issue presented by the interplea, reply, and denial, and judgment was rendered thereon in favor of this defendant. The defendant alleges that all the matters and things now complained of and sought to be litigated were finally adjudicated in that action in favor of this defendant. The entire pleadings, records, and proceedings in that action are made a part of the answer. This case was tried by the court at the October term, 1888, and findings of fact and conclusions of law were entered as follows:

"FINDINGS OF FACT.

"(1) The plaintiffs are, and at the times herein referred to were, copartners in the business of real-estate agents and loan-brokers at Ottawa, Kansas.

"(2) On the 19th of March, 1883, the plaintiffs, by written agreement, undertook, as such brokers, to sell for E. E. Wilson certain land in this county. This agreement was modified by a further writing on May 10, 1883, whereby it was agreed that \$814 of the proceeds of said sale, when made, should be paid over to the plaintiffs. This was a balance of purchase money due on said land to one Hamilton, and by agreement between him and the plaintiffs was to be received by the latter in satisfaction of a debt Hamilton owed them.

"(3) Wilson conveyed said lands December 26, 1883, to W. A. Clark as a member of and for the firm of Underwood, Clark & Co., whose agent Wilson was, and for whom he had held the legal title to said lands; and therefore said Clark adopted and ratified the said prior agreements between Wilson and plaintiffs.

"(4) On December 24, 1883, Clark mortgaged said lands to D. P. Johnson, the defendant, to secure \$20,000 on indebtedness due him from Underwood, Clark & Co. This mortgage contained a condition that Clark might sell the lands or parcels thereof at fair prices, and that upon receipt of the purchase price Johnson would release the tracts so sold. When he took this mortgage the defendant had no knowledge of the plaintiff's claim upon proceeds.

"(5) On May 15, 1884, the plaintiffs agreed in writing, set out in the petition, with said W. A. Clark, that, in consideration of certain sales of the remainder of said land to the plaintiffs, they should have a total commission for such sales of \$365, and that they should have also out of the proceeds of such sale said \$814, and should account for \$300 rent received.

"(6) Written agreements for the sales of said remainder of the Hamilton lands had been made by the plaintiffs, as such agents, with two certain parties, and were outstanding and in full force on May 15, 1884, and remained without being carried into effect for considerable time, because of defects in the title which said plaintiffs were endeavoring to and did afterwards correct, at the request of Clark and his grantor, Wilson, whereby they became entitled to \$99.64 for their services and expenses therein from said Clark.

"(7) On September 22, 1884, the defendant, upon request of Clark, forwarded to Goodin Bank at Ottawa releases for the



lands so sold by the plaintiffs, with instructions to deliver on payment of purchase money in full to the bank for him, (Johnson.) Plaintiffs, learning of this, informed the bank of their claims heretofore referred to, and demanded payment thereof out of said proceeds. The bank at once informed defendant by letter of said claims and demands. Thereupon the defendant's agents, thereto duly authorized, instructed the bank in writing, duly signed by them, as follows, in relation thereto: 'Underwood, Clark & Co. told us that they would settle Beachy's claim. Presume they will do so if they have to. We think it will be arranged, but perhaps they hope to reduce the demand some. We would prefer to have the whole amount, but, if Beachy's claim must be settled, let it be done. U., C. & Co. will make the amount good to us. [Signed] RICHMOND & TITUS.'

"(8) On receiving this letter and instructions, the bank showed Mr. Beachy the letter, and orally promised the plaintiff payment out of the proceeds when they came in. Considerable delay, however, occurred, occasioned by an apparent defect in the title, to cure which the plaintiffs were endeavoring to obtain a certain quit-claim deed, which they finally procured and placed on record November 5, 1884. Pending this delay, the defendant ordered and caused the return of his releases and all other papers from said bank.

"(9) After said deed was procured, still further delays occurred, occasioned by the efforts of the purchasers to negotiate loans upon the lands to pay the purchase money. In March, 1885, the defendant, who lived in Iowa, came in person to investigate the matter and look after the lands. After seeing the lands, he called upon the plaintiffs, and inquired for and obtained the particulars of their claim, and of the terms and conditions of the pending contracts of sale, and promised to plaintiffs to pay said claim, saying to them, with reference thereto, 'I will make it my debt, and see it paid;' and told the plaintiff Beachy to go on and close up the trade, and he should have his pay out of the proceeds. This promise was entirely verbal.

"(10) The plaintiffs negotiated the sales of the lands referred to, and, after the contracts were signed, were active in making the title satisfactory to the purchasers, and in bringing about a compliance on the part of both parties. They were engaged in this when the defendant made the promise just referred to, and continued the same service afterwards; and finally, in May, 1885, the parties were ready to and did perform on both sides. In anticipation thereof the defendant had, after said promise, again forwarded said releases to Goodin Bank, with instructions to deliver them only upon full payment of all the proceeds of sale for him being first made. The deeds from Clark were accordingly delivered, (by another agent,) and the full proceeds of the sales paid to Goodin Bank for Johnson. The plaintiffs protested against this, and demanded payment of their claims from

Clark's agent and from the bank, but were refused.

"(11) While the plaintiffs were at all times active and energetic in making the sales and procuring a compliance with the contracts, and expended much time and work therein, it does not appear that they did anything more or differently because of the defendant's promise than they otherwise would have done, and that, in fact, they did nothing further than they would have done without such promise, but they relied upon receiving their pay out of such proceeds, and when refused they brought suit against Clark, and garnished the bank, as shown in the action of Brant et al. v. Clark, referred to in the preliminary statement.

"(12) The plaintiffs' claims so due from Clark, and which defendant promised to pay, are:

Balance of purchase money as stated....	\$ 814 00
Commissions .....	365 00
Services and expenses in perfecting title	99 64
<b>Total .....</b>	<b>\$1,278 64</b>
Less moneys for rents.....	800 00
Interest.....	
<b>Total amount due plaintiffs.....</b>	

—For the above amount judgment was duly rendered in this action against Clark, November 1, 1888, which judgment is still in full force and unpaid. Underwood, Clark & Co. are insolvent, and after applying all said purchase money they are still heavily indebted to the said D. P. Johnson upon said mortgage debt and otherwise.

"(13) It is admitted that all the written agreements attached to and copied into the petition were duly executed and delivered by the parties thereto alleged.

#### "CONCLUSIONS OF LAW.

"(1) That the plaintiffs had no lien upon the proceeds of the lands sold by them for Clark for the indebtedness due them from the latter.

"(2) The defendant's promise to pay Clark's debt was a special promise to answer for the debt of another, and, not being in writing, is within sec. 6 of the statute of frauds, and cannot be enforced.

"(3) The authority given by Richmond & Titus to the Goodin Bank in the letter of September 22, 1884, is merely an instruction by one of the defendant's agents to another, and cannot be construed into a contract between the defendant and plaintiffs, or as giving to the latter a lien upon funds still in the hands of the purchasers of the lands. Further, it appears that this instruction was revoked, and other instructions given.

"(4) No legal liability of the defendant to the plaintiffs, as alleged in the petition, is shown by the facts appearing on the trial, and judgment will therefore be rendered for the defendant for costs."

The case is properly here for review, and counsel for plaintiffs in error insist that the promises of Johnson, as shown in the seventh, eighth, and ninth findings, were original, and not collateral.

1. A case in which both Brant & Beachy and Johnson were parties, heretofore decided by this court, (Johnson v. Brant, 88 Kan. 754, 17 Pac. Rep. 794,) to some extent

discusses the questions involved in this controversy. The counsel for the plaintiffs in error now insist that the promises of Johnson, as shown in the seventh, eighth, and ninth findings, were original, and not collateral. In the case reported in 38 Kan. and 17 Pac. Rep., Justice VALENTINE says: "As before stated, we think the plaintiffs did not have any lien upon these funds; and, besides, Johnson's waiver appears to have been wholly by parol, and without any consideration whatever; and it was also an agreement to answer for the debtor default of another person." This was said in an action between these same parties, in which the validity of Johnson's promise to pay was directly in issue by the pleadings. It is plain that Brant & Beachy did not, at the time, consider Johnson's promise to pay the debt of Clark an original one, because they did not rely on it, and did not discharge Clark from the debt, but sued him, and insisted on payment from Clark, attempted to garnish funds in the bank which they supposed belonged to Clark, and never attempted to enforce the promise against Johnson until all hope of securing their money from Clark had departed. This conclusively establishes the promise of Johnson as a collateral one. The ingenious theory of counsel for the plaintiffs in error, that seeks to apply the rule that "where one seeks to promote or subserve some interest or purpose of his own by a promise to pay the debt of another, which, if made on a good consideration, is unaffected by the statute of frauds," is not applicable here, because the greater part of the services of Brant & Beachy had already been performed, with a full knowledge on their part that the proceeds of all sales were to be paid to Johnson, and with a special written agreement in their behalf that their agency should not be affected by the execution of the mortgage by Clark to Johnson. With this knowledge when finally they commenced legal proceedings to enforce collection of their commission, Clark was the party against whom they moved, and not Johnson. It would seem from their own acts that this action against Johnson was a *dernier ressort*. There was no antecedent obligation on the part of Johnson to pay these plaintiffs in error. It is not shown that he was specially benefited, because by the litigation that has resulted it has been adjudicated that he was entitled to the balance in the bank, independent of any agreement with or promise to Brant & Beachy. Brant & Beachy are not brought within any of the judicial exceptions to the statute of frauds. There was no original obligation, and, in the nature of things, the promise of Johnson was a collateral one. In any event, the parol promise must be made upon good consideration, and it is now urged that a good consideration was the fact that Johnson would be saved the trouble and expense of a foreclosure; but he had already provided for that by his contract with Clark, and the mortgage executed by Clark provided in express terms that Clark might sell portions or all the land at fair prices, and that

Johnson, upon receiving the purchase price of said sales, shall credit them upon the notes secured by the mortgage. This contract was made by the principal, and Johnson could not be specially benefited by its repetition by the agents. The weight of modern authority now is that the promise, although made upon a new consideration of benefit to the promisor, is held to be collateral, if the original liability remains, and that the promise is within the statute unless it is in effect substituted for the original liability. This rule is sustained from citations from the supreme court reports of Indiana, Iowa, Massachusetts, Michigan, Wisconsin, Mississippi, Georgia, Maine, New York, Nebraska, Ohio, and Pennsylvania, in notes 1 and 2, on page 682, 8 Amer. & Eng. Enc. Law.

2. But it is said that the promise of Johnson is in writing, as evidenced by the letter of his agents, Richmond & Titus, to the Goodin Bank, as set forth in the seventh finding of fact. The third conclusion of law of the trial court adopts the language of this court with reference to that contention, and is a conclusive refutation of that claim. It says the authority given by Richmond & Titus to the Goodin Bank in the letter of September 22, 1884, is merely an instruction by one of Johnson's agents to another, and cannot be construed into a contract between Johnson and the plaintiffs in error; and, further, it appears that this instruction was revoked, and others given. No legal liability of Johnson to the plaintiffs in error is shown by the facts contained in the record. It is recommended that the judgment of the district court of Franklin county be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 386)

GROVE v. JENNINGS.

(Supreme Court of Kansas. May 9, 1891.)

REMOVING CLOUD ON TITLE—DEED IN ESCROW—REDELIVERY.

1. In an action to remove a cloud upon a title, under a petition setting out all of the facts, similar to a bill in equity, and independent of statutory regulations, it is not necessary to allege that the plaintiff was in possession of the premises.

2. Where a deed has been duly executed and placed in escrow by the grantor, to be delivered to the grantee upon the payment of the purchase price, and there is a redelivery of the deed by the depository to the grantor, and there is no evidence to establish the fact that such redelivery was authorized, or that the grantee had failed to comply with the conditions, *held*, that the same was unauthorized, and that the findings and judgment in this case are not supported by the evidence.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Harper county; J. T. HERICK, Judge.

*Shepard, Grove & Shepard*, for plaintiff in error. *Geo. E. McMahon*, for defendant in error.

GREEN, C. This was an action brought by Lewis G. Jennings against J. Paul

Grove to remove a cloud upon the title to lot 17, in block 78, in the city of Anthony, in Harper county, and to declare a certain decree of record in the district court of said county affecting said real estate to be null and void. It was alleged that J. B. S. Coplin owned the lot in question on the 14th day of January, 1885; that he and his wife deeded it to the plaintiff, and that the deed was filed for record on the 29th day of January following; that afterwards Grove commenced an action against Coplin and wife to compel the specific performance of a contract to convey said property to him; that he obtained a decree for specific performance; and that the same constituted a cloud upon the title of the plaintiff to said premises. A demurrer was interposed to this petition, which was overruled. The defendant answered—*First*, by a general denial; *second*, he admitted that Coplin owned the real estate in controversy on the 14th day of January, 1885; and, *third*, a cross-petition based upon the judgment and decree before rendered; and alleged that the deed from Coplin and wife to the plaintiff was a cloud upon his title, and asked that he be adjudged to be the owner of said premises. A reply denying the allegations of this cross-petition was filed by the plaintiff. A trial was had upon the issues thus joined to the court, and judgment was rendered for the plaintiff. The plaintiff in error brings the case here.

1. The first assigned error is the overruling of the demurrer to the petition. It is insisted that it lacks two material averments: *First*, that it did not state that the plaintiff was the owner of the legal or any other title to said premises; *second*, that the plaintiff was not in possession of the real estate. The first proposition is not tenable. The pleadings state the ownership in Coplin on the 14th day of January, 1885; the plaintiff alleged that on said day Coplin and wife deeded to the plaintiff. We think this a sufficient allegation of ownership and title. The plaintiff in error insists that there is no allegation of possession in plaintiff's petition, and that this is necessary. Is possession necessary in an action to remove a cloud from a title? The doctrine is well settled that courts of equity will grant relief on the principle *quia timet*,—that is, that the deed or other instrument or proceeding constituting the cloud may be used to injuriously or vexatiously embarrass or affect a plaintiff's title. Pom. Eq. Jur. § 1399. While there appears to be some conflict of opinion as to whether possession is necessary, we think the greater weight of authorities settle the question in favor of the proposition that, where a party out of possession holds the legal title under such circumstances that the law cannot furnish him adequate relief, his resort to equity to have a cloud removed ought not to be questioned, because he may be out of possession or the land vacant. It is said that this was an action to quiet title brought under section 594 of the Code of Civil Procedure, and actual possession was a prerequisite at the time the action commenced. If this were true, counsel's position would be correct, but the action was

not brought under section 594, and we do not understand that the statute in regard to quieting titles took away any of the previously existing equitable remedies. This case comes within a well-understood rule of equitable jurisprudence, and is independent of statutory regulations. The relief in such cases is of a kind given under the old practice only in courts of equity, and in cases outside the limits of the statute; and the facts must be fully stated, substantially as in a bill in equity under the former chancery practice. *Douglass v. Nuzum*, 16 Kan. 515; *Story, Eq. Jur. §§ 700-706*; *Pettit v. Shepherd*, 5 Paige, 501; *Fleld v. Holbrook*, 6 Duer, 597; *Jones v. Smith*, 22 Mich. 360. Under this equitable rule a person who holds the legal title to land, though not in possession, may, independently of the statute, maintain a suit in equity to remove a cloud upon his title, and in such suit the court may decree the reformation or cancellation of records, and the execution of deeds or releases. *Hager v. Shindler*, 29 Cal. 47; *Thompson v. Lynch*, Id. 189; *Kennedy v. Northup*, 15 Ill. 148; *Redmond v. Packenham*, 66 Ill. 434; *Booth v. Wiley*, 102 Ill. 84; *Tabor v. Cook*, 15 Mich. 322; *Ormsby v. Barr*, 22 Mich. 80; *Jones v. Smith*, supra; *King v. Carpenter*, 37 Mich. 363; *Low v. Staples*, 2 Nev. 209; *Almony v. Hicks*, 3 Head, 39; *Pier v. City of Fond du Lac*, 38 Wis. 470; *Bunce v. Gallagher*, 5 Blatchf. 481.

2. It is next claimed that the findings and judgment of the court below are not sustained by the evidence. This we regard as the most serious question in the case. The evidence established the fact that Grove had been negotiating for the purchase of the lot in controversy before the defendant in error purchased it, and that he had knowledge of such negotiations. He understood that a deed had been executed by Coplin and wife to Grove for this lot, and deposited in a bank at Anthony; that this deed had been withdrawn from the bank by Coplin, and Grove's name had been erased and his own name inserted. The consideration had also been changed from one hundred and seventy five to three hundred and seventy-five dollars. There was no evidence to establish the fact that the withdrawal and these erasures were authorized by Coplin and wife or either of them. There was no evidence to show that the redelivery by the bank to Coplin was authorized. The record is silent as to the conditions upon which the deed was to be delivered to Grove by the bank; it is not disclosed that the time had expired within which Grove would have been entitled to the deed by paying the consideration. There is no evidence to show Grove's consent to the redelivery to Coplin. Where a deed has been delivered as an escrow, subsequent instructions by the grantor to the depositary cannot change the original nature of the transaction. *Robbins v. Magee*, 76 Ind. 381; 6 Amer. & Eng. Enc. Law, 863. If Grove had fulfilled the conditions upon his part, the title would have vested in him without further delivery. The contract upon the part of Coplin and wife had been executed; the title had passed from them, subject only to the per-

formance of the conditions upon the part of Grove. *Farley v. Palmer*, 20 Ohio St. 223. Now, without some evidence to show that the redelivery of the deed was authorized, and that he was lawfully entitled to it, we do not think there is sufficient evidence to uphold the findings and judgment of the trial court, and therefore recommend that the same be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 345)

CITY OF HUTCHINSON *et al.* v. DELANO.

(Supreme Court of Kansas. May 9, 1891.)

INJUNCTION—APPREHENDED NUISANCE—CITY SEWERS.

The apprehended fouling or pollution of a stream of water in the future by the sewage of a part of a city from sewers, which have been legally, scientifically, and properly constructed, but which has not yet taken place, and of which there is no immediate or imminent danger, and which depends upon a contingency that may not happen, does not present a case for an injunction.

(Syllabus by the Court.)

Error from district court, Reno county, L. Houx, Judge.

On March 2, 1889, B. M. Delano commenced his action against the city of Hutchinson and others to perpetually enjoin them from emptying sewage or any filth or offal of the city, or from the houses, hotels, etc., into the waters of Cow creek, and from polluting the waters in any way. At the commencement of the action a temporary restraining order was allowed by the district judge. Subsequently, the city of Hutchinson and the other defendants filed an answer alleging that the city was building and constructing a system of sewers for a portion of the city, and that the sewers so constructed would not be used by more than one-fifth of the inhabitants of the city; that they intended to empty the same into Cow creek, within the corporate limits of the city; but they denied generally the other allegations of the petition. Trial had at the March term of the court for 1889. The court found and filed the following conclusions of fact: "(1) That the plaintiff, B. M. Delano, is the owner of the following described real estate, situated in the county of Reno and state of Kansas, to-wit: The north-west quarter ( $\frac{1}{4}$ ) of section number thirty three, (33,) in township number twenty-three (23) south, range number five (5) west, of the sixth P. M.,—and resides thereon, with his wife and family, and that they have long occupied the same as their home, and that said real estate is of the value of about six thousand (\$6,000) dollars, including the improvements thereon. (2) That the defendant, the city of Hutchinson, is a city of the second class, duly incorporated under the laws of the state of Kansas; that the defendant L. A. Bigger was the duly elected, qualified, and acting mayor, and the defendants J. B. Brown, W. E. Hutchinson, G. W. Hardy, A. M. West, H. Constant, J. V. Clymer, O. Wolcott, and Frank Vincent were duly elected and qualified and acting councilmen of the de-

fendant the city of Hutchinson at the time this action was commenced, and that the defendants Evans and Jack were partners under the firm name of Evans and Jack, and were contractors with the said city for the purpose of building and constructing certain sewers in said city. (3) That a natural water-course, called 'Cow Creek,' has been for time immemorial, and does now, flow through the ground upon which the said city of Hutchinson is now built, and on through plaintiff's said land, and is the natural drain of said land and ground. (4) That at the time of the commencement of this action said Cow creek was a clear, running stream of water, the purity of which renders it fit for domestic purposes and stock use. (5) That plaintiff's land, through which said Cow creek flows, is situated on said stream about five and one-quarter miles below the said city of Hutchinson. (6) That on said plaintiff's land he had a pasture, fenced with posts and wire, containing about seventy (70) acres, and through which said pasture said Cow creek runs; there being about fifty-eight (58) acres of said pasture on the north side of said stream, and about twelve (12) acres on the south side of said stream. (7) That plaintiff used said pasture for his stock, including his milch cows. The milch cows are used by plaintiff and his family for the purposes of making butter for their own use. (8) That the defendant the city of Hutchinson contains a population of fifteen thousand, and is growing in numbers. (9) That the defendants the city of Hutchinson, its officers, agents, servants, and employes, are threatening and intending to construct immediately a part of a system of sewers in said city for the use of a part of its inhabitants thereof, viz., 4,000 of such inhabitants. (10) That said sewers are what is known as the 'separate system,' and will not receive and carry off the storm water and ordinary street drainage, but are intended for carrying off the sewage from hotels, livery stables, private residences, privies, etc. (11) That said city of Hutchinson, under the contract with the defendants Evans and Jack, are now actually engaged in the laying and constructing of a part of said system of sewers, which portion, when completed, will accommodate about 4,000 people. (12) That the main outlet of the sewer-pipe is twenty-four inches in diameter, the sewage of all the people of said city. (13) That said sewers are so constructed as to empty into said Cow creek at a point within the limits of said city of Hutchinson, and about five miles distant above plaintiff's land. (14) That plaintiff's house on said quarter section of land is north of the said stream called 'Cow Creek,' at the distance of about forty-one rods. (15) That the prevailing winds in this country during the summer months are from the south, and in the winter from the north. (16) That said water in said Cow creek flows ordinarily with the velocity of about a mile in about forty-eight minutes, and that ordinarily the volume of water in said stream is about twenty-eight millions to thirty-six millions gallons per day; that is to say, that

amount of water will flow past a given point every twenty-four hours. (17) That during extraordinary and protracted drouth the volume of water flowing in said stream is reduced, and will not exceed fifteen millions gallons every twenty-four hours, but that such occasions are during drouths, and are infrequent. (18) That fifteen hundred thousand gallons flowing every twenty-four hours is necessary to carry off the sewerage from every one thousand population, so that the water moved with the sewerage will not be offensive to the sense of sight, smell, and taste. (19) That plaintiff's said farm is well improved, and has a large barn thereon near his house, and that he has two wells,—one at his house, and the other at his barn; that he has never and does not use the water for anything but stock water, and there is nothing disclosed by the evidence that he would have occasion to use it for any other purposes. (20) That the emptying of said sewerage into said stream will not endanger the lives of plaintiff and his family, or any one residing on said land, and will not be liable to cause such persons to have any disease. (21) That Cow creek heads, about fifty miles above the city of Hutchinson, is from twenty-five to fifty feet wide, one to two feet deep, with sandy bottom and banks; that the fall of said stream from the mouth of said sewer to plaintiff's farm is seventeen and two-thirds feet; that the stream is perennial, and is fed by springs as well as rain water; that there are no trees on its banks between the city of Hutchinson and plaintiff's farm; and that it empties into the Arkansas river a few miles below the farm of plaintiff. (22) That under the city of Hutchinson and plaintiff's farm—indeed, under all Cow Creek valley to its mouth from the city of Hutchinson—is a vast bed of quicksand, through which flows water from the north-west to the south-east, (the direction of the creek;) that this water is on a level with the water of Cow creek; and that on plaintiff's farm as well as at the city on either side of said creek, for an indefinite distance, water can be reached by digging from four to six feet through a sandy loam. (23) That the city of Hutchinson and its officers are authorized by its charter and by proper ordinances to construct sewers and empty same into Cow creek; but no steps, by condemnation or otherwise, were taken against plaintiff or his property. (24) That, some time before the attempt to construct sewers, the city adopted a general system of sewers, including the entire city, or nearly so, so that if any part was constructed it would be in reference to a general system; that said general system comprises the territory south and west of a ridge which runs north-west to south-east through said city, and which is occupied by a majority of the people of said city. No time was fixed for the completion of the entire system, but the intention was to extend it as the exigencies of the city might demand. (25) That before the bringing of this suit the city let a contract to Evans and Jack to construct sewers over a portion of said terri-

tory, to-wit, that occupied by about four thousand people, comprising the business part of the city; and said contractors have partly finished the same, and are still engaged in carrying out the contract. When the work is done they are to receive twenty-three thousand dollars. (26) That there is no negligence in the letting of said contract or any construction of said sewers, but they are being put in scientifically. The main pipes, as well as sub-mains and laterals, are glazed earthen pipes, put in with proper fall, with ample ventilators every few hundred feet, with proper flushing conveniences. (27) That there is in said city a system of Holly water-works, which at all times supply an abundance of pure water to the city and the inhabitants of all that part of the territory which will use the sewers, and that thirty gallons or more of water per head each day will be used by the people who will use said sewers, and the city will have an abundant quantity for flushing purposes. (28) That the sewerage passing into the creek will be in fluid shape, and at least ninety-five per cent. water; that of the general deposit, ammonia and albumenoid ammonia in the urine is the deleterious agency; and that it rapidly diffuses by being mixed with water, and oxygenized by the action of air and sunshine. (29) That from each person per day there passes three pints of urine, of which is ——— per cent. of ammonia, and ——— per cent. of albumenoid ammonia. (30) That the deposit of fifteen thousand people into Cow creek would probably injure the water on the farm of plaintiff so as to unfit it for drinking and cooking purposes and for milch cows. (31) That the deposit of the people who will use the sewers as now constructed, and in immediate process of construction, will not probably injure the water of Cow creek for either domestic or stock purposes at the farm of plaintiff. (32) That the health and convenience of the city of Hutchinson in that territory proposed to be sewerized by the contract of Evans and Jack, and through which flows Cow creek, require that sewers be constructed." Thereon the court made and filed the following conclusion of law: "That the plaintiff is entitled to an injunction forever restraining the defendants from emptying the sewage of said city into said Cow creek so as to pollute and corrupt the waters thereof to the injury of plaintiff." The defendants excepted, and bring the case here.

*Z. L. Wise, Whiteside & Gleason, Swigert & Wisler, and T. S. Brown, for plaintiffs in error. F. L. Martin and Trader, Vendeveer & McNeill, for defendant in error.*

HORTON, C. J., (after stating the facts as above.) It appears from the findings of the court that B. M. Delano, who complains of the city of Hutchinson and its officers and employes on account of their action in constructing a system of sewers in that city, and permitting the sewage to empty into Cow creek, lives five miles below the city of Hutchinson; that Cow creek is a clear, running stream of water, fitted for domestic and stock purposes; that it runs through the city of Hutchin-

son and the premises of the plaintiff below; that the city of Hutchinson is constructing a system of sewers for 4,000 of its inhabitants, which will carry off the sewage from hotels, livery stables, private residences, etc.; that plaintiff below does not use the water of Cow creek for any other purpose than for his stock; that he has no occasion to use it for any other purpose; that he has two wells,—one at his house, and the other at his barn; that the emptying of the sewage into Cow creek will not endanger the life of plaintiff below, or his family, or any one residing on his land, and will not be liable to cause any person to have disease; that Cow creek is from 25 to 50 feet wide, and 1 or 2 feet deep, with sandy bottom and banks; that the fall of the creek from the mouth of the sewer to plaintiff's farm is 17½ feet; that no time has been fixed for the completion of the entire system of sewers, but the intention is to extend the same as the exigencies of the city may demand; that the sewage of 15,000 people of Hutchinson into Cow creek would probably injure the water of the farm of plaintiff so as to unfit it for drinking and cooking purposes and for the use of milch cows; that the sewage of the people of Hutchinson who will use the sewers now constructed, and in immediate process of construction, will not probably injure the waters of Cow creek for either domestic or stock purposes at the farm of the plaintiff. Upon these findings the most that can be said is that there is an apprehensive pollution or fouling of the water at some future time; possibly, when sewers shall have been constructed for the whole population of Hutchinson, comprising 15,000 people. But under the findings of the court this is not certain, only probable. Clearly, it cannot be said that any immediate danger exists to plaintiff below from the sewage into Cow creek from Hutchinson. The findings disclose that the danger is not imminent, but is wholly contingent, in the future, if certain things are done. *Board v. Passaic*, (N. J. 1890,) 20 Atl. Rep. 54; *Citizens' Coach Co. v. Camden, etc., R. Co.*, 29 N. J. Eq. 299; *Stitt v. Hilton*, 31 N. J. Eq. 285; *Delaware, etc., R. Co. v. Central Stock-Yard, etc., Co.*, 43 N. J. Eq. 605, 12 Atl. Rep. 374, and 13 Atl. Rep. 615; *Hagerty v. Lee*, 45 N. J. Eq. 255, 17 Atl. Rep. 826; *Stoudinger v. City of Newark*, 28 N. J. Eq. 187; *Merrifield v. Worcester*, 110 Mass. 216; *Brookline v. Mackintosh*, 133 Mass. 215; *Morgan v. City of Binghamton*, 102 N. Y. 500, 7 N. E. Rep. 424; *Dunn v. City of Austin*, (Tex. 1889,) 11 S. W. Rep. 1125; *High, Inj.* §742; *Wood, Nuis.* §§ 796, 797. The order for the injunction is so doubtful in its language that really it is of little benefit to any one. It forbids the city from emptying its sewage into Cow creek at some time in the future, if such sewage will pollute or corrupt the waters to the injury of plaintiff. It does not forbid the emptying of the present sewage from all of the sewers constructed, or now being constructed. The injunction has but little force. It is unsatisfactory in its terms. It is not definite or certain. It merely declares a proposition of equity, not shown to be applicable in this case.

Upon the findings of fact, we do not think that the injunction should have been granted, and therefore the judgment of the district court will be reversed, and the cause remanded, with direction to the district court to enter judgment in favor of the defendants below, and against the plaintiff. If the exigencies of Hutchinson shall demand in the future the extension or completion of its entire system of sewers, and if the sewage from all of the sewers, when fully completed, should foul or pollute the waters of Cow creek so as to affect in any way the rights of plaintiff below, other and different questions will then be presented. It is sufficient at this time to say there is no pressing necessity for an injunction. The danger is contingent, not immediate and imminent. All the justices concurring.

(46 Kan. 359)

STATE *ex rel.* SMITH, County Attorney, v. DENISTON.

(Supreme Court of Kansas. May 9, 1891.)

VOTERS—QUALIFICATIONS—RESIDENCE—BRIBERY.

1. A man who filed a homestead claim on land in Oklahoma territory and made a settlement and improvements thereon in and after the month of June, 1889, and intended to make said claim his home, and who returned to his former residence in Comanche county, in this state, for a temporary purpose, intending to go back to his claim in Oklahoma, was not a legal voter at an election held in Comanche county on the 5th day of November, 1889.

2. Persons who filed homestead claims on land in Oklahoma territory and made settlement and improvements thereon during and after the month of June, 1889, and who intended to make said homestead claims their homes, and who returned to their former residences in Comanche county, in this state, for a temporary purpose, and agreed to stay and vote at an approaching election if paid for their time, and who voted at said election, and left Comanche county the next day, and have ever since resided in Oklahoma, were not legal voters at an election held in Comanche county on the 5th day of November, 1889.

3. Cattlemen employed on a ranch situated in the Indian Territory, south of the state, working by the month, and who had resided out of the state for more than 35 days prior to the election, and who intended to work on such ranch as long as they were employed, and who had no families residing in Kansas, were not legal voters at an election held in Comanche county, in this state, on the 5th day of November, 1889.

4. When a voter testifies that he was induced to vote for a candidate for office because he was paid a sum of money to so cast his vote, the ballot is an illegal one, and cannot be counted in favor of the candidate in whose interest the money was paid.

JOHNSTON, J., dissenting.

(Syllabus by Simpson, C.)

Commissioners' decision. Original proceeding in *quo warranto*.

H. A. Smith and G. C. Clemens, for plaintiff. T. G. Chambers, for defendant.

SIMPSON, C. This is an original action in *quo warranto*, the object of which is to determine whether Frank Meyer or John I. Deniston was duly elected register of deeds of Comanche county at the general election in 1889. Meyer was declared elected by the board of county canvassers, and received a certificate of election, and within 20 days after the notification of his

election, and prior to the second Monday in January, 1890, he took and filed with the county clerk his oath of office, and demanded of Deniston the possession of the office and the things belonging thereto. Deniston, who had previously been elected for a term of two years, and who was legally in the possession of the office, refused to turn it over to Meyer, claiming that he and not Meyer had been elected in 1889. In July, 1890, Meyer tendered to the board of county commissioners, then in regular session, his resignation, which was accepted, and one S. D. Stipp was appointed to serve until the election in 1890. Stipp took the oath of office, filed a bond, and demanded possession of the office from Deniston, who refused to surrender. This action was commenced on behalf of Stipp on the 26th day of July, 1890. The official canvass of the election in 1889 shows 680 votes cast for candidates for the office of register of deeds, and of these Frank Meyer received 345 and John I. Deniston received 335. Deniston alleges that at the polling place of Coldwater township J. M. Stringer, Guter Stringer, Perry Kinman, J. H. Grattner, G. W. Hoffman, Walter Goff, J. S. Calloway, and Samuel Brown voted for Frank Meyer, when in truth and in fact they were not qualified electors, and not entitled to vote at said election; that in Valley township Abram Vanwey, Otto Barley, W. S. Mussett, Isaac Mussett, E. T. Bidwell, H. H. Dunham, James Crouch, Alexander Boland, George Overocker, and Burt Crew voted for Frank Meyer for register of deeds, and that each and all of them were not qualified voters; that in Protection township W. M. Davis, W. Y. Davis, and Newton Davis voted for Frank Meyer for register of deeds, and that each and all of them were not qualified electors; that in Irwin township Jonathan Morgan and C. M. Ross each voted for Frank Meyer for register of deeds, and they were not qualified electors; that in Avilla township Samuel Young voted for Frank Meyer for register of deeds, and he was not a qualified elector; that in Shimer township Thomas Curran and R. C. Brennon voted for Frank Meyer for register of deeds, and they were not legal voters. That one O. P. Snare voted at the polls in this township for Frank Meyer for register of deeds for and in consideration of the sum of \$7.50, and that this is an illegal vote; same as to one S. O. Miner, who voted for Meyer for a consideration of \$5; same as to one William Maynard. This makes 29 illegal votes that are alleged by Deniston to have been cast for Meyer, and, if these are deducted from the 345 given Meyer by the official canvass, Deniston was legally elected. It is shown by the evidence that Abram Vanwey, Otto Barley, W. S. Mussett, Isaac Mussett, E. T. Bidwell, H. H. Dunham, James Crouch, Alexander Boland, George Overocker, and Burt Crew were at the time of the election, to-wit, on the 5th day of November, 1889, and had been for more than 35 days before that time, residents at Gorham's ranch in the Indian Territory, and were not actual residents or legal voters in the state of Kansas. That

on the day before the election they agreed to vote at Valley township precinct, in Comanche county, Kan., and to all vote alike, and to vote for Frank Meyer for register of deeds of Comanche county. They voted at that precinct on the day of election. The poll-books in evidence show that they voted together, their votes being numbered on the poll-books as Nos. 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16. It was shown that the tickets were prepared by Dunham, who scratched the name of John I. Deniston off and inserted the name of Frank Meyer. The handwriting of Dunham in the change of the tickets was conclusively proven, and the tickets themselves were in evidence, and it appears from them that but nine tickets were changed. All these men were most clearly not entitled to vote, and it must be held that there were nine illegal votes for Meyer and one for Deniston. William M. Davis, William Y. Davis, and Newton Davis all testify that they left Comanche county on the 22d day of April, 1889, and went to Oklahoma, and there took homestead claims and made settlement and some improvements on their claims, and intended to make their homes in Oklahoma. That in the month of October they came back to Comanche county for various purposes, intending to return to Oklahoma before the election, but that certain persons agreed with them that if they would stay until after the election and vote they would be paid for their time. They all three stayed, voted for Frank Meyer for register of deeds, and left for Oklahoma on the 6th day of November, the day after the election, where they have ever since resided. It is plain that these three men cast illegal votes for Meyer. It is admitted that J. S. Calloway voted at Coldwater township polls. His ballot is numbered 29 on the poll-books, and the name of Frank Meyer as a candidate for register of deeds appears on that ballot. S. T. Golloher testifies that in September, 1889, and long before that time, he was a resident of the state of Alabama; that he knew J. S. Calloway, who was and had been for five years a resident of the state of Alabama; that when Golloher moved to Kansas in September, 1889, he left Calloway in the state of Alabama, and that Calloway wanted Golloher to bring him to Kansas; that he first saw Calloway in Kansas in the month of October, 1889. On this state of facts it must be held that the vote cast for Meyer by Calloway was an illegal vote. Thomas Curran, who moved from Logan township to Shimer township on the 10th day of October, 1889, had rented a place in Shimer township on the 19th day of September, and before the 10th day of October had moved a part of his household furniture and some livestock and farming implements to the rented place, but still resided in Logan township with his family until the 10th day of October. He voted in Shimer township, and voted for Frank Meyer for register of deeds for Comanche county. C. M. Ross voted in Irwin township, but had moved into that township within 6 or 8 days before the election. Before that time he had been living in Coldwater



township, and had been engaged in moving his effects for 60 days prior to the election, intending to make his home and permanent residence in Irwin township. He voted for John I. Deniston for register of deeds. His vote and that of Curran are so similar in their surroundings that the same rule must be applied to both. In this particular case, one having voted for Meyer and the other for Deniston, the result cannot be affected no matter what the decision may be. The legality of the votes of R. C. Brennon, Gater Stringer, and others are challenged on the following grounds: Gater Stringer, whose deposition was taken in Kingfisher county, in the territory of Oklahoma, testifies that on the 8th day of June, 1889, he filed a homestead claim on land in the territory of Oklahoma; that he broke ground and put in a small crop in May and June, 1889, and built his house in November and December, 1889; that, from the time he filed on his claim and made settlement, he intended to make that his home and raise his family there. He went back to Coldwater, Comanche county, his former residence, to see his family, who still remained there; voted at the election on the 5th day of November, 1889, for Frank Meyer for register of deeds; left again for Oklahoma on the 7th day of November; his family followed him shortly afterwards, and they have all resided in Canadian county, Oklahoma, ever since. R. C. Brennon filed a homestead claim on land in Oklahoma on the 4th day of June, 1889. He commenced to make his improvements about the middle of September. He intended to make it his home, and had no intention to return to Comanche county, Kan. His family first came to Oklahoma about the middle of September, 1889, but some time before the election he and his family came back to Comanche county to dispose of what crop they had on hand, and to live until they got ready to move away. He voted and served as a judge of the election in Shimer township. He voted for Frank Meyer for register of deeds. He and his family left Comanche county in the latter part of November for their claim in Oklahoma, where they have ever since resided. Perry Kinman left Comanche county to take a homestead in Oklahoma, and made his filing on the 12th day of June, 1889. He planted some in July, and built his house in the winter. He had been back to Comanche county two or three times, but intended always to and did return to Oklahoma. He was in Comanche county on the day of election, and states that he voted the straight Republican ticket without a scratch. Deniston was the Republican candidate for register of deeds. It is very evident that neither Gater Stringer, R. C. Brennon, nor Perry Kinman were legal voters in Comanche county. Two of them voted for Meyer and one for Deniston. One A. H. Wineburner stated that he had received \$10 from Deniston for work done for him during the campaign. At the time Deniston paid him a part of the money he told Wineburner he expected his vote, but Wineburner says that he had not promised to vote for him prior to receiving this

money. Deniston does not deny giving the money, but claims he did not offer to pay any until Wineburner had declared that he was going to vote for him, and then the money was furnished to pay the expenses of Wineburner on his trips to different localities. It seems to us that this would be a corrupt vote if it was shown that Wineburner did vote for Deniston. There is an inference arising from what is recited above that Wineburner did so vote, but it is at best an inference, when with Wineburner on the stand it was within the power of the party producing him as a witness to establish the fact. So with the witness Charles E. Ferguson, who testified that during the first part of the campaign he was for Frank Meyer, and during the latter part of the campaign he was for Deniston; that Deniston paid him for certain work he did and expenses incurred on his behalf, but the witness is not asked for whom he voted, nor is it shown by other evidence that he did vote at the election. Samuel Brown testified that he voted at Coldwater for Frank Meyer for register of deeds, and that he was paid the sum of five dollars for his vote in favor of Meyer. This embraces all the material evidence respecting illegal votes cast at that election for either party, but does not include a mass of stuff consisting of loose declarations and hearsay, to which we have given no weight. It appears that the following illegal votes were cast for Meyer, to-wit, those of Abram Vanwey, Otto Barley, W. S. Mussett, Isaac Mussett, E. T. Bidwell, James Crouch, Alexander Boland, George Overocker, Burt Crew, William M. Davis, William Y. Davis, Newton Davis, J. S. Calloway, Gater Stringer, R. C. Brennon, and Samuel Brown. It appears that the following illegal votes were cast for John I. Deniston, to-wit, those of H. H. Dunham and Perry Kinman,—two in all. The canvass of the county board is corrected so as to show that 333 votes were cast for John I. Deniston for register of deeds, and 329 for Frank Meyer for register of deeds, of Comanche county. It is recommended that judgment be entered declaring that John I. Deniston was duly elected register of deeds of Comanche county at the election in question, and that a judgment be rendered in his favor for costs.

PER CURIAM. It is so ordered.

VALENTINE, J., concurring.

HORTON, C. J., (*concurring*.) I think, under the evidence introduced upon the trial, that John I. Deniston was elected register of deeds of Comanche county at the general election held in November, 1889, but in my opinion his majority was only one or two,—not more than two in any event. I think upon the evidence J. S. Calloway should be counted for Meyer; that Thomas Curran was a legal voter for Meyer; and that A. H. Wineburner, who voted, I think, for Deniston, should not be counted, because his vote was a corrupt one. I make the legal votes as follows: Deniston, 331; Meyer, 330,—Deniston's majority, 1. If Wine-

burner's vote is not taken from Deniston's vote, the canvass should be corrected so as to show: Deniston, 332; Meyer, 330, —Deniston's majority, 2.

JOHNSTON, J., (*dissenting*.) The evidence submitted is not clear or satisfactory as to the exact number of legal votes that were cast for each candidate, but an examination of the same fails to convince me that the board of county canvassers made any mistake in issuing a certificate of election to Frank Meyer, or that John I. Deniston was elected register of deeds by a majority of the legal votes which were cast.

(46 Kan. 332)

#### STATE v. RIDER.

(*Supreme Court of Kansas. May 9, 1891.*)

##### RECEIVING STOLEN GOODS—EVIDENCE.

In a criminal prosecution for buying and receiving stolen property, under section 92 of the crimes act, where the evidence showed that the property was situated in one county, and the defendant was tried in another, and the only evidence connecting the defendant with the property alleged to have been stolen was the fact that he went from the county where he was tried to the county where the property was found, *held*, that there was no completed offense committed in the county in which the defendant was tried and convicted, and that such conviction was erroneous.

(*Syllabus by Green, C.*)

Commissioners' decision. Appeal from district court, Grant county; THEO. BOTKIN, Judge.

S. N. Wood and A. M. Mackey, for appellant. L. B. Kellogg, Atty. Gen., and Wm. Easton Hutchinson, for the State.

GREEN, C. The information in this case charged the defendant with feloniously buying and receiving one mare of the value of \$100, the property of Karl Gall, Jr., "then lately before feloniously stolen, taken, and carried away," knowing the same to have been so stolen. The part of section 92 of the crimes act which is applicable to this case is as follows: "Every person who shall buy or in any way receive any goods, money, rights in action, personal property, or any valuable security or effects whatsoever \* \* \* that shall have been stolen from another, knowing the same to have been so stolen, shall, upon conviction, be punished in the same manner and to the same extent as for stealing the money, property, or other thing so bought or received." The defendant was tried and convicted in the district court of Grant county on the 21st day of July, 1890, and sentenced to imprisonment in the penitentiary for two years. He appeals to this court. The evidence in this case shows that the mare alleged to have been stolen was taken by John Stoffel from the place of Karl Gall, in Grant county, about 3 o'clock in the afternoon on Wednesday, March 5, 1890, and led to his place in Kearney county. The claim was made by Stoffel that the animal had been given to him for one of his, which Gall had been charged with shooting. There is no evidence to indicate that the defendant ever received or purchased the mare in Grant county. If he ever re-

ceived the mare at all, it was in Kearney county. There is no evidence to connect the defendant with the reception or possession of the mare in Grant county; and the only theory upon which the conviction can be upheld is that the offense charged to have been committed was begun in Grant county, and completed in Kearney. In accordance with this theory, the court instructed the jury that if there were any overt acts committed in Grant county, and if there were a series of such overt acts continuing into Kearney county, up to the time of receiving the mare, then such reception would be in Grant county. The overt acts in Grant county, if any, consisted in the defendant being present at Hornaday's printing-office in Ulysses, in Grant county, on the 14th day of March, 1890, where a consultation was had between Stoffel and his attorney in regard to his retaining possession of the mare, and the giving of a redelivery bond, in case the animal should be replevied from him; that the attorney for Stoffel wrote something upon a piece of paper, which he gave to the defendant, and told him to "get that or the mare;" that, in pursuance with the advice, the defendant left town, and went to Surprise, in Grant county, and from there to Stoffel's place, in Kearney county. We do not think the evidence warranted a conviction in Grant county. There was no evidence that the defendant commenced the commission of the offense charged against him in the county in which he was tried. The language of section 23 of the Criminal Code is: "When a public offense has been committed partly in one county and partly in another, or the act or effects constituting or requisite to the consummation of the offense occur in one or more counties, the jurisdiction is in either county." Now, can it be said that the act of the defendant in going from one county to another, under the advice of counsel, to aid a person in maintaining what he regarded as his legal rights, constituted any element of the crime alleged? The defendant was charged with buying and receiving stolen property in Grant county. It is conceded that he did not buy or receive the mare in Grant county, but it is insisted that the overt act which led to the commission of the offense had its inception in this county. Can this be true? The elementary principle is so firmly established that there must be some act, coupled with an evil intent, to constitute, in law, a crime, that it is but necessary to state it. Suppose it should appear that the defendant started from Ulysses for the purpose of obtaining the mare in Kearney county, it might be said that the evil intent existed in his mind, but unless that evil intent was combined with some act in Grant county the offense would not be complete. We do not think the fact that the defendant traveled from one county to another was such an overt act as would constitute an offense. The evil intent might have existed in the mind of the defendant while in Grant county; yet, if no act was committed there, one necessary element of the crime would be lacking. There must be a concurrence, in point of time, of the

act and intent, to constitute an offense. If the evil intent existed in the defendant's mind in Grant county, to receive the animal charged to have been stolen, there was no act coupled with such intent, and hence there was no completed crime committed in Grant county by the defendant. It is recommended that the judgment of the district court be reversed.

**PER CURIAM.** It is so ordered; all the justices concurring.

(46 Kan. 264)

**ANDREWS v. LOVE et al.**<sup>1</sup>

(Supreme Court of Kansas. May 9, 1891.)

**REVIEW ON APPEAL — TEMPORARY INJUNCTION — RESTRAINING TAX LEVY.**

1. An order of the district court, or a judge thereof at chambers, allowing a temporary injunction, may be reviewed in the supreme court before final judgment in the case.

2. Before an injunction can be granted to restrain the levying or collection of a tax, some step must be taken by the taxing officers towards the levying or collection of the same.

3. *Wyandotte & K. C. Bridge Co. v. Board of County Com'rs*, 10 Kan. 326; *Challiss v. City of Atchison*, 39 Kan. 276, 18 Pac. Rep. 195, cited and followed.

(Syllabus by *Strang, C.*)

Commissioners' decision. Error from district court, Cowley county; M. G. TROUP, Judge.

*John W. Shurtel*, for plaintiff in error.  
*Eaton, Pollock & Love*, for defendants in error.

**STRANG, C.** This was an application by the tax-payers of sewer district No. 1, Arkansas City, for a temporary injunction, made before the district judge of Cowley county at chambers, to enjoin the defendant city, and the mayor and clerk thereof, from making and collecting certain assessments against the property of the plaintiffs in payment of bonds which it is alleged were about to be issued to pay for the construction of a system of sewers in said district, and to enjoin the said city, and the mayor and clerk thereof, from issuing said bonds to pay for said sewer, and to enjoin the defendants *Andrews* and *Quigley* from obtaining, or attempting to obtain or negotiate, such bonds. The application for the injunction was made on the 1st day of August, 1890, and the petition, among other things, alleged that the mayor and council of the city of Arkansas City had attempted to create within said city a sewer district known as "Sewer District No. 1," and had let a contract to M. L. *Andrews*, or to M. L. *Andrews* for J. B. *Quigley*, for the construction of a system of sewers in said sewer district; that the said contractors did not comply with the terms of the contract in the construction of said system of sewers, but constructed said sewers in such a negligent, careless, unskillful, and unworkmanlike manner as to render them useless and of no value to said city; that the defendant city, and the officers thereof, unlawfully threaten to and are about to issue bonds for said work to defendant *Andrews*; that the defendant *Benedict*, clerk of said city, is about to certify the amount found due and assessed against the property owned

by these plaintiffs to the county clerk, for the purpose of being spread upon the tax-rolls of said county. The application was heard by the judge at chambers, a demurrer to the petition was overruled, and a temporary injunction allowed as prayed for. The plaintiff herein objected to the order allowing the temporary injunction, and comes here with his case made and asks this court to review and reverse the order of the judge allowing said temporary injunction.

The first question is raised by a challenge to the jurisdiction of this court. It is asserted that an order of a judge at chambers allowing a temporary injunction is a mere interlocutory order, and may not be reviewed by this court before final judgment. This question involves an examination of the following sections of our statutes: Section 237 of the Code provides as follows: "The injunction provided by this Code is a command to refrain from a particular act. It may be the final judgment in an action, or it may be allowed as a provisional remedy, and, when so allowed, it shall be by order." The judgment in this case is clearly not the final judgment in the action. It was allowed by a judge at chambers, and is by said judge declared to be a temporary injunction. It is not, and could not be, a final judgment in an action, because a judge at chambers could not render a final judgment, and because the action is still pending in the district court, and no final judgment has ever been rendered therein. Not being a final judgment in a case, it follows from the section of the statute above quoted that it was allowed as a provisional remedy. Does any statute of our state permit an appeal from an order allowing an injunction as a provisional remedy? It is conceded that if an appeal lies from such an order it is by force of some statutory provision. Section 542 of the Code reads as follows: "The supreme court may reverse, vacate, or modify a judgment of the district court for errors appearing on the record, and in the reversal of such judgment or order may reverse, vacate, or modify any intermediate order involving the merits of the action, or any portion thereof. The supreme court may also reverse, vacate, or modify any of the following orders of the district court, or a judge thereof: *First.* A final order. *Second.* An order that grants or refuses a continuance; discharges, vacates, or modifies a provisional remedy; or grants, refuses, vacates, or modifies an injunction; that grants or refuses a new trial; or that confirms or refuses to confirm the report of a referee; or that sustains or overrules a demurrer. *Third.* An order that involves the merits of an action, or some part thereof." The contention of the defendants in error is that the injunction mentioned in the above section, and from which an appeal may be taken under the provisions thereof, is the final judgment in the action, and that there is no other provision for an appeal from an injunction, and therefore no appeal from an order allowing an injunction as a provisional remedy. We do not think such contention is supported by a fair construc-

<sup>1</sup> Petition for rehearing pending.

tion of the whole section. The first part of the section provides that "the supreme court may reverse, vacate, or modify a judgment of the district court,—that is, the supreme court may reverse, vacate, or modify any final judgment of the district court, which includes the final judgment in an injunction proceeding as much as the final judgment in any other kind of an action. This part of the section then provides for the reversal, vacation, or modification of an injunction when such injunction is the final judgment in an action. Further along in the section it provides that "the supreme court may also reverse, vacate, or modify any of the following orders of the district court, or a judge thereof: *First*, a final order; *second*, an order that grants or refuses a continuance, discharges, vacates, or modifies a provisional remedy, or grants, refuses, vacates, or modifies an injunction,"—that is, an order that grants an injunction. An injunction allowed by an order is a provisional remedy. It is not allowed by an order when it is a final judgment. It is clear to us that the injunction mentioned in this section is an injunction employed as a provisional remedy,—an injunction allowed by an order of the court, or a judge thereof. See, also, *Wyandotte & K. C. Bridge Co. v. Board of County Com'rs*, 10 Kan. 326; *Challies v. City of Atchison*, 39 Kan. 276, 18 Pac. Rep. 195; *Snavely v. Buggy Co.*, 36 Kan. 106, 12 Pac. Rep. 522. In this last case Judge VALENTINE, writing the opinion, says: "With reference to all provisional remedies except injunctions the statute uses only the words 'discharges,' 'vacates,' and 'modifies.' Hence, as the statutes show, it was clearly not the intention of the legislature that an order of the district court granting, refusing, confirming, or sustaining a provisional remedy, except as to injunctions, should be reviewed in the supreme court prior to the final judgment in the case; nor was it the intention of the legislature that an order 'involving the merits' of a provisional remedy, except as to injunctions, should be reviewed by the supreme court prior to such final judgment, unless such order discharged, vacated, or modified the provisional remedy. The legislature had the whole subject of the reviewing of judgments and orders under consideration, and evidently, from the language used, it did not intend that an order granting, refusing, confirming, or sustaining any provisional remedy, except an injunction, should be re-examined by the supreme court prior to the final judgment." While the question of an appeal from an order allowing an injunction as a provisional remedy was not involved in the case under consideration at the time, Judge VALENTINE seems to have considered the whole subject of review of judgments and orders, and among other things to have concluded that the statute authorized the review of an order of the district court or judge thereof allowing an injunction as a provisional remedy, yet we think his construction of the statute in that regard the proper one to put upon it, and therefore we say that an order of the district court or judge thereof allowing an injunction as

a provisional remedy may be reviewed by this court without waiting for a final judgment in the case.

This case being properly here for review we will next consider the question raised by the demurrer to the petition, which was overruled. The demurrer, among other things, alleged that said petition failed to state facts sufficient to constitute a cause of action against the defendants. This branch of the demurrer challenged the petition generally, and therefore, if for any reason the petition failed to state a cause of action, it was error to overrule the demurrer thereto. Under the law as enunciated in the case of *Wyandotte & K. C. Bridge Co. v. Board of County Com'rs*, 10 Kan. 326, followed in the case of *Challies v. City of Atchison*, 39 Kan. 276, 18 Pac. Rep. 195, this case seems to have been prematurely brought. In the former case it was held that, before an injunction can be granted to restrain the levying or collection of a tax, some step must be taken by the taxing officers towards the levying or collecting of the same. The language of the petition in that case, so far as it relates to the particular question now under consideration, is similar to the language of the petition in this case. The petition in that case says "that said defendant is about to issue bonds of said county, and is about to cause to be levied a tax upon the taxable property of said county to pay interest upon said bonds." In the present petition the allegations are "that the defendant city and the officers thereof unlawfully threaten and are about to issue bonds for said work to M. L. Andrews, and that the clerk of said city is about to certify the amount found due and assessed against the property of the plaintiffs, to the county clerk, to be spread upon the tax-rolls." In the last case above cited it is said: "It is the levy, collection, or proceeding to enforce an alleged tax, charge, or assessment that may be enjoined." In this case, as in that, the petition does not allege "either a levy, collection, or proceeding to enforce" the alleged tax, charge, or assessment, but does allege that the city threatens and is about to issue bonds, and is about to certify the assessment against the property of the plaintiffs to the county clerk, to be placed upon the tax-roll of the county. The plaintiffs could not be hurt until a levy was made, or some attempt is being made to collect the tax assessed against the property. There are many other questions in this case, but as to all of them we express no opinion. It is recommended that the order of the judge allowing the injunction be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 290)

#### STATE v. GREGORY.<sup>1</sup>

(*Supreme Court of Kansas. May 9, 1891.*)

CLAIMS AGAINST COUNTIES — PRESENTING FALSA ACCOUNT — INDICTMENT.

An indictment which charges that the defendant named therein made out an account against Finney county for \$1,551.05 in favor of himself, and attached thereto a statement that the charges

<sup>1</sup>Petition for rehearing pending.

are the legal and ordinary charges for the services named therein; that credit has been given the county for all payments and offsets to which it is entitled; and that the account is just, correct, is due and unpaid; which statement was sworn to before the county clerk of said county; and the account was then filed in his office by said defendant, to be presented to the board of county commissioners for their action thereon when they should meet; and also alleges that the charges therein were not the legal and ordinary charges for such services, but were greatly in excess of the legal and ordinary charges for such services; that credit had not been given the county on said account for payments made, and offsets to which it was entitled; that the account was not true, correct, due and unpaid, but, on the contrary, was untrue, incorrect, and had been paid; and that the defendant, in making oath to said account, acted willfully and corruptly,—states a public offense, and it was error for the court to sustain a motion to quash said indictment upon the ground that it does not state an offense.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Finney county; A. J. ABOTT, Judge.

J. N. Ives, Atty. Gen., and H. F. Mason, for the State. Hopkins & Hoskinson, for appellee.

STRANG, C. In this case the grand jury of Finney county, Kan., found an indictment against the defendant, J. W. Gregory, charging him with the crime of perjury in taking the following oath, attached to an account against the county of Finney in favor of the Garden City Sentinel:

"County voucher: The County of Finney, in the State of Kansas, to the Garden City Sentinel, Dr.:

September 27th, 1886. To publishing election proclamation, Kansas, Texas, and S. W. Rly.....	\$1,106 80
To publishing petition, same.....	444 75
	\$1,551 05

"Statement: Finney county, Kansas—ss.: I do solemnly swear that I am the within-named claimant, and that I have had the means of knowing personally the facts therein set forth; that I have given credit to said county for all payments and offsets to which it is entitled; that the charges therein are the legal and ordinary charges for such services, dollar for dollar, and that the within account is just and correct, is due and unpaid. So help me God. J. W. GREGORY. Sworn to and subscribed before me, this 17th day of November, A. D. 1888. O. V. FOLSOM, Co. Clerk."

Attached to said account and affidavit was a further itemized statement of the same account, and also copies of the proclamation and petition for the publication of which the account was rendered, with proof of their publication. When sworn to, the account was presented by the defendant to the county clerk to be filed as a claim against said county of Finney. The indictment alleges that said statement so sworn to was not true; that an account for the same services had previously been presented to the board of county commissioners and allowed, and a warrant issued in payment therefor; that said charges were not the usual and ordinary charges for such services, but were great-

ly in excess of the usual and ordinary charges for such services; that one item of \$444.75, a part of said account, was not a proper or legal charge against said county under any circumstances; that the defendant, in taking said oath, acted unlawfully, feloniously, willfully, and corruptly. A motion to quash the indictment was presented to the district court, and overruled. Trial by the court and a jury was had, resulting in a conviction of the defendant. Motions for new trial and in arrest of judgment were argued and overruled. These motions were heard and passed upon August 1, 1889. August 19th, thereafter, a new motion for new trial was heard by the same court, and sustained. Then a second motion to quash the indictment was entertained by the court; and this time it, too, was sustained. The state appeals, and the question is, does the indictment charge an offense? We think it does. Section 148 of the crimes act reads as follows: "Every person who shall willfully and corruptly swear, testify, or affirm falsely to any material matter, upon any oath or affirmation or declaration legally administered in any cause, matter, or proceeding before any court, tribunal, public body, or officer, shall be deemed guilty of perjury."

Counsel for defendant exhibit a good deal of industry and skill in the preparation of their brief in this court, but the result of their labor consists principally in technical objections to the indictment, with argument and citations in support of them, all of which is unsuited to the condition of things under our statutes. We have statutes providing for the presentation of claims against the counties of the state to the board of county commissioners of the respective counties for allowance and payment. Such statutes provide that claims so presented shall be accompanied by a statement that the charges therein are the legal and ordinary charges for the kind of services for which the claim is made; that credit has been given the county for all payments thereon, and for all off-sets which the county has a right to recoup against the same; and that the account is just and correct, is due and unpaid. The statute also provides that this statement must be verified upon the oath of the claimant. The indictment charges, and counsel for defendant admit in their brief, that the defendant made out a claim against the county of Finney for services rendered the county, and attached thereto the statement required by law, and swore to the same before the clerk of the county, who is *ex officio* the clerk of the board of county commissioners, and filed said statement with said clerk to be presented to the board of county commissioners to be acted on by them when they should meet. We think, when this was done, if done willfully and corruptly, the crime of perjury was accomplished. All argument that the oath was not in a material matter, that it was not taken in a judicial proceeding nor before a judicial tribunal, is unavailing, in the presence of our statutes which provide for the very thing to be done that was done, and also of section

148, above quoted, which provides that the oath may be taken before a public officer, and that if it is false, and is made willfully and corruptly, it shall constitute perjury. The matter in connection with which the oath was taken was a claim against the county for the sum of \$1,551.05. Can it be said that a claim for such an amount against the county is not a material matter, or can it be said that the oath to such a claim is not material to the claim, when the statute expressly provides that the claim shall be verified by oath? But it is said by the counsel in their brief that the matter of the claim and oath thereto are not material, because the statement of the claim which was sworn to shows upon its face that it was barred by the statute relating to the presentation of claims against counties. We do not think this relieves the defendant from the result of his conduct in making and swearing to the claim, but, if material in this connection at all, should operate rather as an aggravation of the offense, since it necessarily admits an attempt on the part of the defendant to collect a claim that counsel say the board of county commissioners are by statute expressly prohibited from paying. We think the information states an offense. It follows, therefore, that the court committed error in sustaining the motion to quash. It is recommended that the action of the court in quashing the indictment be reversed, and the cause remanded for further proceeding.

PER CURIAM. It is so ordered; all the justices concurring.

16 Kan. 310)

STATE V. PROBASCO *et al.*

(Supreme Court of Kansas. May 9, 1891.)

CRIMINAL LAW—DEFENDANT AS WITNESS—CROSS-EXAMINATION—EXCEPTIONS TO RULINGS.

1. A defendant who voluntarily becomes a witness in his own behalf is subject to the same rule as any other witness, and may be asked by the state, on cross-examination, if he had not been convicted of larceny at the previous term of the same court in which he was being tried.

2. Error cannot be predicated upon instructions given, but not excepted to at the time.

3. An objection to evidence, to be available, should be made and excepted to when it is introduced.

(Syllabus by Green, C.)

Commissioners' decision. Appeal from district court, Cowley county; M. G. TROUP, Judge.

W. D. Hulshill, for appellant. J. N. Ives, Atty. Gen., and C. L. Swartz, for the State.

GREEN, C. The appellant Frank Handy was convicted, with one Jake Probasco, at the September term, 1890, of the district court of Cowley county, of grand larceny, and was sentenced to imprisonment in the penitentiary for three years. He appeals to this court, and asks a reversal of the judgment and sentence, upon a number of grounds.

1. It is claimed that during the cross-examination of the appellant the state

was permitted, against his objection, to ask the following question: "As a matter of fact, at the last term of this court you were convicted of grand larceny, were you not?" which was answered: "Yes, sir; I pleaded guilty here to larceny last court,"—and that this was error. The claim of the appellant is not well founded. This court has said, where a defendant, in a criminal case, takes the witness stand to testify in his own behalf, he assumes the character of a witness, and is entitled to the same privileges, and subject to the same tests, and to be contradicted, discredited, or impeached the same, as any other witness. *State v. Pfefferle*, 36 Kan. 90, 12 Pac. Rep. 406, and authorities there cited. As stated in the opinion, these authorities are to the effect that, for the purpose of impairing his credibility, a witness may be cross-examined as to specific facts tending to discredit him as a witness, although such facts are irrelevant and collateral to the main issue. Under the rule thus established there was no error in the cross-examination of the appellant.

2. Complaint is also made that the trial court erred in its charge to the jury concerning a conspiracy between the defendants on trial and the admissions of one of the defendants. We cannot consider this error, for the reason that no exception was taken to the giving of the instructions or any portion of them. This court will not review instructions given by the district court to the jury unless they are excepted to at the time. *Commissioners v. Boyd*, 81 Kan. 765, 3 Pac. Rep. 523; *Gafford v. Hall*, 39 Kan. 166, 17 Pac. Rep. 851; *Mercantile Co. v. Fullam*, 43 Kan. 181, 23 Pac. Rep. 104. Section 219 of the Criminal Code provides that exceptions to any decisions of the court may be made in the same manner as provided by law in civil cases.

3. The appellant's last assignment of error is that the court permitted the state to ask the defendant Probasco "if Handy did not have a sister upon whom he [Probasco] was waiting," and for that reason he was attempting to shield Handy. No objection was made to the question, and no exception taken at the time. An objection, to be available, must run to the specific testimony which is objectionable. *State v. Cole*, 22 Kan. 474; *Long v. Kaseheer*, 28 Kan. 240. In this case no objection was made to the question, and no exception taken at the time to the answer; hence the error cannot be considered. It is recommended that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 255)

Appeal of LOWE.<sup>1</sup>

(Supreme Court of Kansas. May 9, 1891.)

COSTS IN CRIMINAL CASES—CONSTITUTIONAL LAW.

1. Neither section 275 of the crimes act (Comp. Laws 1885, p. 860) nor 836 of the Code of Criminal Procedure (Comp. Laws 1885, p. 760) is unconstitutional and void.

2. A question as to the proper taxation of costs will not be considered in this court without

<sup>1</sup>Petition for rehearing pending.

a motion to retax has been acted upon by the court below.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Appeal from district court, Elk county; M. G. TROUP, Judge.

M. B. Light and J. V. Beekman, for petitioner. Luther Scott and J. N. Ives, Atty. Gen., for respondent.

SIMPSON, C. An information was filed against one F. Keefer in the district court of Chautauqua county charging that the defendant on the 23d day of August, 1889, unlawfully, willfully, and maliciously made, composed, and circulated against the appellant, S. Lowe, a certain false, malicious, defamatory, and scandalous letter, writing, and communication, set forth in full in said information. A change of venue was taken to Elk county, and the case was tried in the district court of that county before a jury, and a verdict returned October 14, 1889, finding the defendant not guilty; that the prosecution was instituted without probable cause and from malicious motives; and stating the name of the prosecuting witness to be S. Lowe. The defendant, Keefer, was discharged from custody without day. On the 17th day of October, 1890, the appellant, as prosecuting witness, filed a motion for a new trial so far as the verdict related to him as a prosecuting witness, which was overruled. On the 18th day of October he filed a motion in arrest of judgment, and this was overruled. The distinct causes for a new trial and arrest of judgment were: *First.* That upon the trial had he had not been heard either in person or by his attorney in his own defense touching the matter in controversy, being neither plaintiff nor defendant in the action. *Second.* That the trial court erred in matters of law, permitting certain depositions to be read, and in certain instructions respecting the same. *Third.* Error in instruction respecting section 326, c. 82, Code Crim. Proc. *Fourth.* That the verdict is contrary to the law and the evidence in the case. *Fifth.* That the court erred in its instruction respecting section 275, c. 81, Comp. Laws 1885; that said section is unconstitutional and void. On motion for arrest of judgment he claimed he had a right to be heard, and that he had a right to a separate trial, which he demands. The court pronounced judgment on the verdict that S. Lowe pay all costs of said action, taxed at \$1,053.40; that he be committed to the jail of Elk county until such costs are paid, or until he executes a good and sufficient bond, with two or more sureties, in the sum of \$2,500, to be approved by the sheriff of said county, conditioned that he pay all costs in said action within six months from the date of said judgment. At the time the judgment for costs was rendered and the various rulings of the trial court were made, the appellant saved exceptions. A bill of exceptions was duly signed by the court and attested, and an appeal taken to this court. Some of the questions discussed by the counsel for the appellant, both in his oral argument and his elaborate brief, have been decided adverse to his views.

He claims that both section 275 of the crimes act and section 326 of the Code of Criminal Procedure are unconstitutional and void for a variety of reasons.

1. We are met by a very serious question on the threshold of the consideration of this record, and that is whether this court can review the rulings and proceedings of the court below. We are asked to set aside the judgment of the court below against this appellant for costs for the reason that the lower court committed many grievous errors of law at the trial, and because the statutes authorizing such a judgment of costs are unconstitutional and void. In the case of *State v. Zimmerman*, 31 Kan. 85, 1 Pac. Rep. 257, which was a prosecution for criminal libel, the jury acquitted the defendant; found that the prosecution was instituted without probable cause and from malicious motives. On motion of the defendant the part of the verdict was set aside that found want of probable cause and malicious motives, and a judgment for costs was rendered against Leavenworth county. The state reserved the question of costs under section 283 of the Criminal Code, and appealed to this court. This court say: "In all prosecutions for libel, the jury have the right to determine, at their discretion, the law and the fact, and therefore the instructions of the court are not to bind the consciences of the jury, but only to inform their judgments. Under section 326 of the Criminal Code the jury trying the case exercised the right permitted by the statute of stating in their finding the name of the prosecutor, and that the prosecution was instituted without probable cause and from malicious motives. The court had no power to set aside a verdict in such a case, and it was equally powerless to set aside a part thereof. Therefore, in the absence of such power, the order of the court was erroneous and must be reversed." Counsel for plaintiff in error criticises this decision, and very earnestly inquires "why the trial court had no power to set aside a part of the verdict." The reason is an obvious one: it is because a statute of the state expressly gives the jury in such an action the right, power, and discretion to determine the law and the fact for themselves. Counsel attacks this provision of the statute and says it is unconstitutional and void, but he forgets that within his memory the practice in criminal cases in almost all, if not all, of the states was for the jury to pass upon the law and the facts. The force of another universal practice of courts everywhere ought to be adverted to, and that is, when a jury return a verdict of not guilty in a criminal case, the trial court has no power to set it aside or modify it in any respect. These findings against the prosecuting witness were a part of a verdict of a jury in a criminal case, wherein express power by statutory enactment is given a jury to determine both the law and the facts. The trial court has no power to interfere with that verdict in any prejudicial respect, and this court is as powerless as the court below.

2. The constitutionality of the other statute has been upheld by this court in



the case of *In re Ebenhack*, 17 Kan. 618, (decided many years ago.)

3. It is not necessary for us to attempt a construction of sections 252 and 326 of the Criminal Code, as there was no motion to retax the costs filed in the court below, and the record discloses no ruling on that question. It is true that there is a statement made by the clerk, attached to the record, long after its filing in this court, showing that the full amount of costs accruing in the case is \$1,585.90, and of this it is said that \$1,181 are the costs of prosecution and \$404.90 of the defense; but we are governed by the record, and that recites a judgment for costs against the prosecuting witness of \$1,053.40. All that we can do in the present condition of the record on the question of costs is to recommend that the judgment for the amount of costs named therein be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 430)

CITY OF ARGENTINE *et al.* v. STATE.

(Supreme Court of Kansas. May 9, 1891.)

MUNICIPAL CORPORATIONS — ERECTION OF CITY HALL — SALE OF REAL ESTATE — PURCHASE OF CITY HALL SITE — INJUNCTION.

1. A city of the second class is authorized to purchase a site and erect thereon a city hall necessary for the accommodation of its officers and the transaction of its business.

2. The expediency and wisdom of purchasing a site and constructing such a building are to be determined by the mayor and council, and as a general rule the courts cannot interfere with their discretion either in the selection of the site or the time when such a building shall be erected; and the fact that the city already owns a lot which was acquired as a site for a city hall, which may be unsuitable and inadequate, will not preclude it from purchasing another.

3. A city has express authority to sell its real property; and, when it is determined to be expedient and necessary to do so, the mayor and council may dispose of the same at such time and upon such terms of payment as they deem most conducive to the interests of the city.

4. A site for a city hall may be purchased by a city in pursuance of an ordinance passed for that purpose, although no ordinance has been enacted specifically providing for the construction of the building.

5. The mayor and council may purchase a site for a city hall without being instructed to do so by a vote of a majority of the electors, and may pay for the same out of any money provided specially for that purpose, or out of any unexpended money belonging to the general fund of the city.

6. In a petition filed in behalf of the state it is alleged that the mayor and council of the city of A. had provided by ordinances for the purchase of a site for a city hall and to pay for the same; that, professing to have been instructed by a vote of the people, they had issued, negotiated, and sold the bonds of the city in the sum of \$10,000 to construct a building to be known as the "City Hall," and to furnish offices for the various officers of the city, and received for the bonds so negotiated and sold the sum of about \$10,000, which amount was then in the hands of the city treasurer. The bonds are alleged to have been illegally issued; but what the defects were, or whether they were good in the hands of innocent holders, was not stated. It was further alleged that the mayor and council proposed to expend \$1,600 of the proceeds of the sale of the bonds for the purchase of certain lots upon which to construct the city hall, and the state asked that the city and its officers be enjoined from ex-

pending the money for that purpose. *Held*, upon a demurrer, that the allegations of the petition do not disclose such an interest in the public as would authorize the state to maintain the action.

(Syllabus by the Court.)

Error from district court, Wyandotte county; O. L. MILLER, Judge.

Action of injunction, brought in the name of the state by the county attorney of Wyandotte county, to enjoin the city of Argentine and the mayor and council thereof from appropriating or expending any portion of the proceeds of the sales of city bonds issued for the purpose of building a city hall in the city of Argentine in the purchase of lots upon which to erect such hall. The following is a copy of the amended petition filed by the state: "The plaintiff for cause of action against the defendants alleges and shows to the court:

(1) That the defendant the city of Argentine is a public corporation organized under the laws of the state of Kansas as a city of the second class; that the defendant William McGeorge is the mayor of said city, and the other defendants [naming them] are the councilmen of said city. (2) That on the 24th day of November, 1890, the said mayor and councilmen of the said city of Argentine enacted two certain ordinances, numbered, respectively, '263' and '264,' copies of which said ordinances are hereto annexed, marked, respectively, Exhibits 'A' and 'B' and made a part of this petition. (3) That on or about the 1st day of May, 1890, the mayor and councilmen of said city of Argentine, pretending and professing to act under and pursuant to paragraph 792 of the General Statutes of Kansas of 1889, being section 35 of 'An act to incorporate cities of the second class and to repeal former acts,' approved February 28, 1872, and pretending and professing to have been instructed so to do by a majority of all the votes cast at an election held in said city for that purpose, did issue, negotiate, and sell the bonds of said city in the sum of ten thousand dollars for the purpose of constructing a building to be known as a 'City Hall,' and to furnish offices for the various officers of said city, and did receive for said bonds so negotiated and sold the sum of about ten thousand dollars, which sum of money is now in the hands of the treasurer of said city of Argentine. (4) That the said mayor and councilmen of the said city of Argentine have denominated said fund so received from the sale of said bonds as 'the City Hall Building Fund of the City of Argentine,' and by said ordinances Nos. 263 and 264 are attempting to and threaten to appropriate, use, and expend \$1,600 of the proceeds of the sale of said bonds for the purchase of lots 1, 2, 3, and 4 in block 2, Meyer's addition to the city of Argentine, mentioned and described in said ordinances, and, unless restrained from so doing by this court, will immediately proceed to use, appropriate, and expend said money for the purpose of purchasing said lots. (5) That at the time of the issuing, negotiation, and sale of the aforesaid bonds the said city of Argentine was and now is the owner of a lot or tract of land theretofore acquired by it as a site for a city hall; that said mayor

and councilmen have not been instructed by a majority of all the votes cast at any election held in said city of Argentine for that purpose to borrow any money, to issue any bonds, or to make any appropriation whatever for the purchase of a new site for a city hall, or to construct a city hall; and no ordinance or resolution providing for the construction of a city hall or making an appropriation therefor has been enacted by said city, nor has any estimate of the cost of such work or improvement been made by the city engineer and submitted to the council of said city; and said mayor and councilmen have no authority in fact or in law to use, appropriate, or expend any portion of the moneys received as the proceeds for the sale of said bonds in the purchase of said lots, or for any other purpose, or to make any expenditure for the purchase of a site for or for the construction of a city hall. Wherefore plaintiff prays that said defendants, and each and every of them, may be restrained and enjoined from appropriating, using, or expending any portion of the proceeds of the sale of said bonds so issued for the purpose of building said city hall, in the purchase of said lots hereinbefore described, or for any other purpose, and for such other and further relief as in equity it may be entitled to." The ordinances referred to in the petition were, —first, one authorizing the mayor, as the agent of the city of Argentine, to purchase four lots in the city as a site for the city hall at the price of \$1,600, which was approved November 25, 1890, and duly published on November 27, 1890. The second ordinance referred to is one appropriating \$1,600 in payment for the lots purchased as a site for the city hall. This ordinance was approved on November 25, 1890, and was duly published. A temporary injunction was granted after a hearing upon the amended petition, and immediately thereafter the city and its officers filed a general demurrer to the amended petition, which was argued and overruled. The defendants elected to stand upon the demurrer, and judgment was entered for the plaintiff granting a perpetual injunction. The defendants excepted, and bring the case here for review.

*Thomas J. White*, for plaintiffs in error.  
*J. M. Asher, T. A. Pollack, and Hutchings & Keplinger*, for the State.

**JOHNSTON, J.,** (after stating the facts as above.) The question for determination is the sufficiency of the petition. Do the facts alleged authorize the interference of the state by a proceeding of injunction? It appears that the city of Argentine is proposing to purchase a site upon which to erect a city hall in order to provide office rooms for the various officers of the city. An ordinance has been enacted authorizing the mayor to purchase four certain lots for that purpose at the specified price of \$1,600, and another ordinance was enacted appropriating that sum to pay for the site. A fund of about \$10,000 has been provided for the construction of a city hall, and the mayor and council are proposing to use a portion of this fund to pay for the site. It is said that their ac-

tion is unwarranted because the city is without power to purchase such a site, but there is no ground for this contention. Express authority is given a city of the second class to purchase and hold real estate for the use of the city, and to sell and convey any which it owns, and to make such orders respecting the same as may be conducive to the interests of the city. Gen. St. 1889, par. 759. Then there is the further provision empowering the council to purchase grounds for and to erect market-houses and all other necessary buildings. Gen. St. 1889, par. 813. It is proper for the city to provide a public building for the accommodation of its officers, and, as we have seen, abundant authority is expressly given to purchase real estate and to construct a public building thereon. The wisdom and expediency of purchasing a site and constructing a building are to be determined by the mayor and council, and, as a general rule, the court cannot interfere with their discretion either in the selection of the site or the time when such a building shall be constructed.

The objection that the city already owns a lot which was acquired as a site for a city hall is not good. Authority is vested in the city, as we have seen, to sell any real property which it owns. A site or building which is suitable and sufficient at one time may by the growth of the city become entirely unsuitable and inadequate. The expediency of selling the real estate which the city owns, and purchasing another location deemed to be more convenient and suitable, is to be determined by the mayor and council, and not by the court. When they determine that it is expedient and necessary to construct a city hall and to purchase a new site therefor there is no reason why they may not proceed to do so before the old one is sold and disposed of. The city is authorized in general terms to sell real property, without specification as to time or manner. It may therefore dispose of the same at such time and upon such terms of payment as may be deemed most conducive to the interests of the city. *City of Wyandotte v. Zeitz*, 21 Kan. 660. It is contended that if the statutory authority referred to carries the power to purchase a site for a city hall, then before a new site can be purchased it must appear that a new city hall is to be built, and an ordinance must be enacted for that purpose. In reply to this it may be said that the enactment of the ordinances providing for the purchase of and payment for the lots for a new site was practically a determination that a new city hall was to be erected. Even if it were not, the purchase of a site is a necessary preliminary before proceeding with the construction of the building; and, until the purchase is effected, an ordinance providing for the construction does not seem to be absolutely necessary. When the location is determined and the site procured, the mayor and council may thereafter exercise their discretion, and provide by ordinance the time and manner of constructing the building.

The objection that there has been no vote instructing the mayor and council to

purchase a site or to construct a city hall is not material. The statute prescribes no such requirement. If bonds are to be issued or money borrowed for making an improvement of a general nature, a vote of a majority of the electors is necessary. Gen. St. 1889, par. 792. This provision, however, applies only where bonds are to be issued or money borrowed, but it is not absolutely essential to the purchase of a site or the determination to construct a necessary public building. For these purposes authority is given elsewhere; and, if there is sufficient money in the treasury belonging to the general fund, it may doubtless be appropriated to pay for the same. As has already been said, the purchase of necessary real estate and the construction of public buildings rests in the discretion of the city officers, and, in the absence of fraud or some statutory restriction, the courts cannot interfere.

According to the allegations of the petition, the city had on hand a city hall building fund of about \$10,000, which appears to have been derived from the issue and negotiation of bonds issued in pursuance of an election; but it is averred that the officers have never been instructed by a majority of the votes cast to issue the bonds for the purchase of a site or the erection of a hall; and it is therefore contended that the city cannot appropriate or expend any portion of the proceeds of these bonds, either for the purchase of a site or the erection of the building. It is not alleged that the site which has been purchased is in an inconvenient location, nor that the price paid for the same was excessive, nor yet that there was any fraud connected with its purchase; neither is there any statement that the officers corruptly issued or negotiated the bonds, nor that they were sold for less than their value. From the allegations that are made, it must be taken that the bonds were illegally issued; but whether they were void on their face, or whether they had passed into and were good in the hands of innocent holders, is not alleged. Whatever may have been the defects in the election proceedings preliminary to the execution and sale of the bonds, it appears that they have been issued, negotiated, and sold, and the proceeds of the same are now in the hands of the city treasurer. No complaint is made of the proposed expenditure, either by the city or any tax-payer of the city, and why should the state or the county attorney in its behalf intervene? It is contended by the state that if the bonds that have been illegally issued are valid in the hands of *bona fide* purchasers, or if the bonds are held to be void, the funds derived from the same in either event belong to the city, and, as we have seen, the right of the city to expend money for the purchase of real estate and the construction of public buildings is undoubted. Under the allegations of the petition and the previous rulings of this court, the interference on the part of the county attorney in behalf of the state is unnecessary to prevent the perpetration of an irremediable wrong and unwarranted by law. In *State v. McLaughlin*, 15 Kan. 228, a

school-district had issued bonds in excess of its powers, which were void in the hands of their holders, and a tax had been levied to pay them off, and it was held that an action to enjoin the collection of taxes to pay the bonds would not lie in the name of the state on the relation of the attorney general. *City of Atchison v. State*, 34 Kan. 379, 8 Pac. Rep. 367, was an action brought by the state in the name of the county attorney against the city of Atchison and others to enjoin the city of Atchison and certain officers from collecting taxes or paying out certain bridge funds which were in the hands of the treasurer. It was alleged that bonds issued to build certain bridges in the city were illegally issued, and that the tax levied for the payment of the bonds was illegal and void, and they asked the court to enjoin the disbursement of the money collected upon the levy; but it was held that as the bonds alleged to be unauthorized and illegal had long since been executed and delivered, and the bridges for the payment of which the bonds were issued had been built and paid for, the community at large had no such interest in the controversy as warranted the interference of the state. So here the bonds have been executed and issued without objection or interference by the state or any one else; they have passed into the hands of the purchaser, and their validity, as between the holders and the city, cannot be tried in this proceeding; nor, indeed, does it appear that the city, or any officer or tax-payer of the city, desires to question the validity of the bonds. The money derived from their sale is in the hands of the treasurer, and if it is treated as a special fund to provide a city hall, the expenditure of the same for the purchase of a site is not unauthorized; and if the bonds are void on their face, so that the proceeds cannot be recovered, then such proceeds would become a part of the general fund, and might be legally appropriated for the purchase of a site or the construction of the building. In either case the right of the state to interfere with the city in the appropriation of the fund is not apparent. From the argument of counsel it would seem that the principal objections to the appropriation have been the location of the site and the supposed want of power in the city to purchase the site, but neither of these objections can be sustained; and, so far as the question of expending the money which the city has provided for that purpose is concerned, we must hold, under the authorities, that the public has no such interest in the same as will warrant the interference of the county attorney. As the site is essential to the construction of the building, we think the money provided for the building may properly be used for the purchase of the site. We are also of opinion that an estimate of the cost of the site by the city engineer is not essential or required in advance of a contract or purchase by the city council. The judgment of the district court will be reversed, and the cause remanded, with instructions to sustain the demurrer of the city to the petition of the state. All the justices concurring.

## STATE v. MORAN.

(Supreme Court of Kansas. May 9, 1891.)

ASSAULT WITH INTENT TO KILL—EVIDENCE—TRIAL—  
—PRESENCE OF ACCUSED.

1. Where a defendant is charged with an assault with a deadly weapon with intent to kill, under the provisions of paragraph 2159, Gen. St. 1889, and the evidence of the prosecution tends to establish that offense, and the evidence of the defendant tends to show that he shot off the deadly weapon (a pistol) into the ground with no intention to harm, hurt, or kill any one, and that no one was shot, struck, or hurt thereby, it is error for the district court to instruct the jury that they might convict the defendant of an assault with intent to commit manslaughter.

2. It is a violation of section 207 of the Criminal Code to try any person accused of felony unless he is personally present throughout the trial. State v. Myrick, 38 Kan. 238, 16 Pac. Rep. 330.

(Syllabus by the Court.)

Appeal from district court, Bourbon county; STEPHEN ALLEN, Judge *pro tem*.  
Keene & Campbell and J. B. Larimer, for appellant. J. N. Ives, Atty. Gen., and L. C. Boyle, for the State.

HORTON, C. J. Dennis Moran was in formed against by the county attorney of Bourbon county for an assault with intent to kill Alexander Mason on the 16th day of November, 1888. He was tried and convicted "of an assault with intent to commit manslaughter." He was sentenced to confinement at hard labor in the penitentiary of the state for the term of 18 months. From the sentence and judgment rendered against him he appeals to this court. The evidence of Alexander Mason, the prosecuting witness, was as follows: "I live in Bourbon county, in this state, two miles south and one-half mile east of Fulton. I am acquainted with the defendant, Dennis Moran. On or about the 16th day of November, two years ago, in the evening, between five and six o'clock, in Bourbon county, in this state, I was doing up my chores and somebody called me, and I answered. I was in the barn putting in corn for the team, and I answered and asked who it was. I stepped out and saw it was Den. Moran. I walked out towards him, and said, 'Den, go home. I don't want to talk to you.' He says, 'You God damn son of a bitch, I am going to kill you,' and shot. When I saw him draw his revolver, I hollowed to Mrs. Graham. She stepped to the door, and saw him shoot. I hollowed to her to get me my gun. He snapped his revolver twice, and then put spurs to his horse. I was about fifteen or sixteen steps from Moran when he shot at me. I heard the bullet whiz by me about a foot or two from my face. I had been shot at before, and had heard a bullet whiz by me once before. The bullet struck the ground after it passed me about twelve or fifteen feet. I looked for the bullet the next day, and dug it out of the ground. I have that bullet now in my pocket. Here is the bullet. I have kept it ever since in my possession. Moran, when he rode up, after he stopped, drew his revolver, held it in his right hand, and shot at me; and after he snapped his revolver twice, and it did not go off, went east up the road as far as I

could see him. I afterwards went on, and done up the night's work, and then went over home, and they informed me that Dennis Moran had had trouble in town that afternoon with my brother Robert. Then I came to town, and got out the papers. I did not have any weapons on me at the time Dennis Moran shot at me. Had been plowing on the farm all day, and had just come in from work, and was putting up the team and feeding them. I looked at the clock when I went to the house to see what time it was. It was just about sunset, the time the shooting took place." The defendant, Dennis Moran, testified in his own behalf as follows: "On November 16, 1888, I was in Fulton. I had some trouble with Robert Mason. I had left town, and was going out home that night, along just before dark, and, as I was going by Alec Mason's, Mason came running out with a scoop shovel in his hand, and said to me, 'Come in, you son of a bitch. You licked my brother, but you can't lick me.' This was the first thing that was said between Alec Mason and myself. Then he called for his revolver, and started for the house to get it, and after he started for the house I pulled my revolver, and shot twice in the ground near the fence. I did not shoot at Alec Mason. I merely shot in the ground. I did not see anybody there. I did not see Mrs. Graham. I had known and heard of a great many threats made by Alec Mason. Several parties had told me he intended to kill me as soon as he got a chance; and when he made the threat that he did, and called for his revolver, on November 16th, I shot twice, as I said, into the ground to scare him, in order that I might have the opportunity to run my horse and get away from him before he could get his revolver and shoot me. That is the reason that I shot twice as I did. I expected him to kill me at that time if he could get his revolver. I have always shunned him if I could. I have always been afraid that he would shoot me, or that I would have trouble with him when I met him. Mrs. Foster had told me of his threats, and several others. I never made any threats against him in my life. I had had enough trouble with the Masons. They had sworn a bastard child on me, and I afterwards brought suit for malicious prosecution against them, and recovered a \$700 judgment off of them, and I was tired of having anything more to do with them." The court charged the jury, among other things, as follows: "In order that you may convict the defendant of assault with intent to commit manslaughter, it is incumbent on the prosecution to prove to your satisfaction, beyond a reasonable doubt, that the defendant, at the county of Bourbon, state of Kansas, on or about the 16th day of November, 1888, did shoot at the said Alexander Mason with a pistol loaded with gunpowder and ball, with the intent to kill said Mason. In order to convict the defendant of the crime of assault with intent to commit manslaughter, it is not necessary that the defendant should have had a settled and premeditated design, formed before the shooting,

If he did shoot to kill said Mason, but he must have shot with the intent in his mind at the time of the shooting to kill said Mason. Within the charge are included the minor offenses of assault with intent to commit manslaughter and simple assault."

Upon the facts testified to by the prosecuting witness, the trial court committed error in charging the jury concerning manslaughter. If the assault was made as testified to by the prosecuting witness, the defendant was guilty of assault with intent to kill and murder. If Alexander Mason had been shot and killed by Dennis Moran at the time of the alleged shooting, Moran would have been guilty of murder in the first degree or murder in the second degree. Within the provisions of the statute, he would not have been guilty of manslaughter in any degree. Gen. St. 1889, pars. 2133-2151, 2159. Where an assault is made by a person with intent to take the life of another, and the killing is not lawful or excusable, if death should ensue the party would be guilty of murder. Excepting under certain circumstances, not embraced within the facts testified to in this case, a defendant could not be convicted of an assault with intent to commit manslaughter, where the facts show that he intended to commit murder. *People v. Lilley*, 43 Mich. 521, 5 N. W. Rep. 982; *State v. White*, 41 Iowa, 316; 5 Lawson, Def. Crime, p. 783. The use of the word "manslaughter" in the charge of the district court may have misled the jury, and therefore the charge was prejudicial. *State v. Mize*, 36 Kan. 187, 13 Pac. Rep. 1.

Further, it appears from the record that the defendant, Moran, was absent, with the consent of the court, while one of the witnesses upon the part of the state was testifying. This is fatal error. *State v. Myrick*, 38 Kan. 238, 16 Pac. Rep. 330. In that case it was said: "Section 207 of the Criminal Code prohibits the trial of any person accused of felony unless he is personally present throughout the trial; and it is therefore error for the court, in a prosecution for felony, to recall the jury and give further instructions while the defendant is absent and under confinement in jail. In such case the presence and consent of defendant's counsel did not waive or cure the illegality." The other questions presented need not be discussed. The judgment of the district court will be reversed, and the case remanded for a new trial.

JOHNSTON, J., concurs.

VALENTINE, J. I concur in the reversal of the judgment of the district court, but I cannot say that I concur in all that is decided, or all that is said by the chief justice.

#### HIGGINS v. BURNS.

(Supreme Court of Washington. May 14, 1891.)

#### DISMISSAL OF APPEAL—FAILURE TO FILE BRIEFS.

An appeal will be dismissed where, without satisfactory reason being given, appellant has failed to cause a transcript to be prepared, and

to serve and file a brief as required by Sup. Ct. Wash. Rule 4, the appellee having filed a certified copy of the judgment and notice of appeal in accordance with rule 9 of said court.

Appeal from district court, Pierce county. *Carroll, Cain & Davis* and *Mr. Crawford*, for appellant. *Town & Likens*, for appellee.

ANDERS, C. J. Appellee moves to dismiss this appeal, and to affirm the judgment of the court below, for the reasons—*First*, that appellant has failed to cause a transcript to be prepared, and to serve and file a brief, as provided by rule 6 of this court; and, *second*, that the original amount in controversy herein does not exceed the sum of \$200, and the action does not involve the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. Judgment was rendered in the lower court on September 6, 1890, and on September 17, 1890, notice of appeal to the supreme court was duly given. This motion was filed on April 27, 1891, at which time no transcript had been prepared, and no briefs had been filed. No satisfactory reason or excuse is given for the failure to comply with rule 6 of this court, and, appellee having filed a certified copy of the judgment and notice of appeal, in accordance with the provisions of rule 9, the appeal will be dismissed, with costs to appellee. It is not necessary, under the circumstances, to consider the jurisdictional question attempted to be raised by this motion.

DUNBAR, HOYT, and STILES, JJ., concur. SCOTT, J., not sitting.

#### DURANT et al. v. COMEGYS et al.

(Supreme Court of Idaho. May 12, 1891.)

#### FINAL JUDGMENT—RIGHT TO APPEAL—OBJECTIONS TO JURISDICTION.

1. Upon the minutes of the court the following entry was made: "At this day, on motion of defendant's counsel, the court ordered this cause dismissed at plaintiffs' costs, taxed at \$3.40." *Held*, this is not a final judgment.

2. When there is no final judgment no appeal can be taken.

3. When there is no judgment in the court below this court has no jurisdiction.

4. An objection to the jurisdiction may be made at any time.

(Syllabus by the Court.)

Appeal from district court, Shoshone county.

By leave of the court an amended complaint was filed in the above-entitled action on May 29, 1890, and thereafter, on the 2d day of June, 1890, the said complaint was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action. Upon the hearing the demurrer was sustained. Thereafter, on March 9th, the court entered the following order: "At this day the court granted the plaintiffs until March 12, 1891, to elect whether to amend or stand upon their complaint." On March 11th the following entry appears in the record: "At this day the plaintiffs, by their counsel, announce that they have elected to stand by their amended complaint." Thereafter, on the

12th day of March, 1891, the court made the following entry on the record: "At this day, on motion of defendants' counsel, the court ordered this cause dismissed at plaintiffs' costs, taxed at \$3.40." From this so-called judgment the plaintiffs take an appeal to this court, by filing and serving the following notice: (Title of the court and cause.) "Please take notice that the plaintiffs in the above-entitled action hereby appeal to the supreme court of this state from the judgment therein made and entered in the above-entitled district court sustaining the defendants' demurrer to the plaintiffs' complaint, and dismissing the above-entitled action at the cost of the plaintiffs, which judgment, made and entered as aforesaid, was in favor of the defendants and against the plaintiffs, and was entered on the 10th day of March, 1891, and appeal from the whole of said judgment. Dated this 18th day of March, 1891. [Signed,]" etc.

W. T. Stoll and McBride & Allen, for appellants. Woods & Heyburn, for respondents.

MORGAN, J. The first question to be considered is, is this a judgment from which an appeal can be taken? If there is no judgment no appeal can be taken, and this court has no jurisdiction. *Gray v. Cederholm*, (Idaho,) 8 Pac. Rep. 12; *Meyssan v. Chabrie*, (Cal.) 7 Pac. Rep. 634; *Stebbins v. Savage*, (Mont.) 5 Pac. Rep. 278. Section 4807, Rev. St. Idaho, is as follows: "An appeal may be taken to the supreme court from a district court—First, from a final judgment in an action or special proceeding commenced in the court in which the same is rendered within one year after the entry of judgment." In *McLaughlin v. Doherty*, 54 Cal. 519, the court states as follows: "Section 939 of the Code of Civil Procedure provides that an appeal may be taken from the final judgment within one year after the entry of judgment." It will be noticed that the wording is the same as our own statute. In *Gray v. Palmer*, 28 Cal. 416, this provision of the practice act was before the court for construction, and the court in its opinion defined with precision the distinction between the rendition and entry of a final judgment within the meaning of that act. The distinction which the court made was that a judgment is rendered when ordered by the court, and entered when actually entered in the judgment book. See, also, *Trenouth v. Farrington*, 54 Cal. 273. In the case of *McNevin v. McNevin*, 11 Pac. Coast Law J. 92, the journal entry was in the following language: "Ordered that plaintiff's prayer for a decree of divorce be denied, and that defendant have judgment for costs." The court held this to be an order for judgment only, and dismissed the appeal. The same was held in the case of *Thomas v. Anderson*, 55 Cal. 43. Both these cases were approved in *Schroder v. Schmidt*, 71 Cal. 399, 12 Pac. Rep. 302; also in *Tyrell v. Baldwin*, 72 Cal. 192, 13 Pac. Rep. 475; *Kimple v. Conway*, 69 Cal. 71, 10 Pac. Rep. 189. Section 4454 of our statute requires the clerk to keep a judgment book, in which judgments must be entered. Section 4456 requires him immediately af-

ter entering the judgment to attach together and file certain papers, which shall constitute the judgment roll. It is from the judgment so entered in the judgment book that an appeal must be taken, and not from the order of the court directing such judgment. The language used in this case and recorded in the journal was simply an order directing the entry of judgment of dismissal and for costs. *Black, Judgm. §§ 110, 115; Hayne, New Trials & App. 183, note 6.* It is but just to the eminent counsel engaged in this cause to say that this conclusion was arrived at before the supplemental briefs were filed. Since they were filed the case cited by counsel for appellants has been examined, but has not changed the opinion of the court. In our opinion, an objection to the jurisdiction may be made at any time. If not made at all by counsel, and it appeared in the record, the court would be obliged to take notice of it. Appeal dismissed, without prejudice to another appeal; costs of appeal awarded to respondent.

SULLIVAN, C. J., and HUSTON, J., concur.

PEOPLE v. BRUGGY. (No. 20,706.)<sup>1</sup>  
(Supreme Court of California. May 22, 1891.)

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

1. An instruction that if defendant killed deceased in resisting an attempt on the part of deceased to "murder" defendant, or an attempt to do defendant great bodily harm, then the killing was justifiable, is not fatally erroneous, as it does not tend to lead the jury to understand that an attempt to kill defendant not constituting murder would not justify the killing by defendant.

2. An instruction that if defendant drew his pistol with a deliberate intent to kill deceased, and that deceased saw the pistol, and, believing himself in danger of defendant, ran away, and that defendant, with intent to willfully and deliberately kill deceased, followed for the purpose of overtaking or meeting and killing him, and did meet him, unarmed, and showing no disposition to kill defendant, and defendant then and there, without believing himself in danger of losing his own life, fired, and killed deceased, then the evidence showed no self-defense, cannot be objected to on the ground that it omits the hypothesis of defendant's being in danger, or believing himself in danger, of receiving great bodily harm. *PATERSON, J., dissenting.*

In bank. Appeal from superior court, Sonoma county; S. K. DOUGHERTY, Judge. J. C. Sims, for appellant. W. H. H. Hart, Atty. Gen., for the People.

PER CURIAM. The defendant was convicted of murder in the first degree, and is under sentence of death. He appeals from the judgment rendered against him, and from an order refusing a new trial. He makes the point that the evidence is insufficient to sustain the verdict. The jury had before them persons who witnessed the homicide, and all its attendant circumstances. There was certainly some evidence which tended to show the guilt of the defendant as charged; and, that being so, we are not warranted in saying that the jury gave it improper weight, and should not have returned the verdict which they did.

It is further claimed that the instruc-

<sup>1</sup> Rehearing granted, post 963.

tion of the court was erroneous, which was in this language: "If the jury believe from the evidence in this case that the defendant, Bruggy, killed the deceased by shooting him, and that the shooting was done by Bruggy in resenting an attack on the part of the deceased to murder him, Bruggy, or an attempt on the part of the deceased to do great bodily harm to him, Bruggy, then in such case I instruct you the killing by Bruggy was justifiable, and you should find the defendant not guilty. The rule in such a case is this: What would a reasonable person—a person with ordinary caution, judgment, and observation—in the position of the defendant, seeing what he saw, and knowing what he knew, suppose from his situation and his surroundings? If such reasonable person, so placed, would have been justified in believing himself in imminent danger, then the defendant would be justified in believing himself in such peril, and in acting on such appearances." The defendant contends that this instruction should not have confined his right to kill the deceased to a state of facts where the deceased was endeavoring to murder Bruggy, or to do him some great bodily harm, but that it should have stated further that an attempt to kill Bruggy by the deceased, either with or without malice aforethought, would have warranted the defendant in taking the life of the deceased, and that the word "murder" was misleading in the connection in which it was used. It must be borne in mind that this instruction was to the effect that, if the whole evidence showed a certain condition of affairs, the defendant was to be acquitted. If it had stated that Bruggy was not to be acquitted unless murder or some great bodily harm was then about to be accomplished by the deceased, then it is plain that the instruction would be misleading. But it is not manifest that as reasonable men the jury could have understood the instruction to mean what the defendant claims. Such a construction by them would not be harmonious in any degree with the language used by the court, and, although to be strictly accurate, the words, suggested, or some others appropriate to convey the idea, would have made the instruction clearer, the omission to do so did not, in our opinion, have or tend to have a misleading effect. The test in such a matter as this is not that a given instruction is erroneous, merely, but, if the court can see that it did not mislead the jury, the judgment will not be disturbed. Hayne, New Trials & App. § 122.

We do not perceive that the instructions of the court with reference to what constitutes murder in the first and second degrees were either misleading or erroneous. If appellant desired any further instructions on that subject he should have asked for them. *People v. Franklin*, 70 Cal. 642, 11 Pac. Rep. 757; *People v. Northey*, 77 Cal. 618, 19 Pac. Rep. 865, and 20 Pac. Rep. 129.

Another ground on which the appellant urges that the judgment and order should be reversed is that the jury were erroneously instructed and misled by the court in the following instruction: "If you be-

lieve from the evidence that the defendant, while upon the sidewalk, drew his pistol with a deliberate intent to kill and murder Dick Louison, and that Dick Louison saw the pistol, and, believing himself in danger of the defendant, ran away, and through the alley, and into the saloon, to avoid the defendant; and you further believe from the evidence that the defendant, with intent to willfully and deliberately kill and murder Louison, entered and passed through the saloon with the pistol in his hand, for the purpose of overtaking or meeting him and killing him; and you further believe from the evidence that he did meet the deceased coming into the saloon through one of the back doors of the saloon, unarmed, and showing no disposition to kill and murder the defendant, and that the defendant then and there, without believing himself in danger of losing his own life at the hands of Dick Louison, fired the fatal shot, and killed said Louison,—then I instruct you the evidence shows no self-defense." The objection to this instruction is that it is confined to a reasonable ground for belief by appellant that he was in danger of "losing his own life," and does not include the other proposition, that he was in danger, or believed himself in danger, of receiving great bodily injury. If the instruction had been intended as an abstract statement of the general doctrine of self-defense there might have been some force in the objection, although even in such case, if the court should give another instruction containing the element of fear of great bodily injury, (as was done in the case at bar,) it is difficult to see how error could be successfully assigned. But such was not the case with respect to the instruction in question. It was based upon a hypothesis (founded on the evidence) which excluded the notion of self-defense entirely. If a defendant pursues the deceased (who runs away) with a drawn pistol, intending to kill and murder the deceased, and does not make any endeavor to decline any further struggle, the fact that at the moment of the fatal act the deceased makes some effort to defend himself which may put the defendant in danger of either death or bodily injury, does not constitute self-defense. The instruction would not have been erroneous if it had not contained any allusion at all to the defendant's belief of danger to his own life. There was nothing in it of which defendant at least could complain. The law of self-defense was very correctly given to the jury in the general charge of the court, which was as favorable to defendant as he could reasonably expect; and we see no error that would warrant a reversal of the judgment.

The evidence discloses that the killing of the deceased was to some extent the result of a drunken brawl; and it would seem that a verdict by the jury of imprisonment for life would have satisfied the law, but that is not a question to be here considered. The law gives the power of fixing the punishment in such cases to the jury, and the only appeal from their decision as to that matter is to the executive. The judgment and order denying a new trial are affirmed.



PATERSON, J., (*dissenting*.) I think the instruction referred to in the opinion was erroneous. It ignores the fact that the defendant may have declined any further struggle immediately prior to the firing of the shot. Although he was the assailant, if he in good faith "endeavored to decline any further struggle before the homicide was committed, the homicide was justifiable." Pen. Code, § 197, subd. 3. Whether he did so decline further combat was a question of fact for the jury to determine on the evidence. It cannot be said that there was no evidence tending to show such a declination. The parties met right at the back door of the saloon, and the deceased immediately grabbed the defendant by the arms, and pushed him back several feet to the billiard table, and was pushing him over against it when the fatal shot was fired. What occurred beyond what has been stated, or what, if anything, was said by either party after they met at the rear door of the saloon, and before the shot was fired, does not appear in the evidence. If the defendant did decline further struggle, he was justified in shooting the deceased if he believed that he was in danger of receiving great bodily injury. This element was also omitted from the instruction.

The court instructed the jury that "to reduce a felonious homicide from the grade of murder to that of manslaughter, upon the ground of sudden quarrel, or heat of passion, the provocation must be of such a character as would be naturally calculated to excite and arouse the passions; and it must appear that the party acted under the smart of his sudden passion and resentment." Here the element of malice is entirely wanting in the charge, yet without malice there can be no murder. The instruction is erroneous because it in effect tells the jury that, although the defendant acted under a heat of passion, it could not be manslaughter unless the provocation was of such a character as would naturally excite and arouse the passions of an average man. The question is not whether some other person would probably have been excited and thrown into a passion by similar circumstances, but whether the defendant acted "upon a sudden quarrel or heat of passion." Pen. Code, § 192. What will excite and anger one man might simply amuse another. The court gave this instruction: "Upon the law of self-defense, I instruct you as follows: To justify the killing of another in self-defense it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and it must appear that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline further trouble before the fatal shot was fired. If the jury believe from the evidence that the defendant, George Bruggy, at the time he fired the fatal shot which killed the deceased, Dick Louison, (if he did fire such shot and kill him,) believed, and had good reason to believe, that his life was in imminent danger at the hands of said Dick Louison, then I charge you that the defendant was justifiable in firing said shot,

and you should acquit him." This instruction is loaded down with errors of a glaringly prejudicial character. The first part of the instruction has been condemned here several times. *People v. Flahave*, 58 Cal. 250; *People v. Gonzales*, 71 Cal. 577, 12 Pac. Rep. 783; *People v. Dye*, 75 Cal. 113, 16 Pac. Rep. 537. The last part of the instruction in effect tells the jury—and no doubt they so understood it—that unless the defendant believed, and had good reason to believe, that his life was in imminent danger, he was not justifiable in firing the shot, thus ignoring the question of appearances, and fear of great bodily injury. *People v. Flanagan*, 60 Cal. 4; Pen. Code, § 197. If these instructions were erroneous, (and I think it must be conceded that they were,) they were not cured by other instructions on the same point, although the latter may have been correct. *People v. Anderson*, 44 Cal. 65. The court in another instruction used this language: "If the murder was deliberate and premeditated, it was murder of the first degree; otherwise it was murder of the second degree." In calling the attention of the jury to the fact that the defendant had been a witness in his own behalf, the court said: "It is proper for the jury to consider whether this position and interest [the defendant's] may not affect his credibility, or color his testimony." The peculiar terms employed here seem to indicate an intimation by the learned judge that the defendant's interest in the case had evidently caused him to "color his testimony." The defendant requested the court to give an instruction on the question of reasonable doubt, which has been several times approved here. It was refused on the ground that it had already been given in the charge of the court, and it is true that the substance of the instruction was given by the court in its own charge, but it was given in such an attenuated form that I think the defendant may justly complain, although standing alone, perhaps, it could not be held to be prejudicial. It is true some of the instructions I have referred to have not been criticised by counsel for the appellant in his brief, but they were all excepted to in the court below, and I think, considering the importance of the case, it is the duty of our court to notice them, whether defendant's counsel refers to them or not. The learned judge of the court below doubtless would have corrected the instructions if his attention had been called to the matters omitted therefrom, but I am unable to see how it can be claimed that other instructions given on the same subject cured the errors in those referred to.

89 Cal. 184

STATLER v. BROEDEL. (No. 13,296.)

(*Supreme Court of California*. May 21, 1891.)

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

J. H. Campbell, for appellant. J. S. Gage, for respondent.

BELCHER, C. This is an action to recover the sum of \$300, the agreed price of 160 acres of land alleged to have been sold

and conveyed by the plaintiff to the defendant. The defendant, by his answer, denies that the plaintiff ever sold or conveyed to him the premises mentioned in the complaint; denies that he agreed to pay the plaintiff for said premises the sum of \$300 or any sum whatever; admits that negotiations for the sale or exchange of said premises for a horse and buggy of defendant's were at one time pending between the parties, but avers that no agreement for such sale or exchange, or any sale or exchange, of said premises was ever made between them. The court below found "that the defendant bought of the plaintiff 160 acres of land, for which he agreed to pay the plaintiff therefor three hundred dollars; that the plaintiff made, executed, and delivered to the defendant a good and sufficient deed conveying the title thereto to the defendant; that the defendant has failed, neglected, and refused to pay the plaintiff the purchase price of said lands, or any part thereof; that there is now due and owing the plaintiff, J. S. Statler, from the defendant, Michael Broedel, three hundred dollars, the purchase price of said lands." Judgment was accordingly entered that the plaintiff recover from the defendant the sum of \$300 and costs of suit. From this judgment the defendant appeals on a statement of the case. The only points made for a reversal are that the findings and judgment were not justified by the evidence. No good end would be subserved by setting forth the evidence here. It was partly written and partly oral. We have carefully read and considered all that is presented in the statement, and are of the opinion that it must be held sufficient to justify the findings. We advise, therefore, that the judgment be affirmed.

WE CONCUR: TEMPLE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

39 Cal. 144

PEOPLE v. FICK. (No. 20,745.)

(Supreme Court of California. May 19, 1891.)

KIDNAPPING—EVIDENCE—JUDGMENT.

1. On indictment for kidnapping, where it is shown that defendant, a constable, had a warrant authorizing him to arrest prosecutrix and bring her before a justice of the peace, and that he did not take her before the justice, but left her at a certain house, evidence is admissible that this was a house of ill fame, such evidence tending to show a motive for his failure to take her before the justice.

2. Evidence that at the same time another constable arrested the husband of prosecutrix on a charge of which he was innocent, and confined him in jail for two days, is immaterial, and its admission is harmless error.

3. It is a question for the jury whether "Choy Fong," the name of the prosecutrix, as alleged in the indictment, is *idem sonans* with "Toy Fong," which the evidence shows to be her true name.

4. Though the indictment alleges that defendant forcibly took the prosecutrix "for the purpose and with the intent to feloniously employ her for the unlawful use" of certain named persons, the intent is surplusage, and need not be proved.

5. It is no defense that the warrant under which defendant acted was regular on its face,

since his arresting prosecutrix, his taking her into another county, and his leaving her at the house instead of taking her before the justice, as directed by his warrant, constitute a continuous act, which was not within his authority under the warrant.

6. A direction in the judgment that, in addition to being imprisoned, defendant shall pay the district attorney a certain fee, though it is unauthorized, is separable, and may be stricken out without remanding the case.

In bank. Appeal from superior court, San Joaquin county; J. H. BUDD, Judge. John M. Fulweiler and Ben. D. Tabor, for appellant. W. H. H. Hart, Atty. Gen., for the People.

DE HAVEN, J. The defendant, H. L. Fick, was indicted by a grand jury of San Joaquin county for the crime of kidnapping. Upon his trial the jury found him guilty as charged. His motion for a new trial was denied, and judgment given that he be imprisoned in the state-prison for eight years, and that he pay the district attorney a fee of \$25. From this judgment and the order denying his motion for a new trial, the defendant appeals.

It was shown upon the trial that the defendant was at the date of the alleged commission of the offense charged a constable of township No. 3, Placer county, and that there was delivered to him on March 22, 1890, a warrant in due form, issued by a justice of the peace, within said county, commanding him to arrest one Toy Fong, and to bring her forthwith before said justice at his office in said county, or, in case of his absence or inability to act, before the nearest and most accessible magistrate of the county. The defendant, armed with this process, proceeded to the county of San Joaquin, and on March 24, 1890, arrested a Chinawoman, whose name is given in the evidence as Toy Fong. This woman he took to the county of Placer, but did not at any time take her before the justice issuing the warrant, or any magistrate, but instead left her at the house of one China Molly, the person on whose complaint the warrant was issued. The appellant assigns as error various rulings of the court in the admission of testimony, and in giving and refusing instructions.

1. The court did not err in admitting evidence that the general reputation of the house in which China Molly lived was of ill fame. It was to this house that the defendant took the woman he was charged with kidnapping, and where he left her. This appearing, it was not improper to show that this house was of ill fame, and it was competent to prove the fact by evidence of general reputation. That appellant left the woman at a house of such a character, and did not thereafter take her before a magistrate, were matters proper for the jury to consider in passing upon his intent in making the arrest, and bringing her into the county of Placer. The evidence tended in some degree to furnish an explanation or motive for the act of appellant in failing to comply with the mandate of the warrant held by him.

2. In going to San Joaquin county the appellant was accompanied from Sacramento city by a constable of that city

named Swift; and at the same time the woman was arrested Swift, who seems to have had a warrant therefor, legal upon its face, arrested her husband, Go Sam. Testimony was admitted, appellant objecting thereto, showing that Go Sam was taken to Sacramento city, kept in jail two nights, and then released on bail. The prosecution was further permitted to show by Go Sam that he was in fact innocent of the alleged crime for which he was arrested. If it should be conceded that by a strict application of the rule which requires evidence to be confined to the points in issue this testimony should have been excluded, still we cannot see how its admission prejudiced the case of appellant. So far as we can see from the record, this evidence had no tendency to show that appellant was guilty of the crime with which he was charged, and it must have been disregarded by the jury as immaterial. A mere technical error in the admission of immaterial evidence, which is of such a character that it is apparent it could have no tendency to excite a prejudice against a defendant on trial, is not cause for the reversal of a judgment.

8. The appellant was charged with kidnapping one Choy Fong. Upon the trial it appeared that the name of the woman actually taken is Toy Fong. The appellant requested the court to charge the jury "that testimony proving or tending to prove that one Toy Fong was \* \* \* taken from said county of San Joaquin by the defendant into the county of Placer will not sustain a conviction under said indictment for so taking Choy Fong." The court refused to so charge. The question whether the name "Toy Fong" is *idem sonans* with "Choy Fong," and so both relate to the same person, was in this case one of fact for the jury, and not a question of law for the court to determine. In the case of *Com. v. Donovan*, 13 Allen 571, the defendant was charged with larceny from one John Mealy. At the trial this person was called, and testified that his name was spelled "Malay" or "Maley," but never "Mealy," and that he was called "Maley," but never "Mealy." The trial court declined to instruct the jury "that if they should find his name to be Maley or Malay, and not Mealy, then they should acquit the defendant," but left it to the jury to determine whether the name proved was *idem sonans* with that given in the indictment, and this ruling was approved on appeal to the supreme court, that court saying: "The question whether one name is *idem sonans* with another is not a question of spelling, but of pronunciation, depending less upon the rule than upon the usage, which, when it arises in evidence in the general issue, is for the jury, and not for the court, and was rightly submitted to the jury in this case." This rule applies with peculiar force here, where the question relates to the pronunciation of Chinese proper names. The court cannot say as a matter of law that the names mentioned in the instruction asked for, as usually spoken by that people, do not have the same sound. The instructions given, in the absence of a request from the defendant for more specific

directions as to the right and duty of the jury to determine the particular question, were sufficiently definite, and we must presume that the jury passed upon the question, as it was their province to do, and found from the evidence that these names, "Choy Fong," and "Toy Fong," are pronounced alike.

4. The indictment charges that the woman Choy Fong was forcibly taken from San Joaquin county "for the purpose and with the intent to willfully and feloniously employ her, said Choy Fong, for the use unlawfully of the said Mow Lin Gut and Ah Young (*alias* China Molly.)" The court gave the following instruction to the jury: "If you believe from the evidence beyond a reasonable doubt that the defendant, H. L. Fick, did, on or about the 24th day of March, 1890, and before the finding of said indictment, willfully, unlawfully, feloniously, and forcibly take the woman named in the indictment, Choy Fong, against her free will or consent, from the county of San Joaquin in this state, and carry her into the county of Placer in this state, then you will say in your verdict: 'We, the jury, find the defendant, H. L. Fick, guilty.'" In giving this instruction the court committed no error. The words above quoted from the indictment as to the purpose and intent of defendant are surplusage. Under section 207 of the Penal Code "every person who forcibly steals, takes, or arrests any person in this state and carries him into another \* \* \* county" is guilty of kidnapping. The language just quoted necessarily implies that the arrest and conveying to another county must be without the consent of the person injured, and without any lawful authority therefor; but the particular purpose intended to be accomplished by such unlawful act is immaterial. The crime consists of a false imprisonment, aggravated by a removal to another county, and these acts are sufficiently alleged when the indictment is in the language of the statute defining the offense. The allegation as to the purpose of defendant being surplusage, it was not necessary for the prosecution to prove such purpose, or for the jury to find it to exist, and the instruction just quoted was correct.

5. Appellant claims that in taking the woman from San Joaquin to Placer county he committed no crime, because he was acting under a warrant regular on its face, and that, such action being lawful, it did not become a crime by reason of his subsequent failure to take her before a magistrate in the latter county; and that not only did the court err in its instruction upon this point, but that the verdict is against the evidence. The error of this contention is in its assumption that in what appellant did he was acting in obedience to the warrant in his possession, and in its denial of the right to look at the entire transaction, for the purpose not only of determining whether the appellant did pursue the authority with which he was clothed, but also whether any departure from such authority was willful, and with the intention of disregarding the personal rights of the woman taken by him. It is a maxim of the law (and its

correctness is shown by human experience) that acts indicate the intention, and in conformity with this the law in some cases judges of a man's previous intentions by his subsequent actions. Broom, Leg. Max. p. 271. In this case the arrest of the woman, and her conveyance into Placer county, and there placing her in the house of China Molly, constitute one continuous act, and for the purpose of determining the intention of defendant when he made the arrest, or at any other time while he had the woman in custody, it is proper to look at the entire transaction as one act, from its beginning to its consummation. Thus viewing it, it is not unreasonable to believe that appellant when he made the arrest intended to do with his prisoner just what the evidence shows that he did do, and that he had no other purpose; in other words, that her arrest was simply a means to the end he had in view; that he never intended to take her before a magistrate, but did intend to place her in the charge of China Molly. Such an act was unlawful, and, as the warrant under which appellant claims that he acted never authorized such a proceeding, the warrant cannot of itself afford any justification for the act now under consideration. If an officer desires the protection which the law always gives to one who acts under its authority, he must keep within the limits of its commands. If he arrests under a warrant he must follow its directions in dealing with his prisoner. The rule is that "one who arrests the person of another by legal process, or other equivalent authority conferred upon him by law, can only justify himself by a strict compliance with the requirements of such process or authority. If he fails to execute or return the process as thereby required, or to do what the law required him to do in making the arrest, his whole justification fails." *Phillips v. Fadden*, 125 Mass. 198. In *Brock v. Stimson*, 108 Mass. 521, referring to the principle which holds an officer to be a trespasser *ab initio* for an abuse in the execution of process, it is said: "The same rule holds good in the case of an officer who, after arresting a person on criminal process, omits to perform the duty required by the law of taking him before a court." The case here is unlike that of *Ex parte Sterner*, 82 Cal. 245, 28 Pac. Rep. 38. In that case it appeared that the officer acted under a lawful warrant, and did precisely what he was thereby commanded to do; and it was held that he had committed no crime in so doing. The instructions given by the court below upon the point we are now considering were full and complete, and the one given by the court of its own motion seems to have been prepared by the learned judge with unusual care, and states with precision the law applicable to the evidence before the jury. By this the jury were instructed that, if the appellant arrested the woman in good faith, under a warrant, intending to take her before a magistrate in Placer county in obedience to its commands, they should find him not guilty, even though they might find that, after reaching that county, he unlawfully placed her in an insecure place, and thereby al-

lowed her to escape; but if they were satisfied beyond a reasonable doubt that he did not make the arrest in good faith, and that he carried her into Placer county without any intention of taking her before the magistrate issuing the warrant, or other magistrate, and did not in fact take her before any magistrate, then they must find him guilty. The jury were also instructed that an officer is required to arrest any person named in a warrant which is delivered to him for that purpose, and that it must be presumed that his official duty was faithfully performed, unless the presumption was overcome by the evidence for the prosecution. Thus the question of the defendant's good faith in what he did was fairly submitted to the jury; and his conviction was not made to depend upon the mere fact that he had not followed the authority given him by law, and the evidence was amply sufficient to justify the verdict of the jury.

6. The attorney general concedes that he has found no law authorizing that portion of the judgment directing the appellant to pay a fee of \$25 to the district attorney. This portion of the judgment may be separated from the other, and we can correct it here without remanding the case. Ordered that the judgment appealed from be, and the same is hereby, modified by striking therefrom the words: "And that he pay the district attorney a fee of twenty-five dollars;" and, being so modified, the judgment and order are affirmed.

We concur: BEATTY, C. J.; PATERSON, J.; MCFARLAND, J.; GAROUTTE, J.; SHARPSTEIN, J.; HARRISON, J.

89 Cal. 228

PEOPLE v. DUNN, (four cases.) (No. 13,852.)

(Supreme Court of California. May 26, 1891.)

LIQUOR LICENSES—VALIDITY OF ORDINANCE.

In an action to recover unpaid liquor license taxes under an ordinance passed by a board of supervisors, Monday, October 1, 1883, it appeared that prior thereto, on August 6, 1883, the board, pursuant to County Government Act Cal. March 14, 1883, § 22, requiring the supervisors to provide for the holding of regular meetings, and which act repealed Pol. Code, § 4045, March 13, 1883, requiring the supervisors, on the first Monday of October, to fix rates of county licenses, passed an ordinance for the holding of regular meetings on the first Monday in February, May, August, and November, to continue in session until the business was disposed of. The ordinance was passed at a special meeting of the board held for the fixing of county taxes only. Held, that the ordinance passed October 1st is void.

Commissioners' decision. In bank. Appeal from superior court, Placer county; B. F. MYERS, Judge.

G. H. Colby and J. E. Prewett, for appellant. F. P. Tuttle, Dist. Atty., for the People.

VANCLIEF, C. This is a consolidation of four actions to recover from the defendant license taxes by virtue of an ordinance (No. 3) passed by the board of supervisors of Placer county on Monday, the 1st day of October, 1883, providing that persons selling spirituous liquors, etc., in

said county, must procure from the tax collector a license, authorizing them to carry on that business, for which they must pay to the tax collector a tax of \$24 per quarter and a fee of \$1; and further providing that the tax collector may authorize suit, in the name of the people, to be brought against any person who has carried on such business without license, for the recovery of such tax, with \$15 damages. The trial was by the court without a jury, and judgment was rendered in favor of plaintiff "for the sum of one hundred and sixty dollars, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of one hundred and nine dollars." Defendant moved for a new trial on a bill of exceptions. A new trial was denied, and defendant appeals from the judgment, and from the order denying a new trial.

The appellant's principal point is that the ordinance passed by the board of supervisors on Monday, October 1, 1883, was void, because the meeting on that day was not a regular meeting of the board, nor a special meeting called for that purpose. Section 4045 of the Political Code, a new section, passed on March 13, 1883, provided, (subdivision 3:) "The board of supervisors of each county must, on the first Monday of October of each year, fix the rates of county licenses," (adding a proviso not material to the present purposes.) In *San Luis Obispo Co. v. Hendricks*, 71 Cal. 243, 11 Pac. Rep. 682, it was decided that this provision was repealed by section 22 of the county government act, passed March 14, 1883, which provides: "The board of supervisors must by ordinance provide for the holding of regular meetings of the board at their respective county-seats." And as a consequence of such repeal it was further held that after the board of supervisors has provided for holding regular meetings, as required by section 22 above quoted, it has no authority to fix the rate of county licenses at any other than at one of the regular meetings thus provided for, or at a special meeting called for that purpose according to section 23 of the county government act. It appears that prior to October 1, 1883, to-wit, on August 6, 1883, the board of supervisors of Placer county, by ordinance, provided that the regular meetings of that board should thereafter "be held at the office of the county clerk at Auburn, on the first Monday in February, May, August, and November of each year, and continue in session until the business before it is disposed of." And it further appears that the meeting at which the ordinance on which this action is brought was passed convened on October 1, 1883, and was not a continuance of any former meeting, nor a meeting specially called for the purpose of fixing the rate of county licenses. It was a special meeting held for the purpose of fixing the rate of county taxes in obedience to section 3714 of the Political Code, at which no other business could be done except on the conditions prescribed by section 23 of the county government act. It follows from these facts, and the

decision in the case of *San Luis Obispo Co. v. Hendricks*, supra, and cases therein cited, that the board of supervisors of Placer county had no authority to enact the ordinance fixing county licenses on the 1st day of October, 1883, and consequently that the ordinance is void. I think the judgment and order should be reversed, and the cause remanded.

We concur: FITZGERALD, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded.

89 Cal. 170

RICHARDS *et al.* v. TRAVELERS' INS. CO.  
(No. 13,960.)

(Supreme Court of California. May 21, 1891.)

#### ACTION ON ACCIDENT POLICY—PLEADING.

1. Where, in an action on an accident policy, the complaint alleges that deceased sustained bodily injuries effected through external, violent, and accidental means, such a state of facts being provided against by the policy, an objection that the complaint does not state the particular circumstances under which the insured met his death is not maintainable under a general demurrer.

2. The policy provided that the money shall be paid within 90 days after proof that the insured received injuries which alone occasioned his death within 90 days from the happening thereof. The complaint alleged that "more than 90 days had elapsed prior to the commencement of this suit after sufficient proof that the insured at a time within the continuance of the said policy had sustained bodily injuries through external, violent, and accidental means, within the intent and meaning of said policy; that such injuries alone had occasioned death within ninety days from the happening of such injuries," and that deceased and plaintiff "have duly complied with all the terms and conditions of said policy and renewal by them or either of them, to be kept or performed." Held, it sufficiently alleged the notice and proof of death required by the policy.

3. Where the insured died from the effects of a blow struck by a person after an attempt to blackmail, such death is the result of accidental means within the general terms of a policy providing against injuries or death caused through "external, violent, and accidental means."

4. Where, in an action on an accident policy providing that the insurance shall not extend to any cause of death unless the claimant shall establish by positive proof that the death was not the result of design, either on the part of the insured or of any other person, it appearing that the insured died from the effects of a blow struck by another person, it is not error to charge that if the death of insured was caused by a blow dealt him, that would not prevent recovery if the person inflicting the blow did not mean to kill the insured.

In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

T. M. Osmont, for appellant. Cross & Simmonds, for respondents.

McFARLAND, J. This is an action upon an accident insurance policy. By the terms of the policy the insured, Philip Richards, was to have a sum of money paid him weekly in case of injury to him by accident, and his estate was to be paid

\$5,000 in case of his death from such injury. During the life of the policy said Richards was killed. The jury returned a verdict in favor of plaintiffs, executors of said Richards, deceased, for \$5,000; and defendant appeals from the judgment and from an order denying a new trial.

1. We think that the complaint is sufficient. There was no formal demurrer, but defendant objected to a jury being impaneled and to the introduction of any evidence upon the ground that "the complaint does not state facts sufficient to constitute a cause of action." The first objection is that the complaint does not state the particular circumstances under which the death of the insured occurred,—that is, whether it was caused by lightning, drowning, railroad collision, etc. But the complaint avers that at a named date the deceased "sustained bodily injuries, effected through external, violent, and accidental means; and that on, to-wit, the 27th day of May, 1887, the said Philip Richards died at Nevada City, Nevada county, California; and that the said death was occasioned by said injuries alone." This language, which avers a state of facts expressly provided against by the covenants of the policy, is sufficient as against an attack which is no more specific than a general demurrer. The other objection to the complaint is that it does not aver notice and proofs of death, as required by the policy. But it is averred that "said Philip Richards and said plaintiffs have duly complied with all the terms and conditions of said policy and renewal by them, or either of them, to be kept or performed," and this was generally a sufficient pleading of conditions precedent. Code Civil Proc. § 457; *Blasingame v. Insurance Co.*, 75 Cal. 633, 17 Pac. Rep. 925. It has been held in some cases that where money covered by an insurance policy is not to be paid until a certain time after the loss, or after notice and proofs of the same, there should be a special averment that such time had elapsed. In the case at bar there was a provision in the policy that the money should be paid "within ninety days" after proof that the insured received injuries which alone "occasioned his death within ninety days from the happening thereof;" and with respect to this matter it is alleged in the complaint that "more than 90 days had elapsed prior to the commencement of this suit after sufficient proof that the insured, at a time within the continuance of the said policy, had sustained bodily injuries, effected through external, violent, and accidental means, within the intent and meaning of said policy; that such injuries alone had occasioned death within ninety days from the happening of such injuries." This averment, together with the general averment above noticed, makes the complaint entirely sufficient as against a general demurrer.

2. Upon the merits appellant contends that the verdict was not justified by the evidence, and that the court erred in its instructions to the jury. The deceased lived at Nevada City, and was brought by one H. J. Dassonville to the drug-store and office of a physician in that city

about 9 o'clock on the evening of April 22, 1887. He was suffering from a severe wound on the head and over the left eye, from the effect of which he died on the 27th of the next month, May, 1887. There was evidence tending to show that the wound was caused by a fall from an elevated sidewalk down onto Spring street, in which there were rocks and piles of old iron; but appellant contends that the evidence shows the wound to have been inflicted by said Dassonville, who, after a failure to blackmail the deceased, suddenly struck him a blow with some instrument or thing capable of producing the wound. The general terms of the policy provide against injuries or death caused through "external, violent, and accidental means." The means by which the death of the deceased was caused were certainly "external and violent;" and, while there was not much evidence to show that it was caused by a blow from Dassonville, still in that case the jury had the right, under the evidence, to find it "accidental," within the general covenants of the policy. It is impossible to give a precise definition of the word "accidental." As every effect has a cause, there is one sense in which nothing is accidental. Accident policies are of recent origin; and there have been only a few judicial decisions with respect to them; but the authorities to be found on the subject seem to be to the point that "accident" must be given its popular meaning,—that is, a casualty, something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured. The fullest discussion of the subject is to be found in the opinion of the United States circuit court for the district of Michigan in the case of *Ripley v. Railway Co.* In that case the insured had been attacked by highwaymen and killed, and it was contended that, as the highwaymen intended violence, there was no accident. The learned judge, (WITHER, J.,) in delivering the opinion of the court, says: "Perhaps, in a strict sense, any event which is brought about by design of any person is not an accident, because that which has accomplished the intention and design, and is expected, is a foreseen and foreknown result, and therefore not strictly accident. Yet I am persuaded this contract should not be interpreted so as thus to limit its meaning, for the event took place unexpectedly, and without design on Ripley's part. It was to him a casualty, and in the more popular and common acceptance 'accident,' if not in its precise meaning, includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event. \* \* \* I think in construing a policy of insurance against accident, issued to all sorts of people, a majority of whom do not, as the company well knew, nicely weigh the meaning of words and terms used in it, courts are called upon to interpret the contract as a large class, not versed in lexicology, are sure to regard its terms and scope. That which occurs to them unexpectedly is by them called 'accident.' The company fix the terms of the con-

tract, and are to be held, in the absence of plain, unequivocal exceptions and provisions, to intend what, in popular acceptance, the insured party is likely to understand by its terms." 2 Bigelow, Ins. Cas. 738. In that case judgment went for defendant upon another point, and was affirmed by the United States supreme court, where the meaning of "accident" was not discussed, (16 Wall. 336;) but the language of Judge WITHEY seems to us to express correct views of the question. It is quoted approvingly in other authorities. Bliss, Life Ins. § 438; 7 Amer. Law Rev., 587; 1 Amer. & Eng. Enc. Law, p. 87, § 3, and notes; Insurance, etc., Co. v. Martin, 32 Md. 315. We are of opinion, therefore, that, if it could be considered that, in the case at bar, the death of the deceased was caused by a blow from Dassonville, still it was caused by "accidental means" within the general terms of the policy. The policy, however, contains a special condition as follows: "This insurance shall not be held to extend to disappearances, or to any cause of death, or personal injury, unless the claimant under the policy shall establish by direct and positive proof that the said death or personal injury was caused by external violence and accidental means, and was not the result of design either on the part of the insured or of any other person." Respondents contend that this clause is a mere attempt to change the rules of evidence, and therefore entirely void,—that it is not a provision about anything except evidence. We do not think it necessary to examine this contention. Taking the provision as valid, it merely states as a condition, so far as it applies to the circumstances of this case, that the death shall not be the result of the design of any person; that is, that it must not be caused by the act of one whose design was to cause death by the act. The point was presented by the fifth instruction given by the court as follows: "If the death of Philip Richards was caused by a blow dealt him by H. J. Dassonville, or some other person, that would not prevent plaintiffs from recovering in this action, if you believe from the evidence that when Dassonville or such other person inflicted such blow he did not mean to kill said Philip Richards." We are of opinion that this instruction is not erroneous. There were circumstances in evidence tending to show that if Dassonville did give the blow which resulted afterwards in the death of deceased, he did not intend such result, and it would not be a correct construction of the clause of the policy under review to say that it includes every case where a blow not intended to kill unfortunately and undesignedly produces death, and particularly when we consider the rules of construction which apply to the makers of instruments.

The other instructions of the court seem to be unobjectionable, and to present the law of the case very fully. Those given at the request of the defendant presented that side of the case very favorably. Instructions No. 1 and No. 5, asked by defendant, were properly refused. Whatever was correct in them was given elsewhere. The

judgment and order appealed from are affirmed.

We concur: GAROUTTE, J.; DE HAVEN, J.; HARRISON, J.; PATERSON, J.

(39 Cal. 186)

LANGAN v. LANGAN *et al.* (No. 13,610.)

(Supreme Court of California. May 25, 1891.)

ACTION ON NOTE—PAROL EVIDENCE OF CONSIDERATION—INCONSISTENT FINDINGS.

1. Where in an action on a note it appeared that said note was given in consideration of the balance due upon a prior note, such prior note being collateral to and described in a written agreement on the part of plaintiff to sell defendant certain property therein, and compliance therewith to be deemed full consideration for the note therein set out, oral evidence is inadmissible to show that certain land-warrants, not specified in said agreement, formed part of the consideration of the note in suit.

2. Where there was a conflict in the findings of the court below,—three findings that the consideration of the note was the sale of property described in the written agreement, and two findings that the consideration included certain land-warrants not referred to in said agreement,—a judgment based thereon is a decision against law, for which a new trial may be had.

McFARLAND, J., dissenting.

In bank. Appeal from superior court, Merced county; C. H. MARKS, Judge.

F. H. Gould, for appellant. J. K. Law, for respondents.

DE HAVEN, J. Action for the balance alleged to be due upon a promissory note executed by defendants to plaintiff on April 25, 1885, for the sum of \$2,000. The answer of the defendants alleges that in December, 1884, the defendant Thomas F. Langan purchased from plaintiff an undivided one-fourth interest of all the copartnership property belonging to a firm of which plaintiff was a member for the sum of \$3,000, and in payment thereof then executed to plaintiff his promissory note for said sum. That he afterwards paid \$1,000 thereon, and then took up said note, and he and the other defendant, his wife, gave to plaintiff the note mentioned in the complaint, for the balance due on account of said purchase,—that is, as we construe the answer for the balance due upon the promissory note executed in December, 1884. The answer, then, in a separate defense, alleges that a part of the copartnership property purchased by defendant consisted of two land-warrants, and that said warrants were a part of the consideration for which the note referred to in the complaint was given, that plaintiff agreed to locate them upon lands, and convey said lands so located thereunder to defendant T. F. Langan; that plaintiff has located the same, and refuses to make a conveyance of the land so located to defendant, and by reason thereof defendant has been damaged in amount equal to the value of said land. There was another partial defense interposed, but this was found against the defendants, and needs no consideration. The court below found the allegations of defendants' answer in relation to the land-warrants to be true, and judgment was rendered in favor of defendants for their costs. The plaintiff



appeals from this judgment, and also from an order denying his motion for a new trial.

1. It is apparent from the answer of defendants, and the court so finds, as we read findings Nos. 4, 5, and 6, that the note mentioned in the complaint was given in consideration of the balance due upon the note for \$3,000, executed in December, 1884. It therefore became a material question upon the trial to determine what was the consideration for this original note. Upon the trial it appeared that this note of December, 1884, had a contract attached to it, written on the same sheet of paper, and was executed in duplicate, each of the parties retaining a copy. This note and agreement are in the following words:

"Merced Co., December 3, 1884. Sixty days after date, I promise to pay J. A. Langan the sum of three thousand (\$3,000) dollars, gold coin of the United States, for value received. THOS. F. LANGAN."

"It is further agreed that if at the end of sixty days T. F. Langan gives collateral security to J. A. Langan, and pays one per cent. per month for the payment of two thousand dollars by a mortgage upon the homestead of Honora Langan and Heseekiah M. Martin tracts of land, and otherwise secures the payment of the same, then J. A. Langan agrees to take said security and grant further time, not to exceed two years from the date hereof, upon two thousand dollars of said note; and thereupon J. A. Langan agrees to give a bill of sale to T. F. Langan for one thousand sheep, the property of J. A. Langan, which are now in the possession of T. F. Langan, and a deed to all his (J. A. Langan's) rights in the homestead of Honora Langan, and one-fourth interest in the Heseekiah M. Martin tract of land, and the half interest in two express wagons, and all the improvements on said ranch, the title of said sheep and ranch to remain as they are at present until the performance of said agreement, to-wit, the payment of the foregoing note according to the tenor thereof, or the security of the payment as herein provided by mortgage, etc. This agreement has nothing to do with any former agreements made by said parties, but such other agreements are to be settled according to the tenor of themselves, namely, the three hundred dollars for rent of sheep, and the one thousand dollars balance due on sheep sold by J. A. Langan to T. F. Langan last year. J. A. LANGAN. THOS. F. LANGAN. Witness: W. J. STOCKTON."

This writing is to be construed as an agreement on the part of the plaintiff, J. A. Langan, to sell to the defendant T. F. Langan the property therein mentioned, for the price and upon the terms therein stated; and this agreement to sell said mentioned property and compliance with it is to be deemed full consideration for the note therein set out, precisely as if the agreement had so recited in words; and therefore the court erred in admitting oral evidence to show that the land-warrants referred to in the evidence were a part of the consideration of this note. This ruling of the court is not sustained by the rule which permits parol evidence of

a consideration different from that named in the contract or deed, or the existence of a separate oral agreement, constituting a condition precedent to the taking effect of a written contract obligation. The effect of the oral evidence here was to add to and vary the terms of the written agreement by proving a contract to sell other and different property from that described in the agreement. The opinion of the court in *Hubbard v. Marshall*, 50 Wis. 327, 6 N. W. Rep. 497, is in point here: "The rule which allows the maker of a promissory note to show in an action upon it a failure or partial failure of consideration, is not sufficiently broad to cover this case. Here we have written instruments, which set out particularly the consideration of the notes in suit, to-wit, the assignment of notes and mortgages, and of a contract to convey lands and to sell timber upon other lands. The right to prove a failure of consideration would admit evidence of the failure of any consideration expressed in the writings, as that the title to any of the property thus sold or assigned had failed, but does not go to the extent of allowing proof of an additional consideration not expressed in the writings, and a failure thereof. To hold otherwise would be to destroy the rule which prohibits parol evidence to contradict or vary written instruments. The instrument signed by plaintiff and accepted by the defendant, and the notes signed by the latter and delivered to the former, constitute an agreement in writing. The terms of the agreement are clearly expressed, and the writings contain no clause from which it may be inferred that the parties did not intend to incorporate in them the contract just as it was made, and the whole of it."

2. In the bill of exceptions the plaintiff specifies that the decision of the court was against law, because certain findings are contradictory; and this is one of the grounds upon which a new trial was asked. The motion should have been granted for this reason: Findings 7 and 11, which are necessary to support the judgment in favor of defendants, are in conflict with findings 4, 5, and 6, as we construe them; those first named being to the effect that the consideration of the note referred to in the complaint is as stated in the answer of defendants, while findings 4, 5, and 6 are that its consideration is the balance due upon the note of December 3, 1884, and that the consideration of that note was the sale of the property described in the written agreement above set out. In this condition of the findings it cannot be said that they determine the issues of fact arising in the case, and a judgment based upon such findings is a decision against law, for which a new trial may be had. *Knight v. Roche*, 56 Cal. 15.

3. The appeal from the judgment in this case was taken more than one year after the date of its entry. The parties entered into a stipulation, thus extending the time for appealing from the judgment, and the respondent has not asked that the appeal be dismissed. The court, however, is not bound by this stipulation. The appeal

from the judgment is dismissed. Order denying plaintiff's motion for a new trial reversed.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.

PATERSON, J. I concur in the order dismissing the appeal from the judgment. I also concur in the order reversing the order denying the motion for a new trial, on the ground that the findings are uncertain and conflicting.

McFARLAND, J. I dissent. I see no contradiction in the findings, and no error committed in the trial of action. I think the order should be affirmed.

(39 Cal. 223)

PEOPLE v. ARRAS. (No. 20,675.)

(Supreme Court of California. May 26, 1891.)

LARCENY—INFORMATION—VARIANCE.

1. An information for larceny charged that defendant, "on or about the 17th day of November, 1889, did \* \* \* steal \* \* \* a certain bank-check, \* \* \* which said check was then and there of the value of \$95.50, and was the property of said P." Held, that this sufficiently alleges that the check was the property of P. at the time the offense was committed.<sup>1</sup>

2. Though the information alleges that the check was drawn "in favor of one P.," and the evidence shows that it was drawn in favor of "A. G. P. or bearer," the variance is immaterial.

DE HAVEN, J., dissenting.

In bank. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

Hurst & Hurst and Charles W. Thomas, for appellant. W. H. H. Hart, Atty. Gen., for the People.

PER CURIAM. The defendant was convicted of grand larceny, and appeals from the judgment, and from the order denying his motion for a new trial. He relies upon two propositions to reverse the case: (1) That the demurrer to the information should have been sustained. (2) That there is a fatal variance between the information and the proof. The information charges the defendant with grand larceny in stealing a certain "bank check" drawn by one D. N. Hershey on the Bank of Yolo, in Woodland, Cal., "in favor of one Pennington, for the sum of ninety-five dollars and fifty cents, and which check was then and there of the value of \$95.50, and was the property of said Pennington." The objections to the sufficiency of the information are extremely technical, and are, in our opinion, without merit. It is claimed, for instance, that the information does not allege that at the time the

offense was committed the check was the property of the complaining witness, Pennington. The language of the information is that "on or about the 17th day of November, 1889, Calvin Arras did willfully, unlawfully, and feloniously steal, take, and carry away certain personal property, to-wit, a certain bank-check, \* \* \* which said check was then and there of the value of \$95.50, and was the property of said Pennington." It would be overrefinement, not justified by the law or the language used, to hold the information defective in this respect. The variance relied upon by appellant consists in this: As appears by the information, the check was drawn in favor of "one Pennington;" the check when introduced in evidence disclosed the fact that it was drawn in favor of A. G. Pennington or bearer. If this be a variance, is it a material variance? A material variance between the proof and the information arises when an acquittal of the defendant under the information would be no bar to a further prosecution for the same offense. *People v. Hughes*, 41 Cal. 234. In this case the check described in the information and the check introduced in evidence have so many earmarks in common as to establish the identity of the two instruments as being one and the same beyond all doubt, and indicate conclusively that the misdescription could not have misled the defendant to his prejudice, and that a conviction or acquittal of the offense charged in this information would forever bar any further prosecution for the larceny of the check. This court has held that information charging the larceny of "fifty sheep," "one cow," "four cattle," "one horse," "a gold watch," etc., were sufficient as to the description of the property stolen, when taken in connection with an allegation of ownership. Surely, then, no greatly detailed description of the bank-check was necessary to be used in the information, especially when section 967 of the Penal Code provides: "In an indictment or information for the larceny of money, bank-notes, certificates of stock, or valuable securities, it is sufficient to allege the larceny to be of money, bank-notes, certificates of stock, or valuable securities, without specifying the coin, number, denomination, or kind thereof." If a defendant cannot object to being tried under an information measured by the foregoing section, how can this defendant complain that in this information he has been misled by a misdescription of the check, and that a fatal variance exists? In the case of *People v. Edwards*, 59 Cal. 360, the defendant was charged with the crime of burglary in entering a building known as the "store of one S. Loupe," etc. The evidence disclosed that the store belonged to S. Loupe, L. Loupe, and A. Haas, who were partners doing business there, but was known as "Loupe's Store." This court said: "It is true that the additional fact was elicited that other persons were interested with the party named in the information as owner of the store which had been broken into and entered; but, if that fact had been recited in the information, it would not have identified the offense with any

<sup>1</sup>In an indictment for cutting timber from the land of another, the name of the owner is sufficiently charged by giving his surname and initials only. *State v. Prince*, (La.) 8 South. Rep. 591. An indictment for a trespass in wrongfully cutting down timber on lands, "the estate of Madison Young, deceased, \* \* \* and the heirs of said estate," sufficiently describes the owners. *State v. Paul*, (Iowa,) 47 N. W. Rep. 773. But an indictment charging the breaking and entering the "store of the Perry Mason Shoe Company," but not alleging that the company was a corporation, or, if it was a partnership, giving the names of the partners, is bad. *Edmonds v. State*, (Ala.) 6 South. Rep. 54.

greater certainty, or enabled the defendants to understand more clearly the offense with which they were charged. It only showed that there was a partially erroneous description or allegation of ownership of the store in which they had committed the offense. But the discrepancy did not in any respect affect the validity of the information, nor could it in any way have misled or prejudiced the defendants in their defense; it affected none of their substantial rights. The variance was therefore immaterial." This information describes the check correctly in so many respects that a defect in description in the one respect urged could not have misled the defendant in his defense, and certainly rendered the variance immaterial. Judgment and order affirmed.

I dissent: DE HAVEN, J

(90 Cal. 590)

REED *et al.* v. NORTON *et al.* (No. 18,843.)  
(Supreme Court of California. Jan. 31, 1891.)

MECHANIC'S LIEN—NOTICE OF CLAIM.

1. Where, in an action to enforce certain liens of mechanics and others, plaintiffs' notice of lien stated that the labor and materials furnished were to be paid for at what they were reasonably worth, and the testimony showed that part of the materials were furnished upon a contract price, and the balance upon a basis of a *quantum meruit*, a finding that such notice was "in due form, as required by law," is error, under Code Civil Proc. Cal. § 1187, which requires the person to file his claim, stating the terms and conditions of his contract.

2. Under Code Civil Proc. Cal. § 1187, which requires a person to file a notice containing the name of the owner of the structure for which materials were furnished, and also the name of the person by whom he was employed, or to whom he furnished materials, a notice of lien stating that the materials were furnished to H., and that claimants were employed by both H. and N. to furnish the same, is a compliance therewith; it appearing that plaintiffs made the contract with N., the owner of the building, to furnish the materials, and that H., the contractor, gave sundry orders for payment, drawn on N., which he paid.

3. Where plaintiffs' notice of lien alleged that the price agreed upon was "the usual price, and what said materials were reasonably worth at their place of business," and that the goods were to be paid for on delivery, it sufficiently complies with the above section, requiring the notice to state the terms of the contract expressly agreed on, to entitle plaintiffs to recover on a *quantum meruit*; it appearing that the goods were furnished the architects of the defendant owner of the building, and that they were reasonably worth the amount sought to be recovered.

4. The notice of lien alleging that H., the contractor, purchased the goods both as contractor and as the agent of the owner of the building, an allegation in the complaint that he purchased only as agent is an immaterial variance.

5. A variance between the record and the evidence, as to the value of the materials furnished, and the way in which they were purchased and furnished, is immaterial.

6. An allegation in the complaint to enforce a mechanic's lien that "said firm sold and delivered N. certain hardware and building material, to be used in the erection and construction of said building, and affixed and attached thereto," warrants the finding that the materials were used in the building.

7. Plaintiff's notice of lien set out that his agreement with defendant N. was "that he was to be paid for said labor done and furnished at what it was reasonably worth, to be paid for when the work ceased." On the trial plain-

tiff testified: "My contract was to furnish all the material and do all the painting for \$250." *Held*, that the variance between the actual contract and the statement in the notice is fatal.

8. Where M., whose contract for furnishing materials exceeded \$1,000, failed to allege in his complaint that his contract was in writing, or filed for record, such omission does not contravene Code Civil Proc. Cal. § 1183, which provides for the filing of a contract between the contractor and owner where the amount exceeds \$1,000, it appearing that he was a subcontractor and material-man.

9. Where the memorandum of contract was filed at 10:30 o'clock A. M., and it appeared that the work was commenced no earlier than 8 or 8:30 A. M. of the same day, the evidence thereof being doubtful, and such work being of a trivial nature, a finding that the work commenced before said filing will not be sustained.

10. The contract providing that the owner should pay, upon the written order of the contractor, the material-men when the materials were used in the building, and also pay the mechanics and laborers at the end of every week for work performed, such payments are specific enough as to time and amounts to comply with Code Civil Proc. Cal. § 1184, which requires the contract price to be made payable in installments at specified times after commencement of the work, or completion of specified portions, or of the whole work.

11. An objection to the failure to file, in the recorder's office, the plans and specifications of the building, is not well taken, where the contract was made after Code Civil Proc. Cal. § 1183, was amended in 1887, and such amendment does not require the filing thereof.

12. The contract provided for the payment of \$5,500 for all work and material, three-fourths payable in installments as the work progressed, the other fourth 35 days after completion, with an obligation to pay for materials when used, and work as it was rendered weekly. *Held*, that such contract was a substantial statement of "the amounts of all partial payments, together with the times when such payments shall be due and payable," required under Code Civil Proc. Cal. § 1183.

13. It appearing that defendant owner of the building against which liens were filed, had not retained for 35 days after the completion of the work, and paid over to those entitled thereto, 25 per cent. of the contract price, as provided in his contract, he is responsible to that extent.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Graves, Turner & Graves and William Shipsey, for appellants. J. M. Wilcox, for respondents.

FOOTE, C. Eight actions were brought against the defendants here—the owner of a building, Thomas Norton, and his contractor, Thomas Helm—to enforce the liens of certain mechanics and material-men. Before trial they were all consolidated. The contractor, Helm, made default. Norton, the property owner, answered, denying all the allegations of the complaints, except as to his ownership of the property on which the liens were sought to be enforced. Judgment passed for the plaintiffs, it being stipulated that there should be priority in favor of one claim over another, and that all claims should be satisfied *pro rata* if the money arising from the sale of the property should be insufficient to pay all in full. From that judgment and an order denying a new trial the defendant Norton appeals.

One reason urged for a reversal of the judgment and order is that the finding as to the notice of lien filed by the plaintiffs Smith & Waite, that it was "in due form as required by law," is not sustained by the evidence. It is said in support of this contention that the notice of lien required to be filed under section 1187 of the Code of Civil Procedure, in order to preserve the lien, sets out that the materials to be furnished and labor to be performed were to be paid for on the basis of what they were reasonably worth, and that the proof shows that they were furnished at an agreed contract price, and that, therefore, the evidence disproves the contract set out in the notice, and, as the notice was fatally defective in this respect, no lien attached that could be enforced. The notice does state the contract as contended for by the defendant. The evidence as to the matter is that given by F. L. Smith, one of the lien claimants, as follows: "We contracted with defendant Helm to furnish this material. There was no special contract, except as to the price of the material. We gave him a list of what we would furnish a certain amount of material for. We furnished Helm with a list of the materials and prices, and most of the materials were furnished by us according to that list. Question. Did your firm agree to furnish all the material furnished in your line for \$658? Answer. No, sir, we did not,—most emphatically. The list we furnished to Mr. Helm for that amount of material was taken from a portion of the plans from figures that Mr. Laird made on his plans that it would require so much,—so many feet of each kind of material,—and we gave him figures on that, and furnished it to him at the figures we gave him; but we didn't give him the figures for the whole amount of material and all other things; but, of course, we charged in the same proportion, as near as we could. The materials were reasonably worth the amount charged." From this it appears that a certain portion of the materials were furnished upon a special contract as to price, and that the balance were furnished on the basis of a *quantum meruit*. Inasmuch as this shows the finding to be wrong in stating that the notice of lien complied with section 1187, Code Civil Proc., giving the terms of the contract under which the materials were furnished, at least so far as a part of them are concerned, the contention of the defendants seems to be sound. Neither is the finding supported by the evidence that the materials furnished or work done by these plaintiffs were upon the agreement of the defendant Helm, with the knowledge of Norton, to pay for them all at what they were reasonably worth.

With reference to the claim of Schwartz, Beebe & Co., it is objected that the evidence shows that their notice of claim of lien was not in legal form as shown by their evidence, and therefore the finding that it is in due form is unsupported by evidence, as well as the finding that the contract was to furnish materials, etc., for what they were reasonably worth. It is further asserted that "the claim of

lien is at variance with the contract proved, in that the former states that the materials were furnished to Helm, and that claimants were employed by both Helm and Norton to furnish the same, while the evidence of one of the plaintiffs is: "I made a contract about this lumber with defendant Norton about June 20th. The contract was made in this way: I met defendant Norton, and we talked over the prices of lumber and the discount for cash, and that was the only time I ever had any conversation with him about it; and he said he was going to build a house, and wanted to know what the price of lumber would be. I had no conversation with defendant Helm about it. I never transacted any business with him about it. Wm. Evans came after the lumber. He brought the bill there. I gave no particular time for payment. It was to be a discount for cash. The amount charged in the notice of lien is the reasonable value of the lumber furnished—such as we sell it for in the market in our lumber-yard. About August 2d, I went to defendant Norton for payment. He said I must get an order from defendant Helm. I got an order for \$1,100, and Norton paid it. I then talked with Norton about the balance of the bill. He said he and I would deal about that bill. I said I had nothing to do with Helm, and had said nothing to him about it, and he said he and I would arrange about the payment of that bill, and pay the bill up in full, and the percentage be fixed afterwards. Since we filed the lien he said he thought I had better take what I could legally get. When I was furnishing the material I heard that Helm had the contract." From this it seems that Norton did make a contract with the plaintiffs to furnish the material, that it went into the building that Helm, the contractor, was erecting for Norton, and for which he got it from the material-men, and that Helm gave orders to pay for it drawn on Norton, which were paid. Thus it would seem that practically the materials were furnished to Helm; that Norton originally contracted for them; and Helm, by giving an order for the payment, admitted his liability to pay for them. How any injury could result to Norton from this kind of a variance we do not perceive, and therefore the statement of claim, so far as it mentions the name of the person by whom the plaintiff was employed, or to whom he furnished the materials, was substantially the same as shown in evidence. As to the terms and conditions of the contract, we think there is no substantial variance between the statement in the notice of claim of lien and the evidence.

As to the Reed, Smith & Co. claim, it is said by appellant that the contract as set out in the claim of lien is different from what the proof shows it to be, and as a consequence the findings as to the nature of the contract, and that it was in due form, are unsupported by the evidence. In the notice the contract as to price is that it was "the usual price, and what said materials were reasonably worth at their place of business,"—that is, at the place of business of the plaintiffs. In that

connection his counsel argues as follows: "In the notice of lien it is alleged that the price agreed upon was 'the usual price, and what said materials were reasonably worth at their place of business.' There is not a word in the testimony to support the allegation that there was such an agreement. The testimony is simply silent upon this point. Nor is there any testimony as to what the materials were reasonably worth at the place of business of Reed, Smith & Co. The Code of Civil Procedure, § 1187, requires the notice of lien to state the terms, time given, and conditions of the contract. This means the terms, time, and condition expressly agreed upon. *Jewell v. McKay*, (Cal.) 23 Pac. Rep. 139. If no terms, time, or conditions were agreed upon, the notice need state none. *Jewell v. McKay*, supra. But, when the notice states that terms, time, or conditions were agreed upon, then the proof must come up to the statement. The notice of lien states that it was agreed that payments should be at the time of delivery; no testimony that there was such an agreement." The statement in the claim appears to be nothing more than that the materials were bought and furnished on the basis that they were to be paid for on delivery at what they were reasonably worth. This would be, in effect, giving the plaintiffs a right to recover on a *quantum meruit*. And while it may have been unnecessary to set out such a contract in the notice of claim of lien under the decision just cited, we do not think that such decision announces the principle that where such a course is pursued the party shall not be held to have filed a notice of claim based upon a *quantum meruit*. The evidence being that such materials as were asked to be furnished were furnished and delivered upon the order of Helm and Norton and Laird, the architects for Norton, that they were used in the building of Norton and that they were reasonably worth \$939.90, and no part of that sum has been paid, we can see no force in the defendants' contention on the point.

It is further argued in reference to this claim that there is a variance of a fatal nature between the notice of claim and the complaint; that the notice treats the contract between the contractor and the owner as valid; that it does not allege that the contract or a memorandum thereof was not filed, and in this respect it differs from all the other notices of lien; that the complaint treats the contract as void for want of filing; that in the notice of lien it is alleged that Helm, the contractor, purchased the materials both as contractor and agent of Norton; that in the complaint it is alleged that he purchased as agent only. The point made seems to have been decided adversely to the contention made here, in *Lumber Co. v. Gottschalk*, 81 Cal. 641-646, 22 Pac. Rep. 860.

We perceive no merit in the points made of the same tenor as to the C. H. Reed & Co. claim, looking at the record and the evidence, particularly as to the value of the materials furnished, and the way in which they were purchased and furnished.

As to the L. H. Simmons case, it is said that the complaint does not state a cause

of action; that it does not state that the materials were used in the building. There was no special demurrer filed to this complaint, and the court found that the materials were used in the building, and the complaint set out that "said firm sold and delivered to said Norton certain hardware and building material to be used in the erection and construction of said building, and affixed and attached thereto." If this hardware and building materials were affixed and attached to the building, they must be said to have been used in the erection and construction of it. Under the circumstances, we think the complaint was sufficient. There is nothing in the cases cited by the appellants to sustain their contention. *California Powder-Works v. Blue Tent, etc., Mines*, (Cal.) 22 Pac. Rep. 391; *Silvester v. Mine Co.*, Id. 217. There is no substantial variance between the notice of lien and the evidence as to the contract in this case.

It is contended, further, that the J. M. Huyck complaint does not state a cause of action, in that it omits to state that the building was completed. There is nothing in the point, as it is fairly inferable from the language of the complaint at folio 94 that the building was completed when the notice of lien was filed.

As to the point made of the variance between the actual contract made with Knight and the statement of the same in the notice of lien, it appears that it is well taken. The notice sets out: "That the agreement between him and said Norton was that he was to be paid for said labor done and material furnished at what it was reasonably worth, to be paid for when the work ceased." The evidence is, on the part of Knight, that he had an express contract with Norton to do painting for \$250; that he did a portion of it, and stopped because Norton refused to pay him. He says: "My contract was to furnish all the material and do all the painting for \$250." The other points made, that there is a variance between the notice and the contract proved, as to the name of his employer, and that the complaint does not show that the building was completed when the notice of lien was filed, are without force.

The point seems to be made upon the Mitchell complaint that it is not alleged therein that the contract for furnishing the materials, etc., was in writing or filed for record, and that as it was over \$1,000 it was void. Mitchell was a mere subcontractor and material-man, and there is nothing in section 1183, Code Civil Proc., requiring a contract of the kind he had to be in writing or recorded; and, even if the contract between Norton and Helm had been void, there was no necessity for Mitchell to have had any written contract or to have recorded it.

The defendants argue that the findings are conflicting as to the completion of the building at the time the notices of lien claims were filed, and that the evidence shows that they were prematurely filed. We do not think either point well taken. The contractor had ceased to work upon the building for 30 days on December 10, 1889, before the lien claims were filed, and

this is held to entitle such claimants as are here involved to file their notices of lien as they did. *Lumber Co. v. Olmstead*, 85 Cal. 84, 24 Pac. Rep. 648.

But we do not think that the finding of the court that the work was commenced before the contract, or a memorandum thereof, was filed in the recorder's office of the proper county, is sustained by the evidence. The memorandum was filed on the 25th of June, at 10:30 o'clock A. M. While even admitting the plaintiff's view of the testimony to be correct, which is doubtful, that any work at all was commenced before this filing, it was of the most trivial nature, and was not commenced until, at the earliest, 8 or 8:30 A. M. of the same day. It should be held, under the evidence, that the filing of the memorandum was before the work was actually commenced.

The objection urged that the contract as made is defective, in that the time specified for payments thereunder is not in accordance with section 1184 of the Code of Civil Procedure, which reads thus: "No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work; but the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on the completion of specified portions of the work, or on the completion of the whole work; provided, that at least 25 per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract \* \* \* In case such contracts \* \* \* do not conform substantially to the provisions of this section, the labor done and the materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof." The contract provided: "For all the material, and for the construction of said building, as herein provided, said Norton agrees to pay said Helm the aforesaid sum of \$5,500, as follows: (1) Upon the written order of said Helm, he [Norton] will pay the material-man for materials furnished as soon as the same is actually worked into the building, and whether the same be furnished directly to said Helm or to his subcontractors. (2) Upon the written order of said Helm he [Norton] will pay the mechanics and laborers upon said building at the end of every week for work actually done, and whether such laborers and mechanics be hired directly by said Helm or by his subcontractors. (3) When all the material and labor is paid for, as aforesaid, then said Norton will pay said Helm the balance of said contract price: (4) provided, that said Norton may retain 25 per cent. (\$1,375) of said contract price until thirty-five days shall have expired after final completion of said contract." We think these payments, to be made through Norton to the material-men when their material was

used in the building, and to the mechanics and laborers weekly, were specific enough as to time and amounts to comply substantially with the statute.

In their opening brief the respondents claim that, in order for the memorandum to be valid, there must have been filed in the recorder's office the plans and specifications for the building. But this contract was made after the amendment of 1887 to section 1183, Code Civil Proc., and in that amendment it is not specified that any plans or specifications shall be filed, nor is it necessary to a proper memorandum that they should be.

In their reply brief they press this point no further, but claim that the memorandum filed is insufficient because it does not specify the time mentioned in the contract for making payments, and is not a memorandum of the contract as to payments. The memorandum, among other things, contains this: "Said Helm to be paid \$5,500 for all work, labor, and material; three-fourths thereof payable in installments as work progressed. (Said Norton to pay the material-men, laborers, and mechanics upon the written order of said Helm; laborers and mechanics to be paid weekly during the progress of the work, until said three-fourths is exhausted.) The other one-fourth payable in thirty-five days after the final completion of the contract." We do not see but what this is a substantial statement of "the amounts of all partial payments, together with the times when such payments shall be due and payable," as set out in the contract, and required to be in the memorandum, under section 1183, Code Civil Proc. The point is also made that certain of the verifications to some of the claims of lien are insufficient. But we see no merit in it; it is only required that the verification should state that the claim is true, without setting out the particulars which the law requires to be contained in the body of the claim. *Arata v. Mine Co.*, 65 Cal. 342, 4 Pac. Rep. 195.

This disposes of all the material questions argued on the appeal, and it appears that the defendant Norton did not retain for 35 days after the final completion of the work and contract, and pay it over to those entitled thereto, 25 per cent. of the contract price of \$5,500, and that he is responsible to that extent, but no further, to those who make good their claim to it; but the judgments rendered are for more than that amount. For the reasons heretofore stated we advise that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

GREER v. HEISER.

(*Supreme Court of Colorado*. May 7, 1891.)

WATER-RIGHTS—IRRIGATION—PRIOR APPROPRIATION—WAIVER—DITCHES—VARIANCE.

1. Gen. St. Colo. § 1763, provides that "every person \* \* \* owning or claiming any interest

in any ditch \* \* \* within any water district shall, on or before the 1st day of June, 1881, file with the clerk of the district court having jurisdiction of priority of right to the use of water for irrigation in such water district a statement of claim under oath." Section 1788 provides that no review of a decree entered under the provisions of this act shall be ordered, unless applied for within two years from the time of entering such decree. But section 1796 provides that "nothing in this act \* \* \* shall prevent any person \* \* \* from bringing \* \* \* any suit \* \* \* whatever, hitherto allowed in any court having jurisdiction, \* \* \* at any time within four years." Held, that a party who failed to file such claim within the requisite time, or to apply for a review within two years after a decree, but brought an action within four years thereafter, is neither presumed to have had no rights, nor to have waived them.

2. In an action for priority of right to water for irrigation, it was alleged that the ditch in controversy was constructed in 1875, that it was 89 rods long,  $1\frac{1}{4}$  feet wide at the bottom, and 2 feet wide at the top, and 8 inches deep, and that it watered from 30 to 35 acres. The proof showed it was 2 feet deep, and a foot and a half wide at the bottom, but that it was not constructed until 1887, and that a much smaller ditch was constructed in 1874 or 1875, which did not water more than 15 to 20 acres. Held, that a decree fixing the time of priority April 30, 1874, and allowing plaintiff the right to all the water necessary to fill his ditch, describing it as 87 rods long,  $1\frac{1}{4}$  feet wide at the bottom, 2 feet wide at the top, and 8 inches deep, was erroneous for variance.

3. The facts that a party has changed the head of a ditch to a point higher up stream, or that he built a new ditch in which to carry the water of a former appropriation, do not affect his right to such water.

4. The fact that for several years a party has obtained his water exclusively through a neighbor's ditch, by agreement, will not affect his right to receive water through his own ditch, as against the neighbor's grantee.

Commissioners' decision. Appeal from district court, Douglas county.

Action by Charles Heiser against Henry C. Greer to amend a decree establishing priorities of water-rights. Defendant appeals.

*W. T. Rogers and D. C. Webber*, for appellant. *Wm. Dillon and John Hipp*, for appellee.

REED, C. This was a suit instituted in November, 1887, by appellee filing a bill or petition asking that a general decree made and entered of record on the 10th day of December, 1883, establishing the priorities and appropriations of water in the different irrigating ditches in water district No. 8, be amended, and that the irrigating ditch of plaintiff (appellee) be decreed entitled to priority over the ditch of appellant, known as "Ditch No. 82," and the "McCracken Ditch," and ditch No. 83, known as the "Smith Ditch." It appears that at the time the respective rights of the different ditches were adjudicated appellee allowed the matter to go by default, making no appearance and no claim, and offering no testimony in regard to any ditch or water-right whatever, the reason given in the petition being that he had only recently, and within the year, learned that the respective rights had been adjudicated and a decree entered; that he "never had any actual notice of any such proceedings, and was not aware that such proceedings were being had." It is

alleged in the petition that appellee was the owner of a ditch having its head at East Cherry creek, on the S. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 33, in township 9 S.; that the ditch had a width of  $1\frac{1}{4}$  feet on the bottom, and 2 feet on the top, and a depth of 8 inches, with a fall of 30 inches to the half mile; that it was 89 rods long, irrigating 30 or 35 acres; that the work of constructing the ditch was commenced in April, 1875, by building a dam across the creek; and that the work was continued from that date with diligence, and without intermission, until it was finished. No date is given of the time of the completion of the work, and nothing by which the court can judge in regard to diligence, nor is there anything in the testimony showing when the appropriation of such water was concluded. It is stated that 49 rods in length of the ditch is on the west side of the creek, and 40 rods on the east side. It is alleged that the construction of the McCracken and Smith ditches was not commenced until after the commencement of his death, but no date is given as to when the construction of such ditches commenced. It is further alleged that the two ditches had been decreed priority over his ditch, and asking that the decree be so amended as to establish the priority of his ditch over the ditches mentioned. The court found for plaintiff, (appellee,) and a decree was entered giving the ditch priority over the ditch of appellant, a portion of such decree being as follows: "A ditch constructed for the purposes of irrigation, to take its supply of water from East Cherry creek, in said water district No. 8, and having its head-gate on the north-east quarter of the north-east quarter of section 4, in tp. 10 S., said ditch being 87 rods in length, and having a width of  $1\frac{1}{4}$  feet on the bottom, and two feet on the top, and a depth of 8 inches, on a grade of 30 inches to the half mile, and to be held to have appropriated as much water as will flow in a ditch of the size aforesaid. \* \* \* Such appropriation to date from the 30th day of April, 1874."

There is a very grave question lying at the foundation of this proceeding, viz., whether, in a proceeding of this kind, against two ditches or individuals, an adjudication could be had modifying the general decree regulating the distribution of water in the entire district. But we are of the opinion that the action is warranted by section 1796, p. 583, Gen. St., when, as appears to be conceded in this case, no interests are involved or affected, save those of persons who are parties to the adjudication. This section does not appear to be in harmony with other portions of the statute. By section 1763, p. 572, Id., it is provided that "every person \* \* \* owning or claiming any interest in any ditch, canal, or reservoir within any water district shall, on or before the 1st day of June, 1881, file with the clerk of the district court having jurisdiction of priority of right to the use of water for irrigation in such water district, a statement of claim under oath." Section 1768, p. 575, Id., provides that the clerk of the court having jurisdiction shall cause a notice to be published four consecutive weeks



in a newspaper, which "shall notify all persons \* \* \* interested as owners in any ditch, canal, or reservoir in such water district to appear at said court at the time so appointed, and file a statement of claim under oath, in case no statement has been before filed by him." Section 1772 provides for the appointment of a referee to take the testimony. Section 1773 prescribes the notice to be given by the referee. Section 1774 requires proof of said notice to be made by affidavit of referee. The statute also provides that, unless suit be brought to modify such decree within two years, the party shall be barred.

Nothing having been shown by evidence to the contrary, it is a legal presumption that proper proceedings were had by notice to give the court jurisdiction under the statute; hence the allegation in the petition that appellee never had any actual notice, etc., can be of no avail; and appellee, having filed no claim or asserted any right whatever to water, and having allowed the matter to go by default, might be held concluded by the decree as *res adjudicata*, as in other cases, unless the decree could be successfully attacked for fraud or irregularity, were it not for the language of the subsequent section, (1796:) "Nothing in this act, or in any decree rendered under the provisions thereof, shall prevent any person, etc., \* \* \* from bringing and maintaining any suit or action at law whatever, hitherto allowed in any court having jurisdiction to determine any claim of priority of right to water by appropriation thereof, for irrigation or other purposes, at any time within four years." This would seem to take cases like the one at bar out of the general rule, and allow the prosecution thereof within the statutory limit of time. This being the case, failure to file claim for water, as required by the statute, would not raise the legal presumption that the party failing to file had no rights, or that he intended to waive any rights he may have had.

We do not think the decree entered in this case can be sustained.

1. There is a fatal variance between the allegations and the proof, and the decree follows neither.

2. There is no sufficient proof of material allegations or of material facts to support the decree. The allegation in the petition in regard to the ditch is: "Said ditch has its head on said Sherry creek, on the south-east quarter of the south-east quarter of section 33, p. 9," etc. It is shown by the proof that in either 1874 or 1875 appellee constructed a dam across the stream at the point designated in the petition. The allegation in the complaint is that the same was done in 1875. The decree of priority fixes it April 30, 1874. At such dam, the evidence shows, water was taken out on both sides of the stream. A short ditch, some 40 rods in length, on the west side, was constructed by plowing three furrows, two of which were turned out by the plow and the third removed in some other manner. This ditch discharged into and ended at a gulch through which the water returned to the stream. In regard to the ditch on the east side, the testi-

mony is very indefinite and unsatisfactory, but seems to establish the fact that there was a small ditch or single furrow that carried water. This is the most liberal extent to which the testimony of appellee can be carried, while testimony of the appellant would show no application of water, or of hardly any. The testimony of Mr. McCracken, a witness for appellee, shows great familiarity with the subject and great fairness. He says: "Heiser's ditch, before I built my ditch, would probably cover 15 or 20 acres." This estimate is the only one we have of the extent of land under the ditch, and must be held to include all the land that could be irrigated from it. He is the only witness who testifies to the existence of a ditch on the east side of the stream capable of carrying water. He says: "I do not remember definitely; I know that it was a ditch that carried water." This was the condition of affairs prior to and at the time of the construction of the McCracken ditch in 1876. The fact that upon an allegation of priority attaching April, 1875, a decree was entered establishing a priority dating April 30, 1874, is one of such importance that it should not be overlooked in discussing the variance between the allegations, proof, and decree, but is unimportant on the merits of the controversy, as either date is prior to the appropriation by the McCracken ditch. It is shown by the testimony, and not disputed, that after the construction of the McCracken ditch, by a parol agreement with McCracken, the owner, appellee took his water from that ditch, and was entitled to the use of the water of that ditch two days in each week; that at some date, not definitely fixed, by a freshet, the dam of appellee was carried away, and "a large hole washed out," so that water could not be discharged into the ditches. From that time, or the time of the construction of the McCracken ditch, no water was carried or used on the east side until the year 1887; and the testimony of witnesses shows that no water was taken from the creek by the ditches of appellee, and used on the land, for 10 or 12 years previous to the trial, until the year 1887. The short ditch on the west side was only available by discharging the water into it from the McCracken ditch. The use by appellee of water from the McCracken ditch continued until the year 1882, when appellant became the owner, and refused to recognize the pre-existing arrangement between McCracken and appellee. In 1887 appellee constructed an entirely new ditch, starting from near the head of the McCracken ditch, on the N. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 4, in township 10, running below the McCracken ditch some 40 rods; then by a flume crossing the creek to the east side to cover and irrigate land on that side,—the aggregate area covered by the ditch being, as testified, 30 or 35 acres. There is no proof or pretense that the ditch described in the petition, 49 rods long on the west side, and 40 rods long on the east side, 15 inches in width on the bottom, 2 feet wide on the top, and 8 inches deep, had any existence prior to the year 1887, nor that the construction of any such

ditch was commenced in either 1874 or 1875, "and continued with diligence and without intermission until the same was accomplished." Nor was there in the petition any allegation in regard to a ditch commencing on section 4, in township 10, yet the decree established a ditch starting at that point, and awards it a priority, dating April 30, 1874, while the proof establishes a different appropriation in extent, at another place, of water carried in other ditches, and covering only 15 or 20 acres of land. The allegations of the petition were denied in the answer. The issues thus formed were the questions of fact to be tried. Not a material allegation was established by the evidence, and the decree is at variance with both the evidence and the allegations of the petition. In *Miller v. Hallock*, 9 Colo. 553, 13 Pac. Rep. 541, it was said: "There was a fatal variance between the allegation of the complaint and the proofs. In such a case it is not enough that the evidence of the plaintiff show a case that calls for some relief; to entitle him to judgment, he must show himself entitled to the relief called for by the facts stated in his complaint." "The allegations of the complaint, the evidence, and the findings should correspond in legal intent." *Tucker v. Parke*, 7 Colo. 62, 1 Pac. Rep. 427; *Gregory v. Haworth*, 25 Cal. 658; *Mondran v. Goux*, 51 Cal. 151. The pleadings should have been reformed, or the proceeding dismissed.

We do not deem the fact material that appellee changed the head of the ditch to a point higher up the stream, nor that he built a new ditch in which to carry the water of a former appropriation, if such appropriation had been properly made. The questions to be determined were: (1) The appropriation of water, and the date of such appropriation; (2) The extent of such appropriation. The allegations of the petition were in regard to the rights claimed and asserted, based upon an appropriation of water and construction of a ditch shown to have been in 1887. The evidence given was in regard to both the condition of affairs as they existed at the time of the original appropriation and the condition of affairs after the construction of the ditch in 1887, while the decree was based, not upon the original appropriation, but the claim and appropriation of 1887, and in one notable particular followed the allegations in the complaint, and entirely disregarded the evidence. It is said in the decree, in describing the ditch: "The said ditch being 87 rods long, [instead of 89, as testified,] and having a width of 1½ feet on the bottom, and two feet on the top, and a depth of eight inches." The only testimony given in regard to the size of the ditch was that given by appellee, in which he says: "I believe it is about two feet deep, and a foot and a half wide on the bottom."

It is evident from the facts established that the petitioner would have been, upon proper allegations and issues, entitled to some decree establishing his prior right to some water from the stream. It is contended that, by reason of his abandonment of the ditches by him constructed

prior to the construction of the McCracken ditch, he abandoned his rights of priority. This contention cannot prevail. The change in the method of carrying the water could not affect his right to a priority. It appears that by parol agreement made with McCracken his prior right to an undefined quantity of water was conceded by that agreement, and it was agreed to be the two-sevenths of the water carried in the McCracken ditch, or the use of all the water carried by the ditch two days in each week. The failure of appellant to recognize the McCracken agreement to carry the water could not affect the right of appellee, but, at most, could only compel him to find some other method of conveying it. See *Thomas v. Guiraud*, 6 Colo. 533. In section 6, art. 16, of the state constitution, it is declared: "The right to divert unappropriated waters of any natural stream, for beneficial uses, shall never be denied. Priority of appropriation shall give the better right, as between those using the water for the same purpose." "To constitute a legal appropriation, the water must be applied within a reasonable time to some beneficial use. \* \* \* The diversion ripens into a valid appropriation only when the water is utilized by the consumer." *Wheeler v. Irrigation Co.*, 10 Colo. 582, 17 Pac. Rep. 487; *Sieber v. Frink*, 7 Colo. 154, 2 Pac. Rep. 901; *Platte Water Co. v. Northern C. Irrigation Co.*, 12 Colo. 531, 21 Pac. Rep. 711; *Reservoir Co. v. Southworth*, 13 Colo. 115, 21 Pac. Rep. 1028. From April, 1874, until 1876 must be deemed ample time in which to have constructed the cheap and limited ditches of appellee. And the water then applied, viz., sufficient for 15 or 20 acres, must be taken as the extent of the appropriation; consequently the extent of appellee's priority should have been deemed to be water sufficient for 15 or 20 acres, or the equivalent of two-sevenths of the water carried by the McCracken ditch. No testimony was introduced to establish the quantity of either. The arbitrary decree allowing appellee at all times sufficient water to fill a ditch of the capacity named in the decree, regardless of the amount of the appropriation, was erroneous. The amount actually appropriated in 1874 or 1875, and not the capacity of the ditch in 1887, should have been the basis of the decree on proper issues. A ditch of the size and with the fall as described in the decree is capable of carrying nearly water enough for 160 acres, certainly enough for 100 acres. Its capacity may be greater than that of the McCracken ditch, and may be greater than the amount of water ordinarily carried in the stream at that point. The prior right of appellee should have been limited in the decree to either the proved quantity requisite for 15 or 20 acres, or the quantity agreed upon with McCracken. We advise that the decree be reversed, and cause remanded for a new trial in conformity with the views here expressed.

BISSELL and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed.

**TRAVELERS' INS. CO. OF HARTFORD V.  
MURRAY.**

(Supreme Court of Colorado. April 27, 1891.)

**ACCIDENT INSURANCE — CONDITIONS OF POLICY—  
EVIDENCE.**

1. Where, in a trial to the court, testimony is received subject to a decision as to its competency on final hearing, and on a motion to strike out, and no further objection to its admission is made, and no exception reserved, the appellate court cannot pass on its admissibility.

2. In an action on an accident insurance policy for the death of the insured from hernia, caused by an accident while in performance of his duty as a railroad fireman, where the defense is that he was for years before afflicted with chronic hernia, testimony of the engineer that he had been continuously at work prior to the accident is admissible.

3. In such action, deceased's physician testified that, after the accident alleged to have resulted in hernia, deceased told him that he had never before, to his knowledge, had a rupture or any such trouble, but that he had noticed a little lump there for eight years back. The testimony of several physicians was against the possibility of there having been hernia, and deceased's mother and brother, with whom he lived, and who frequently saw his person, and a number of intimate friends, testified to his good health and vigor. *Held*, that the existence of hernia previous to the accident was not established.

4. Where a person, injured in an accident resulting in hernia, dies after a dangerous and unsuccessful surgical operation resulting in peritonitis, performed when death seemed inevitable without it, the accident is the proximate cause of his death.

5. An accident insurance policy, insuring against death "from bodily injuries effected through external, violent, and accidental means," but excepting death from hernia, does not relieve the insurer from liability where death results from hernia caused by "external, violent, and accidental means."

BISSELL, C., dissenting.

Commissioners' decision. Appeal from Lake county court.

On the 17th of August, 1886, appellant issued and delivered to M. J. McDonald, at Leadville, a policy of insurance, called an "accident policy," on his life, for \$1,500, payable, in case of his death, to his mother, Margaret Murray, (appellee.) McDonald, at the time of securing such policy, and for a long time previous thereto, and for some time subsequently, up to the time of the injury resulting in death, was employed as fireman on an engine of the Denver & Rio Grande Railway. On the 28th day of January, 1887, McDonald, while in the discharge of his duties upon the engine, received an injury, supposed to be from slipping and falling, striking his bowels upon some part of the machinery, causing rupture and inguinal hernia. An attempt to reduce it, and keep the protruding portion of the bowels in place by ordinary and artificial methods, proving unsuccessful, and the hernia becoming strangulated, in order to save his life a surgical operation was performed, which failed to accomplish that result, and on the 14th of February following he died. The appellant refused to pay the sum insured, and the mother, beneficiary under the policy, brought suit. The policy of insurance is copied entire in the com-

plaint, the only portion of which necessary to a discussion and proper understanding of the case is as follows: "This insurance does not cover disappearance; nor injuries of which there are no visible mark upon the body; nor accident nor death or disability resulting wholly or partly, directly or indirectly, from any of the following causes, or while so engaged or so afflicted: \* \* \* Medical or surgical treatment; \* \* \* disease or bodily infirmity; hernia, fits, vertigo, sleep-walking." The written application of the deceased for insurance was put in evidence by appellant, in which occurs the following paragraph, which is all that is considered necessary to be copied: "I have never had, nor am I subject to, fits, disorders of the brain, or any bodily or mental infirmity, except as herein stated." The special defenses pleaded in the answer, and relied upon by the appellant, after general traverses of the allegations in the complaint, were, in substance—*First*, that by the terms of the contract of insurance it was agreed that the policy of insurance should not cover death resulting wholly or partly, directly or indirectly, from hernia, and that the death was the direct result of hernia; *second*, that it was agreed that the policy of insurance should not cover death resulting wholly or partly, directly or indirectly, from medical or surgical treatment, and that the cause of death was medical and surgical treatment, and no other cause; *third*, (in the amended answer,) that the application of deceased contained a warranty that he never had been, prior to such application, subject to any bodily infirmity, that the warranty was not true, and that deceased had hernia for a long time prior to making such application, and was at the time of the application subject to hernia,—to which replications were filed putting in issue the allegations of the answer. A jury having been waived, the cause was tried to the court, resulting in a judgment for appellee for \$1,500 and costs.

Markham & Dillon and Harry Curr, for appellant. J. L. Murphy and Browne & Putnam, for appellee.

REED, C., (after stating the facts as above.) Nearly all the errors assigned are based upon the admission and rejection of evidence; the first six being directed to the supposed error of the court in allowing Dr. Heron, the attending physician, and Patrick Harvey, the locomotive engineer under whom the deceased was employed, to testify to the statements made by the deceased immediately after the injury was received, in regard to the manner and character of the accident by which the injury was received. It appears from the evidence that no one saw the accident, or knew of its occurrence or the injury, until nearly half an hour after its occurrence; and that deceased was not conscious of having received serious injury, and continued to perform his duties for about that length of time, when the engineer observed the changed appearance and apparent suffering of his fireman, and made inquiries in regard to its cause. The statements made to the engineer, and

testified to by him, and those made to the physician, and testified to by him, being all the evidence in regard to the character of the accident, and the manner in which it occurred, it is insisted were hearsay, and incompetent, and erroneously admitted. It appears from the record that objections were made to the admission of such testimony by appellant's counsel, on the grounds above stated, and the court admitted the physician's testimony "subject to the objection to be decided upon the final hearing," and afterwards admitted the engineer's testimony "subject to the motion to strike out." The record does not show that any further objection or motion was made, or that the ruling of the court was afterwards or otherwise expressed, and no exception appears to have been taken at any time. The exception at the close of the trial was in these words: "To which ruling of the court in finding the issues in favor of said plaintiff, and against said defendant, and in rendering judgment upon said finding in favor of the plaintiff and against the defendant, the said defendant, by his counsel, then and there excepted." This cannot, in any sense, be construed as an exception to the admission of the testimony of the physician, the engineer, or any other witness. Hence, under the well-established rule of this court, we are relieved from the necessity of passing upon the admissibility of the testimony. The cause having been voluntarily submitted by both parties to a trial by the court without a jury, the testimony having been received by the court subject to a decision as to the competency thereof upon final hearing and upon a motion to strike out, and no further challenge to the testimony having been interposed, and no exception whatever having been reserved, we cannot properly sustain the assignments of error based upon the admission of said testimony. We may reasonably presume that counsel supposed at the trial, as we do now, that the court of its own motion disregarded all improper testimony, and based its finding and judgment upon competent evidence only. *Rollins v. Board*, 15 Colo. —, 25 Pac. Rep. 319.

The questions to be determined upon the trial were—*First*. Did the deceased, while following his avocation and performing his duties, receive an injury which caused his death? *Second*. Was such injury one against which he was insured by the appellant? *Third*. Was the policy of insurance void by having been obtained through fraudulent misrepresentations of the insured?

The proof of an injury having been received by the deceased was not dependent upon his declarations to the engineer or to his physician. If it had been, the admission of the testimony would probably have been more strenuously resisted at the trial. That there had been serious injury was obvious; its physical effects were patent and apparent. A brother of the deceased testified to seeing a bruise and discoloration upon the bowels of the deceased shortly after the alleged accident. The fact of the injury was at once established by the examination of the physician, and his testimony in regard to it, and sup-

ported by that of all the physicians who made an examination. The fact of the injury having been received by the deceased while attending to his duties was established by the evidence of Harvey, the engineer. These being the facts necessary to be proved, and they not having been dependent upon the statements of the deceased, the peculiar attendant circumstances of the accident that caused the injury were incidental and secondary.

The seventh assignment of error is to the effect that the court allowed the witness Harvey to testify that the deceased had been continually at work for a long time previous to the injury, etc. We do not think this was error. The defense relied upon and sought to be established was that the deceased had for years been afflicted with chronic hernia, and any and all proper testimony to show his habits, health, vigor, and ability to perform continued hard labor, up to the time of the injury, was competent as refuting that supposition. *McCarthy v. Insurance Co.*, 8 Blas. 362.

The other objections urged in regard to the admission of testimony appear to be far more technical than substantial. The special defense that the policy of insurance was fraudulently obtained by misrepresentations of his physical condition in the application for insurance, and that the deceased had been suffering from or subject to a hernia for several years previous, is not sustained by the evidence. It is based entirely upon the statements of the deceased to the physician after he received the injury. Dr. Heron's testimony was: "The first day he was injured he told me he never knew he had a rupture. \* \* \* He told me he never knew he was ruptured, or had any trouble or had any hernia or a rupture there at all. He said he noticed a little lump there, and I quizzed him. I asked him how far back he remembered it, and he said there was a lump there at times; he did not know, but about eight years back." This was substantially all upon which to base the defense, and, taken as a whole, is no admission whatever of the existence of hernia. He says he never knew he was ruptured, or had any trouble. This is almost conclusive evidence that no such trouble had existed, and that he had no definite idea of what a hernia was. It seems physically impossible that it could have existed that length of time, and he have no trouble or knowledge of it. A large number of physicians were examined as experts, and the weight of the evidence was clearly against the possibility of his having been afflicted with hernia previous to the injury. The mother, with whom he had always resided, and with whom he resided at the time of his death, testified to having seen frequently his person exposed at the point of the supposed hernia, and that none existed, and if, as supposed, a hernia was developed at an early age, she must have during all these years learned of its existence. The brother, who had during all the years associated and slept with him, who had frequently seen his person exposed, said: "If there had been anything there, I would have

seen it." That he saw nothing, and his brother never complained. Several witnesses who knew him intimately, and had for a long period, testified to his continued good health, bodily vigor, and a condition absolutely incompatible with the supposed disability. In order to make the supposed defense available, the previous existence of the hernia must have been established affirmatively by competent testimony, like any other material fact. It could not be established by supposition or presumption. "Neither party is bound to prove negatives. Upon each rests the burden of proving the affirmative matter which he alleges, and upon which issue is taken." *McCarthy v. Insurance Co.*, supra. The statements to his physician in regard to the "lump" could, under no circumstances, be regarded as an admission for the purposes of this suit. The subject of the policy of insurance was not under consideration, probably not thought of, by either party to the conversation. There is no testimony that during treatment, including the incision at the surgical operation, any evidence was found of the existence of a case of chronic hernia. If, as supposed by counsel of appellant, the admission by the court of the statements of the deceased in regard to the manner in which the injury was received was error, the statements of deceased to his physician in regard to the former existence of a lump, being of the same character, was a very weak basis upon which to build a defense to defeat the action. It is apparent that the trial court found, as a fact, that deceased had not been afflicted with hernia previous to the injury, and that the injury received was the proximate and sole cause of death. By "proximate cause" is meant that cause which directly precedes and produces the effect, as distinguished from a remote cause. "Whether a cause is proximate or remote does not depend alone upon the closeness in the way of time in which certain things occur." *Cunningham v. Lyness*, 22 Wis. 245. "An efficient, adequate cause, being found, must be deemed the true cause, unless some other cause not incidental to it, but independent of it, is shown to have intervened between it and the result." *Kellogg v. Railroad Co.*, 26 Wis. 223; *McCarthy v. Insurance Co.*, supra; *Insurance Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. Rep. 685; *Mallory v. Insurance Co.*, 47 N. Y. 52. After a careful examination of the evidence, we think it was ample to sustain the finding.

There is no evidence whatever to establish the defense that the insured "died of medical and surgical treatment, and no other cause." All the physicians who saw the case seem to have conceded that death was inevitable without a surgical operation. No charge of unskillfulness in performing the operation is made or suggested. That life was prolonged for quite a period by the operation is shown by the evidence. That the insured died of peritonitis resulting from the surgical operation is unimportant, when the fact is established that death was inevitable without the operation, and that, after a consultation of skilled physicians, the opera-

tion was resolved upon—necessarily dangerous—as the only possible means of preserving life.

It is ably urged in argument that deceased died of hernia, a cause of death excepted by the policy. Although appellant in its third special defense, which is verified, averred "that the cause of said death was medical and surgical treatment, and no other cause," which seems to be greatly at variance with the theory of the argument, counsel, perhaps, was not precluded by it. We cannot adopt the construction of the exception in the contract of insurance so ably urged. The hernia must be regarded as the result of the accident that caused the death; the cause of death; the force of the blow received; the consequent injury arising from the concussion, and the hernia as resulting. Deceased was insured against the accident by the terms of the body of the policy. Had he died of ordinary hernia not produced by a serious and violent injury, appellant would probably have been released from payment; but, when the hernia is the accidental result of the force of the blow, it cannot be regarded as excepted. In this view, both the contract of insurance and the exception can be allowed to stand without doing violence to either,—a rule always adopted when practicable. If not so construed, the exception must yield in this instance. It is "the fundamental rule of interpretation that policies of insurance are to be construed most strongly against the insurers who frame them." *Insurance Co. v. Crandal*, supra; *Burkhard v. Insurance Co.*, 102 Pa. St. 262. It is now well recognized as a general rule that, where an exception to a policy of insurance, emanating from the insurance company, is capable of two meanings, the one is to be adopted which is most favorable to the insured. *Insurance Co. v. Horner*, 14 Colo. 391, 23 Pac. Rep. 788; *May, Ins. §§ 172-179*; *Wood, Ins. §§ 141-146*; *Allen v. Insurance Co.*, 85 N. Y. 473; *Insurance Co. v. Cropper*, 32 Pa. St. 351. The business of the company is to insure against accident. The object of the insured in making the contract was to secure compensation and support in case of injury or disability arising from accident, and, in case of accidental death, to furnish a fund for the benefit of the mother. The contract in the policy for and on which he paid the consideration was to pay the mother \$1,500. "If death shall result \* \* \* from bodily injuries effected during the term of this insurance through external, violent, and accidental means." That the contingency against which he insured did happen, and death ensued, is uncontradicted; that the bodily injuries resulting in death were received "through external, violent, and accidental means" was established beyond controversy. Such construction must be given to contracts of this kind as was evidently contemplated by the parties, and, while so construing them as to protect the insurer against fraud, deception, and misrepresentation, give the insured the benefit of his contract and consideration for the premium paid. Where, as in this case, there was no evidence of fraud or intentional

imposition, the defense must fail. We advise that the judgment be affirmed.

RICHMOND, C., concurs. BISSELL, C., dissents.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

(16 Colo. 316)

FIRST NAT. BANK OF COLORADO SPRINGS  
v. WILBUR.

(Supreme Court of Colorado. April 27, 1891.)

CHATTEL MORTGAGES—RIGHTS OF MORTGAGOR—TROVER.

1. The common-law rule that trover will not lie in favor of the mortgagor against the mortgagee who has taken possession of the goods for condition broken is not changed by the Colorado Code of Civil Procedure, which abolishes the forms of action, and hence, in the absence of fraud, the mortgagor cannot recover of the mortgagee the difference between the value of the goods taken possession of by him and the price for which he sold them.

2. The mortgagee in possession after condition broken has a title which falls short of being absolute, to the extent that he is bound to exercise reasonable care and diligence in disposing of the goods, and to account for any surplus after payment of his debt.

Appeal from district court, Arapahoe county.

In October, 1882, Matthew C. Wilbur brought this suit against the First National Bank of Colorado Springs to recover the difference between the price at which certain personal property was sold under mortgage by the bank and its value in the market at the date of sale; and also to recover the difference between the actual value of certain assigned book-accounts and the price at which the same were sold. The complaint in form is analogous to one in the old action of trover, and contains all its essential elements. It set up the ownership of the plaintiff in the goods, the possession and conversion by the bank and Halthusen, and prayed a money judgment. The value of the chattels is stated to be \$12,600 in this pleading, and the book-accounts at \$1,300. The answer admits the indebtedness of plaintiff in the sum of \$4,000 on the 1st of August, 1882, and alleges that said indebtedness was secured by three several mortgages upon the livery stock of plaintiff, and by an assignment to it of certain book-accounts. It admits that the property described in the complaint was a correct list of the property taken possession of by plaintiff on August 1, 1882, under the several mortgages; it denies that the property was of the value of \$12,675, as alleged in the complaint; states its true value to have been no greater than \$7,400; and the book-accounts transferred of no greater value than \$400. It is alleged also in the answer that said mortgages "given to secure said indebtedness as aforesaid were given subject to a prior chattel mortgage held by Ruth A. Newton upon the same property to secure her in the payment of \$4,000,

from April 20, 1881, no part of which has been paid." And this is not denied in the replication. The sales to the defendant Halthusen upon the 8th day of August, 1882, are admitted in the answer, but all collusion and bad faith is denied. It is expressly alleged that said transfers were made subject to said prior mortgage to Ruth Ann Newton, aforesaid, and this also is not denied. It alleges violations by appellee of the provisions of the chattel mortgages, and justifies the taking possession of the property. Without objection, the cause was tried to a jury, and under oral instructions, resulting in a verdict for the plaintiff, Wilbur, of \$8,138.82, with interest amounting to \$2,708.41. The interest was subsequently remitted. No specific objection was taken to the charge. One in the general form of an "exception in favor of the defendant" was saved.

At the trial it appeared that in the spring of 1881 plaintiff, Wilbur, and one J. E. Newton formed a copartnership for the carrying on of the livery business at Colorado Springs. On the 12th day of October, 1881, the firm was indebted to the defendant bank in about the sum of \$3,300. It appeared that at this date one Humphrey, who was connected with the institution, had signed an appeal-bond for the benefit of the firm. To secure both the indebtedness and the contingent liability, the firm, on the day named, executed a chattel mortgage upon all the livery stock owned by it, which is specifically set out both in the instrument and in the complaint. Later, the liability upon the bond was apparently extinguished, and the mortgage stood as security for the loan. By its terms and the tenor of the note it was due one year after its date. It contained all the usual grinding provisions of that class of securities as taken by financial institutions, but was expressly made subject to the prior mortgage of Mrs. Newton. In case of default in payment of the principal, or of the interest, which was to be paid monthly, or in the event of an attachment against the firm, or in case the mortgagee should feel "insecure or unsafe in his security," the mortgage was authorized to take "immediate and full possession," and to "proceed to sell the said property at public or private sale, on such terms, and for such price or prices, in such manner, and to such persons, as he might see fit." The debt was not diminished by the payment of any part of the principal, and was increased by a failure to pay the accrued and accruing interest. Later, and in May and July, 1882, the security was somewhat increased by mortgages on other property which had been added by purchase to the stock. These later mortgages were given to secure the identical paper and indebtedness protected by the original instrument. The course of dealing had resulted in the creation of other debts between the parties which appeared to exist in the shape of overdrafts, and a general bank balance against the firm. In July, 1882, as a further security to cover all existing debts, the firm, by assignment, transferred to the bank all its bills receivable and book-accounts.

amounting in value to something like a thousand dollars. Wilbur was left in charge of the collections, and continued to run the business until about the 1st of August, when he voluntarily turned over all the property covered by the mortgages to the bank which held these securities. At the time of the formation of the copartnership between Wilbur and Newton, the firm executed a mortgage to Newton's mother, Ruth Newton, to secure her for the \$4,000 which she had loaned her son to put into the business. The defendant offered this mortgage in evidence, as also the indorsement on its margin showing its satisfaction on the day following the sale to Halthusen. Neither the instrument nor the indorsement were admitted in evidence, and defendants saved an exception to the ruling of the court upon that question. The bank took possession, as the record shows, under the several mortgages executed by the firm covering the property described in the instruments. It was conceded on the trial, and for all its purposes, that the bank had a right, by the terms of the securities, to take possession as and when it did. On the 9th of August, 1882, after the bank had gotten the property under its control, it sold the entire stock at private sale, in a lump, together with the assigned book accounts, to Halthusen, and put him in possession. The price for which both the stock and accounts were sold was \$3,500. With the proceeds the bank canceled the original note of \$3,221.17, and surrendered it to Mr. Newton, formerly one of the concern. The balance was credited to the unsecured account, which amounted to about \$470. This left a balance unpaid, which was charged to profit and loss, but it still stood as a claim against the concern. It was clearly established on the trial that the price which Halthusen paid was far below the actual value of the property, unless he took subject to, and was compelled to pay, the Newton mortgage. After the verdict a motion for a new trial was filed and overruled. From the judgment entered upon the verdict in favor of the plaintiff, Wilbur, the bank appeals.

*L. S. Dixon and A. E. Pattison*, for appellant. *M. B. Carpenter*, for appellee.

*HAYT, J.*, (after stating the facts as above.) To hold that an action in the nature of trover can be maintained, under the circumstances of this case, would be contrary to the uniform current of both American and English authority. To support such an action, the plaintiff must allege and prove a right of possession in himself, and a conversion of the property by the defendant. The right of possession being in the mortgagee, the mortgagor cannot, after default, maintain trover against him for a refusal to surrender the property or for selling it. It is no answer to say that the forms of action have been abolished by our Civil Code. The legal and equitable rights of the parties must still be determined by the same principles that measured the rights and liabilities under the former practice. *Jones, Mortg.* §§ 435, 436; *Landon v. Emmons*, 97 Mass. 37; *Horn v.*

*Reitler*, 12 Colo. 315, 21 Pac. Rep. 186; *Bank v. Ford*, 7 Colo. 314, 3 Pac. Rep. 449. "A mortgagor, after condition broken, while the chattels remain in the hands of the mortgagee, may, under proper circumstances, maintain a bill in equity to redeem, or a bill for an accounting after they are disposed of, and perhaps an action for damages, when the conduct of the mortgagee has been negligent or oppressive; but these actions proceed upon principles quite different from an action of replevin." *Horn v. Reitler*, supra. The complaint proceeds upon the theory that the property was unlawfully converted by the defendants, while admitting that the mortgagee took possession of the property after condition broken. No facts are alleged going to show that the defendants, or either of them, were properly chargeable with fraud, negligence, or oppression. From this brief statement it will be seen that the pleading is so radically defective that it could not have been sustained if a proper demurrer had been directed against it. Instead of demurring, however, appellant answered, taking issue upon the allegations of the complaint, and alleging a *bona fide* sale of the property to Halthusen, and the due application of the proceeds of such sale to the extinguishment of the secured indebtedness. Should it be conceded that the issues were by the answer and replication broadened sufficiently to admit proof of fraud had such evidence been tendered, none was offered except as the inadequacy of price may have tended to establish such fraud. The cause seems to have been tried upon a mistaken theory throughout. The scope and nature of the issues, as understood by counsel at the trial, are made plain by the charge of the court to the jury. They were told that the principal things to be determined were the amount of plaintiff's indebtedness to the bank and the value of the property taken by it. If the value of the property exceeded the indebtedness, the jury were plainly told that the plaintiff was entitled to recover the balance. These were the only questions left by the charge for the jury to determine. No question was submitted to the jury as to the *bona fides* of the sale of the mortgaged property. This should not be considered a matter of surprise, in view of the entire omission of evidence specially directed to this point. The proof is not sufficient to support any cause of action that can be maintained by a mortgagor against a mortgagee in possession after condition broken. Appellee seeks to charge the defendant bank upon the assumption that it had taken property to which the plaintiff had a legal title, and, having disposed of it by sale, it was responsible to him for the difference between the price realized and the market value of the property at the time. It is clear, upon the authorities, that the bank was not responsible upon any such hypothesis, and that the sale, as disclosed by the record, was not a conversion for which it could be held liable. *Landon v. Emmons*, supra; *Atchison v. Graham*, 14 Colo. 217, 23 Pac. Rep. 876; *Metzler v. James*, 12 Colo. 322, 19 Pac. Rep. 885; *Heyland v. Badger*, 35 Cal.



404; *Stamps v. Gilman*, 43 Miss. 456; *Bragelman v. Daue*, 69 N. Y. 69. Aside from this, the judgment rendered is excessive, and cannot for this reason be allowed to stand. The chattels at the date of the sale to Halthusen are alleged in the complaint to have been of the value of \$12,600, and the book-account \$1,300, making a total of \$13,900 as the greatest possible value of the property. As against this, the record discloses that Mrs. Newton held a mortgage upon the property for \$4,000 and accrued interest, amounting at the time of the trial to the sum of \$400. To this total of \$4,400 should be added the sum of \$3,500, received from Halthusen, and we have a total of \$7,900 as the consideration for the sale. If the proof had supported the allegations of the complaint as to the value of the property, and had been otherwise sufficient, appellees would have been entitled only to a judgment for the difference between these two amounts, or \$6,000, while the judgment rendered is for \$8,138.35. The proof, however, fell short of sustaining the allegations of the complaint in reference to value. As we have seen, it is admitted by the pleadings that the sale was made subject to the Newton mortgage for \$4,400; and although it does not appear that the attention of the court below was called to this state of the pleadings at the trial, nevertheless the parties to the litigation and their attorneys must be held to have understood that such title as Halthusen acquired was subject to the Newton mortgage. This money was due Mrs. Newton. It was never paid to the bank, and it was neither liable to Mrs. Newton nor to the plaintiff for it. Such rights as she may have had by reason of her mortgage upon the property were neither extinguished nor in any way impaired by the sale to Halthusen. If any person was entitled to recover this amount, it was Mrs. Newton, and not the plaintiff, and she is not a party to this action.

In view of a retrial of the case, we deem it necessary to notice briefly the contention of appellants that the title of a mortgagee in possession after condition broken is absolute. While his title is sometimes stated to be absolute, this is only true at law, and the use of the word, even in this connection, is misleading, in view of the reserved rights of the mortgagor as defined by the modern decisions. It is now well established that he will be held to the exercise of reasonable care and diligence in the disposition of the property, and also to account for any surplus remaining after his debt is fully discharged. *Bird v. Davis*, 14 N. J. Eq. 474; *Stromberg v. Lindberg*, 25 Minn. 513; *Webber v. Emmerson*, 3 Colo. 248; *Metzler v. James*, supra; *Wygal v. Bigelow*, 42 Kan. 479, 22 Pac. Rep. 612; *Leach v. Kimball*, 34 N. H. 568; *McConnell v. People*, 84 Ill. 583; *Hungate v. Reynolds*, 72 Ill. 425. The judgment will be reversed, and the cause remanded, with direction to the district court to allow the parties to amend the pleadings as they may be advised.

ELLIOTT, J., having presided at the trial below, did not participate in this decision.

DENVER & R. G. R. CO. v. STARK.

(*Supreme Court of Colorado*. May 7, 1891.)

EMINENT DOMAIN—VERDICT—BENEFITS.

The eminent domain act of Colorado (Code Civil Proc. § 254) provides that the verdict of the jury awarding damages shall state a description of the land taken, with its value; the damages, if any, to the residue; and the amount and value of the benefit. *Held*, that where the court refuses to instruct that the verdict must be in the language and form of the statute, and the verdict fails to show any finding as to the benefit, the judgment will be reversed.

Commissioners' decision. Appeal from district court, Montrose county.

*Wolcott & Valle and Bell & Goudy*, for appellant. *Simmons & Wilson*, for appellee.

RICHMOND, C. This was a proceeding instituted by appellant herein for the purpose of condemning a right of way through a tract of land owned by the appellee, H. M. Stark, and situate in the county of Montrose, Colo. To the petition answer was filed, and thereafter a jury selected for the purpose of determining the compensation to be awarded. To the manner of selecting the jury appellant objected, and also to the instruction of the court. The trial resulted in a judgment for appellee for the sum of \$1,368. Motion to set aside the verdict and for a new trial duly made and overruled. Many errors are assigned, but we think the only one to be considered is the error of the court in its instructions to the jury, and its refusal to set aside the verdict and grant a new trial. The eminent domain act (Code Civil Proc. § 254) provides that the report of the commissioners or the verdict of the jury in every case shall state: *First*, an accurate description of the land taken, *second*, the value of the land or property actually taken; *third*, the damages, if any, to the residue of such land or property; and, *fourth*, the amount and value of the benefit. The judge, although requested to instruct the jury that their verdict should be in the language and form as provided by statute, declined to do so, and the verdict of the jury fails to state the amount and value of the benefit, if any, as provided by this act. The record discloses that the jury in person inspected and reviewed the premises, besides hearing much testimony, and the statute contemplates that they should pass upon the question of whether or not the land of the defendant would be in any manner benefited by the construction of the road as contemplated by the petition. It is very evident from the record that the jury did not pass upon this question. This court in the case of *Railroad Co. v. Rudd*, 5 Colo. 270, has settled the question here under consideration. In that case it is decided that the matter of benefits must be considered, and that the statute must be strictly pursued. Accepting that decision as conclusive of the question here, we are compelled to recommend that the judgment of the court below be reversed, and the case remanded for further proceedings.

BISSELL and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed.

COCHRANE V. JUSTICE MINING CO. *et al.*

(Supreme Court of Colorado. May 7, 1891.)

AGREEMENT FOR MINING LEASE — SUFFICIENCY — SPECIFIC PERFORMANCE.

1. A mining company advertised for bids for the lease of its property, in answer to which plaintiff offered "to take lease on the whole property at 35 per cent. royalty at eighteen months, and agree to expend at least \$5,000 every month in development work; I to have 30 days to begin work, in order to make examination of property, and put machinery in place. Lease to date from time of commencing work. Settlement as usual." At a meeting of the officers of the mining company it was moved and carried that plaintiff's bid be accepted, and the president empowered to draw up a lease in conjunction with plaintiff, and present it to the board of directors for their consideration. The president thereupon telegraphed to plaintiff that the lease had been awarded to him. *Held*, that this constituted a binding and concluded agreement for a lease.

2. The time for the beginning of the term, as fixed by plaintiff's offer, is sufficiently definite to support a decree of specific performance.

3. The words "settlement as usual," in connection with the specified royalty, are sufficiently definite as to the matter of compensation where they may refer either to the custom of the district or to the terms of settlement under a prior lease that plaintiff had of the same property.

4. It is no defense to a suit for specific performance that the company had already leased a part of the property, and could not make a lease of the whole, especially where plaintiff had offered to take the residue.

5. Plaintiff is not bound under this contract to accept a lease which requires him to do certain work on the property regardless of its productiveness, and gives the lessor the privilege under certain contingencies to dispose of the ore mined.

BISSELL, C., and HAYT, J., dissenting.

Commissioners' decision. Error to district court, Lake county.

T. J. O'Donnell and L. S. Dixon, for plaintiff in error. Rucker & Titcomb, for defendants in error.

REED, C. This was a suit in equity, brought by plaintiff in error against the defendants, to compel the specific performance of an alleged contract to lease certain mining property in the county of Pitkin. Upon the hearing a decree was entered dismissing the suit. The pleadings were very lengthy, and a large mass of testimony was taken. The issues made by the pleadings, and the facts established by the testimony, deemed necessary for an understanding of the case, are, to save repetition, embraced in the opinion instead of in a statement of the case. There are numerous assignments of error, many upon minor and unimportant points. The only one necessary to be considered is the general one, — the twelfth: "That the court erred in its finding, judgment, and decree in favor of the defendant and against the plaintiff." There being no serious controversy in regard to the facts and premises, the determination of the case depends upon the solution of the following questions or propositions: *First*. Did what transpired between the parties constitute a binding and concluded agreement for the lease of the property; and, if so, was it sufficiently

definite to be enforced in a proceeding to compel specific performance? *Second*. Was the failure to consummate the agreement by a written contract of lease attributable to the plaintiff or defendants? The advertisement for bids to lease the property of defendants was as follows: "Bids will be received at the office of the Justice Mining Co., up to noon on March 18, 1889, for lease or leases on the properties of the Justice Mining Co., consisting of the Justice, Marlin, Monte Cristo, and Western Union, situated in Tourtelotte park, and consisting of 26.8 acres. Bids to be addressed to Peter Lux, President J. M. Co." In response to this, plaintiff, who had formerly with others a lease upon and worked the same property, as alleged, at great pecuniary loss, made three proposals or bids, — two for a portion of the property, which we need not consider, and the third for the entire property, as follows: "I will take lease on the whole property at thirty-five per cent. royalty at eighteen months, and agree to expend, under the best management obtainable, at least five thousand (\$5,000) dollars each and every month during life of lease in development work, I to have thirty (30) days to begin work, in order to make examination of property, and put machinery in place. Lease to date from time of commencing work. Settlement as usual." At a corporate meeting of the officers of the defendant the third proposition or bid of plaintiff was accepted, and evidenced by the following entry made in the minutes of the corporate proceedings: "After some deliberation it was moved and carried that F. T. Cochrane & Co.'s proposition for lease on the three sections of the Justice Mining Co.'s property, according to paragraph 3, be accepted. (Date of proposition, Denver, Colorado, March 16, 1889.) Moved and carried that all other bids be rejected." And as appears in the minutes of the same meeting, the following corporate action was taken: "Moved and carried that the president be empowered to draw up the lease in conjunction with Mr. Cochrane, or his agent, and present it to the board of directors for their consideration. Moved and carried we now adjourn subject to the call of the president." On the same day the defendant, by Peter Lux, its president, sent the following telegram to plaintiff at Denver: "F. T. Cochrane, Senate Chamber: Lease awarded to you on last proposition. PETER LUX." The advertisement or offer to lease was definite in regard to the property to be leased, naming the respective claims constituting the property, and giving the aggregate area in acres and fractions of an acre. The bid of plaintiff was, as to extent of property, length of term, percentage or rental to be paid, and amount to be expended monthly in development, and manner of expenditure, equally definite. The corporate acceptance by defendants entered of record, was a general and unqualified acceptance of the plaintiff's bid as made, and the notification of the acceptance general and unqualified. Under the authorities, to create a valid contract of lease but few points of mutual agreement are necessary: *First*,

there must be a definite agreement as to the extent and bounds of the property leased; *second*, a definite and agreed term; and, *third*, a definite and agreed price of rental, and the time and manner of payment. These appear to be the only essentials; the others, such as the covenant for the peaceful possession on the part of the lessor, diligent, proper, workman-like and continuous working with a view to best results, both present and prospective, on the part of the lessee; and where, as in this case, the rental is a share or percentage of the proceeds, the disposition of the ore to the best advantage, the keeping of accurate and honest accounts and making honest returns, are secondary and implied covenants, growing out of the principal agreement.

It is contended by counsel for defendants that the above-recited acts of the parties did not constitute a concluded agreement; that they in certain respects lacked the necessary definiteness, and could only be regarded as inconclusive negotiations in regard to a specific contract to be afterwards agreed upon and executed by the parties. It is contended, first, that there was no definite time designated for the beginning of the term. With this, we cannot agree. The language of the bid is: "I to have thirty days to begin work."

\* \* \* Lease to date from time of commencing work." If the offer was accepted, and plaintiff notified of its acceptance, the agreement for lease would be concluded as of that date, and the 30 days would commence to run, and the term would commence at the expiration of the 30 days. It is also contended that there was a want of definiteness in regard to the basis upon which the rental of 85 per cent. was to be computed, as to what expenses of production the gross proceeds from ore were to be subject before calculating the percentage, and the offer of plaintiff, containing in regard to payment only the words, "settlement as usual." It is contended that there would be no concluded contract until the terms of payment were definitely settled, specified, and defined. The plaintiff had for a long time been a lessee of the same property. The clause "settlement as usual" evidently relates to one of two well-understood premises, either—*First*, to the former method of computation and time and manner of payments existing between the parties; or, *second*, a well-known and established custom of the district; either one of which was sufficiently definite to constitute a part of the contract. It is immaterial to which it referred. It is evident from the action of the board of officers that it was properly understood at the time of the acceptance. No objection was made to it on account of uncertainty or indefiniteness. Nothing more definite was required or asked. The acceptance was complete and unqualified. Had the indefiniteness now relied upon in argument suggested itself to the officers at that time, it would necessarily have resulted in the rejection of the bid, or in requiring a better defined offer. In *Van Ness v. Pacard*, 2 Pet. 148, it is said: "Every demise between landlord and tenant in re-

spect to matters in which the parties are silent may be fairly open to explanation by the general usage and custom of the country or of the district where the land lies. Every person, under such circumstances, is supposed to be conversant of the custom, and to contract with a tacit reference to it." This is the universal doctrine, and further authority is considered unnecessary. From this it will be apparent that all the essentials necessary to constitute a concluded agreement of lease were contained in the advertisement, bid, and acceptance, and that the element of indefiniteness was such that it was capable of being made definite by reference to former course of dealing, or the customs of the district. In *Bish. Cont. § 322*, it is said: "If one makes to another an offer, verbal or written direct, by letter or by telegram, of a sort implying nothing to be done except to assent or decline, and the latter accepts it, adding no qualification, there is thus constituted a mutual consent of the same thing at the same time,—in other words, a contract." In support of this elementary proposition, see *Smith v. Colby*, 136 Mass. 562; *Cheney v. Transportation Line*, 59 Md. 557; *Highland Co. v. Rhoades*, 26 Ohio St. 411; *Wells v. Railroad Co.*, 30 Wis. 606; *Abbott v. Shepard*, 48 N. H. 14. It is contended on the part of defendants that there was no concluded agreement, for the reason that, at the same corporate meeting at which the bid of plaintiff was accepted, there was a subsequent motion passed and entered of record, in which the president was "empowered to draw up the lease, in conjunction with Mr. Cochrane or his agent, and present it to the board of directors for their consideration." This contention cannot prevail: *First*, the language used—"the lease"—presupposes a contract already in existence; *second*, it in no way attempts to modify, qualify, or restrict the contract as made and accepted; *third*, the proceeding was *ex parte*, was not communicated to the plaintiff or brought to his notice, appears to have been simply a designation of a party who should represent the defendants in reducing the contract to writing and attending to its execution as the agent of the corporation. Had it been embraced in the resolution of acceptance, and communicated to the plaintiff, it could in no way have modified the contract, or had the effect claimed by counsel for defendants. The rule is well settled that, where the agreement is made by written communications, it must appear from them, or some of them, and be known to both parties, that the execution of the formal lease was to be a condition precedent to the agreement becoming obligatory. In *Bonnewell v. Jenkins*, 8 Ch. Div. 74, decided in 1878, in the court of last resort in England, the same question was presented, but under circumstances far more favorable for the contention of the defendant than those in this, in that the letter of acceptance contained the following: "We are instructed to accept your offer of 800 pounds for these premises, and have asked Mr. Jenkins' solicitor to prepare a contract." In discussing the question, Fry, J., said: "Now, if the matter

were not covered by decision, it is very probable that I should feel myself drawn to the conclusion that wherever there is a reference to a future contract the letters themselves do not constitute a contract, and for this very obvious reason: that a reference to a contract as a future thing seems to negative the notion of the existence of a contract as a present thing. But it is too late for that argument to be used before me successfully when a long series of cases has established this proposition: that the mere reference to a future contract is not enough to negative the existence of a present one." BAGGALLAY, L. J., said: "But the letter must be expressed in such a way as to show clearly that such a condition is intended." THESIGER, L. J., said: "The mere reference to the preparation of an agreement by which the terms agreed upon would be put into a more formal shape, does not prevent the existence of a binding contract." JAMES, L. J., said: "Whether there is a binding contract or not depends on the construction of two letters. It is settled law that a contract may be made by letters, and that the mere reference in them to a future formal contract will not prevent their constituting a binding bargain." In that case, COOKSON, Q. C., cited and relied upon the same cases cited and relied upon by the defendants in this case, viz.: *Ridgway v. Wharton*, 6 H. L. Cas. 238, and *Honeyman v. Marryat*, Id. 112. But they were distinguished and disregarded by the court, and a decree for specific performance entered.

The question as to whether the contract was sufficiently definite to be enforced in a suit for specific performance is answered in disposing of the first question, viz., whether there was a concluded contract for lease. The general rule, as above shown, is: "An offer or proposal made by one party, and the acceptance thereof by the other, constitutes a contract; in other words, a contract is thereby concluded so that it may be enforced." Pom. Spec. Perf. § 59. And whenever it is shown that there was a definite and concluded legal contract, it may be enforced by suit for specific performance. There appears no conflict of authority on this point. The leading English cases in support of the positions here taken are: *Kennedy v. Lee*, 3 Mer. 441; *Fowle v. Freeman*, 9 Ves. 351; *Bonnewell v. Jenkins*, supra. See, also, the following cases in England: *Crossley v. Maycock*, L. R. 18 Eq. 180; *Thomas v. Dering*, 1 Keen, 729; *Gibbins v. Board*, 11 Beav. 1; *Skinner v. McDouall*, 2 De Gex & S. 265; *Jaques v. Millar*, 6 Ch. Div. 153. And in the United States, *Pratt v. Railroad Co.*, 21 N. Y. 305, in which it was said by SELDEN, J.: "If two parties negotiate for a lease of certain premises, and they agree upon the terms and conditions of the lease, and that a written lease shall be drawn and executed embracing those terms, this is not a lease, but it is a contract, which, whenever the statute of frauds does not interfere to prevent, can be enforced, and which the courts will compel the parties specifically to perform.

The books are full of such cases, and it can hardly be necessary to refer to them at length." See, also, *Mackey v. Mackey*, 29 Grat. 158; *Cheney v. Transportation Line*, supra; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Blaney v. Hoke*, 14 Ohio St. 292; *Clark v. Clark*, 49 Cal. 586. Our conclusion is that the acts of the parties in the premises constituted a definite and concluded agreement for a lease, and that there was nothing that could not have been made definite and certain by means of knowledge and data in the possession of the parties, and that it was so considered by the defendants at the time of the corporate acceptance of the offer. It is true, as contended by counsel, that there is a material difference between an unaccepted proposal and a binding agreement, between negotiations preparatory to an agreement and the agreement itself; but counsel seem to confound the concluded agreement or contract of lease with the written document to be drawn subsequently and executed by the parties, which paper in this case could only be evidence of the contract concluded at the time of the corporate acceptance. Counsel have briefed and argued the case of defendants with great care and ability, have collected and cited a large number of authorities, which we have carefully examined, and we fully agree with counsel when they frankly say: "It may be that none of the cases cited above are exactly parallel to the present case, but they are the nearest that we have been able to find." There was no want of diligence. The trouble is, when applied to the premises in this case, the great weight of authority is overwhelmingly against the position sought to be sustained.

The remaining question is whether the plaintiff or defendants was in fault; in other words, has plaintiff shown himself entitled to the relief asked? The question is comparatively free from embarrassment. The offer of defendants to lease by its terms contained the entire mining property; the respective claims were named, and their aggregate are given as 26.8 acres. The offer of plaintiff was for the entire property. No lease of the entire mining property was ever tendered; the "Crowe shaft" with surface ground was excepted and reserved for a part of the term. It is conceded that it had at the time of the contract been leased to other parties. It is claimed by defendants that the fact was known to plaintiff at the time of making the contract. This fact cannot prevail as a defense. The knowledge on the part of plaintiff, if it existed, would not relieve defendants from the necessity of complying with their contract. It is also contended that the suit could not be maintained because of the inability of defendants to perform by reason of having leased the Crowe shaft previous to the contract with plaintiff. It appears that, between the date of the advertisement for bids and the awarding of the lease to plaintiff, defendants had leased part of the property to other parties, and had also leased the boarding-house used with the property. It would be sufficient answer to this contention to say that, having already leased to other parties,

the exception and reservation of those portions should have been made at the time of making the contract with the plaintiff. Another sufficient reason why it cannot prevail lies in the fact that plaintiff offered to adjust the matter by receiving the rent which was to be paid to the defendants, which offer was refused. The law is well settled that a lessor who cannot fully comply with his contract will not be allowed to set up his own inability to perform as a defense when the lessee is willing to take what can be demised, and compensation for the balance. See Pom. Spec. Perf. § 388, and cases cited. It is obvious that under the agreement plaintiff was entitled to the entire mining property, including the Crowe shaft, or the income from the portions leased. We leave the question of the boarding-house out of the discussion, for, although claimed by plaintiff as a part of the property to which he was entitled, it was not specifically mentioned in the papers constituting the agreement. The offer of plaintiff, as accepted by defendants, as before shown, contained the following: "And agrees to expend under the best management obtainable at least \$5,000 each and every month during life of lease in development work." The lease tendered by defendants and refused by plaintiff contained the following: "To sink a shaft upon the Justice or Monte Cristo claims aforesaid, from the surface, at or near the east end line of said Justice claim, and near the west side line of the Last Dollar lode claim, adjoining said Justice, upon the easterly side line of said Justice. Said Justice and Monte Cristo claims overlap each other at or about the place said shaft is to be sunk, and the location of same is to be mutually agreed upon by the president, vice-president, and secretary of the Justice Mining Co. and the lessee herein." And after elaborate specifications in regard to size and construction of shaft, timbering of the same, etc., proceeds: "Said shaft to be sunk no less than six hundred (600) feet in depth from the surface: provided, however, that mineral in place and in paying quantities be not discovered before said depth shall have been reached, in which event said lessee may drift on the same in any direction within the boundaries of the premises leased: provided, however, that the lessee shall sink said shaft to the depth aforesaid,—that is, six hundred (600) feet,—even if mineral be discovered before said depth is reached." The offer of plaintiff must be construed to mean the expenditure of the money in development in such a manner as to produce ore during the existence of the lease, and thus benefit both parties. He cannot be reasonably understood as offering to expend his money in a way that would only inure to the benefit of the lessor. The provision for the expenditure of a large amount of money in sinking a shaft at a point designated by the lessor, and to a given depth, regardless of its utility in the production of ore, was arbitrary, and certainly not contemplated in the offer. The sinking of the shaft at the point designated to the "contact" or ore body might be proper and

mutually beneficial, but the same cannot be said of its extension an indefinite distance in barren rock, which could not add to the ore product during the lease, and could only add to the value of the property of the lessor. The lease tendered also contained the following: "Shall use his best ability and endeavors to obtain the best price for all ores mined under this lease, and to handle and dispose of the same to the best possible advantage of both parties hereto, and the lessor shall have the right to co-operate with the lessee for the purposes aforesaid; and whenever the lessor can procure better terms as to treatment and sale of the ores mined than the lessee, the lessor shall have the right to dispose of the ore so as to realize greater profit to the lessor and lessee." Such a provision was certainly not contemplated,—the reservation of a power certainly unusual, if not unheard of, in that class of leases; a provision incompatible with the relations of the parties to the property, and as destructive of the rights of the lessee as would have been a covenant allowing the lessor to take possession of the property and work it whenever in the judgment of its officers it could do so to better advantage than the lessee. It is claimed, and not without reason, that the provisions allowing no deduction for expense of delivering the ore from the mines to Aspen, the requiring the lessee to pay 65 per cent. of the taxes upon the property, and some other provisions contained, were harsh, arbitrary, and oppressive, not contemplated in the contract, and unusual in mining leases; but a discussion of them seems unnecessary. The lease drawn and tendered by defendants was refused by plaintiff. One was drawn and tendered by plaintiff, in which, as shown by the evidence and a perusal of the lease, many concessions on the part of plaintiff were made with a view to closing the matter, and the lease was rejected by the defendants. In the letter of plaintiff transmitting the draft of the lease, after saying in regard to the lease sent him by the defendants to be executed: "It has many clauses in it that I never agreed to, and which are unreasonable and unfair,"—he proceeds to say: "I have had a lease drawn which covers my offer, which you accepted. I believe it is fair to both sides. If it does not comply with my offer it is a mistake, and I am ready to correct it, to agree in every respect with my offer." This was written on March 29th. No notice of it appears to have been taken on the part of defendants, no attempt to arrive at a proper determination of the matter. On April 12th the following was sent by defendants to plaintiff: "To Frank T. Cochrane: You are hereby notified that, owing to your failure to execute and return to this company the lease heretofore sent you on or about the 21st day of March, and to be executed by you and returned to this company on or before the 1st day of April, 1889, the undersigned, the Justice Mining Company, hereby withdraws and rescinds said lease tendered for your acceptance, and rescinds and holds for naught all negotiations and offers heretofore conducted and made concerning

the leasing of the property of said company to you, and holds and declares itself free from any and all obligations to you in the premises. Witness the seal of the company and the signatures of its president and secretary this 9th day of April A. D. 1889. PETER LUX, President. J. W. RICHARDS, Secretary. [Justice Mining Co. Seal. Aspen, Colo.] Comment upon this document is unnecessary. The failure to execute the lease sent by defendants to plaintiff is made the basis for abrogating and rescinding the contract, and the closing of all negotiations concerning it. It will be apparent that no effort was made on the part of the defendants to comply with their contract; and if it does not show an intention to avoid the agreement, it certainly shows no attempt or desire to comply with it. We think the court erred in dismissing the suit, and that a decree for specific performance should have been allowed, and advise that the judgment be reversed.

RICHMOND, C.: I concur.

BISSELL, C.: I dissent.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed.

HAYT, J., (*dissenting*.) A decree for the specific performance of a contract is sought in this action. The contract is alleged to have been entered into between appellant and appellees upon March 18, 1889. The controversy turns almost entirely upon a bid made by plaintiff in error, Cochrane, for a lease upon a certain mining property, and the action of the board of directors of the Justice Mining Company taken thereon. The bid is as follows: "(3) I will take lease on the whole property at 35 per cent. royalty at eighteen (18) months, and agree to expend, under the best management obtainable, at least \$5,000 each and every month during life of lease in development work, I to have thirty (30) days to begin work, in order to make an examination of property, and put machinery in place. Lease to date from time of commencing work. Settlements as usual. [Signed] FRANK T. COCHRANE & Co." The action of the board of directors relied upon to bind the company was taken upon March 18, 1889, and is evidenced by the following entry upon records of the company: "Moved and carried that Frank T. Cochrane and Company's proposition for lease on three sections of the Justice property, according to the terms of paragraph 3, be accepted. Moved and carried that all other bids be rejected. Moved and carried that the president be empowered to draw up the lease, in conjunction with Mr. Cochrane or his agent, and present it to the board of directors for their consideration." Shortly thereafter a lease was prepared, satisfactory to the company, and forwarded to plaintiff in error for his acceptance. This lease Mr. Cochrane would not accept. He in turn prepared a lease, which the company refused to sign, and, the parties not being able to agree upon the terms of the

lease, Mr. Cochrane brought this suit to enforce the specific performance of the alleged contract, and compel the company to execute a lease to him in accordance therewith. About the time of the meeting of the board of directors at which the foregoing resolutions were adopted, and before plaintiff in error was notified of the action taken by the company, he caused to be sent to the president of the Justice Mining Company, then at Aspen, the following telegram: "Peter Lux: Hold my bids for leases until arrival of John Beach, Tuesday. F. T. COCHRANE." This telegram, which was delivered before appellant received notice of the action of the board of directors, was immediately supplemented by the following letter: "Denver, March 18, 1889. Peter Lux, Esq., Aspen—Dear Sir: Please allow Mr. John Beach to correct my bids for leases, and add to them as he sees fit, as I have now some information that I did not have when I made them. He will return to you at once. Yours, truly, F. T. COCHRANE." The language of the concluding clause of the resolutions of the board of directors relied upon as binding the company shows quite plainly that further action was contemplated by the board before any contract was to be entered into. The president of the company was not authorized to execute the lease with Mr. Cochrane. He was only authorized to draw up the lease in conjunction with Mr. Cochrane or his agent, and submit the same "to the board of directors for their consideration." It is unreasonable to suppose that it was to be submitted to the consideration of the board of directors with no power reserved in that body to change its terms. It is more reasonable and natural to conclude from the language employed that further action was to be taken by the company before it should be definitely and irrevocably bound. In view of this resolution, and the telegram and letter from Cochrane, it may well be doubted if the court below was not right in holding that there was no contract concluded between the parties. But, should we concede the contrary, this would not, in my opinion, change the result; the bid and its acceptance not being sufficiently definite and certain to admit of a decree for specific performance. Take, for instance, the item of 35 per cent. royalty. Is this percentage to be based upon the gross output of the mines, after deducting transportation and smelting charges, or transportation charges only, or was the lessee to pay both? These are matters of considerable magnitude, and they are left in uncertainty, with no data by which they may be determined. So also in the matter relied upon as constituting an agreement there is nothing fixed as to the place where the development work is to be expended, and nothing whatever as to the nature or character of such work. In reference to the item of royalty the learned judge who tried the case below well said: "This is always a matter of convention between the parties. Settlement on smelter returns in the mining camp where the property is situated, so far as our observation has gone, is always the subject of conven-

tion between the parties. In some instances the lessee pays the cost of transportation from the mine to the railroad and from the railroad to the smelter. Sometimes he is only required to pay transportation from the mine to the railroad." In this connection it should be added that the words "settlements as usual" evidently refer to the time only at which settlements were to be made. Upon the items mentioned, and many others, there is a wide, and apparently an honest, disagreement between appellant and appellees. There are some 18 points of difference between the two leases,—the one submitted by the company, and the one prepared by Mr. Cochrane. It should not be a matter of surprise, under the circumstances, that the court below, after patiently listening to the evidence, reached the conclusion that a decree for specific performance was not warranted. The evidence offered is not sufficient, in my judgment, to establish the terms of a contract with anything like the definiteness and certainty required to warrant a decree for specific performance, and the judgment of the trial court should therefore be affirmed.

**BARRY v. GOAD et al. (No. 12,984.)**

(*Supreme Court of California. May 26, 1891.*)

**BOARDS OF EDUCATION — INSPECTING TEACHERS —  
INJUNCTION.**

1. The board of education of the city and county of San Francisco, under the authority given it by Act Cal. April 1, 1872, to employ teachers, and fix, allow, and order paid their salaries, cannot appoint and employ "inspecting teachers" to perform duties imposed by the act on the board itself, and on the superintendent, consisting of visiting the schools, ascertaining their condition by oral examinations, observing the methods of the teachers, and giving them advice and instructions in the methods of teaching.

2. A tax-payer may maintain an action to enjoin the board from drawing drafts on the school fund in favor of such inspecting teachers, without showing that he will sustain any special injury different from that of the public at large.

In bank. Appeal from superior court of city and county of San Francisco; N. HAMILTON, Judge.

*Otto Tum Suden and Horace W. Philbrook*, for appellant. *Jos. Rothschild*, for respondents.

HARRISON, J. The plaintiff, a resident and tax-payer of the city and county of San Francisco, brought this action for the purpose of restraining the board of education of said city and county from drawing any draft upon the school fund in favor of the defendants, Kennedy and Fowler, in compensation for services rendered and to be rendered under an appointment from said board, upon the ground that such appointment was unauthorized by law. In their answer to the complaint the defendants set forth the order under which they allege that the said Kennedy and Fowler were employed, in which is specified in detail the duties required of them. Upon the trial of the cause the court made the following findings of fact: "(1) That the allegations in plaintiff's complaint are not sufficient in law to entitle plaintiff to any relief or

any judgment; (2) that all the affirmative allegations in defendants' answer are true;" and thereupon rendered judgment in favor of the defendants. The board of education of the city and county of San Francisco is a creature of the legislature, and has only such powers as have been conferred upon it. It has no authority to divert the moneys of the school fund to any purposes other than such as have been expressly authorized by law. By Act April 1, 1872, (St. 1872, p. 846,) defining the powers and duties of the board, it is declared: "Section 1. The board of education of the city and county of San Francisco shall have power: \* \* \* Third, to employ and dismiss teachers, janitors, and school census marshals, and to fix, alter, allow, and order paid their salaries or compensation." The board is also authorized "to employ and pay such mechanics and laborers as may be necessary to carry into effect the powers and duties of the board;" and "to employ and pay counsel" for the purpose of prosecuting and defending actions relating to the property of the school department. St. 1864, p. 162. Section 15 of the act of April 27, 1863, (St. 1863, p. 606,) declares that the school fund of the city and county of San Francisco "shall be kept separate and distinct from all other moneys, and shall only be used for school purposes under the provisions of this act;" and section 16 of the same act declares: "The said school fund shall be used and applied by said board of education for the following purposes, to-wit: First, for the payment of the salaries or wages of teachers, janitors, school census marshals, and other persons who may be employed by said board." The "other persons" herein referred to are "mechanics and laborers," and the "counsel" authorized by section 2 of the same act, as amended in 1864. St. 1864, p. 162. Aside from these provisions, we have not been cited to any statute which authorizes the board to employ any person in any capacity other than those above mentioned, or to direct payment out of the school fund for any services other than such as may be rendered under the above-named employments. It is alleged by the defendants in their answer herein that on or about the 20th day of March, 1883, the board of education of the city and county of San Francisco adopted a resolution to appoint and employ, and did appoint and employ, the defendant Laura T. Fowler inspecting teacher; and in said resolution it was provided that the special duty of such inspecting teacher should be to "visit schools, and ascertain by frequent oral examinations the condition of the classes; to observe carefully the methods of teaching and discipline pursued by the teachers; to give advice and assistance to teachers and principals when necessary, and in their presence and before their classes exemplify the best method of teaching; that the inspecting teacher shall be subject to the direction of the superintendent and deputy superintendent of public schools for the accomplishment of a careful, efficient, and thorough inspection of the schools, under such further direction



or instructions as may from time to time be given by the committee of classification and credential and qualification of teachers, subject to the approval of the board, at a salary of \$175 a month;" and that this was the only order under which the defendant Fowler was employed by said board; that on or about the 5th of January, 1887, it appointed and employed the defendant Kennedy as head inspecting teacher of the public schools of said city and county, at a compensation of \$200 per month; and that said defendants Kennedy and Fowler have ever since been engaged in the performance of their duties under said employment. This averment by the defendants of the resolution or order under which the defendants Kennedy and Fowler are employed by the board of education is substantially the same as that alleged in the complaint, and is treated in the briefs upon both sides as expressing the duties required of said defendants under their employment by the board.

It is contended by the respondents that under its power to employ "teachers" for the public schools, the board had authority to employ Kennedy and Fowler as "inspecting teachers" to perform the duties provided by the resolution under which they were appointed; and that these duties are peculiarly such as appertain to the functions of a teacher. On the other hand, it is claimed by the appellant that the duties required of these "inspecting teachers" are precisely such as the statute has imposed upon the superintendent of schools and the board of education itself, and that the board cannot, by merely giving its appointees the title of "inspecting teachers," transfer to them the duties which the statute has imposed upon itself or upon the superintendent. Section 3 of the act of April 1, 1872, (St. 1872, p. 848,) declares that "it shall be the duty of the superintendent of common schools of the city and county of San Francisco—First, to visit and examine every school under the board of education as often as once in every six months; to inquire into all matters relating to the government, course of instruction, books, studies, discipline, and conduct of such schools; \* \* \* and to counsel with and advise the teachers in relation to their duties, the proper studies, discipline, and conduct of the pupils, the course of instruction to be pursued, and the books of elementary instruction to be used; \* \* \* and to make a monthly report to the board of education, stating which schools have been visited by him, and adding such comments in respect to the matters here specified as he may deem advisable;" and by the first section of said act the board of education is authorized "to establish and regulate the grade of schools, and determine the course of studies, and the mode of instruction to be used in said schools." It is apparent, upon a comparison of the provisions of these statutes with the resolution defining the duties of inspecting teachers under which the defendants Kennedy and Fowler were employed, that the special duties which these inspecting teachers are to perform are such, and such only, as the statute has prescribed as a por-

tion of the duties of the superintendent and of the board of education. Aside from the normal schools, which it is the duty of the board to provide "for the instruction of those who desire to become teachers," the only "teachers" which it has the power to employ are those whose duties are to instruct the children (between the ages of six and twenty-one) for whose benefit the public schools are maintained. The duties, however, which under the resolution authorizing their appointment are required of the inspecting teachers, in no respect pertain to instruction, but are simply those which would pertain to a superintendent or inspector of the several schools to which their attention is directed. The action of the board cannot be upheld upon the ground that its appointees are termed "inspecting teachers," if, in fact, their duties are those of "inspectors" rather than of "teachers." The character of the appointees must be determined from the functions which they are to discharge, and not from the name by which they are called. As is conceded by counsel for respondents in his brief, "it is by the resolution appointing them, and defining their duties, their *status* must be determined." If the duties which they are to perform are those of a superintendent, it is immaterial whether they are styled "superintendent" or "inspector" or "inspecting teacher." It needs no argument to show that the board cannot transfer to its own appointees the duties that the statute has devolved upon another officer, or appropriate any portion of the school fund to a payment for services that the legislature has declared shall be rendered by the board itself without compensation, or be performed by the superintendent as a part of the duties for which he was elected. The statute allows to the superintendent only one deputy, and his compensation cannot be paid out of the school fund. Pol. Code, § 1549. If the board can appoint persons under the name of "inspecting teachers" to perform the duties which appertain to the office of the superintendent, or of his deputy, and cause their compensation to be paid out of the school fund, it would thus indirectly do that which is forbidden by statute.

We fully recognize the force of the argument on behalf of the respondents, that great advantage would accrue to the public schools from the services of competent persons appointed to discharge the duties specified in this resolution of appointment, and we readily concede that the board in making the appointment was prompted solely by its desire to increase the efficiency of the school department. It is also easily perceived that the services of capable persons in the discharge of the duties required under this resolution would be of great aid to the board in remedying any defects that might be found to exist in the conduct of the schools, and in increasing the efficiency of the teachers in giving instruction to their pupils. The board of education is, however, in the exercise of a public trust, limited by the act under which it was created, and with only such powers as the legislature has seen fit to confer. If by experience it has found that

these limitations are too great, or that the powers conferred are insufficient to enable it to properly discharge its trust, the board is not at liberty to disregard the limitations, or to exercise powers not conferred upon it. The remedy for these defects must be sought from the legislature. The objection that the plaintiff cannot maintain this action, for the reason that he does not show that he will sustain any special injury different from that of the public at large, is untenable. *Winn v. Shaw*, (Cal.) 25 Pac. Rep. 968. The judgment of the superior court is reversed, and that court is directed to enter judgment for the plaintiff in accordance with the prayer of his complaint.

We concur: BEATTY, C. J. ; DE HAVEN, J. ; PATERSON, J. ; GAROUTTE, J. ; SHARPSTEIN, J.

*In re MOORE'S ESTATE.* (No. 14,275.)

(*Supreme Court of California.* May 6, 1891.)

Department 1. Appeal from superior court, Sacramento county. W. C. VAN FLEET, Judge.

*Johnson, Johnson & Johnson*, for appellant. *Cullin & Blanchard*, for respondent.

PER CURIAM. Upon the authority of *Estate of Bauquier*, No. 14,080, (see opinion filed on denying petition for rehearing, ante, 532.) the motion to dismiss the appeal in this cause is denied.

89 Cal. 70

*BURGEL et al. v. PRISSE.* (No. 13,645.)

(*Supreme Court of California.* May 14, 1891.)

EJECTMENT—TENANCY IN COMMON—JUDGMENT.

Where, in ejectment, it appeared that the land had been the community property of the plaintiffs' father and mother; that the father died, and plaintiffs inherited one-half of the land, and their mother the other. If; that the mother subsequently married the defendant, and afterwards died, whereupon plaintiffs inherited from her two-thirds of her half, and the defendant the other third,—a judgment that plaintiffs recover an undivided five-sixths of the land, instead of merely that plaintiffs were tenants in common of an undivided five-sixths of the land with the defendant, and should be let into possession thereof as such, is error, as being against evidence.

In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

*Albert A. Johnson*, for appellant. *Add. C. Hinkson*, for respondents.

MCFARLAND, J. This is an action of ejectment, the complaint being in the usual form. Defendant, in his answer, denies that plaintiffs were either the owners or entitled to the possession of the demanded premises. The court found that the plaintiffs were the owners and entitled to the possession of the undivided five-sixths of the tract of land described in the complaint, as tenants in common with defendant, who is found to be the owner and entitled to the possession of one undivided sixth; and judgment was rendered that plaintiffs recover such undivided five-sixths. Defendant moved for a new trial, the motion was denied, and

from the order denying the motion defendant appeals. There is a short statement on the motion for a new trial which summarily states that there was evidence which "proved" certain facts. (There is some contention by respondents that this statement is not sufficiently authenticated; but, as the record shows that the statement was settled and allowed by the presiding judge, we must take it to be genuine, and sufficiently certified.) Among other facts shown by this statement to have been "proved" are these: The land in contest was owned by Charles H. Burgel, the father of plaintiffs, and was the community property of said Charles and his wife, Mary, who was the mother of plaintiffs. Charles, the father, died in 1884, and the land went, by operation of law, one-half to the widow, and the other half to the plaintiffs. In February, 1886, the defendant, Prisser, married the mother, Mary, and was her husband until February, 1887, when she died. The defendant was appointed her administrator in March, 1887, and was such administrator at the time of the commencement of this action, and at the time of the judgment; the administration not yet having been closed. The proof of these facts was admissible under the denials in the answer. Under these facts, plaintiffs are the owners and entitled to the possession of the undivided one-half of the land which descended to them from their father. They are also heirs to the undivided two-thirds of their mother's half, to which they will be entitled on final distribution, if no part thereof be necessary to pay debts, etc.; but, pending administration, the defendant, as administrator of their mother, is entitled to possession of the undivided half which came from the mother. If the judgment had merely determined that plaintiffs were tenants in common, and should be let into possession with defendant, there could have been no objection to it. It has been decided, however, that in an action like the one at bar, on account of mesne profits and other matters that may arise, "it is proper for the court before which the ejectment suit is tried to ascertain and settle the respective interests of the parties." *Freem. Co.-Ten.*; *Mahoney v. Middleton*, 41 Cal. 54. The finding, therefore, that plaintiffs "are entitled to the possession of an undivided five-sixths interest in the tract of land described in their complaint," is against the evidence; and for this reason the order denying a new trial must be reversed. The order appealed from is reversed, and the cause remanded for a new trial.

We concur: DE HAVEN, J. ; GAROUTTE, J. ; HARRISON, J. ; PATERSON, J.

89 Cal. 69

*PAIGE et al. v. ROEDING et al.* (No. 14,262.)

(*Supreme Court of California.* May 14, 1891.)

APPEAL—DEFECTIVE RECORD—DISMISSAL.

Code Civil Proc. Cal. § 950, provides that on appeal from a final judgment the court must be furnished with a copy of the judgment roll; and Id. § 954, provides that, "if the appellant fails to furnish the requisite papers, the appeal

may be dismissed." *Held* that, where the whole judgment roll is not "requisite" to the full determination of the appeal, it will not be dismissed because of the omission of an unessential part.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

*Pillsbury & Blanding*, for appellants.  
*Rosenbaum & Scheeline*, for respondents.

McFARLAND, J. This cause is before us on a motion of respondents to dismiss the appeal upon the ground that the transcript filed by appellants does not contain a copy of the judgment roll. Section 950 of the Code of Civil Procedure directs that on an appeal from a final judgment the court must be furnished with a copy of the judgment roll; and section 954 provides that, "if the appellant fails to furnish the requisite papers, the appeal may be dismissed." This power to dismiss might, perhaps, be properly exercised in extreme cases; but it frequently happens that the whole of a judgment roll is not "requisite" to the full determination of an appeal. And it would be unjust to dismiss an appeal merely because some part of the roll had been—inadvertently, perhaps—omitted from the transcript. If the omission be deemed material by respondents, they can easily remedy the supposed defect by suggestion of a diminution of the record. In the case at bar the asserted defects in the copy of the judgment roll—which do not very clearly appear from the certificate of the clerk—are not important enough to authorize a dismissal of the appeal. The motion to dismiss the appeal is denied.

We concur: HARRISON, J.; PATERSON, J.; GAROUTTE, J.; DE HAVEN, J.

89 Cal. 68

ONETO V. RESTANO. (No. 13,798.)

(*Supreme Court of California*. May 13, 1891.)

LEASE—DELIVERY—WATER-RIGHTS—ESTOPPEL.

1. The fact that a lease has always been in the possession of the lessor is not conclusive evidence that there has been no delivery, since the lessor has as much interest in it as the lessee, and as much occasion for its possession, and the fact that the tenant has entered under it is sufficient to sustain a presumption that it has been duly delivered.

2. Where of two parties in possession of certain water-rights it appeared that one had been the original appropriator, and that, after his ditch and flume had fallen into decay, he arranged with the grantor of the other that they should together repair and renew the ditch and flume, appropriating a quantity of new water from a different spring, and share the total flow equally, the subsequent acceptance by the grantee of the other party of a lease from the original appropriator will be held, in the absence of any other showing, to be a compromise of the respective rights, and the lessee, after enjoying the fruits of the compromise during the term of the lease, cannot afterwards repudiate it, and claim to have held the water adversely to the lessor.

Commissioners' decision. In bank. Appeal from superior court, Tuolumne county; J. F. RUONEY, Judge.

*F. W. Street and A. L. Hart*, for appellant.  
*F. D. & G. W. Nicol*, for respondent.

TEMPLE, C. This is the second appeal in this case. The former appeal, like this,

was taken by the plaintiff from a judgment in favor of defendant, and from an order denying his motion for a new trial. The judgment was reversed on the ground that the court failed to find that the use of the water by the defendant and his grantors had been adverse. 78 Cal. 374, 20 Pac. Rep. 743. After the case had been remitted to the trial court the defendant was allowed to amend his answer so as to aver that for more than five years last past he has been using the water adversely to plaintiff and his grantors. There is no other claim in the answer of title on the ground that the use was adverse, unless such defense is involved in the simple allegation of ownership. In fact, the theory of the defense seems to be that Bache, plaintiff's grantor, was the owner of a spring from which he had conducted water to his premises in the city of Sonora; that by agreement with the Antoninis, through whom defendant derives his title, Bache and the Antoninis some years afterwards constructed a new ditch and flume, and took in other waters; that it was understood that the Antoninis and Bache should then share the water equally. The new water taken in was, defendant claims, just about equal to that which had previously been carried by the Bache ditch from the spring which belonged to him. So that by the arrangement with the Antoninis, Bache was able to secure a new ditch and flume in place of one which had become dilapidated and unserviceable, and still practically retain all the water he had before. And the court finds that it was agreed, when they arranged to rebuild, that the water of said spring (the new water to be taken in) to be thereafter appropriated, together with the Bache spring, should belong to them in common, and to share equally in the use of the water each alternate day for irrigating their respective gardens, and for culinary, domestic, and other useful purposes. It is also found as a fact that they did open up another spring, constructed the ditch and flume as agreed, and caused the waters of both springs to flow into it; and it is found that from that time—1867—Bache and the Antoninis and their respective grantors have used the water on alternate days for irrigating their respective gardens, and for culinary and other useful purposes, continuously, peaceably, and uninterruptedly; that the new spring had not previously been owned, claimed, or appropriated by any person. This state of things continued until May 1, 1877,—some 10 years,—when Lorenzo Antonini, who had become sole owner, sold to David Sanguinetti. At that time Bache and Sanguinetti made and executed an agreement in writing, whereby Bache, in consideration of one dollar, did rent, lease, and demise to Sanguinetti, for the term of 10 years, one-half of the water flowing in his ditch every alternate day. Sanguinetti agreed to keep the ditch in repair on his premises, and to pay one-half the expense of repairing the ditch and flume above his premises, and of a new flume if it should be necessary; and, should the flume and ditch be flooded, both agreed to repair the same at their

joint expense. The parties continued to use the water after the lease as before, taking the whole of it each alternate day, and accordingly on the former appeal it was held this lease was for one-half of the water, to be measured by using every other day. In short, the lease covered the very water-right in controversy.

Sanguinnetti was a witness at the trial, and testified that he could not read or write, that he never had or heard of a lease, and that he always claimed the use of the water in his own right, and had so informed Mr. Bache. The court finds, however, the due execution of the lease, but also that it was retained by Bache, and never had been in the possession of Sanguinnetti. The finding that the agreement was executed must be held to include delivery, for otherwise there is no finding upon this important point, and the word has been held to include all that is necessary to make an instrument complete and operative. There is evidence which tends to show that the parties believed they had executed the instrument, and that Sanguinnetti so understood it. In regard to a lease, the mere fact that the instrument has always been in the possession of the lessor is not conclusive evidence that it has not been delivered so as to become operative. An ordinary deed is usually of value only to the grantee. The maker has no further interest in it. But an indenture of lease is a very different thing. It continues to be of fully as much interest to the landlord as to the tenant, and he has fully as much occasion for its possession. Such agreements are usually executed in duplicate. But where it is retained by either party with consent of the other it must be considered as delivered, if both understand that it has been executed, and is in operation. Where the tenant enters under it, there can usually be very little question about it. The due execution of the lease being found, the question arises as to its effect. It will be seen from the above statements that, according to the findings of the court, at the time of the execution of the lease the parties were equally entitled to the use of the water, although some question might be made as to whether their interest was joint. So long as the water of the two springs was carried in the common flume they were equally entitled to use the water; and so the parties had been continuously using it for more than 10 years, and were so using it at the time the lease was made. Sanguinnetti, then, was in possession at the time of the demise. The evidence upon which the court bases its finding is conflicting, confused, and contradictory. A. Antonini, upon whose testimony both parties chiefly rely, seems uncertain as to the ownership of the property. The facts apparently shown by the evidence do not seem very conclusive upon that point, although, after a careful study of the transcript, we are satisfied there is evidence sufficient to justify every material finding. Still, as there was much room for grave doubts upon the subject of ownership, it is altogether probable that the lease was executed after a claim made by Bache and a consideration of the matter

by Sanguinnetti. In fact, it was most likely a compromise of threatened litigation. Bache conceded the free use of the water for 10 years in consideration of the acknowledgment of his title by Sanguinnetti. If it were a new question, we should say he could not now, having enjoyed the fruits of this compromise, go back upon it. But the rule is too thoroughly established to be open to question in this state. *Tewksbury v. Macgraff*, 33 Cal. 237; *Franklin v. Merida*, 35 Cal. 558; *Holloway v. Galliac*, 47 Cal. 474; *Peralta v. Ginochio*, Id. 460; *Insurance Co. v. Stroup*, 63 Cal. 150; *Davis v. McGrew*, 82 Cal. 138, 23 Pac. Rep. 41. The lease had expired by its terms before this litigation was commenced, and, under the rule established by the above decisions, it constituted no estoppel as against the defendant. Under the circumstances it becomes unnecessary to pass upon the questions raised in regard to the verbal sale, and the claim that the defendant held the property adversely for five years since such alleged sale. It follows that the judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; VANLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

89 Cal. 89

GESSNER v. PALMATER. (No. 13,468.)

(Supreme Court of California. May 16, 1891.)

VENDOR'S LIEN—ASSIGNMENT—ATTACHMENT.

Where the owner of land contracts to convey it upon the payment of a certain price, for which he accepts notes, but the title is not to pass until the notes are paid, the land is, by express contract, held in pledge for such payment, and the notes and contract are in the nature of a mortgage, and the lien will pass to the assignee of such a note, who, under Code Civil Proc. Cal. § 538, requiring a plaintiff in attachment to state that his claim is without security, cannot maintain action by attachment therefor. *McFarland, J.*, dissenting.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, judge.

*Winslow P. Hyatt*, for appellant. *Del Valle & Munday*, for respondent.

PATERSON, J. This is an appeal from an order denying a motion to dissolve an attachment. The motion was made on the ground that the note upon which the action was brought was given to Webster, plaintiff's assignor, in part payment for certain land purchased from him by defendant; that Webster had a vendor's lien as security for the payment of the note; that the lien passed to plaintiff by the assignment of the note, and, being thus secured, an attachment was improper. The affidavit filed in support of the motion states that the defendant purchased certain land from Webster under a contract which provided for payment of the purchase price by installments, and that at the time and place of making said contract for the sale and purchase of said lot

of land, and as part of the said contract, the defendant executed and delivered to Webster the promissory note sued on, and that Webster still holds, against the defendant, the contract giving him the right to purchase. There is, perhaps, no subject of equity jurisprudence discussed in the books upon which there is a greater diversity of opinion than exists in relation to the origin, nature, and effect of a vendor's lien, against whom and in whose favor it avails, and how it may be discharged or waived. *Hammond v. Peyton*, 34 Minn. 531, 27 N. W. Rep. 72. The various definitions given and principles applied to it by the courts, are hopelessly irreconcilable; and, if we take the expressions found in decisions and text-books, without observing the distinction between the lien implied by law in favor of a vendor who has parted with the legal title and taken no security for the purchase money, and the security which the vendor has while he holds the legal title under an unexecuted contract for the conveyance of lands upon payment of the purchase money, there will appear to be great confusion and inconsistency. The former, the implied lien, is properly known as a "vendor's lien." It is the creature of courts of equity, founded upon the equitable presumption that where the vendor has parted with his title and taken no security for the payment of the purchase money, the parties intended that the property itself should remain as a pledge for the payment of the purchase price of the land. The lien thus created by implication is not a specific, absolute charge upon the property; it is personal to the vendor, and does not pass by a transfer of his claim for the purchase money. The fee is in the purchaser, and he may defeat the lien by a conveyance to a *bona fide* purchaser for value. *Sparks v. Hess*, 15 Cal. 186; *Baum v. Grigsby*, 21 Cal. 172; *Lehndorf v. Cope*, 122 Ill. 333, 13 N. E. Rep. 505. The latter is improperly designated as a vendor's lien. Where the vendor holds the legal title under an unexecuted contract for the conveyance of the land upon payment of the purchase money, the transaction shows upon its face that he holds it as security. The vendee cannot prejudice that title, or in any way divest it, except by performance of the act for which the vendor holds it. The vendor's security is something stronger than a mortgage, because the legal title is retained as security. *Stevens v. Chadwick*, 10 Kan. 413. It has been called an "imperfect" or "equitable" mortgage, which is a more appropriate term than "vendor's lien." *Moore v. Lackey*, 53 Miss. 85. In many of the best-considered cases, including *Sparks v. Hess*, supra, it is treated as if it had the similitude of a mortgage, subject to foreclosure in the same way a mortgage is foreclosed. There is no necessity for any lien by implication. Where the title is not to pass until the vendee pays the purchase price, the land is by express contract held in pledge for such payment, and the notes and contract may be considered as an instrument in the nature of a mortgage. It is a lien by contract, is an incident to the debt, and the assignee of notes given for the purchase

money, like the assignee of a note secured by mortgage, is entitled to the benefit of the security. *Avery v. Clark*, (Cal.) 25 Pac. Rep. 919, (filed February 6, 1891;); *Wright v. Troutman*, 81 Ill. 374; *Adams v. Cowherd*, 30 Mo. 460; *Lowery v. Peterson*, 75 Ala. 109; *Bradley v. Curtis*, 79 Ky. 327; *McClintic v. Wise*, 25 Grat. 448; *Lagow v. Badollet*, 1 Blackf. 419; *Dingley v. Bank*, 57 Cal. 471. There are a few decisions to the contrary, some of which inveigh against the rule, and, emanating, as they do, from highly respectable authority, are entitled to careful consideration; but they bear evidence of a departure from sound legal rules, and will be found generally to have been influenced by decisions in cases where the legal title had passed to the vendee, thus overlooking the distinction we have attempted to point out, and which is paramount always in determining questions of this kind. The authorities preponderate very decidedly in favor of the view we have expressed. 2 Jones, Liens, § 1119, note.

The provisions of our Civil Code, §§ 3046, 3047, apply to the vendor's lien proper, and not to the security held by a vendor under an unexecuted contract for the sale of land. There has been, and still exists, a great conflict of decision among the American courts, not only as to the nature of the security of the implied lien, but as to whether it could be assigned, and what act of the vendor would amount to a waiver of the lien. *Perry, Trusts*, (4th Ed.) § 328, note 4. The notes of the code commissioners, and cases cited by them under the sections above referred to, show that it was intended to settle this conflict by express enactment. Ann. Civil Code, §§ 3045, 3046, notes; *Avery v. Clark*, supra.

We are not called upon in this case to say whether the purchaser of a negotiable note for value, without notice of the security held by a vendor of real estate under an unexecuted contract, would have the right to a writ of attachment. The affidavit, on motion to discharge the writ herein, stated that plaintiff "purchased the note sued upon in this action with full knowledge that the same was given as collateral to and identical with the debt secured by said contract and the lien on said real estate." The note having been secured originally by the vendor's lien, and plaintiff having taken it with notice of that fact, it was his duty to state in his affidavit for the writ "that such security has without any act of the plaintiff, or the person to whom the security was given, become valueless." Such is the requirement of the statute. Section 538, Code Civil Proc. The affidavit upon which the attachment was issued states that the payment of the sum claimed "has not been secured by any mortgage or lien upon real or personal property." The affidavit filed by defendant in support of his motion to discharge the writ states facts showing that the note was originally secured. No counter-affidavit was filed by plaintiff. The attachment was improperly issued, and therefore the motion should have been granted. The order is reversed, with directions to discharge the attachment.

We concur: BEATTY, C. J.; DE HAVEN, J.; GAROUTTE, J.; HARRISON, J.

McFARLAND, J. I dissent, and adhere to the views expressed in the former opinion. 24 Pac. Rep. 608. I cannot subscribe to the doctrine that the owner in fee of land, who simply agrees to convey it upon the payment to him of certain money evidenced by a promissory note, is in the same position as one who conveys the land and takes back a mortgage; or that if, in the former case, he merely assigns the promissory note, the assignee of the note has a lien on the land. If the latter can enforce such a lien, he must be able to release it. But how could he release it? It could be released only by conveying the land to the vendee, but how could he convey that which he hath not? If, after the assignment of the note, the vendor should convey the land to the vendee, what then would be the condition of the supposed lien of the assignee of the note? The whole doctrine must rest on the untenable proposition that the assignment of a negotiable promissory note is a conveyance in fee of land.

I know that some of the recent text-writers speak of such a case as bearing "a strong similitude to that of mortgagee and mortgagor," and say that, although it "is often spoken of in the cases as a vendor's lien," yet, in their opinion, such language is "a misuse of terms;" and that, although "it has been said, in English and American decisions, that the vendor's lien may arise before conveyance as well as after," yet that this saying "confounds legal notions which are essentially different." But, in my opinion, those "English and American decisions" correctly state the law, and tend to prevent confusion. In this state *Sparks v. Hess*, 15 Cal. 194, is the leading case on the subject. In that case the court say: "This is not a suit to enforce a vendor's lien after conveyance executed, but to enforce such lien when the contract of sale remains unexecuted;" and that, while the position of the vendor is "in some respects" like that of a mortgagee, it is in other respects different. "The vendor is at liberty to ask either a decree directing performance, and in case of refusal a sale of the premises, or a decree barring the right of the vendee to claim a conveyance under the contract." Throughout the whole case the right of the plaintiff is treated as and called a "vendor's lien;" and there is no doctrine better established than that a vendor's lien is not assignable. In the case at bar there was no conveyance of the legal title from the owner of the land (Webster) to the assignee of the note; and, in my opinion, the mere assignment of the note carried no title to the land, and no vendor's lien, or any lien at all. But, in my opinion, a vendor's right is too shadowy to be a lien, within the meaning of the attachment law.

89 Cal. 73

BELCHER v. FARREN *et al.* (No. 13,752.)  
(Supreme Court of California. May 14, 1891.)

NATURALIZATION—EVIDENCE.

A widow, born in Ireland, whose parents never came to this country, and who was herself

never naturalized, in order to prove her citizenship by marriage to a naturalized citizen, must produce record evidence of her husband's naturalization.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

*Garber, Boulst & Bishop*, for appellant, Belcher. *W. B. Wallace*, for respondent.

TEMPLE, C. This is a contest over the right to purchase swamp and overflowed lands from the state. There are three applicants. Farren's application was filed before the segregation, and under the recent decision of *Buchanan v. Nagle*, (Cal.) ante, 512, the judgment denying his right to purchase must be affirmed. Belcher's application was made after the survey and segregation, but he is not an actual settler, and the court finds that the land is suitable for cultivation, and on the authority of *Fulton v. Brannan*, ante, 506, (Cal. No. 13,603,) the judgment must be affirmed as to him, unless it appears that there was error at the trial such as will necessitate a reversal. We find no such error. The facts, we think, show, independently of the opinion evidence complained of, that the land is suitable for cultivation. The land is level, free from serious obstruction to plowing; the soil a rich, sandy loam. It is near Lake Tulare, but has been dry for some years; and there is evidence that the lake is steadily receding year by year. If in such a soil crops sometimes or often fail through drought, it cannot be said, in this state, that the land is therefore unsuitable for cultivation. The defendant Ford is found to be an actual settler on the east half of the section. Her residence seems from the evidence to be somewhat ideal. The purchaser is required to be an actual settler. He must show something more than that he has eaten and slept on the place, besides having a cabin there, and that he has made some fanciful attempts at planting trees and cultivation. The section means real settlers on the land, and not occasional visitors. It does not contemplate casual acts, done not in good faith to make a home, but simply to secure cheap land; although, if a home is actually established, motives cannot be further questioned. At the trial it appeared that defendant Ford was a widow, born in Ireland. Her parents never came to this country, and she was never naturalized. After she came to the United States she married, as she says, a naturalized citizen. If she did so, under the law of congress she became a citizen. She had no record evidence, however, to prove the naturalization of her husband. Objection was made to the parol proof, and counsel asked to have her application stricken out. We are constrained to hold under the decisions that the evidence was incompetent. *Miller v. Prentice*, 82 Cal. 104, 23 Pac. Rep. 8; *Bode v. Trimmer*, 82 Cal. 513, 23 Pac. Rep. 187; *Prentice v. Miller*, 82 Cal. 575, 23 Pac. Rep. 189. In the last case it is said: "And, like any other judicial record, must be proved by the record itself, or a properly exemplified copy thereof, or by proof of its loss or destruction." Charles

*Green's Sons v. Salas*, 81 Fed. Rep. 107. There are, however, certain limitations to this rule, for after proper proof of the naturalization of the parents of alien children, who were under 21 years of age and residents of the United States at the time their parents were naturalized, parol evidence may be received to prove the minority and residence of the children in order to show that they are citizens, (Rev. St. U. S. § 2172;) and proof of naturalization may also be by the parol evidence of the party, in the form of an affidavit, in proceedings concerning mining claims, by virtue of section 2321 of the Revised Statutes of the United States; but the appellant does not come within either of these limitations." This quotation is made because it intimates that in case of the children they must also prove the naturalization of their parents by the record,—a case parallel to the present. The other facts which it is said they may prove by parol constitute no exception to the rule, which is simply that an ordinary naturalization is effected by a judgment, and it must be proven as other judgments are. So the cases cited by the respondent, if they are properly called "naturalizations," are not by judgment, and the practice in such cases throws no light upon the point involved here. We think the judgment, so far as it adjudges that plaintiff and defendant Farren are not entitled to purchase the land in question, should be affirmed, as also the motion denying defendant Farren new trial; and that as to defendant Ford the judgment should be reversed, and a new trial ordered.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment as to plaintiff and defendant Farren, and the order denying defendant Farren's motion for a new trial, are affirmed, and the judgment as to defendant Ford is reversed, and a new trial ordered.

HARNEY V. FARREN *et al.* (No. 12,853.)

(*Supreme Court of California.* May 19, 1891.)

In bank. Appeal from superior court, Tulare county; Wm. W. Cross, Judge.

Garber, Boalt & Bishop and Freeman & Bates, for appellants. W. B. Wallace, for respondent.

PER CURIAM. Upon the authority of the recent cases of *Buchanan v. Nagle*, ante, 512, (No. 18,705;) *Fulton v. Brannan*, ante, 506, (No. 13,603;) and *Belcher v. Farren*, ante, 791, (No. 13,752;) the judgment and order denying a new trial in this action are affirmed.

87 Cal. 557

HARVEY V. HADLEY *et al.* (No. 13,961.)

(*Supreme Court of California.* Jan. 30, 1891.)

TRIAL—FINDING BY THE COURT.

In an action by the vendee of land against the vendor for damages caused by misrepresentations in selling it the court found that the value of the land without any prospect of a college or street-car line being built as represented was at the time of the sale \$3,000; that, if the contract for building the street-car line had been let as represented, the market value of the land would have been \$6,000; that with a good prospect that

both the college and street-car line would be built the land would have been worth \$8,000, which was the sum the vendee paid for it; that as it was with the prospect of the building of the college then existing the value was \$5,000. Held, that a judgment for \$3,000, based on the third and fourth branches of the finding, was not inconsistent with the finding as a whole, and would be sustained.

Commissioners' decision. Department 2.

Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

*Wells, Guthrie & Lee* and *J. A. Donnell*, for appellants. *C. W. Pendleton* and *Anderson, Fitzgerald & Anderson*, for respondent.

VANCLIEF, C. On July 8, 1887, the plaintiff and defendants entered into an agreement in writing, whereby the plaintiff agreed to sell to defendants a certain tract of land, situate in the town-site or projected town of Whittier, in the county of Los Angeles, for the sum of \$8,000, \$3,000 of which had been paid before the commencement of this action. For the residue (\$5,000) the defendants made their promissory note of even date with the contract, payable on or before June 7, 1888, with interest at 10 per cent. per annum, to be compounded semi-annually. This action was brought to recover the amount due on the note, and to foreclose the vendor's lien upon the land. The defense is that the defendants were induced to purchase the land by false and fraudulent representations of the plaintiff to the damage of the defendants. The court found that plaintiff made the representations charged, and that the greater portion of them were false and fraudulent, to the damage of defendants in the sum of \$3,000, and deducted this sum from the note, and rendered judgment for the plaintiff for the residue and interest, amounting to \$2,565. The defendants appeal from the judgment on the judgment roll, and contend that the finding of only \$3,000 damages is inconsistent with the twelfth finding, by which, they say, it appears that the damages were \$5,000. This is the only point made, and to dispose of it in favor of the respondent I think it is only necessary to read the twelfth finding in connection with the eighth and thirteenth findings. The twelfth finding is as follows: "That the value of said land, without any prospect of a college or street-car line being built as represented by the plaintiff, and without any contract being let for the same or either of them, was at the time of the purchase the sum of \$3,000; that, if the contract for the building of said street-car line along Hadley street to the south-west corner of said land to Painter avenue had been let, as represented by plaintiff, said land would have been at the time of the purchase of the market value of \$6,000; that, if said plaintiff had in good faith intended to build said college, and the Quakers had agreed or determined to build said college, and the contract for building said street-car line had been let at the time of making said contract, as represented by plaintiff, said land would then have been of the market value of \$8,000; and that said land as it was, and with the prospect of the building of said college then exist-



ing, was of the market value of \$5,000." The court here finds what would have been the value of the land at the time of purchase under four different conditions of facts: (1) In case all the representations of the plaintiff had been entirely false; (2) in case the representation as to the contract for building the street-car line alone had been true; (3) in case all the representations made by plaintiff had been true; and (4) the value of the land "as it was, with the prospect of the building of the college then existing," as appears in the eighth finding, wherein it is found: "There were general rumors afloat, and a prospect that said college would be built as stated by plaintiff." The value of the property in the first two supposed cases is immaterial, even according to the rule of damages claimed by counsel for appellant, viz.: "The measure of damage is the difference between the actual value of the property at the time of purchase and its value if the property had been what it was represented or warranted to be." In order to estimate the damages by this rule only the third and fourth branches of the twelfth finding are necessary. The third finds that if the property had been what it was represented to be, its value would have been \$8,000. The fourth finds that the actual value of the property as it was at the time of purchase (one part of plaintiff's representations then being true) was \$5,000. Thereupon the court estimated defendants' damages to be \$3,000, the difference between these two valuations. Counsel for appellants are mistaken in assuming that the court found the representations of plaintiff to have been entirely false. The court found that a part of plaintiff's representations as to the college was true, and considered this in estimating the actual value of the property at the time of the purchase, but excluded it from the estimate. (1.) whereby the value was found to be \$3,000. I think the judgment accords with the findings of fact, and that it should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

87 Cal. 445

ROSENBERG v. DURFREE et al. (No. 18, 842.)

(Supreme Court of California. Jan. 30, 1891.)

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. In an action for personal injuries it appeared that plaintiff, a child of eight years, was invited by one of the defendants, in the presence of the other, to ride on a narrow pole drawn by a horse to propel machinery, which in its circuit passed near to portions of the machinery then in motion; that she lost her hat, and told defendant in charge of the sweep to stop the horse and let her get it; that he told her to pick it up next round; that she tried to do so, lost her balance, and threw out her arm to regain it, when her hand was caught in the cog-wheel, and crushed. Held, that a verdict for plaintiff was supported by the evidence.

2. An instruction that a child of such tender years and immature judgment as to be incapable of comprehending the danger to which it is ex-

posed, and of exercising the necessary precaution in guarding against it, cannot be charged with negligence in exposing itself to threatened danger, and that in determining this proposition the jury must consider the age, sex, and all the conditions surrounding plaintiff at the time of the injury, is not erroneous as misleading, or as instructing the jury that the machinery was dangerous.

8. It was not error to charge that if the jury should find that the sweep was a dangerous place for plaintiff to ride, and that defendants, having reason to know that it was dangerous, permitted her to ride upon it in dangerous proximity to the machinery, and that because of her tender years and immature judgment she was incapable of comprehending and guarding against the danger, and under such circumstances was injured, it would be evidence of negligence.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Chapman & Hendrick, for appellants. Galbreth & Morrison, for respondent.

FOOTE, C. This action is to recover damages caused to the plaintiff, a child eight years of age, alleged to have resulted from the carelessness of the defendants in negligently inducing and permitting her "to sit upon a sweep or narrow pole drawn by a horse to propel the machinery for pumping water, then being propelled by and under the control and for the use and benefit of defendants." It is alleged further in the complaint that the "sweep in its circuit passed above and near to cog-wheels and other portions of said machinery then in motion, thereby exposing plaintiff to the danger of being crushed and mangled therein if she accidentally fell or in any manner was dislodged from the sweep, and was precipitated upon the machinery; that the defendants well knew of the danger to which the child of tender years was thus exposed, yet they knowingly, carelessly, and negligently suffered her to remain alone on said sweep with no person to guard her, exposed to the danger aforesaid; and that by reason thereof plaintiff fell or was precipitated upon said machinery then in motion, and her left hand was caught, mangled, and lacerated therein, causing the loss of three fingers therefrom, thereby maiming and crippling the plaintiff permanently." The defendants demurred to the complaint. The demurrer was overruled, an answer filed, and upon the trial a jury returned a verdict for the plaintiff, and assessed her damages at \$1,750 and costs. Judgment was rendered upon the verdict, from which this appeal is taken, and an order denying defendants' motion for a new trial. There is no dispute but that the child was injured, and suffered the loss of her fingers while on the sweep and falling upon the machinery. The defendants' counsel states that the child was seated upon the lever or sweep, and while riding around upon it she lost her balance, and, endeavoring to recover herself, threw her left hand into the cog-wheel, "and, unfortunately, just at that moment it was passing under the smaller wheel, when it was caught, and three of her fingers crushed, so that they had to be removed." The defendant Charles Durfree, the son of the other defendant, was in charge of the machinery

at the time of the injury. This the father knew, and also that the child was riding around upon the sweep.

A part of the testimony of the child is that: "I was sitting on the sweep. I was going around, and lost my balance, and my hand got in the wheel. I was at the cow corral before I went on the sweep." "Question. How far away was that from the sweep? Answer. About half an acre; not as much as that. Charley [meaning young Durfree] called me, and said, 'Come and take a ride.' First I didn't hear him, and said, 'What?' Then he said it again, 'Come and ride, Hannah,' and I went over to the sweep, and I saw Mr. Durfree, [meaning the father, the other defendant,] and he had a shovel in his hand. He was standing there watching me go over. When I was getting on the sweep he said, 'Hannah, look out; there might be some danger to your hands and your arms,' and I said, 'Oh, no; there won't.' He was in the corn when he said that, and then I went on, and had gone round several times, and I made the horse go when I was on there, and then I lost my balance. First I dropped my hat, and then I said, 'Charley, stop the horse; I want to get my hat.' And he said, 'Pick it up the next time round.' I tried to pick it up, and I lost my balance, and my hand caught in the wheel of the cog. I first got on the sweep near the horse, and Charley said, 'Move up towards the big wheel and machinery.' The way I happened to lose my hat was the wind blew it off. When I came round, and went to pick up my hat, Charley made some motion, and the horse jerked, and that is the way I lost my balance. The horse's name is Doc. My hand got caught in the wheel. I didn't fall off the sweep, and Charley took me off, and carried me to the house. Some of the fingers were cut, and the ends of the fingers dropped. Charley took me to the house. He didn't say anything that I remember. Mamma hollered, and said, 'Charley, you have crippled my little girl for life.' The child is the daughter of a domestic servant of the defendants.

It is claimed by the defendants that the evidence is utterly insufficient to prove that the machinery is at all dangerous; that there is no proof that the defendants were guilty of any negligence. In this connection it is further said that the evidence of the child is contradictory, since upon a former trial she testified as to a material matter differently from what she did on this trial; and that, therefore, her testimony is to be disregarded, and that of the defendants, in contradiction of it, received, in which event it is contended the verdict is unsupported by evidence. We do not perceive any conflict in the child's evidence, as contended for. Her testimony on the last trial was somewhat fuller than upon the first, but there was no contradiction by one of anything in the other, and nothing to show any unreliability on her part; in fact, she was in many respects sustained by the evidence of the defendants. It does appear from the evidence that the child was a favorite, both with the father and son, defendants, and

that the want of care which they exercised in permitting a young child like this little girl to get upon the sweep and ride around upon it, involving a risk of her getting injured, was the result more than anything else of a desire to have the child's society by the son, and of a disposition by both father and son to be indulgent to her; but these motives, commendable as they may be in the abstract, cannot excuse them from exercising such care as the law requires to prevent the little girl from placing herself in danger, and getting maimed for life. We do not, therefore, think the verdict unsupported by evidence.

It is further claimed that the instructions asked for and granted were erroneous. One of them is: "The court instructs you that a child of such tender years and immature judgment as to be incapable of knowing, comprehending, and measuring the danger to which it is exposed, and of exercising the necessary precaution in guarding against it, cannot be charged with negligence in exposing itself to the threatened danger. In determining this proposition in connection with this case, you must consider the age, sex, and all the conditions surrounding the plaintiff at the date of the injury, as disclosed to you by the evidence." We do not understand this instruction to say to the jury, as defendants contend that the court instructed the jury, that the machinery by which the plaintiff received her injury was dangerous; for, whether the danger to the child existed or not, they were told it was "as the evidence disclosed it;" that is, existed or not, as the evidence disclosed. There was nothing misleading in telling the jury that they were to consider all the conditions surrounding the plaintiff, including her age and sex, in determining from the evidence as to the danger she may have been exposed to, and her appreciation of it, as bearing upon the question of contributory negligence.

An objection is also made to an instruction that the jury are instructed that if the plaintiff was in peril under certain circumstances it would be evidence of negligence; thus, as is claimed, telling the jury that the injury while riding on the sweep was of itself evidence of negligence. The instruction is: "If you shall find from the evidence that at the date of the alleged injury the sweep referred to, in its relation to the machinery, was a dangerous place for the plaintiff to ride, and shall find that while the defendants were using said machinery, and the defendants had reason to know the same was dangerous, and they knowingly permitted the plaintiff to sit upon and ride said sweep, in dangerous proximity to said machinery, her parents or other guardians not being present; and you shall further find that, because of the tender years and immature judgment of the plaintiff, she was incapable of comprehending and guarding against the danger to which she was thereby exposed; and you shall further find that, while she was riding under the conditions and circumstances stated, plaintiff's hand was caught and injured in and by said machinery,—that it would be evidence of negligence." As we understand the instruc-

tion, it informs the jury that, if a certain state of facts exists, culminating in plaintiff's injury, such state of facts is evidence of negligence. We do not see that the clause objected to, in view of all the other portions of the instruction, and others given, would tend to mislead the jury as complained of.

Objection is also made to this instruction: "And, finding the facts as above stated, you should further find from the evidence that defendants were father and son, and that the son, while working the machinery for the father, invited, requested, induced, or permitted the plaintiff to ride on said sweep, and that the father knew of her so riding, or had reason to know it was dangerous, and could have removed her, or caused her to be removed, therefrom, or could have stopped said machinery, or caused the same to be stopped, and did neither, but, on the contrary, both he and the son suffered her to remain, such facts would show negligence on the part of the defendants." It is said that in this instruction it is not clearly stated how the jury were to determine as to the father's responsibility; that the jury might have been impressed with the idea that the father was responsible for the son as his servant inviting the plaintiff to ride. But we do not so understand the instruction. The first part of it is with reference to the state of facts under which it appeared in evidence that the son invited, permitted, and induced the plaintiff to ride under circumstances of danger to her. The second, that the father, aware of the danger into which she had been placed by the conduct of the son, had yet permitted her to remain there thus exposed, when he could have prevented her. The jury were correctly told that if the state of facts with reference to each, somewhat different, existed, they were both responsible. But we do not understand that they are told that either is responsible for the negligence of the other. We perceive no prejudicial error, and advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

87 Cal. 134

McMENOMY v. BAUD. (No. 12,759.)

(Supreme Court of California. Dec. 15, 1890.)

NUISANCE—LAWFUL OCCUPATION—INJUNCTION.

A brass foundry and machinery incident thereto are not, *prima facie*, nuisances, and in an action by an adjoining proprietor for damages and injunction, where the evidence shows that the smoke-stack and steam escape-pipe are too low; that the boiler and engine are not properly set; that the fuel is not such as should be used; that the dipping of brass castings in diluted acids was practiced upon the sidewalk,—the resulting annoyances are such as can be remedied, and an injunction restraining defendant from operating the factory at all is error, and must be modified. WORKS, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

John Darcy, (Otto Tum Suden, of counsel,) for appellant. Clunie & Young, for respondent.

PER CURIAM. The plaintiff and defendant are coterminous owners of lots of 27½ feet front on Fulton street, in San Francisco, and running back 120 feet to Ash avenue. Each, with his family, resided on his lot, there being an open space of only five to six inches between their houses. The defendant operated a small brass foundry on the first or ground floor of his house, with machinery incidental thereto, propelled by a small steam-engine having a cylinder of six inches diameter, and seven inches stroke. The principal machinery consisted of turning lathes for turning and polishing brass. The objects of this suit are to enjoin the operating and use of the foundry and machinery, on the ground that they are a nuisance to plaintiff, and to recover \$2,000 damages. The allegations of the complaint in regard to the nuisance are as follows: (3) That defendant has erected and maintained on his said premises, and used and operated for the two years last past, in the same place, and in close proximity to the above-described premises of plaintiff, a steam-engine and boiler and lathe, and the machinery of a brass foundry, and still maintains, uses, and operates the same, and threatens to continue to do the same; that he has operated and used, and operates and uses, and threatens to operate and use, the same in such a manner as to disturb and annoy this plaintiff, and this plaintiff's family, and to endanger the safety and health of this plaintiff, and this plaintiff's family, and to offend the senses of this plaintiff and his family. (4) That the presence and proximity of said machinery, and its operation and use by defendant, has greatly injured and damaged plaintiff, in this: That the defendant has used said machinery and operated the same for the last two years continuously, night and day, and on Sundays and at all times, and still so uses and threatens to and will so use it, unless restrained by this court; that said machinery constantly produces intolerable noise, which deprives plaintiff and his family of all rest and enjoyment, and has produced such effect for two years last past, and has rendered the life of this plaintiff and that of his family miserable; that by the jarring thereof said building of plaintiff has been shaken and unsettled, and the walls and plaster thereof broken and cracked; that defendant has employed and still employs, and threatens to employ, unskilled employees in and about said machinery, and thereby has endangered, and will endanger, the safety of this plaintiff, and this plaintiff's family, and thereby keeps them in peril of their lives, and will so keep them; that thereby the value of this plaintiff's said property has been and is become greatly impaired in value, and this plaintiff is and will be unable to rent the same, and will be compelled to abandon the same, unless defendant be restrained from operating the same machinery." The answer denies that the operating of the foundry and machinery is, or ever was, a nuisance, and denies all

averments tending to prove the nuisance.

As to the alleged nuisance and damage, the court found the following facts: "That during all said times he, said defendant, used, operated, and maintained the same said foundry and machinery, engine and boiler, in such a manner as to disturb and annoy the plaintiff and his family, and to endanger the safety and health, and to offend the senses, of the plaintiff and his family. *Fourth.* That the presence and proximity of said machinery, and its operation and use by defendant, as aforesaid, greatly injured and damaged plaintiff and his property. That the defendant, during all of said two years next before the commencement of this action, used and operated said engine, boiler, and machinery at unusual and unreasonable hours, night and day, and on Sundays, and that such use and operations caused intolerable noise, produced offensive fumes, smells, smoke, and soot, which extended to and within the said premises of plaintiff; that, by the jarring caused by the operation of said machinery and engines, the said building of plaintiff was continuously shaken and unsettled, the walls and plastering therein broken and cracked, and said house rendered unsafe as a dwelling, and thereby greatly endangered the lives and safety of the plaintiff and his family; that, on account of all thereof, the said property of plaintiff has been greatly impaired and depreciated in value, and the life and existence of plaintiff and his family rendered uncomfortable and miserable, and their health impaired. *Fifth.* That by reason of the premises, plaintiff has been damaged in the sum of two thousand dollars. *Sixth.* That the maintenance of said foundry, and the use and operation of said engine, boiler, and machinery, is, and during all of said times has been, a nuisance on said premises of defendant, and to said plaintiff and his family, upon plaintiff's said premises. *Seventh.* That the said location of said foundry is in a residence portion of the said city of San Francisco, and is in an unsuitable place for the location of such works." As a condition of denying defendant's motion for new trial, the damages were reduced to \$1,200. The judgment perpetually enjoins the defendant "from erecting, maintaining, having, keeping, or operating on said premises of defendant described in the pleadings and records herein, said brass foundry and machine-shop, boiler and engine, or any foundry or machine-shop, boiler or engine, causing noises, smoke, or other effluvia injurious to health, offensive to the senses, or an obstruction to the free use of plaintiff's property described herein." And further orders and decrees that a permanent injunction issue to defendant and his servants and employees, "requiring him and them and each of them to perpetually refrain from having, maintaining, operating, or continuing the use of said brass foundry and machine-shop, boiler and engine, or either thereof, on the said premises of defendant, and requiring him and them, and each of them, to perpetually refrain from having, erecting, maintaining, or operat-

ing any brass foundry, or foundry or machine-shop, boiler or engine, thereon, causing noises, smoke, or other effluvia injurious to health, offensive to the senses, or an obstruction to the free use of plaintiff's property described herein, and that said nuisance now maintained on said premises of defendant be abated." The defendant, as appealed from the judgment and from an order denying his motion for a new trial, and his counsel here contend that the evidence is insufficient to justify the findings, and that the findings do not support the judgment.

1. As to the effect of the running of the foundry and machinery, upon the plaintiff and his family and his property, the evidence is extremely conflicting. On the part of the plaintiff it tends to prove that the defendant operated the foundry and machinery in such a manner as to offend the senses of the plaintiff and his family, and to interfere with the comfortable enjoyment of their residence. To this extent the findings are justified by the evidence, notwithstanding the conflict, and entitle the plaintiff to an adequate remedy by injunction. But so far as the findings exceed this, I think they are not justified by the evidence. The evidence does not justify the findings that the noise was "intolerable," that said building of plaintiff was "continuously" shaken and unsettled, that said house was rendered "unsafe" as a dwelling, that the lives of the plaintiff and his family were "endangered" or rendered "miserable," or that their health was "impaired." The points to which the evidence was directed were annoyances (1) by smoke and soot, (2) by noise and jarring of machinery, (3) by noisome smells, and (4) by obstruction of sidewalk. There is no finding, and no evidence to justify a finding, that either of these causes of annoyance and injury to plaintiff was necessarily incident to the proper operation of the foundry or machinery complained of. Indeed, the evidence tends to prove that the injurious effects may be remedied without enjoining the running of the foundry or machinery, and that it was only the improper and negligent manner of running them that caused the injurious effects upon the plaintiff and his property. It is said that the smoke-stack and the steam escape-pipe are too low, that the boiler and engine are not properly set, and that the fuel is not such as should be used. There is no pretense that the "dipping" of brass castings in diluted acids, upon the sidewalk, was necessary, or that such dipping might not be done at some other place from which the fumes would not reach plaintiff's house, nor that the improper obstruction of the sidewalk was necessary to the proper operation of the foundry or machinery. A brass foundry, and machinery incident thereto, are not *prima facie* nuisances; and a plaintiff who complains of them must allege and prove that they are such by reason of their peculiar location or the improper or negligent manner in which they are conducted. Therefore, where the injurious effects complained of may be prevented without abating or enjoining the works

or the operations thereof entirely, only the causes of the specific injurious effects proved should be enjoined. If, for example, the cause be the production and escape of smoke and soot in such a way as that they penetrate plaintiff's premises to his injury, the remedy by injunction should be restricted to this specific injury, and leave the defendant at liberty to operate his works, if he can, and elects to do so, in such a manner as to remove the cause and prevent the injury. *Tuebner v. Railroad Co.*, 66 Cal. 171, 4 Pac. Rep. 1162; *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. Rep. 655; *Cooley, Torts*, (2d Ed.) p. 714 et seq.; *Wood, Nuis.* §§ 144, 151, 556, 559, 565; *Carson v. Railroad Co.*, 35 Cal. 332; *Brown v. Kentfield*, 50 Cal. 129. The first part of the injunction in this case restrains the defendant from operating the foundry or machinery complained of, in any manner or at all; and the second part restrains him from operating "any foundry or machine shop, boiler or engine, causing noises, smoke, or other effluvia injurious to health, offensive to the senses, or an obstruction to the free use of plaintiff's property described herein." Even this last part is too general. It is not confined to such noises, smoke, and effluvia as shall be injurious to the health or offensive to the senses of the plaintiff, or to the occupants of his property. That the injunction should be modified is apparent, but, on account of the exaggerated findings of fact not justified by the evidence, the extent of the modification cannot be determined here. The judgment and order are therefore reversed, and the cause remanded for a new trial.

WORKS, J., dissents.

87 Cal. 140

CRALL v. BOARD OF DIRECTORS OF POSO IRRIGATION DIST. (No. 14,038.)

(Supreme Court of California. Dec. 15, 1890.)

IRRIGATION BONDS—CONFIRMATION—PROCEEDINGS IN REM.

1. St. Cal. 1887, p. 29, known as the "Wright Act," authorized the organization of irrigation districts, with boards of directors, who, after determining the necessary amounts to be raised, should submit the question of the issue of bonds therefor to the qualified voters at a special election. St. 1889, p. 212, supplemental to the Wright act, provided for confirmation of proceedings for the issue and sale of bonds issued thereunder by a special proceeding in the superior court on petition of the board of directors after notice given and published in a prescribed manner. *Held*, that an order of confirmation entered in such proceedings is conclusive, as to a proper compliance with all the provisions of the Wright act, on a land-owner of the district who did not appear at the confirmation proceedings, but who seeks to enjoin the sale of the bonds.

2. The confirmation proceeding being a proceeding *in rem*, the land-owner is bound thereby if there has been due publication of notice in accordance with the terms of the statute, notwithstanding there has been no personal service upon him.

Commissioners' decision. In bank. Appeal from superior court, Stanislaus county; WILLIAM O. MINOR, Judge.

L. J. Maddux, for appellant. Wright & Hazen and A. L. Rhodes, for respondent.

BELCHER, C. C. An irrigation district, known as the "Poso Irrigation District," was organized by the board of supervisors of Kern county under the act passed by the legislature of this state, and commonly called the "Wright Act." St. 1887, p. 29. A board of directors for the district was elected, and the members qualified and entered upon the discharge of their duties. In performance of the duties prescribed by the act, the board estimated and determined that the amount of \$500,000 was necessary to be raised for the purpose of constructing necessary irrigating canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of the act. Thereupon the board called a special election, to be held on a day named, at which was submitted to the qualified electors of the district the question whether or not the bonds of the district should be issued in the amount so determined. Notice of the election was given and published in the manner and for the time prescribed by the act, and the election was held pursuant to the call. When the returns of the election were canvassed, it was found and determined that a majority of the votes cast were in favor of the issuance of the bonds, and thereupon the board ordered that bonds of the district to the amount of \$500,000 be immediately prepared and issued in the manner and form provided by the act. Subsequently the board made another order that the bonds to the amount of \$200,000 be offered for sale. All of the foregoing proceedings were apparently regular, and in compliance with the provisions of the Wright act. After the entry of the order for the sale of the bonds, the board of directors, under the act supplemental to the Wright act, "and to provide for the examination, approval, and confirmation of proceedings for the issue and sale of bonds issued under the provisions of said act," (St. 1889, p. 212,) commenced a special proceeding in the superior court of Kern county for the purpose of having all the proceedings for the organization of the district and the issue of the bonds judicially examined, approved, and confirmed. A petition for confirmation, in due form, was filed, and thereupon the court fixed a day for the hearing of the petition, and ordered notice to be given and published for the time and in the manner prescribed by the act; and in pursuance of this order notice in proper form was duly given and published. At the time appointed the matter was heard upon oral and documentary evidence, and thereafter the court filed its findings of fact and conclusions of law, and entered its judgment, approving and confirming all of the proceedings for the organization of the district and for the issue of bonds; and it "further ordered, adjudged, and decreed that the said Poso irrigation district, ever since its organization as aforesaid, has been, and now is, a duly and legally organized irrigation district, and that it possesses full power and authority to issue and sell, from time to time, the bonds of said district, to the amount of five hundred thousand dollars." The plaintiff herein did not appear in the

confirmation proceedings, but after the entry of the judgment of confirmation he commenced this action to obtain a decree enjoining the sale of the bonds.

For the purpose of showing that the plaintiff is a proper party to bring the action, the complaint alleges that he is the owner of lands within the district, and that they will be subject to assessment to raise money to pay the bonds if they should be sold. It then, after stating facts sufficient to show that there was, in form, a regular organization of the district, and an apparent compliance with the provisions of the statute for the issue of bonds, proceeds to allege that the board of directors has no power to issue or sell the bonds, because—*First*, the petition which was presented to the board of supervisors for the organization of the district was not in truth signed by 50 freeholders, nor by a majority of the freeholders, then or at any time owning land within the proposed district, and that not more than 30 of the persons whose names purport to have been signed to the petition ever were freeholders within the district; *second*, the notice of the time and place when and where the election for the organization of the district would be held was not in fact published for the full period prescribed by law; *third*, the lands of plaintiff were not susceptible of irrigation by the same system of works applicable to the other land of the district, and they would not be benefited by irrigation thereby; *fourth*, the notice of the special election upon the question whether bonds should be issued was not published or posted for the full period prescribed by law; *fifth*, the board of directors wrongfully and unlawfully estimated and determined that it was necessary to raise \$500,000 for the purposes of the district, when in fact it was necessary to raise only \$200,000 for those purposes. The answer of the defendant sets up the judgment of confirmation in bar of the action, and is, in effect, that the matters of irregularity and illegality stated in the complaint were conclusively determined by that judgment. To the answer the plaintiff filed a general demurrer, and thereupon, the vital question in the case being whether the plaintiff was estopped by the judgment of confirmation, the parties stipulated that final judgment should be rendered in accordance with the decision upon the demurrer. The court overruled the demurrer, and rendered judgment for the defendant. From that judgment the plaintiff appeals.

There can no longer be any question that the Wright act is constitutional, and that irrigation districts organized under its provisions, like reclamation districts, are public corporations. *Irrigation Dist. v. Williams*, 76 Cal. 360, 18 Pac. Rep. 379; *Irrigation Dist. v. De Lappe*, 79 Cal. 351, 21 Pac. Rep. 825. The districts are authorized to construct irrigation works, and to that end to issue bonds bearing interest at the rate of 6 per cent. per annum, the interest payable semi-annually, and the principal in installments extending over 20 years. These bonds are, from time to time, to be offered for sale, and to be sold

to the highest responsible bidder, provided that not less than 90 per cent. of their face value shall be accepted; and they are to be paid, interest and principal, by revenue derived from an annual assessment upon the real property of the district. It is a matter of every-day observation that bonds bearing such a rate of interest, and about whose validity and payment at maturity there is no question, can be readily sold for considerable more than their face value, while bonds which are liable to be assailed and questioned years after their issue, by any one who is required to contribute to their payment, are reluctantly taken at any price. It was doubtless for the purpose of settling all these matters in advance, and thereby making the bonds of irrigation districts more readily salable, and at better prices than they would otherwise command, that the legislature passed the confirmation act, providing that the districts might, before offering any of their bonds for sale, have all questions affecting their validity judicially and finally determined. The confirmation proceeding is denominated in the act a special proceeding, and it is clearly in the nature of a proceeding *in rem*, the object being to determine the *status* of the district, and its power to issue valid bonds. The fifth section of the act is as follows: "Upon the hearing of such special proceeding the court shall have power and jurisdiction to examine and determine the legality and validity of and approve and confirm each and all of the proceedings for the organization of said district under the provisions of the said act [Wright act] from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order for the sale, and the sale thereof." St. 1889, p. 212. That the legislature had power to pass an act to accomplish the purposes intended by this act cannot be questioned. Nor is it pretended that the appellant did not have notice of the confirmation proceedings, or that he was in any way or for any reason prevented from appearing therein, and raising all the objections which he now seeks to raise. The contention is simply that no process issued in those proceedings was served on him personally, and hence that he was not obliged to appear, and his rights are not barred by the judgment, but he is at liberty now to make "any attack upon the proceedings for the issue of bonds, including the proceedings for the organization of the district, that he could have made had there been no judgment of confirmation." To hold otherwise, it is claimed, would have the effect of depriving him of his property without due process of law.

It will be observed that the question is not whether the valuation of the land for the purposes of assessment can be made and definitely fixed without further notice to the land-owner, nor whether the assessment can be collected without further notice, but it is simply whether the notice by publication and posting was sufficient to give the court jurisdiction to determine that the proceedings taken for

the organization and on behalf of the district were such as will enable the district to create a valid debt to be paid by the levy of assessments in the manner provided by the Wright act. In our opinion the contention of appellant cannot be sustained. It was not necessary, we think, that personal service be made upon all or any of the land-owners of the district in order to give the court jurisdiction and power to render a judgment, valid and binding as against them and all the world, upon all the questions involved in the case; and this view seems to be well supported by the authorities. In *Pennoyer v. Neff*, 95 U. S. 727,—a case largely relied on by appellant,—the supreme court of the United States held that, where the entire object of the action is to determine the personal rights and obligations of the defendants,—that is, where the suit is merely *in personam*,—constructive service by publication upon a non-resident of the state is insufficient for any purpose, and at the same time declared that “such service may answer in all actions which are substantially proceedings *in rem*.” In this state constructive notice, given in such way as is provided by statute, of proceedings for the probate of wills, and of all proceedings in the administration of estates of decedents, has always been regarded as sufficient. In *State v. McGlynn*, 20 Cal. 233, it was held that the probating of a will was a proceeding *in rem*, and that the decree admitting a will to probate was conclusive not only upon the parties who were before the court, but upon all other persons. In its opinion the court quotes the following language, used by the supreme court of Vermont in *Woodruff v. Taylor*, 20 Vt. 65: “The probate of a will I conceive to be a familiar instance of a proceeding *in rem* in this state. The proceeding is in form and substance upon the will itself. No process is issued against any one; but all persons interested in determining the state or condition of the instrument are constructively notified, by a newspaper publication, to appear and contest the probate; and the judgment is not that this or that person shall pay a sum of money or do any particular act, but that the instrument is or is not the will of the testator. It determines the *status* of the subject-matter of the proceeding. The judgment is upon the thing itself; and, when the proper steps required by law are taken, the judgment is conclusive, and makes the instrument as to all the world (at least so far as the property of the testator within this state is concerned) just what the judgment declares it to be.” See, also, *In re Warfield's Will*, 22 Cal. 51; *Rogers v. King*, Id. 72; *Halleck v. Moss*, Id. 266; *Irwin v. Scriber*, 18 Cal. 500. So in an action brought against the land and all owners and claimants, known and unknown, to recover a street assessment, it has been held that constructive service of process may be sufficient to authorize the court to render a judgment which is conclusive and binding upon all the world until reversed on appeal or set aside by some direct proceeding brought for that purpose. *Mayo v. Ah Loy*, 32 Cal. 477;

*People v. Doe G.* 1,034, 36 Cal. 220; *Eitel v. Foote*, 39 Cal. 439. So, too, in insolvency proceedings it has been held that notice by publication is sufficient to give the court jurisdiction over the subject-matter and the parties. *Bennett v. His Creditors*, 22 Cal. 38; *Friedlander v. Loucks*, 34 Cal. 18; *Arnold v. Kahn*, 67 Cal. 472, 8 Pac. Rep. 36. Many other analogous cases might be cited, but we think the above sufficient.

The decision in *Mulligan v. Smith*, 59 Cal. 206, cited by appellant, is not in conflict with what has been said. That case was ejection to recover possession of a lot of land, which had been sold to pay an assessment under the Montgomery-Avenue act. The act required that a petition, signed by a majority of the owners in frontage of the property to be charged with the costs of the improvement, be presented to the mayor; that a board of public works be then organized, and that it make a report showing the benefits and damages resulting from the improvement to each piece of property within the district to be assessed; and that the report be presented to the county court for approval and confirmation. This court, on page 231, said: “In no part of the statute does it appear that any provisions were made for any notice to be given to property owners of the proceeding authorized to be taken before the mayor, or of the proceedings by the board of public works, or in the county court, against the property declared to be benefited by the opening of the avenue. No personal notice was in fact given to the defendant of the presentation of the petition or of any of the acts of the board. Neither the mayor nor the board was required to give notice until the board had completed the report of its work. Then the statute required it to publish a notice for twenty days in two daily newspapers printed and published in the city and county of San Francisco, that the report would be open for the inspection of all parties interested, at the office of the board, every day, during ordinary business hours, for thirty days.” And again, on page 232: “Nowhere in the statute is the petition made part of the report or of the data or documents used in making it. Nor is it anywhere required that the board or the mayor shall return it to the court or file it there or elsewhere. The court had, therefore, no jurisdiction of the petition,—no power to adjudge upon its execution,—and it could not assume jurisdiction of it, or by its judgment decide upon its sufficiency and validity so as to conclude the defendant; and in adjudicating upon the report itself the court acquired no jurisdiction of the person or property of the defendant, so as to determine his rights. Both, it is true, were within the territorial limits of the jurisdiction of the court, but no actual or substituted process of law had been served upon one or the other.” It was accordingly held that the court below rightly admitted evidence to show that the petition was not signed by the owners of a majority in frontage of the lands assessable for the opening of the avenue. On the other hand, our attention is called to *Lent v. Tillson*, 72 Cal. 404, 14



**Pac. Rep. 71**, in which was involved the validity of the proceedings taken for the widening of Dupont street in the city and county of San Francisco, under the provisions of an act passed for that purpose. It was held, in an able and elaborate opinion by Mr. Justice TEMPLE, that notice by publication, as required by the act, was sufficient to constitute due process of law, by which all persons whose rights were affected by the proceedings had before the county court were brought into court, and was sufficient from that time on to charge them with notice of everything done, and to uphold the final order of the court. We conclude that the court below had jurisdiction in the confirmation proceedings of the subject-matter and the parties, and that its judgment is conclusive and binding upon the defendant and all the world until reversed on appeal, or set aside by some direct proceeding instituted for that purpose. We therefore advise that the judgment be affirmed.

We concur: VANCLIEF C.; HAYNE, C.

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment is affirmed.

86 Cal. 449

**STANLEY v. McELRATH.** (No. 12,187.)

(*Supreme Court of California.* Dec. 16, 1890.)

Modifying judgment in 25 Pac. Rep. 16.

**PER CURIAM.** The judgment heretofore ordered and entered in this case is set aside, and the following substituted: The judgment of the superior court as to the difference between 7 and 10 per cent. is reversed, and the cause is remanded, with directions to the superior court to modify the judgment by computing interest on the principal sum of \$6,136.50 at 7 per cent. per annum from March 28, 1883, up to the date said judgment was entered. As so modified, the judgment will stand affirmed, the appellant to be allowed the costs of this appeal.

89 Cal. 211

**DEDMON et al. v. MOFFITT et al.** (No. 13,823.)

(*Supreme Court of California.* May 26, 1891.)

**VERDICT—FAILURE TO MAKE FINDINGS.**

Where, in an action to restrain the diversion of water claimed by plaintiffs by prior appropriation, one of the defendants is enjoined, and it is found that the others had a right to divert the water in the mode and to the extent they were diverting it, plaintiffs cannot complain of a failure to find that said defendants were threatening a further diversion, in the absence of evidence affecting the correctness of the former finding.

In bank. Appeal from superior court, Plumas county; G. G. CLOUGH, Judge.

*Goodwin & Goodwin*, for appellants.  
*John Gale*, for respondents.

**PER CURIAM.** The plaintiffs, claiming to have acquired by prior appropriation the waters of Adams creek and its tributaries, in Sierra county, commenced this action against the defendants to recover damages for a diversion of said water,

and to restrain them from further diverting the same. The case was tried by the court, and judgment rendered in favor of the plaintiffs against the defendant Goble, and in favor of the other defendants. The findings are very elaborate and carefully prepared, and appear to give a history of the appropriation of the waters in question by the several parties to the action and their predecessors in interest for a period of 20 years. The plaintiffs moved for a new trial upon a statement of the case, upon the ground of the insufficiency of the evidence to justify the findings, and that the same are against law; and assign as a particular error that the evidence was insufficient to justify the eighteenth finding of fact. It is a sufficient answer to this assignment of error that the finding itself is not upon a material issue in the case, and that the judgment does not depend upon this finding. Irrespective of this, however, the evidence of Horton and Moffitt, found in the statement, tends to support the finding, and, in the absence of direct evidence to the contrary, was sufficient to justify the court therein.

Appellants ask a reversal of the judgment for the reason that the court has failed to make findings upon certain material issues in the case. A judgment will not, however, be reversed merely for the failure of the court below to make findings upon any issue presented in the case, unless it shall be made to appear to this court that there was evidence presented to that court upon such issue sufficient to authorize it to make a finding thereon. It must also appear that the issue upon which the evidence was given was of such a nature that the finding which the appellant claims should have been made would have the effect to counteract other findings in the record to such an extent that the judgment thereon would be invalid. *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. Rep. 1098; *Winslow v. Gohransen*, (Cal.) ante, 504. It appears from the evidence set out in the statement that the south ditch of the plaintiffs was deprived of water during a portion of the irrigating season of 1887, and that the plaintiffs were not able to irrigate as much of their land during that season as they had been accustomed to irrigate in previous seasons. The court found that whatever diversion of the water was made by the defendants, other than the defendant Goble, was rightfully made by them. It also found that during the greater portion of the period covered by the complaint the defendant Goble diverted through his north-west ditch a quantity of water from the creek greater in amount than would have been sufficient to fill all of the plaintiffs' ditches; and, as such diversion was in violation of the plaintiffs' right, the court enjoined Goble from further diversion of water through his north-west ditch. Inasmuch as whatever diversion was made by the defendants, other than Goble, was rightfully made, and as Goble was enjoined from diverting water through his north-west ditch, the plaintiffs obtained all the relief to which they were entitled. When the court had found that the defendants, other than Goble, had the

right, as against the plaintiffs, to divert the water in the mode and to the extent in which they were diverting it, the plaintiffs were not entitled to a finding that they threatened any further diversion, as it would not invade their rights. So, too, the extent to which the plaintiffs had appropriated the waters of the creek, or the precise time at which they had completed their ditch, or the amount of water which flowed in it at any particular date, was immaterial, so long as any act of the defendants in reference to such water was not an invasion of their rights. If the plaintiffs do not claim that the findings of the court respecting the relative rights of the parties to divert the waters of the creek were erroneous, it was unnecessary for it to find the time at which the defendants made any specific amount of diversion, or the extent to which the plaintiffs could fill their ditches. As the plaintiffs have not set forth in the statement any evidence affecting the correctness of the above findings, any further findings upon issues, which would not impair the sufficiency of these findings to support the judgment, would be immaterial, and the failure to make such findings does not justify a reversal of the judgment.

It is also urged that certain findings made by the court are inconsistent, and that for this reason the judgment should be reversed. We have carefully examined the findings, and are unable to see that there is any inconsistency in them upon any material point, or which would justify a reversal of the judgment. The case appears to have been fully tried by the court below, and the findings appear to have been carefully prepared, and to show the several rights of the respective parties to the waters in question, and to fully sustain the judgment of the court. The judgment and the order denying the motion for a new trial are affirmed.

39 Cal. 196

**BROWN v. CLARK et al.** (No. 13,456.)

(*Supreme Court of California.* May 26, 1891.)

**ADVERSE POSSESSION—PAYMENT OF TAXES.**

1. Code Civil Proc. Cal. § 835, provides that adverse possession is not established unless the land has been occupied and claimed continuously for five years, and the occupants, their predecessors and grantors, have paid the taxes which have been levied on such land. April, 1878, A. entered on land of plaintiff's, fenced it, and occupied it until May, 1884, when he erected a building, and put a tenant in possession, who has since occupied the property. The taxes assessed upon the lot in 1883 were paid by plaintiff. In 1884 the land was assessed to B., mortgagee of A., who paid the taxes that were thereafter assessed for that and three succeeding years. The assessment of 1888 was paid by A. Plaintiff sued in ejectment in 1889. *Held*, that there had been actual and continuous occupation of the premises and a payment of taxes for five years under adverse claim of right, authorizing a decree quieting A.'s title to the property.

2. Where land is assessed to the mortgagee, and he pays the taxes, it becomes a payment on account of the mortgagor, and is as if made by him, under Const. Cal. art. 13, § 4, providing that the mortgage security shall be assessed as an interest in land to the mortgagee, and either party can pay the tax thereon.

Commissioners' decision. Department 1.

v.26p.no.12—51

Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

*J. C. Bates*, for appellant. *Otto Tum Saden*, for respondents.

FOOTE, C. Brown brought an action of ejectment against the defendant Clark and his tenant for the possession of a lot of ground in the city and county of San Francisco. The defendants denied that they had ousted the plaintiff from any portion of the lot described in the complaint except 12½ feet in width by 80 feet in length thereof; and as to this portion they set up by way of cross-complaint the right and title to the same in Clark by virtue of the provisions of section 325 of the Code of Civil Procedure, and prayed that his title thereto might be quieted. Upon the issue tendered by the cross-complaint, and the answer thereto, the court below sustained the contention of the defendants, and held that they were entitled to a judgment for costs, and that the defendant Clark was entitled to a decree quieting his title to the 12½ by 80 feet of the lot, which he claimed in his cross-complaint to be the owner of by adverse possession under claim of right, etc. From the judgment thereupon rendered, and an order refusing a new trial, the plaintiff appeals. The grounds upon which he claims that the court below erred in its findings for the defendants are: That, although the evidence shows that for five years before the action was brought the defendant Clark, or his tenant, was actually and continuously in possession of the land involved here, under a claim of title exclusive of any other right, and had protected the land by a substantial inclosure, and improved the same by building a house thereon, and occupying it by himself or tenant, yet that the evidence did not show that Clark had paid all the taxes levied and assessed upon the land, so as to establish adverse possession, such as is meant by the proviso to section 325 of the Code of Civil Procedure, which reads thus: "Provided, however, that in no case shall adverse possession be considered established under the provision of any section or sections of this Code unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land." If the statute is to be given the construction that the taxes to be paid by the claimant of title, such as is Clark, are taxes which are assessed and levied during the time of his continuous occupation and claim under adverse right, then the defendant is entitled to the relief he obtained if it is also to be held that the payment of taxes by his mortgagee is a payment by him. The action was brought on the 25th of March, 1889. On the 1st of April, 1878, the plaintiff, Brown, was the owner of the land. On that day the defendant Clark entered upon and occupied it, under an adverse claim of right, and under such claim and occupation at once inclosed it with a substantial fence. Ever since that date until

May 4, 1884, he maintained his actual occupation and possession of it, keeping the same protected by a substantial inclosure. At the date last mentioned he improved the lot by erecting a building on it, and since then his tenant, Quang Teong, has been in the exclusive possession and occupation of the building and lot. The taxes were paid by the plaintiff, Brown, on the 29th of December, 1883, which had been levied and assessed on the lot on the first Monday of March, 1883. The lot was assessed some time in 1884 to the mortgagee of Clark, and this mortgagee paid all the taxes as they became due which had been assessed against it on the first Monday in March of the years 1884, 1885, 1886, 1887, and the defendant Clark paid all the taxes assessed against the lot on the first Monday of March, 1888, and was in possession up to the day this action was brought, and still is. The plaintiff contends that, as he paid the taxes that were assessed on the first Monday of March, 1883, this was a payment of all taxes due up to and including June 30, 1884, that being the end of the fiscal year, (Const. art. 20, § 5.) and that, therefore, the defendant cannot claim to have the statute run in his favor until the 1st of July, 1884, which would not be five years prior to the 25th of March, 1889, when this action was commenced. But these taxes, while they had been levied and assessed before March 25, 1884, did not remain an assessment levied and unpaid on that day, but became a lien from the first Monday of March, 1883, by virtue of the levy and assessment thereof. Pol. Code, § 3718. The duty laid upon the occupant, as it seems to us, is to pay all taxes which have been levied and assessed against the land during his term of continuous occupancy and adverse claim of right for five years. If he does this he can maintain his possession as against the person who would otherwise be the owner of the land. The plaintiff paid all the taxes which had been levied and assessed on the land, and which remained a burden upon it up to the 29th of December, 1883. When Clark, or his mortgagee, under contract to do so for the mortgagor, paid all the taxes levied and assessed after that, during the five years of Clark's continuous occupation and adverse claim, he satisfied the conditions of the statute as to payment of taxes.

This view of the matter is greatly strengthened when we come to consider that the actual continuous possession under claim of right, exclusive of any other right for five years, was sufficient to establish adverse possession as against the owner of a paper title by one not relying upon a written instrument, judgment, or decree, where land claimed and occupied was protected by substantial inclosure, or was cultivated or improved, under sections 324 and 325 of the Code of Civil Procedure, until April 1, 1878, when the proviso was added, making, as we think, as an addition to the necessary element of occupation and continuous claim, exclusive of all others, another element that all taxes should be paid which "have been" levied

or assessed on the land; the proviso intending that the one element should accord with the other as to time, and this cannot be done except on the idea we have advanced, viz., that the taxes to be paid are all those assessed or levied during the possession, adverse claim, and occupancy. As to continuous occupation under adverse claim of right, it is obvious, under the statute, that it must have existed for five years before the date of bringing the action. That would carry the date of commencement of such necessary possession and occupancy to the 24th of March, 1884. There is nothing in the statute which computes these five years upon the basis of fiscal years. There is nothing therein which states directly for how many years taxes shall be paid. But it says, the taxes to be paid are those which have been assessed on the land. It would seem reasonable, therefore, to say that the object of the proviso was to make the person claiming by occupancy have annexed to this conditional privilege the further condition that he must pay all the taxes which become a burden on the land by levy and assessment during his occupancy under adverse claim of right. It would appear to follow that if Clark had an actual and continuous occupation under adverse claim of right for five years prior to the 25th of March, 1889,—the day this suit was brought,—he satisfied the first condition of the proviso in question, and a reasonable construction of the language thereof must be that if he satisfied this first condition he satisfied the next condition, if he paid all the taxes assessed and levied during that occupation; for, if this be not so, then the rule by which he occupied as to length of time must become different from that which the statute declares to be sufficient as to occupancy, and, in the absence of direct statutory direction, such an inference should not be indulged. Under the constitution of this state, art. 13, § 4, the mortgage security is assessed as an interest in the land to the mortgagee, and either party can pay the tax thereon; but if paid by the mortgagor it is *pro tanto* a payment of his mortgage debt. Thus, when the mortgage is executed it is in view of this provision of the constitution, and a relation springs up between the parties by virtue of which this tax is to be paid by the mortgagee primarily, but really for the mortgagor; and the tax when thus paid by the mortgagee for the mortgagor by virtue of such relation to do so is a payment for and on account of the mortgagor, and is as if made by him. Therefore, when the mortgagee paid the taxes assessed, there being none other, the mortgagor paid all the taxes assessed and levied on the land. For these reasons we are of opinion the judgment and order should be affirmed.

WE CONCUR: FITZGERALD, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

## MAXWELL v. TILLAMOOK COUNTY.

(Supreme Court of Oregon. April 14, 1891.)

CONSTITUTIONAL LAW — SPECIAL LEGISLATION—  
CONSTRUCTION OF HIGHWAY.

The act entitled "An act to appropriate \$10,000 to aid Tillamook county in the construction of a wagon-road from the Nehalem river, in the north end of said county, to the Fuqua toll-road, in the south end of the county, and to use \$1,000 of said appropriation on a branch road from South Prairie to Netart's bay, and to create a board of commissioners to construct said work," approved February 18, 1889, is in conflict with article 4, § 23, subd. 7, of the constitution, which declares that "the legislative assembly shall not pass special or local laws in any of the following enumerated cases, that is to say: \* \* \* For laying, opening, and working on highways, and for the election or appointment of supervisors." The said act is not a general law, but a special and local law, within the meaning of that clause of the constitution.

(Syllabus by the Court.)

Appeal from circuit court, Yam Hill county; R. P. BOISE, Judge.

W. W. Thayer, for appellant. James McCain and George G. Bingham, for respondent.

LORD, J. This is an action to recover from the defendant, Tillamook county, the sum of \$895 for services alleged to have been rendered as superintendent of construction of a public wagon-road from Nehalem to the Fuqua toll-road, in said county, with a branch road from South Prairie to Netart's bay. The complaint alleges, in substance, that by virtue of the provisions of an act entitled "An act to appropriate \$10,000 to aid Tillamook county in the construction of a wagon-road from the Nehalem river, in the north end of said county, to Fuqua toll-road, in the south end of said county, and to use \$1,000 of said appropriation on a branch road from South Prairie to Netart's bay, and to create a board of commissioners to construct said work," the commissioners named in the act duly employed the plaintiff on the 6th day of March, 1889, as superintendent to superintend the work on said road, at an agreed compensation of \$5 per day; that under said employment, and under the direction of said commissioners, the plaintiff rendered services as such superintendent upon and about the construction of said roads from the 26th day of March, 1889, to the 16th day of November, 1889, inclusive, to-wit, 179 days; that the commissioners, upon the construction of such roads, duly reported to the county court of said Tillamook county concerning the construction thereof in manner and form as required by law, and that thereby the said county became indebted to the plaintiff in the sum aforesaid, etc. An answer was filed, denying the material allegations, and further alleging that the plaintiff had filed a verified claim for a less amount (\$710) for such services; that the court had examined the same, and adjudged the amount due thereon to be the sum of \$300, and ordered a warrant to be drawn on the treasurer of the county for that amount, etc. The plaintiff in his reply alleged that the claim presented was in the nature of a compromise, and did not include all his services, but that he

was willing to receive the reduced sum of \$710, without controversy, in full, rather than incur the delay and expense of a lawsuit. Upon the case being called for trial, the counsel for the defendant moved to dismiss it for the reasons (1) that the complaint did not state facts sufficient to constitute a cause of action; and (2) that the court had not jurisdiction of the subject-matter of the action. The trial court sustained the motion, and ordered that the action be dismissed, and that the defendant recover its costs; and from the judgment entered thereon this appeal was taken.

The main question to be determined is as to the validity of the act under which the services were rendered. The contention is that the act is special and local, and, as such, in contravention of subdivision 7, § 23, art. 4, of the constitution, which provides that "the legislative assembly shall not pass special or local laws in any of the following enumerated cases, that is to say: \* \* \* (7) For laying, opening, and working on highways, and for the election or appointment of supervisors." The act which is claimed to be in conflict with this provision of the constitution reads as follows: "Section 1. There is hereby appropriated out of the general fund of the state of Oregon, not otherwise appropriated, the sum of ten thousand dollars for the purpose of constructing a wagon-road from Nehalem river, in the north part of Tillamook county, to the Fuqua toll-road, in the south part of same county: provided, that one thousand dollars of said appropriation shall be expended on a road from South Prairie to Netart's bay, commencing where the above-named road crosses South Prairie. Sec. 2. That Fred Scherinzinger, A. L. Alderman, and E. W. Mills are hereby appointed commissioners and viewers to locate said road, and cause the same to be surveyed by the county surveyor. When said road or roads are located and run through the lands of any person or persons who may feel themselves aggrieved thereby, they shall have the same recourse at law as is now provided for county roads; but this latter provision shall not apply to any part of said road or roads that are now already located. When said road or roads are located and surveyed, and a plat thereof recorded in the county clerk's office, said road or roads shall not be changed or vacated except upon a petition to the county court, signed by a majority of the freeholders of the district where said change is desired. Sec. 3. The commissioners shall employ some suitable person to superintend the work on said road or roads. The salary of the said superintendent, together with the expenses of damages, viewing, locating, and surveying, shall all be paid out of the county funds of Tillamook county. The said commissioners shall report to the county court of Tillamook county, Oregon, setting forth their action concerning the construction of said road, and a full and explicit statement of their acts in constructing said road. Said report shall be made upon the completion of said road or roads." Section 4 makes provision for the payment of the \$10,000

on completion of the road. *Sess. Laws Or. 1889*, p. 169.

It will be admitted, if this act is a special or local law, that then it comes directly within the prohibition of the clause of the constitution cited, and never had any validity whatever, for the legislature had no power to enact it. But, to determine whether an act of the legislature is special or local, it is necessary to ascertain the meaning to be given to the words "special or local," as used in the constitution. The restriction is that the legislature "shall not pass special or local laws" in the enumerated cases; that is, the inhibition is directed against both "special or local laws;" and as laws may be special and not local, or they may be local and not special, it is necessary that each word receive its distinct and peculiar signification. It is not easy to define with precision the distinction between a general law and one that is special or local. In general language, a local statute may be said to be one that is operative only within a portion of a state, and a special statute is one that is applicable to particular individuals or things. Statutes are sometimes distinguished as general or local, according to whether they are intended to operate throughout the entire jurisdiction, or only within a single county or other division or place. A law which applies only to a limited part of the state, and the inhabitants of that part, is local. At common law, statutes were classified as public or general, and private or special. 1 Bl. Comm. 86. "A general or public act," says Blackstone, "is a universal rule that regards the whole community, and of this the courts of law are bound to take notice judicially and *ex officio*, without the statutes being particularly pleaded. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons and private concerns." Under this classification, the words "public or general" and "private or special," are used synonymously. The classification of statutes as local is of later origin; for, under the common law, statutes restricted to particular localities were considered as private or special. But the distinction between public and private acts as defined by Blackstone is not quite the distinction recognized in this country, where the disposition has been, on the whole, to enlarge the limits of the class of public acts which in any way affect the community at large. *Unity v. Burrage*, 103 U. S. 455; *Suth. St. Const.* § 193. Within this view, local acts may be public or private, and are treated as public when they concern the public generally, though restricted in their operation to a local community. The distinction is important, owing to the various restrictions in the constitutions of the several states, and the division made in some of them between public or general laws, in printing the acts of their legislatures, and to be kept in mind in the examination of the authorities. Thus, in Maryland, the division of the laws as published are "Public General Laws" and "Public Local Laws." Under the constitution of that state, article 3, § 33, inhibits the passage of local or special laws in cer-

tain enumerated cases, but the laying out of roads is not included among them; but the next sentence imposes an inhibition to the passage of special laws for any case for which provision has been made by an existing general law. In *State v. Commissioners*, 29 Md. 516, the case shows that an act was passed relating to roads of that county; and the contention was that the act was a special law, within the meaning of section 33, art. 3, *supra*, and, because provision had been made by an existing general law for jurisdiction and control over county roads and bridges, it fell within the constitutional prohibition and was a nullity. But the court held that it was not a special law, but a public local law; that to make a statute a public law of general obligation it is not necessary that it should be applicable to all parts of the state; all that is required is that it shall apply to all persons within the territorial limits described in the act. But the clause of our constitution under consideration inhibits the general assembly from passing any "local or special laws" for the laying out and establishing of roads, and any act obnoxious to the objection of being special or local would be a nullity: for it is obvious that the prohibition of the enactment of "local or special laws" in the enumerated cases—as the laying out of a highway—is equivalent to the command that general laws alone shall be enacted for that purpose; for the words "local" or "special" are clearly used in contradistinction to the word "general;" and, there being no power in the legislature in such cases to enact "local" or "special" laws, there can be no other than "general" laws enacted. *People v. Cooper*, 83 Ill. 586. Hence, if the act in question is local or special,—obnoxious to either objection,—the legislature was without power to enact it, and the act is without any validity. A local act applies only to a limited part of the state. It touches but a portion of its territory, a part of its people, or a fraction of the property of its citizens. "Legislation, to be local," said MULLIN, P. J., "must apply to and operate exclusively upon a portion of the territory of the state, and the people living therein. If it applies to and operates upon persons or property beyond such locality, it is not local." And again: "The true criterion by which to determine whether an act is local or general is to inquire whether, under it, the people of the state may be affected. If not, it is local; if they can be, it is general." *Healey v. Dudley*, 5 Lans. 115. "A local act," said EARL, J., "is one operating within a limited boundary or specified locality. An act operating upon persons or property in a single county, or in two or three counties, would be local." *People v. Plank-Road Co.*, 86 N. Y. 7. A special statute is one that is only applicable to particular individuals or things. "They are those made," says Mr. Sutherland, "for individual cases, or for less than a class, requiring laws appropriate to its peculiar condition and circumstances. Local laws are special as to place." *Suth. St. Const.* § 127. A special law is one such as at common law the courts would not notice un-

less it was pleaded and proved like any other fact. *Hingle v. State*, 24 Ind. 28; *Railroad Co. v. Nordyke*, 27 Ind. 95. At common law, "private" and "special" laws, as applied to statutes, were convertible terms. In *Allen v. Hirsch*, 8 Or. 412, the view was sustained that a special law under section 23, art. 4, is a private law at common law. An act changing the venue of a particular trial for murder is special. *People v. Judge*, 17 Cal. 547. An act to establish a court at a particular place was held to be a special law in *McGregor v. Baylies*, 19 Iowa, 43. One text-writer defines a special law as distinguished from a general law in this wise: A general law "is one which provides for all things of a kind or genus; special provides for a species of the genus." *Smith, Con. St.*

It is not easy to define with accuracy the distinction between general and special laws, but the instances given will serve to elucidate the idea. It is, however, manifest from the construction given to these words, "special or local," as applied to statutes, that the purpose of the prohibition against the general assembly passing "local or special laws" in the enumerated cases, including the laying out of highways, was to secure a harmonious system of general laws upon these subjects, and to avoid the mass of incongruous acts, each applying to some limited portion of the state, or some particular individual or special case, as would inevitably result. This would prevent any distinction in the operation of laws between different localities, as well as between persons or things, in respect to these subjects. It would require, as to these matters, that they should be regulated by general laws of uniform operation throughout the state.

Turning now to the act in question, it is entitled "An act to appropriate \$10,000 to aid Tillamook county in the construction of a wagon-road" wholly within its boundaries. It appropriates the money for that purpose out of the general fund of the state. It appoints the commissioners and viewers to locate the road, authorizes them to employ some suitable person to superintend its construction, provides that the expense of damages and locating the road shall be paid out of the county funds, and makes provision for the payment of the \$10,000 on the completion of the road. It is thus seen that the law applies and operates exclusively in that limited portion of the state known as "Tillamook County." It does not apply to all highways in that county, but only to the particular highway designated in the law. It confers on that county special benefits, at the expense of the general public, not conferred upon the other counties of the state. The act is plainly intended for a particular case and for a particular county, and contemplates no broader application in the future. When the road is built as provided, and paid for out of the appropriation, the mission of the act is ended. It arbitrarily distinguishes between the different counties of the state, in its operation, by building for that county alone a highway at the public expense for

its special benefit, save the expense of salary and damages of locating, when all other counties must lay out and construct their roads at their own expense, under the operation of a general law enacted for that purpose. Nor does the road connect two great or remote sections of the state in which the community at large have an interest, but its advantages and benefits are confined almost exclusively to the inhabitants living along its route. The act is addressed to that county alone, personally as a legal entity, and designed to aid it exclusively, and operates only within its boundaries. If a local act is one operating within a limited territory or specified locality, "one operating upon persons or property in a single county, or two or three counties, would be local," and the act in question must be obnoxious to that objection. In *Kerrigan v. Force*, 68 N. Y. 381, an act entitled "An act relating to the expenses of judicial sales in the county of Kings" was held to be a local law, within the meaning of the constitutional provision that no private or local bill should contain more than one subject, which should be expressed in its title. *Church, C. J.*, says: "I entertain no doubt that this is a local act, within the meaning of the constitution. It applies to an officer of a single county, and to the property and sales made therein. It is not general, and does not apply to the people of the whole state. True, all persons, wherever living, in or out of the state, foreclosing mortgages in the county, would be bound by the act, and they would be so bound because they would then come within the operation of this local act." In *Montgomery v. Conn.*, 91 Pa. St. 125, the case shows that an act was passed to reimburse certain parties for money advanced, and required the school directors of Ayr township to assess and levy a tax, etc., for that purpose; and the question was whether this act was in conflict with the provision of the constitution of that state declaring that "the general assembly shall not pass any local or special laws regulating the affairs of counties, cities, townships, wards, boroughs, or school districts," etc.; and the court held that the act was a local and special law, saying: "The act in question is clearly local. It applies to the township of Ayr only. \* \* \* It is also special. The tax was to be levied and collected for one specific purpose. That purpose was to pay a certain sum of money to the persons named in the act. The money could not be used for any other or different purpose."

If the true criterion by which to determine whether an act is local or general is to inquire whether, under it, the people of the state may be affected by its operation, the answer to that question, as regards the present act, must be that it is local, and not general. It operates in the county of Tillamook only, and has no force or effect in any other portion of the state. If such a law is not local, it is difficult to understand, in the light of the authorities, what species of legislation would constitute a local law. It is also special, because it is limited to a particular county

for a special purpose. This is as much an individual case as a special law, applicable only to a particular individual. It can have no application to any other county or road than that named, and the appropriation could not be used for any other or different purpose. An act may be special where it applies to many particular and existing persons or things, as where it applies to only one; but the strength of our case lies in the fact that it applies to only one; it is special to Tillamook county, and to no other. General laws relate to the public at large, but special acts concern the particular interest or benefit of certain individuals or particular classes of men. We are relieved of the difficulty which often arises in distinguishing whether an act is general or special, when it concerns many particular persons or things; for the act here concerns the interests of one county only, and that designated by name. In *Devine v. Commissioners*, 84 Ill. 590, an act was passed under which it was proposed to issue bonds for the erection of a court-house, etc., but which, by its terms, limited its operation to counties containing over 100,000 inhabitants, etc.; and the question was whether the act was in conflict with that provision of the constitution of that state which provides that the general assembly shall not pass local or special laws in certain enumerated cases, and among the subjects mentioned is a subdivision "for regulating county and township affairs;" but the court held that a statute which, by its terms, can have application to but one county in the state, although purporting to be a general law, applicable to all counties having a certain population, is special legislation, and within the prohibition of the constitution on that subject. The court say: "Its very terms preclude it from having any application to any county except Cook county; for we take judicial notice no other county in the state contains over one hundred thousand inhabitants. \* \* \* That it is a 'local or special law,' applicable only to Cook county, is a proposition so plain it will bear no discussion, and, unless its passage can be justified for some reason, it is invalid." In *City of Topeka v. Gillett*, 32 Kan. 437, 4 Pac. Rep. 800, an act was passed which was claimed to be in conflict with that provision of the constitution of Kansas which provides that "the legislature shall pass no special act conferring corporate powers;" and the court say: "The act would apply to just those three cities, Topeka, Lawrence, and Atchison; no more, and no less. Is such an act a general act, or is it merely a special act? It is our opinion that it is merely a special act. It is true, it applies to three cities, and not merely one; but the act declared unconstitutional in the case of the City of Council Grove, 20 Kan. 619, applied to four cities, and not merely one; and the act declared unconstitutional in the case of *State v. Hammer*, 42 N. J. Law, 435, applied to two cities, and not merely to one; and the act declared unconstitutional in the case of *State v. Bridge Co.*, 22 Kan. 433, applied to several different corporations, and not merely to one; and the act

declared unconstitutional in the case of *State v. Herrman*, 75 Mo. 340, applied to a large number of notaries public, and not merely to one." But our act applies merely to one. It is designed to aid Tillamook county, and no other. It specifically names that county as its beneficiary, and contemplates no broader or other application of its benefits. Within the definition that all special laws are made for individual cases; that they relate to divers particular towns, or to one or more particular counties,—this act was made to aid that particular county to build that particular road. It applies specifically to it, and operates only within its boundaries. Such a law is in no sense general, but wholly special, within the meaning of all the authorities. It seems to us that it would be difficult to imagine a clearer case of special legislation.

With these considerations in view, it becomes necessary now to notice *Allen v. Hirsch*, 8 Or. 412, mainly relied upon by the plaintiff. The act passed upon in that case was an act for the construction of a wagon-road up the south bank of the Columbia river from near the mouth of the Sandy, in Multnomah county, to The Dalles, in Wasco county, and was to be paid for, not from taxes levied upon the people of the state, but from the proceeds of sales of public lands for the purpose of making internal improvements. That act was treated as providing for an internal improvement—a state highway—in which the community at large was interested. The benefits of the road to the people along its route were regarded as insignificant, compared to the great advantages to the people at large, which it was its purpose to subserve. Referring to its character, its necessity, and its advantages to the people at large, KELLY, C. J., said: "It is well known to all that during the winter months it is the only practicable route for a public road through the mountain range which separates eastern from western Oregon, and it was deemed to be of the most importance to the people of the state that trade and travel and mail facilities should not be obstructed; that intercourse between these two great divisions of the state should not be suspended during that season of the year when navigation on the Columbia is closed by ice in the river. It was well known to the legislative assembly that for weeks at a time all communication between the east and west was suspended, until the interruption came to be regarded as almost a public calamity; and it was to prevent these obstructions that the appropriations of money were made to construct the Dalles and Sandy road." It is thus seen that the road was regarded by the court as a great highway, connecting two important divisions of the state, separated by a high range of mountains, through which travel and traffic might pass at all seasons of the year, and in which the people of the whole state were interested in like manner as they would be in the construction of a portage road to connect the navigable waters of the Columbia at the place of its obstruction. It was in this view that the court thought that the act could not be regarded as local



or special; for the sphere of its influence or operation was not confined to a specified locality, but applied to the people of both sections of the state, and was therefore a matter of general concern. This is the ground upon which that case was decided. But while it was insisted by opposing counsel that this difference was sufficient to exclude the present case from the effect of that decision, yet his argument amounted to saying that the law was stated correctly by the court, but wrongly applied in that case.

The purpose of the constitutional restriction upon the legislative power in the cases enumerated was obviously to require that these specified subjects should be regulated by general laws of uniform operation throughout the state. In the execution of this purpose, it was intended by the restriction to prevent unjust distinctions from the operation of local laws between different localities, and to prevent like distinctions from the application of special laws to particular individuals, counties, or things. This act violates that principle of this constitutional restriction, and embodies the mischief it was intended to prevent, and cannot be upheld. This is the ground upon which we declare this act to be unconstitutional. While it is true that every court approaches with gravity the question of declaring a law to be unconstitutional, and never exerts its power so to do while doubt exists, yet considerations of gravity stand for naught when its incompatibility with the constitution is shown, and nothing remains for the court but to discharge its duty by declaring the law to be unconstitutional. It may be that in this county, as some other localities of the state, where the population is sparse, and the funds of the county are limited, such roads, built at the public expense, would be of general service to the people of those localities, and lend to the development of their interests and prosperity. If this is so, and a change is desirable, the remedy lies with the people, and not with the court. There was no error, and the judgment of dismissal must be affirmed.

STATE *ex rel.* COELLA v. FENNIMORE, Clerk of the Supreme Court of Jefferson County.

(Supreme Court of Washington. May 14, 1891.)

CONVICTION OF MURDER—COSTS ON APPEAL.

A person who on conviction of murder gives notice of appeal, and shows that he is absolutely unable to pay for a transcript of the record, is entitled to such transcript at the expense of the public. DUNBAR, J., dissenting.

Application for *mandamus*.  
John Fairfield, for relator.

HOYT, J. Relator was convicted of murder in the first degree and sentenced to death. He gave notice of appeal to this court, and to perfect the same sought to have the clerk transmit a transcript of the record. The clerk declined to do this unless the fees for preparing the same were first paid. Relator thereupon showed that he was without means, and was absolutely unable to pay such fees. Under

these circumstances, relator was entitled to such transcript at the expense of the public. The writ of *mandamus* must issue as prayed.

ANDERS, C. J., and STILES and SCOTT, JJ., concur.

DUNBAR, J. I dissent. I know of no provision of law, either statutory or constitutional, empowering the court to authorize the disbursement of public funds to aid a defendant to prosecute his appeal to the supreme court. Section 22, art. 1, of the state constitution, relied upon by counsel for appellant, in my judgment does not touch this case. That section simply guarantees to the accused the right of appeal in any case; that is, provides that the right of appeal in criminal cases shall not be taken away by statute; and the final judgment referred to in said section refers to final judgment in the superior courts. Such was the construction placed upon it in *Stowe v. State*, 25 Pac. Rep. 1085, decided by this court at its last term. The payment by the state of the costs of appeal in a criminal action, where the defendant is not able to pay, might be a humane policy for the law to adopt; but as the law-making power has not seen fit to adopt such a policy it is not within the inherent power of the court to grant the relief asked for.

#### PIERCE v. FRACE.

(Supreme Court of Washington. Feb. 11, 1891.)

PUBLIC LANDS—PRE-EMPTION—FRAUD—CANCELLATION OF ENTRY AND CERTIFICATE.

Act Cong. July 4, 1836, provides that the issuing of patents and sale of public lands shall be under the supervision of the commissioner of the general land-office. Rev. St. U. S. § 2263, provides that proof of settlement and improvement shall be made before entry "to the satisfaction of the register and receiver of the land district in which such lands may lie." Held that, where a pre-emptor has proved his settlement to the register's satisfaction, and received from him a cash entry certificate and final receipt, the latter's judgment cannot be reopened by the commissioner and set aside, on complaint of a stranger that his residence has not been established as required by law. Per DUNBAR, J., dissenting from ante, 192.

For majority opinion, see ante, 192.

DUNBAR, J., (dissenting.) As I indicated at the time of the filing of the majority opinion, I will now give some of my reasons for dissenting thereto. It is a common remark by practitioners before the land department that the land laws "do not amount to anything, but that everything depends upon the instruction." But, in the investigation of rights under the land laws, I prefer to look first at the law, and see if any provisions are made by the law, or direct authority given by the law, for the action of the commissioner, or whether the authority is conferred upon the commissioner, under his supervising powers, to set aside the findings of the register and receiver on the questions of residence and cultivation in case of a pre-emption proof, which is the point involved in this case. An examination of

the pre-emption law shows that preceding sections state what lands shall be subject to pre-emption entry, who are qualified pre-emptors, etc.; while section 12 of the act of 1841, corresponding with section 2263 of the Revised Statutes, provides that, "prior to any entries being made under and by virtue of the provisions of this act, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands may lie, agreeably to such rules as may be prescribed by the secretary of the treasury," now by subsequent enactment changed to secretary of the interior. It seems to me that there is no room for a construction of this section. Here is a judicial authority conferred upon a tribunal in language plain and unmistakable. The power is conferred as plainly as words can state a proposition. It is the judgment of the register and the receiver that is to be satisfied; not the judgment of the commissioner or the secretary of the interior. This is a judicial investigation on their part; not merely a clerical or administrative duty to be performed. A fact is to be judicially determined from evidence adduced under certain rules and regulations of law. The rules and regulations governing the admission of this testimony, or the mode of procedure, are prescribed by the secretary of the interior, and it is the duty of the commissioner to see that these rules and regulations are observed, and that the investigation is conducted in accordance with them; but the judicial inquiry and determination of the facts, under those prescribed rules, are matters exclusively within the jurisdiction of the register and receiver, so far as settlement and improvement are concerned. I repeat that, if this investigation has not been carried on agreeably to, or in conformity with, such rules as the secretary is authorized to make, then for that reason only should the commissioner reject the proof or send it back for a rehearing; for when those officers have obtained jurisdiction, by reason of all the other requirements of the law having been met, and when their discretion and judgment have been legally exercised and a decision reached on the question of settlement and improvement, questions especially submitted to their discretion by the law, that decision is not subject to the supervising power of superior officers. There is a vast difference between prescribing rules and regulations and usurping judicial functions. Supervisory powers may be exercised over acts which are purely administrative or executive; but the distinction must be constantly kept in view between acts which are administrative or executive and those which are judicial in their character. Under this section the register and receiver are authorized by law to exercise their discretion judicially. As was well said by the court in *Butterworth v. Hoe*, 112 U. S. 50, 5 Sup. Ct. Rep. 25: "It is not consistent with the idea of judicial action that it should be subject to the discretion of a supervisor, in the sense in which that authority is conferred upon the head of an executive department in

reference to his subordinates. Such a subjection takes from it the quality of a judicial act."

But it is asserted by counsel for defendant in error that the commissioner, at the time of ordering a rehearing in this case, acted with authority, because the following circular instructions were then in force, viz.: "Failure to inhabit and improve the land in good faith, as required by law, renders the claim subject to contest, and the entry to investigation." "Final proof in pre-emption cases must be made to the satisfaction of the register and receiver, whose decision, as in any other case, is subject to examination and review by this office." I answer that, if he had no authority before the publication or issuance of these instructions, he manifestly had none afterwards. Courts must confine the enactment of laws to law-making powers. The congress of the United States is the only body that can make laws regulating the sale or disposition of the public lands. The secretary of the interior is authorized to prescribe rules and regulations to make the laws effective, and to exercise supervisory powers in certain instances; but he is not authorized to make new laws, to increase his own powers, or to take away any judicial authority that has been especially, or even generally, conferred upon another tribunal. If the secretary or commissioner are allowed arbitrarily, without any appeal, to substitute their discretion for that of the register and receiver on subjects especially submitted to them, they might logically go further, and dispense with their judgment altogether. "If fraud is alleged in obtaining the final receipt," says Judge *DRADY* in *Smith v. Ewing*, 23 Fed. Rep. 741, "the government must seek redress in the courts, where the matter may be heard and determined according to the law applicable to the rights of individuals under like circumstances. The right of a party holding a certificate of purchase of public land and that of his grantee is a right in and to property of which neither of them can or ought to be deprived without due process of law." I think the case of *Wilcox v. Jackson*, 13 Pet. 498, fairly sustains the theory of the plaintiff in error; also *Lytle v. State*, 9 How. 314. It must be borne in mind that it is not contended by appellant that the action of the register and receiver cannot be reviewed; but the contention simply is that their decision on these two questions, of residence and improvement only, cannot be reviewed in a pre-emption case, and such I believe to be the distinction made by the cases generally; and those cases cited wherein their decisions have been reversed or set aside on some other ground do not involve the pertinent question in this case, and should not be considered. This distinction I think was plainly maintained in the late case of *Cornelius v. Kessel*, 128 U. S. 456, 9 Sup. Ct. Rep. 122. Said Mr. Justice *FIELD*, in a well-considered opinion: "The power of supervision possessed by the commissioner of the general land-office over the acts of the register and receiver of the local land-offices, in the disposition of the pub-

lic lands, undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits;" fairly implying that the entry could not be annulled on the ground of want of proof of settlement or cultivation.

But it is contended that the earlier cases are not in point, because they were decided on controversies which arose prior to the passage of the act of 1836, which enlarged the supervisory powers of the commissioner, the first section of which act is as follows: "That, from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed, by law, appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government of the United States, shall be subject to the supervision and control of the commissioner of the general land-office, under the direction of the president of the United States. I am of the opinion that the act of 1841 was intended for a full, complete, and independent pre-emption law, and, if it be conceded that the act of 1836 modified the act of 1830 with reference to the powers of the register and receiver, the re-enactment of the same section in 1841 must be conceded to be a restoration of that authority, and their decision would again be final on that point; and this view of the law is in harmony with *Johnson v. Towsley*, 13 Wall. 72, wherein Justice MILLER says that the act of 1841 so enlarged the right of pre-emption as to have been ever since considered the main source of pre-emption rights." And it may be observed in this connection that, in all the cases relied upon by the majority, while the decisions were rendered subsequent to 1841, yet all the controverted facts had transpired prior to the passage of the act of 1841.

However, conceding that the law of 1836 is still in full force, I cannot conceive how it can in any manner conflict with section 12 of the law of 1841; for it will be observed that the law of 1836 refers exclusively to the executive duties appertaining to the survey and sale of the public lands. Certainly an executive act spoken of in general terms in the act of 1836 has no reference to a judicial duty especially imposed upon a certain tribunal. But, if there could possibly be any doubt on this question, it has been squarely met and settled in the case of *Butterworth v. Hoe*, 112 U. S. 50, 5 Sup. Ct. Rep. 25. There it was announced that "the executive supervision and direction which the head of a department may exercise over his subordinates, in matters administrative and executive, do not extend to matters in which the subordinate is directed by statute to act judicially." This was a case growing out of the patent-office department; but the subject of supervisory powers in general, including the supervisory powers in the land department, was reviewed with care and ability by Mr. Justice MATTHEWS, and

the doctrine announced therein, it seems to me, is squarely decisive of this case. So far as the case of *Harkness v. Underhill*, 1 Black. 316, is concerned, I cannot see its application to the case at bar. That was not a contest under the pre-emption laws; but simply under a special law passed April 5, 1832, which allowed parties a pre-emptive right to purchase not to exceed 160 acres of land, which they had already settled and improved prior to the passage of the act, and the parties in that case had made settlement and improvement in anticipation of the passage of the act. The act specially provided that all the entries should be made under regulations prescribed by the secretary of the interior. There was no provision in the act for proof of residence or improvement to the satisfaction of the register and receiver, and the main question involved in this case was not and could not have been involved in that. *Barnard's Heirs v. Ashley's Heirs*, 18 How. 43, seems to be more in point, so far as some of the expressions in the opinion of the court are concerned, though the material facts in that case were essentially different from the facts in this case. There one of the main questions involved was whether or not the lands were subject to pre-emption at the time of *Barnard's* attempted entry. It is not contended here that that would not be a proper question for review by the commissioner.

I do not think that it is the province of the court to nullify a plain provision of the law by an argument based upon the bad policy of the law; that is purely a legislative prerogative; though, in my judgment, the view of the law, as contended for by the appellant, can be maintained upon the highest grounds of public policy, and in strict accordance with a just and equitable administration of the laws. It is and should be the policy of the law that rights should be speedily adjusted, and that litigation should be terminated as soon as is possibly consistent with a rightful determination of the matters in controversy. Especially is this true with reference to rights under the land laws, where the home of the citizen is involved. Every consideration of public policy and of private right then calls for a speedy adjustment. The law recognizes the necessity, and, while leaving the more general questions to be reviewed and determined by the higher officers of the department, especially clothes a local tribunal with the power of determining the local fact of residence and improvement, under such rules and regulations as may be prescribed by the department. These officers are on the ground. They are acquainted with the character and reputation of the people making the proof. In many instances they meet the witnesses face to face; in fact, this was the universal practice at the time the law was enacted. They are acquainted with the country, its topography, its soil, and its climate. They know the peculiar circumstances surrounding the settler, in his sometimes successful and sometimes unsuccessful efforts to cultivate the soil; and they are better calculated to pass intelligently on the settler's

rights in those particulars than is the commissioner or secretary, albeit they are lower officers in the department, and are more remote from the seat of government. As one member of this court, I cannot indulge in the presumption that an officer's tendency to a careless or corrupt administration of a trust reposed in him is in proportion to his rank or the distance of his habitation from the seat of government. I prefer to believe that—

"The rank is but the guinea-stamp;  
The man's the gold for a' that."

But, that all possible safeguards might be thrown around this investigation, the act of 1879 provides that notice of proof shall be given by publication in a newspaper nearest to the land in question for 30 days before the day of proof, and that the names of the witnesses by which claimant intends to establish his claim shall be given in such publication. Opportunity is thus given, to any one who has knowledge of bad faith on the part of the claimant, to appear and resist the claim. Up to this time the settler understands that he must look out for and have on hand the necessary witnesses, and he makes arrangements accordingly. He makes his proof as the law requires, and to the satisfaction of the tribunal empowered by the law to pass upon the sufficiency of the proof. No one appears to contest his right. No appeal is taken from the decision rendered. He pays the money demanded by the government, and so far as he knows and is able to ascertain the case is closed. His final certificate issues. He takes possession of the land, and pays taxes on it. His witnesses are allowed to depart and leave the country, as they are very liable to do in all new countries. He makes valuable improvements on the land, and all the results of his years of labor between the time that he makes his proof and the long time which frequently elapses before patent issues is absorbed by the land; and I agree with the attorneys for the appellant that to subject him during all this time to the uncertainties of an arbitrary proceeding or hearing before the officers of the executive or political branches of the government, at a time when he may be helpless to secure the evidence which he needs, and where he may be overwhelmed with so-called "testimony," which does not have the sanction even of an oath upon which perjury can be prosecuted, is so obviously unjust and unfair that the courts ought not to sanction it.

In the case at bar, Pierce made his final proof to the satisfaction of the register and receiver on the 13th day of February, 1883, paid to those officers the sum of \$400, and received his "patent certificate." No appeal was taken from this decision; but six months afterwards Frace, a stranger, filed with the commissioner an affidavit alleging that Pierce had not established a residence upon said land. No action was taken by the commissioner upon this notice until May 16, 1885. Thus it will be seen that after the expiration of two years and three months from the adjudication of this case Pierce's right to this land was

called in question in this summary manner. The judgment was reopened and set aside. The land was awarded to the informer, the government retaining the purchase price paid by Pierce, presumably, upon the ground that perjury had been committed in making the proof, without giving him an opportunity to answer that charge in a court of competent jurisdiction, where a judicial determination could be had on that question. There is no claim that the land was not properly subject to pre-emption entry, or that Pierce was not a qualified pre-emptor, or that the register and receiver had not complete jurisdiction of the case when it was first tried, but the sole question involved was one of residence. This question having been once decided by the proper tribunal, and certificate of patent having issued, I think that the commissioner acted without authority of law in disturbing that decision.

#### MCGRAW V. FRANKLIN.

(*Supreme Court of Washington. Jan. 28, 1891.*)

#### REPLEVIN—FRAUD—EVIDENCE.

1. Goods recently sold to plaintiff were attached by a creditor of her vendor, and, in consideration of plaintiff giving her note for the debt, the vendor promised to pay the note at maturity. Plaintiff gave a mortgage to secure this note, and both were assigned to A., who was the brother of said vendor, and who foreclosed the mortgage. In replevin against the sheriff having possession of the goods under the foreclosure proceedings, plaintiff alleged that the vendor in fact paid the note, and fraudulently procured the transfer of the mortgage to A., instead of causing its discharge. It appeared that A. had no money with which to buy the note. The testimony was conflicting as to who furnished him the money, and as to whether the mortgage had actually been paid. *Held*, that the judgment for plaintiff should be reversed.

2. The defendant having obtained possession of the goods by a decree in foreclosure upon default of the plaintiff, evidence as to whether the said vendor of the mortgaged goods and the assignee of said mortgage conspired together to defraud plaintiff is irrelevant to the taking and selling of said goods by the defendant.

*Per ANDERS, C. J., and HORT, J., dissenting.*

For majority opinion, see 25 Pac. Rep. 911.

ANDERS, C. J., (*dissenting*.) I am unable to concur in the conclusion reached by the majority of my brothers in the case. The plaintiff in the court below, being the owner of certain personal property, which she had previously mortgaged, sought to recover the possession, or the value thereof, from the defendant, who was sheriff of King county, and who had taken said property into custody by virtue of a statutory foreclosure proceeding instituted by the assignee of the mortgagee. The note secured by the mortgage was overdue, and both it and the mortgage were in the possession of Andrew Merchant, to whom they had been transferred by the original mortgagee for value. No steps were taken in the pending proceedings, in accordance with the provisions of the statute or otherwise, to contest the right to foreclosure

or the amount due; but instead this action was brought to recover the property then in the custody of the sheriff and of the law by reason of the default of the plaintiff herself. It is true the testimony of the defendant shows that, before the sale of the goods under the foreclosure proceedings, she was told by the plaintiff's attorney that, as matter of fact, the note had been paid, and that the attempt to foreclose was a fraud between Robert and Andrew Merchant. But, under the circumstances, he was not bound to relinquish the property on a mere statement of that character, nor, indeed, would he have been justified, as an officer charged with the performance of an official duty, in so doing. It is disclosed by the record that the foreclosure and sale were substantially in conformity to the statute, and the sheriff should not be held responsible in the action for the goods sold by him, unless it be shown that his acts were wrongful and unauthorized by law. The action was tried and judgment rendered against the defendant in the lower court, on the theory that the note and mortgage of Mrs. Franklin had been paid, and that, therefore, the defendant had become a trespasser by seizing and disposing of the goods in question. But I am strongly of the opinion that all the testimony upon that point, taken together, fails to show more than that Robert Merchant promised Mrs. Franklin to pay her note before maturity, and that he failed to do so; and it requires no argument to demonstrate the proposition that a promise to pay is not payment, either in fact or in law. It also seems to me that all the testimony concerning the alleged fraudulent transactions between the Merchants and the agreement made by Robert Merchant with Mrs. Franklin to pay the note was wholly irrelevant, and should have been excluded by the court. Nor do I think the defendant waived any of his legal rights by going to trial, without objection, upon the pleadings, as made up by the parties to the action. The question of conspiracy between the Merchants and Stewart to defraud plaintiff was set up in her reply to defendant's answer. It tendered an immaterial and collateral issue, and I am unable to perceive how the denial of such allegations could, in any way, justify the introduction of testimony touching the same which was objected to by the defendant. In an equitable action against Robert and Andrew Merchant to compel a surrender and cancellation of the note and mortgage, such testimony would have been relevant and proper; and it may be that the facts and circumstances would have warranted the court, in that event, in granting the relief demanded. But in this action the sole question to be determined was whether or not the taking and selling of plaintiff's chattels by the defendant was wrongful, and not whether some other person or persons were guilty of perpetrating a fraud upon the plaintiff, and, in my judgment, the plaintiff should have been confined to the trial of the former question. For the foregoing and other reasons that might be given. I am of the opinion that the judgment of the court be-

low should be reversed, and a new trial granted.

HOYT, J., concurs.

# SOLOMON v. SMITH.

(Supreme Court of Colorado. May 7, 1891.)

## WRONGFUL ATTACHMENT — DEFENSES — FRAUDULENT CONVEYANCES—PLEADING.

In an action against an officer for goods seized under an attachment against a third person, where the answer alleges that the goods were the property of such third person, and had been fraudulently transferred to plaintiff in order to hinder and cheat his creditors, and that the transfer was fraudulent and simulated, such answer, being replied to, is sufficient to put the fraud in issue, and evidence tending to prove it is admissible.

Commissioners' decision. Appeal from district court, Arapahoe county.

V. D. Markham and Perry & Carpenter, for appellant. W. S. Decker and T. D. W. Yonley, for appellee.

RICHMOND, C. This action was brought in the district court of Arapahoe county, May 8, 1884, to recover certain personal property, or its value. By the complaint plaintiff claims she was and is the owner and entitled to the possession of the goods, wares, and merchandise therein enumerated; and that on the 2d day of May, 1884, defendant without authority took and carried away and unlawfully detained the same; that the alleged cause of seizure is that in certain suits begun in the circuit court of the United States for the district of Colorado the said goods, wares, and merchandise were seized under a writ of attachment sued out and issued, whereby the defendant seized said goods as the property of one Samuel Bernstein. The defendant answers, and, after denying plaintiff's ownership and possession, admits that he seized the property by virtue of said writ of attachment, as the property of Samuel Bernstein, issued in certain causes pending in the circuit court of the United States for Colorado, wherein Samuel Bernstein was defendant and others were plaintiffs; alleging that the said property so seized was the property of Samuel Bernstein, and that the said Bernstein, intending to cheat, hinder, delay, and defraud the plaintiffs in said action and other creditors, and with intent to conceal, remove, and put his effects out of the reach of his said creditors, did fraudulently convey, transfer, and assign the goods and chattels mentioned in the complaint to the plaintiff herein; that by the transfer, sale, and disposition of such goods and chattels the said plaintiff and the said Bernstein contrived to cheat, hinder, and delay and defraud the creditors of the said Bernstein; and that the said transfer was fraudulent, colorable, and simulated, and was designed to cover up the property of the said Bernstein. Demurrers to answers were interposed, questioning the sufficiency of the defense. Thereafter plaintiff withdrew the demurrers and filed replies. The question of jurisdiction, and the right of plaintiff to institute this suit against the United States

marshal, are eliminated from the case. Three trials were had. The last and final trial resulted in a judgment for defendant, to reverse which judgment this appeal is prosecuted. Numerous errors are assigned, the principal one being that the defenses to the causes of action mentioned in the complaint were not sufficient in this: that they failed to specifically allege fraud on the part of Bernstein and the plaintiff against the creditors; hence no evidence tending to prove fraud was admissible under the pleadings; and that the instructions of the court were erroneous because they left the question of fraud to the jury. A careful review of the abstract will show that the main question for our consideration is whether or not the defenses interposed by the defendant were sufficient. If that is shown, it naturally follows that the objection to the instructions of the court, and the objection to the introduction of testimony tending to prove fraud, must be overruled. In this case the plaintiff withdrew his demurrers, and replied to the answer. At least the answer contains a general allegation of fraud, and the appellee went to trial upon the issues thus joined, without taking any exception to the answers on the score of insufficiency. But we are not inclined to agree with counsel that the answers were defective. The defenses clearly aver that the sale from Bernstein to Solomon was colorable and simulated, and for the purpose of putting his property beyond the reach of his (Bernstein's) creditors. To use the language of appellee's counsel, "That sale was a sham, and was contrived by the parties for the sole purpose of swindling creditors." The question of fraud was directly put in issue by the complaint, answers, and replications. This being so, then evidence tending to prove that the sale was fictitious and without value; that the indebtedness between Bernstein and Solomon was not genuine; and testimony relative to the manner of transferring the goods from Bernstein to Solomon; the fact that they were transferred in a lump without invoice; that they were surreptitiously removed from one place to another; that a portion of the goods was exported from the city of Denver, while another portion was dumped into an express wagon and conveyed through an alley to an isolated room in the city, with the evident purpose of concealing them from the officers and the creditors of Bernstein; and the nature of the alleged indebtedness as evidenced by the notes,—were all facts and circumstances clearly admissible under the issue. Hence, as above said, we must conclude that the testimony objected to was admissible, and that the court did not err in overruling the objections.

The last and only question is the one of instruction. The instructions were in the nature of a general charge, and, following the rule of the court heretofore laid down, we feel prepared to say that, taken as a whole, they clearly and sufficiently advised the jury of the law applicable to the case. The sufficiency of the exception is vigorously challenged; but, even conceding this sufficiency, we are clearly of

the opinion that the charge to the jury was as favorable to the plaintiff as the evidence warranted. The judgment should be affirmed.

BISSELL and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

ELLIOTT, J., did not participate in this decision, having tried the cause below.

#### SOLOMON v. SMITH.

(*Supreme Court of Colorado. May 7, 1891.*)

Commissioners' decision. Appeal from district court, Arapahoe county.

V. D. Markham and Perry & Carpenter, for appellant. W. S. Decker and T. D. W. Yonley, for appellee.

RICHMOND, C. The questions presented in the above case are identical with those presented in the foregoing case, ante, 811, and were submitted at the same time. For the reasons stated in the above opinion the judgment of the court should be affirmed.

PER CURIAM. The judgment is affirmed.

#### MATTHEWS et al. v. PATTERSON.

(*Supreme Court of Colorado. May 7, 1891.*)

CORPORATIONS—REPORT OF CONDITION—LIABILITY OF OFFICERS.

1. Gen. St. Colo. § 252, requires every corporation to make an annual report stating the amount of its capital, the proportion thereof actually paid in, and the amount of existing debts; and it provides that a failure to file this report shall render the directors and trustees jointly and severally liable for the debts of the company contracted during the year preceding the time for filing it. *Held* that, where a report is actually filed, the fact that it is false will not render them liable under this section as upon failure to file any report at all.

2. Section 255 provides that all the officers who have signed such false report, knowing it to be false, shall be jointly and severally liable for all damages thereon arising. *Held* that, in an action to enforce this liability, the complaint is demurrable where it fails to state that officers knew the report was false.

Commissioners' decision. Error to superior court of Denver.

The judgment sustained a demurrer to the complaint. The substantial averments of the pleading were that the Union Smelting & Refining Company was a Colorado corporation organized in 1885, which afterwards bought of the plaintiffs large quantities of ore, and failed to pay about \$8,500 of the purchase price. On the 17th day of February, 1886, the company filed in the office of the clerk and recorder of the county of Clear Creek, the county of its place of business, a report which stated that the capital stock of the company was \$500,000, of which \$407,500 was paid in property and \$52,500 in cash, and put the amount of their existing debts at \$9,138.31. The report was subscribed by one Lee, as the treasurer of the company; and by the president of the company, who is the defendant in the suit, who made oath to its accuracy, and filed it in the proper of-

fact. These general allegations were followed by this paragraph: "Plaintiff in fact further says that the said pretended report was and is false and fraudulent in this, to-wit: That the capital stock of said company, \$407,500, never was paid in property; nor was any part nor share thereof, save the part of \$10,000 or thereabouts, paid in property; nor was \$2,500 of said capital stock paid in incash at any time before the filing of said certificate report." The plaintiffs then proceeded to aver that, save as stated, the company did not, within 60 days from the 1st day of January, make any report as required by the statute. This is followed by a general averment of the non-payment of the capital stock, a failure to file a certificate, and a demand for judgment. The complaint contains a further allegation that the certificate was not verified, although it is signed in the following form: "I, Charles B. Patterson, president of the Union Smelting & Refining Company, do certify that I have examined the foregoing report, and find the same to be correct. CHARLES B. PATTERSON. [Seal.] Subscribed and sworn to before me this 15th day of January, 1888. PETER WINNE, Notary Public." The two sections of the statute involved in the decision are sections 252 and 255. The first requires that every corporation shall annually make a report, "which shall state the amount of its capital, the proportion actually paid in, and the amount of existing debts." The report must be signed, verified by oath, be under the seal of the company, and filed in the office of the recorder of the county. A failure to comply with the provisions of this section makes all the directors and trustees jointly and severally liable for all the debts of the company contracted during the year preceding the time fixed for filing the report. Section 255 is as follows: "If any certified report or statement made or public notice given, by the officers of any corporation, shall be false in any material representation, all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable for all damages arising therefrom."

*Wells, McNeal & Taylor*, for plaintiffs in error. *Markham & Dillon*, for defendant in error.

BISSELL, C., (after stating the facts as above.) It is clear that, in the enactment of the two sections of the statute contained in the statement of facts, the legislature intended to subject the officers and trustees of corporations to a statutory liability for the debts of their companies under two very dissimilar conditions. The first section imposes a joint and several liability upon the officers and trustees of corporations for a failure to file the report provided for in that portion of the statute. The liability results from a failure to perform the statutory duty. It makes no difference whatever whether the defaulting trustee did or did not sign the report. The other section imposes a like penalty upon the officer or trustee making and signing the report knowing it to be false. It will be observed that in the latter section there are two elements essen-

tial to the liability: *First*, a participation in the report by an actual signing; and, *second*, a knowledge of the falsity of that which is made. A casual inspection of the allegations of the complaint will make it apparent that in this case a recovery was sought upon the ground that the report was untrue and false in a material representation, and therefore not a report as required by section 252 of the statute. The real *gravamen* of the complaint is to be found in the allegations setting out a failure to file a report. It cannot be seriously contended that the allegation that the report was false and fraudulent brings the case within section 255, although the action was brought alone against the trustee who signed it. In order to charge him under that section, it was necessary to aver, not only that the certificate as made and signed by him was false in some material representation, but also that he knew it to be false. This guilty knowledge is made essential to the liability by the express terms of the statute and, in order to charge the officer with the severe penalty imposed, there must be some allegations indicating that it was made for some fraudulent purpose, and with knowledge of its falsity. *Pier v. Hanmore*, 88 N. Y. 95; *Stebbins v. Edmonds*, 12 Gray, 203; *Bonnell v. Griswold*, 89 N. Y. 122. Since it is apparent that upon the complaint the action could not be maintained under the section establishing a liability for filing a report which is known to be false by the officer making it, it leaves the very simple question as to whether, if a report be filed which is false, there can be said to have been a failure to file a report as required by the other section. If the report set out in the complaint be analyzed, and compared with the statute, it is impossible to hold that it is not in form a compliance with its provisions. It was filed within the time designated. It states the amount of the capital stock, the amount which was paid in cash, and the amount paid in property. It was signed by one of the officers charged with the duty, and was sufficiently verified to satisfy the statutory requirement. It therefore would seem that the company did not fail to do what the statute required. But the contention is that a false report is no report and the inquiry ought to be, not only whether the report was made, but whether it was true, and, if not true, then that all the trustees are liable whether they did or did not sign the report. This cannot be the purpose, nor is it the plan, of the statute. The subsequent section contemplates the possibility of a false report, and provides a penalty. As was well said by the court in *Bonnell v. Griswold*, 80 N. Y. 128: "The statute does not declare that, if false, it shall be as no report, or annul it. It leaves the report in its place as part of the scheme or plan provided by statute, and imposes a penalty or punishment upon those who signed it knowing it to be false, and upon no others. Not all, then, who signed the false report are liable therefor, but only those who signed it knowing it to be false. As the statute makes this discrimination, the court cannot ignore it." It is impossible to import into



the statute a time or a condition for the purpose of extending or imposing a penalty. The statutory liability provided for by section 252 can only arise in the specific case designated by the statute, to-wit, a failure to file a report in compliance with its provisions. If that be done, then the trustees are not liable, even though the report be totally and wholly false; and the party must seek his remedy therefor under the section which provides a penalty in such case, and pursue the officers who are knowingly guilty of the misrepresentation for which the statute has provided a penalty. This doctrine is well supported by the New York cases, and is a reasonable and safe construction. The demurrer was properly sustained, and the judgment should be affirmed.

RICHMOND and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

#### HUTCHINSON v. HUTCHINSON.

(Supreme Court of Colorado. May 7, 1891.)

DEED — RECORD — CONVEYANCE BY HUSBAND TO WIFE — PROOF OF DELIVERY.

1. The recording of a deed is not essential to its validity. A deed duly executed and delivered, although unrecorded, can be enforced against a subsequent purchaser for value who buys with actual notice of its existence.

2. In an action between a married woman and a third party, involving title to real estate, she may, under our statute, testify to the delivery of a deed to her by her husband, although such delivery took place during the existence of the marital relation.

(Syllabus by the Court.)

Appeal from district court, Lake county.

The record in this case shows that on and prior to March 5, 1884, Asa B. Hutchinson was the owner in fee of a certain lot in the city of Leadville, at which date he executed and delivered a deed for the same to his wife, the plaintiff and appellee herein. After the execution and delivery of this deed, and upon the day of the execution thereof, the plaintiff and her husband left Leadville for the city of Denver; and while in Denver, and on the 6th day of March, 1884, the plaintiff gave to her husband a receipt, which reads as follows: "Denver, Colorado, March 6th, 1884. Received of Asa B. Hutchinson a certain deed made at fifth of March, 1884, in the city of Leadville, Colorado, deed of lot 10, block D, and mortgaged description of lot 11, block D, both of said lots in Stevens & Leiter's subdivision of United States survey No. 271, situated on south side of East Fourth street, between Harrison avenue and Poplar street, in the city of Leadville, Colorado; said deed to be delivered to Jervis Joslin, of Leadville, Colo., for safe-keeping, subject to said Asa B. Hutchinson's order, and to be unrecorded during Asa B. Hutchinson's life, J. C. HUTCHINSON. Witness: E. L. BETTS." That, in pursuance of the terms of said receipt, the plaintiff, on her return from Denver to the city of Leadville, deposited said deed with Joslin & Park, jewelers, in said city, for safe-keeping, and took from said Joslin & Park a

receipt therefor. Subsequent thereto, and on the 10th day of June, 1884, said Asa B. Hutchinson executed and delivered a warranty deed for said premises to O. D. Hutchinson, his son by a former marriage, which deed was duly recorded on the 21st of June, 1884. On the 10th day of July, 1884, the plaintiff withdrew the deed first above mentioned from the custody of Joslin & Park, and placed the same upon record. Thereupon this suit was commenced, plaintiff alleging that she was the owner in fee of said premises by virtue of the deed executed and acknowledged by her husband and delivered to her, and charging the conveyance by the same grantor to his son to have been in fraud of her rights, and a cloud upon her title to the property. Trial was had and a decree entered in favor of the plaintiff, to reverse which decree this appeal is brought to this court. The evidence establishes the due execution and delivery of the deed to Mrs. Hutchinson upon the 5th day of March, 1884. It also appears from the evidence that, at the time of the execution and delivery of the deed from her husband, there was a house upon the deeded property, but as to whether this house was erected thereon by the husband or by the wife is not definitely shown. It does appear, however, that the house was held and occupied by Mrs. Hutchinson, and that she put many improvements upon the lot with the understanding and promise on the part of her husband that it should be her property. Upon receiving notice that the deed to appellant had been placed upon record, appellee procured the deed to her, which up to this time had remained in the custody of Joslin & Park, and filed the same for record. Thereupon she brought this suit to remove the cloud upon her title created by the deed to appellant. Judgment for plaintiff.

C. C. Parsons, for appellant. T. A. Green, for appellee.

HAYT, J., (after stating the facts as above.) Under our laws, a husband may convey title to real estate direct to his wife with the same freedom as to a third person. It is not essential that a deed be recorded in order to pass title. By the execution and delivery of the deed to appellee upon March 5th, the title vested immediately in her. The recording of the deed was not essential to its validity. A deed duly executed and delivered, although unrecorded, can be enforced against a subsequent purchaser for value who buys with actual notice of its existence. The subsequent deposit of the deed with Joslin & Park by Mrs. Hutchinson, without consideration, and the written receipt given by her, did not divest her previously-acquired title to the premises. Gen. St. § 215; 5 Amer. & Eng. Enc. Law, p. 451. Appellant admitted while upon the witness stand that he had actual notice of the contents of the receipt of March 6th, and therefore he must be held to have had ample notice of the title under which Mrs. Hutchinson held the property. In addition to this, she was then in the actual and exclusive possession of the premises, and so remained in possession up to the

time of trial. Asa B. Hutchinson, the grantor in both deeds, died prior to the trial. We are unable to ascertain from the record the exact date of his death. We infer from the testimony, however, that it occurred shortly after the execution of the deed to his son, bearing date June 10, 1884. Upon the trial Mrs. Hutchinson was allowed in rebuttal, against objection, to testify in reference to certain transactions with her husband during his life-time in relation to the property; and this, in the opinion of counsel for appellant, raises the most important question appearing upon the record. As to whether the testimony was offered as a part of the main case or in rebuttal is quite immaterial. The conduct of the trial, and the time and manner of the examination of witnesses, is largely a matter within the discretion of the trial court. In this case we cannot say that such discretion was abused. By our modern statutes, the rights and privileges of married women in reference to property have been very much enlarged. She may now, with us, own, buy, sell, and hold property, both real and personal, in her own right, the same as if she were not married. These rights necessarily required a modification of the common-law rule in reference to evidence; and such modification has been made by statute. Mrs. Hutchinson was permitted, against objection, to testify to communications between herself and husband. The testimony objected to was in reference to the delivery of the deed to her by her husband. This being the nature of the evidence, we think it was properly admitted. The testimony of O. D. Hutchinson, the grantee in the second deed, in reference to statements made to him by counsel and others as to the legal effect and purport of the receipt signed by Mrs. Hutchinson, was properly excluded. We discover no substantial error upon the record. The evidence fully justifies the findings of the court below, and the judgment must be affirmed.

#### ATKINSON v. COLE.

(*Supreme Court of Colorado.* May 7, 1891.)

#### LANDLORD AND TENANT—LIABILITY OF TENANT—HOLDING OVER—INCREASE OF RENT.

In case of a tenancy from month to month, the landlord cannot, by notice to vacate, fix the tenant's liability if he holds over, for a greater rent than under the old lease, and without regard to the value of the use, unless the tenant expressly or impliedly assents to the increase.

#### Error to Arapahoe county court.

Action by landlord to recover \$100 rent from tenant for the use of certain premises for the month of September, A. D. 1887, and also for possession of the demised premises. For some time prior to said month of September, Atkinson, plaintiff in error, had occupied the premises under a verbal agreement with defendant in error, Cole, to pay him as rent for the same \$25 per month, payable at the end of each month. Atkinson claimed that this agreement was for the period of one year, which time had not yet expired, while Cole denies this, and alleges that the tenancy was only from month to month. In

the month of August, 1887, Cole caused the following notice to be served upon Atkinson: "Denver, Colo., October 3d, 1887. Mr. Alex. G. Atkinson: You are hereby required to pay me one hundred dollars due as rent for the premises now occupied by you as my tenant, and known and described as follows, viz., lots 25, 26, 27, and 28, in block 2, Snyder's subdivision, Denver, Colo., in three days after the day of service upon you of this notice, or, in case of your failure to pay said rent, to deliver up to me said premises within said time. In case of your failure to comply with the terms of this notice, I shall proceed to oust you by process of law. Respectfully, G. W. COLE, Landlord." To which notice Atkinson replied, as follows: "Denver, Colo., Aug. 23rd, 1887. George W. Cole—Dear Sir: Your notice of this date to vacate premises by September 1st, known as lots 25, 26, 27, and 28, block 2, Snyder's subdivision to Denver, or you would raise my rent to \$100 per month. My contract with you was, I was to have the premises for one year from the time I sold to you, March 1st, at the rate of \$25.00 per month, payable at the expiration of each month, and you have received the same as near that date as I could see you, and give you check. I am prepared to live up to my agreement, and expect you to do the same if you count your word any good. Yours, etc., A. G. ATKINSON." The court below found that the tenancy was from month to month only, and rendered judgment for plaintiff for possession, and for \$100 rent for one month.

*J. P. Brockway*, for plaintiff in error.  
*Perry & Carpenter*, for defendant in error.

HAYT, J., (*after stating the facts as above.*) The conclusion of the trial court that Atkinson's tenancy was from month to month only, is amply supported by the evidence, and cannot be disturbed in this court. The case, therefore, presents but a single question for our consideration, viz., can a landlord, against his tenant's objection, arbitrarily fix by notice the amount of rent which the latter must pay when holding over after the expiration of the term of such tenant's lease? The trial court decided the landlord had such right. Its conclusion was probably founded to some extent upon the opinion of the case of *Hurd v. Whitsett*, 4 Colo. 77,—a case decided under a statute which has since been repealed. This statute provided that, if any person held over after notice to quit, and in violation of his lease, he would by such conduct become chargeable with certain additional liabilities. It also declared that the notice shall operate to create and establish, "as a part of the lease or agreement, the terms and conditions specified in said notice." The repeal of this statute is indicative of an intention on the part of the legislature to change the rule therein provided for, whereby a landlord was permitted arbitrarily to fix the liability of a tenant holding over after notice. But, aside from any inference that is to be drawn from this repeal, upon principle and authority, it is now clearly established that, where the right to terminate the tenancy is in the landlord, and

an increase of rent is demanded, the tenant will not be liable for such increase, unless it is shown that he expressly or impliedly assented to the same. A tenant thus holding over is regarded merely as a tenant at will, and only liable for an increase of rent when the value of the use and occupation of the premises is shown to exceed the rate fixed by the lease. *Galloway v. Kerby*, 9 Ill. App. 501; *Meaher v. Pomeroy*, 49 Ala. 146; *Gallagher v. Himmelberger*, 57 Ind. 63. Applying the foregoing rule to this case, and it follows that, although the trial court found that the tenancy was only from month to month, and subject to termination by the landlord accordingly, this will not permit the landlord to fix the tenant's liability for rent at a greater price than under the previous lease against said tenant's protest, and without reference to the value of the use, as has been attempted in this case. The rule announced by the county court, and contended for here by counsel for defendant in error, is not only contrary to the general current of authority, but is so unreasonable and unjust that it ought not to be followed. Its unfairness is well illustrated in this case. The evidence shows that the rent had been fixed by the parties at \$25 per month; that a *bona fide* dispute had arisen between them as to the length of the term, and, although upon the evidence it has been decided that the tenancy was only from month to month, and subject to termination by the landlord accordingly, to allow him to fix the tenant's liability for rent, against such tenant's protest, would be subjecting the latter to a demand entirely disproportionate to anything warranted by his conduct. Had Atkinson remained silent after receiving notice of the attempted increase of rent, then a promise on his part to pay the same might have been implied. He did not do this, however, but promptly communicated his protest against any such change. An examination of the cases cited to support the conclusion of the trial court shows that in nearly every instance the tenant's consent to the terms was properly implied from his conduct or language. Under this principle it was held in *Dickson v. Moffatt*, 5 Colo. 114, that consent would be implied against one going into possession, after ascertaining the amount of rent demanded, although he at the time expressed his dissent therefrom. But this case can have no application, under the facts here presented. The judgment of the county court will be set aside, and a new trial ordered. Reversed.

#### LUNDY V. HANSON.

(Supreme Court of Colorado. May 7, 1891.)

RESULTING TRUST—TITLE IN ANOTHER'S NAME—EVIDENCE.

Plaintiff and her two daughters, E. and H., bought a home, plaintiff paying the purchase money, except small contributions from the daughters' earnings. The title was taken in the name of E., who, against her will, as she testified, conveyed one-half to H., and the other half to plaintiff. Plaintiff and E. testified that the purchase was by and for plaintiff only; that E. negotiated for the purchase and took the title in her name because plaintiff could not speak nor

write English; and that she, with her family, occupied the property as a residence for eight years, during which she paid the taxes and insurance. H. testified that she and E. bought the property, and was somewhat corroborated, and she introduced a lease to plaintiff, but both E. and plaintiff denied that they knew of or authorized it. Held, that a decree that H. held the title to half the property under a resulting trust for plaintiff was proper.

Appeal from district court, Arapahoe county.

A. L. Dond and E. B. Coe, for appellant. Bartels & Hood and Browne & Putnam, for appellee.

HELM, C. J. This suit was brought upon the theory of a resulting trust for an undivided half interest in certain real property within the city of Denver. Plaintiff, in 1880, was a widow with seven children, the eldest, Ellen, being 16, and the youngest 2, years of age. Plaintiff was poor, and Ellen and her next younger sister, Hilda, who was about 14, and who is the defendant and appellant in the present case, worked out and helped plaintiff to support the family. Plaintiff and the two elder girls decided upon the purchase of the premises plaintiff was then renting and occupying, \$750 being the purchase price. They conferred together frequently concerning this purchase before it was agreed upon, and during the time of making the deferred payments. The business was attended to mainly by Ellen, and title was subsequently taken in her name to the entire premises. She afterwards deeded one-half of the property to plaintiff, and the other half to Hilda, but no consideration was paid her for either of the conveyances. During this entire period, and up to the date of her marriage, Hilda was under age. In the county court, and in the district court, to which the cause was taken by appeal, decrees were rendered in favor of plaintiff, recognizing the trust, and requiring Hilda to convey the moiety in her name to plaintiff. The sole assignment of error now urged in argument is that the decree challenged is not sustained by the evidence. We might, perhaps, decline to review the record before us upon this assignment, because no proper objection was interposed or exception reserved to the entry of the decree. But, under the circumstances, we prefer to rest our decision upon the merits. True it is that, when parol evidence is relied on for the purpose of establishing a resulting trust, the essential fact or facts must be sustained by clear, strong, and convincing proofs. It should be borne in mind, however, that the trust asserted in the present case is not claimed to result solely from payment of the purchase money. Plaintiff and Ellen both testify positively and repeatedly that the property was really bought by plaintiff. They say that while Hilda participated with them in the conferences, and took part in bringing about the purchase, the intention of all was to have the ownership ultimately vest in the mother, so that she would be securely provided with a home for herself and the remaining children. According to their explanation, the reason why title was taken in Ellen's name, and why she was

so conspicuous in the negotiations, was that plaintiff could not read or write in English, and understood very imperfectly the English language when spoken. Hilda, on the other hand, testifies that she and Ellen bought the property, and in this respect she receives corroboration through the testimony of her husband touching subsequent admissions of plaintiff; also through the testimony of Mr. and Mrs. Gallup, as to incidental declarations of Ellen. But the following circumstances, in addition to those already mentioned, so strongly confirm the position taken by plaintiff and Ellen as to clearly demonstrate Hilda's error, viz.: The cash payment of \$50 advanced at the time the contract was made was by plaintiff from her own funds. Plaintiff was at that time in possession of the premises with the five younger children, and continued in the quiet and undisputed occupancy thereof down to the time of trial, about eight years. During this period she paid all expenses, including taxes, insurance, and repairs, and also made certain improvements, such as the digging of a well, etc. For a considerable time plaintiff boarded and lodged Baldwin, the vendor of the property, and did his washing, the income from such board, lodging, and washing, whatever it was, being applied upon the purchase price. Subsequent to the making of the contract, she advanced \$128 more of the purchase money, besides additional sums, the exact amount of which cannot be determined from the evidence. It is undoubtedly true that some of the earnings of both Ellen and Hilda were used in discharging the deferred payments, or in liquidation of loans obtained to complete the purchase. But the amount thus contributed is extremely uncertain, and we are fairly warranted in assuming that it was either by way of loan to plaintiff, or voluntary advancements in the nature of gifts. The evidence very strongly points towards the latter theory. Both girls made plaintiff's home their home, and when out of employment, which was seldom, lived with her. They were affectionate daughters, and contributed at times from their meager earnings to the support of the family and education of the other children. It is not entirely clear why Ellen deeded one-half of the property to Hilda; but she (Ellen) testifies that it was not of her own free will, and that she expected Hilda to convey it "over" to her mother. As to the lease giving plaintiff possession of the property for life upon the payment of one dollar per year, we observe—*First*, Ellen declares under oath that she had no knowledge of its existence, and, if she signed the paper, it was in ignorance of its contents; *second*, there is nothing in the record showing that plaintiff asked for this lease, or authorized such an arrangement, and she also denies all knowledge thereof. Both of the trial courts saw and heard the witnesses, and were in much better position than we to correctly resolve the conflicts appearing in the evidence. Under all the circumstances, we cannot say that a trust was not established with the requisite clearness and sufficiency. In view of the fore-

going conclusion concerning the facts and the law, it becomes unnecessary for us to follow the interesting discussion of counsel on the subject of emancipation from parental control. We leave undetermined the question whether or not, under the circumstances presented by this record, plaintiff would have been entitled to demand and receive the wages earned by Hilda, who was, during the period in question, an unmarried minor under the age of 18 years. The mother having made the purchase herself, merely conducting the transaction through Ellen for convenience, it is a matter of no significance whether she was entitled of right to the earnings of Hilda, or whether Hilda voluntarily contributed, as a gift or loan, money over which her mother had no original control. The decree of the court below is affirmed.

#### FRYER v. BREEZE et al.

(*Supreme Court of Colorado. May 7, 1891.*)

BILL OF PARTICULARS—RECORD ON APPEAL—EVIDENCE OF PARTNERSHIP—HARMLESS ERROR.

1. A bill of particulars is not a part of the record proper. This court cannot take notice that a paper certified in the transcript as a bill of particulars was the bill in controversy at the trial, nor that some other or further bill was not furnished in due time. Such matters cannot be effectually reviewed on error unless they are definitely preserved by bill of exceptions, together with the rulings of the trial court thereon.

2. Correct pleading requires that parties intending to sue as partners should allege the fact of their copartnership in the body of the pleading; but the general rule is that a failure so to do should be taken advantage of, if at all, in apt time, and before final judgment.

3. A mere technical variance between the pleadings and proofs, not noticed at the trial, which does not prejudice the opposite party, will not be considered in the appellate court for the first time as a ground for reversal.

(*Syllabus by the Court.*)

Error to district court, Garfield county.

Defendants in error, plaintiffs below, brought this action, alleging in their complaint that defendant was indebted to them on an account in the sum of \$1,000 for services as the attorneys of defendant, rendered at his instance and request and upon his retainer between the 1st day of February, A. D. 1883, and the 1st day of June, A. D. 1884, in prosecuting and defending suits, drawing and preparing instruments in writing, taking depositions, preparing motions and notices and serving the same, and advising defendant in and about his business and at his request, which services so rendered were and are reasonably worth the said sum of \$1,000; that defendant has not paid the same, except the sum of \$106.80. The defendant answered to the effect that the payment of the sum of \$106.80 was payment in full for plaintiffs' services, and that he was not indebted to the plaintiffs, or either of them, in any further sum. The cause was tried by jury. Verdict and judgment were rendered in favor of plaintiffs for the sum of \$777.66. The defendant below brings the case to this court by writ of error.

M. B. Carpenter, for plaintiff in error.  
H. B. Johnson, for defendants in error.

ELLIOTT, J. (after stating the facts as above.) It is assigned for error that the court erred "in permitting testimony of plaintiff to be given upon any account, as the bill of particulars was not filed within the time required by law, and amounted to nothing as a bill of particulars." A single extract from the bill of exceptions is relied on as the basis for this assignment. One of the plaintiffs being examined as a witness, plaintiffs' counsel, Mr. Bartley, asked him: "What, if any, services did you perform for Mr. Fryer in the month of February, 1883?" Objected to by Mr. Ashton, attorney for defendant, for the reason that they have not complied with the notice served upon them to furnish an itemized statement of the things done, the dates when done, and the cases in which the services were rendered. Mr. Bartley replied: "An itemized statement and an amended statement was served on October 13, 1885. Objection overruled. Exception taken." It is scarcely necessary to say that the question, objection, ruling, and exception thus preserved do not sustain the assignment. The record does not affirmatively show that any bill of particulars had been demanded of plaintiffs in pursuance of section 63 of the Code. But, conceding that such demand was duly made, it does not appear whether plaintiffs failed to furnish any copy of the account at all, or whether defendant intended to question the sufficiency of the one alleged to have been furnished. A bill of particulars is not a part of the record proper. This court cannot take notice that the paper certified in the transcript as a bill of particulars was the bill in controversy between the attorneys at the trial; nor does it appear that some other or further bill of particulars was not furnished in due time before the trial. Such matters cannot be effectually reviewed on error unless they are definitely preserved by bill of exceptions, together with the rulings of the trial court thereon. *Cook v. Hughes*, 1 Colo. 51; *Freas v. Truitt*, 2 Colo. 495; *Robbins v. Butler*, 13 Colo. 496, 22 Pac. Rep. 803; *Rutter v. Shumway*, 16 Colo. —, ante, 321. It is further assigned for error that "the evidence, verdict, and judgment are given plaintiffs as partners, and there is no allegation of partnership in the complaint." The names of the parties, as specified in the title to this action, are as follows: "John M. Breeze and Lemuel L. Breeze, partners, doing business under firm name of Breeze & Breeze, plaintiffs, vs. James Fryer, defendant." The words, "partners doing business under firm name of Breeze & Breeze," in this title, are, in legal effect, regarded as *descriptio personarum*, and not as indicating that plaintiffs sue as partners. 2 Wait, Pr. 373. Strictly speaking, therefore, the parties did not sue as copartners, but as joint plaintiffs. The summons followed the complaint as to the names and capacity in which plaintiffs sued. No question was raised by demurrer or answer as to such names or capacity. The verdict and judgment correspond to the complaint and summons indicating the plaintiffs as joint plaintiffs and not as copartners. So there was not even a technical variance in the record proper. Cor-

rect pleading undoubtedly requires that parties intending to sue as partners should allege the fact of their copartnership in the body of the pleading; but the general rule is that a failure so to do should be taken advantage of, if at all, in apt time and before final judgment. No objection to the supposed defect in this case was interposed in the court below at any stage of the proceeding; and no attempt is now made to show that defendant has been, or can in any way be, prejudiced by the omission of such averment. The complaint is unquestionably sufficient in substance. The objection now sought to be raised by the assignment of error is at most a mere technical variance between the pleadings and proofs, not noticed at the trial. Under the circumstances, it would be manifestly unjust, and contrary to established practice, to allow such question to be raised in this court for the first time. If the objection had been made at the trial, the plaintiffs would have been entitled to amend the complaint to conform to the proofs. 3 Chit. Pr. 480, 923; Code Civil Proc. § 78; *Blass*, Code Pl. § 435 et seq.; *Wall v. Toomey*, 52 Conn. 38. This disposes of the assignments of error so far as the same have been presented by counsel for plaintiff in error in their brief and argument. It is not incumbent upon the court to go further. The judgment of the district court is affirmed.

#### HOCHMARK v. RICHLER.

(Supreme Court of Colorado. May 7, 1891.)

#### USURY — COMPOUND INTEREST — ALTERATION OF NOTE.

1. A note of \$177 stipulated that interest should be paid thereon after maturity at the rate of 3 per cent. a month. It was shown that the face of the note was made by adding to \$150, the actual loan, \$27, which was equal to the interest at 3 per cent. a month from the date of the note to its maturity. Held that, as to this, \$27, the interest after maturity was compound interest, contracted for in advance, and to that extent no recovery can be had, it being usurious.

2. Where one of the makers of a note signed only as accommodation maker, without knowledge that appellant was to sign it afterwards, appellant's subsequent signing is not such an alteration as will avoid the note as to all the makers, including himself, when he received part of the loan.

#### Appeal from Lake county court.

This action was begun before a justice of the peace upon a promissory note in favor of appellee, signed by appellant and two other parties. The note was for \$177, and provided for the payment of interest after maturity at the rate of 3 per cent. per month. Judgment being rendered in favor of plaintiff, an appeal was taken to the county court. There the cause was retried, and a recovery by plaintiff again sustained. The remaining facts sufficiently appear in the opinion.

*Geo. Goldthwaite*, for appellant. *Alvin Marsh*, for appellee.

HELM, C. J. The note sued on in this action is not illegal upon its face. Interest at the rate of 3 per cent. per month after maturity is provided for, but by

statute in this state parties may contract for a larger rate of interest than that specified to govern in the absence of contract. Gen. St. § 1708; Buckingham v. Orr, 6 Colo. 587, and cases cited. While, however, the contract was, upon its face, unobjectionable, it clearly appears by the evidence that the amount specified (\$177) consisted of two items, viz., \$150, the actual loan, and \$27 interest,—the interest on this loan at 3 per cent. per month from the date of the note to its maturity; and, though no further interest was payable until the debt became due, yet after that date interest was to be paid upon the \$27 interest, which had been made part of the principal. The contract did, therefore, in effect, provide for compound interest, (2 Pars. Cont., 6th Ed., 150 et seq.;) and to this extent it was illegal, for with us compound interest is, in general, not recoverable, (Manufacturing Co. v. McAllister, 6 Colo. 261; Fillmore v. Reithman, Id. 121; Beckwith v. Beckwith, 11 Colo. 568, 19 Pac. Rep. 510.) There was in the present case no such gross delinquency or intentional misconduct on the part of appellant as justified an application of the exception to the foregoing rule mentioned in Fillmore v. Reithman, supra, and in Sedg. Dam. (6th Ed.) 475. A disposition undoubtedly appears in some of the modern decisions and text-books to reject the doctrine that compound interest contracted for in advance is *per se* unlawful. 3 Pars. Cont. 153. But, the question being *stare decisis* in this state, and there being much to commend the doctrine, it will not now be disturbed. We do not intimate that the arrangement would have been illegal had the promise of appellant to pay compound interest been made after instead of before the interest to be compounded had accrued. Sedg. Dam. 473, 474; 3 Pars. Cont. 151, 152. The fact that compound interest was thus provided for did not, however, as counsel contends, render the entire contract usurious and void. Courts, upon grounds of public policy, simply decline to enforce payment of the interest upon interest. 3 Pars. Cont. 152. An indorsement appeared on the back of the note, showing a payment by Gaw, one of the makers, of \$150, and a release from further liability on his part. Appellant insists that this release, without his knowledge and consent, of one of his co-makers, operated as a release of himself and his remaining co-maker. The instrument in suit is both joint and several; but the common-law rule invoked has been held applicable in this state to joint and several as well as to joint promissory notes. Heckman v. Manning, 4 Colo. 543; Nicholson v. Revill, 4 Adol. & E. 675; Benjamin v. McConnell, 4 Gilman, 536; Bank v. Doolittle, 14 Pick. 123; Rowley v. Stoddard, 7 Johns. 207; Tuckerman v. Newhall, 17 Mass. 580. It is shown by the proofs that the indorsement of the \$150 credit was made by Gaw himself over appellee's signature while the note was held by one of appellee's creditors as collateral security, appellee not being present or consenting at the time. Gaw testifies that appellee previously

promised, upon payment of the sum mentioned, not to trouble him further in connection with the note, and there is other testimony tending to corroborate him in this regard; but appellee crossed out the release before bringing suit. The record is exceedingly meager, and does not purport to contain all the evidence. Whether Gaw was actually released from further liability is a question of fact, and without all the evidence before us we cannot consider the court's finding thereon. For the above reason, and for the additional reason that no exception was saved to the judgment, we are unable to say whether or not the proofs sustain the remaining conclusions of fact that must have been reached by the county court in rendering judgment. But were the statement of counsel for appellant as to what the evidence showed accepted, his legal deduction predicated thereon would not follow. He says that Gaw signed the note solely as an accommodation maker for his co-obligor, Gutt, and did not know that appellant was either to sign it or to receive part of the loan. This subsequent signing of the note by appellant as a co-maker constituted such an alteration, it is argued, as rendered it void as to all the defendants, including appellant. We must decline to recognize the applicability of the common law principle relied on, for, in the first place, appellant had been active in obtaining the signatures of his co-makers, and signed his own name immediately after Gaw had attached his signature. He received all and retained part of the money borrowed, and it was not paid to him till after he signed. There is, therefore, strong ground for the position that the note did not become a perfect contract till after appellant's signature was appended. But, secondly, such alterations at most operate only to invalidate the instrument as to non-consenting parties, and no such party is here complaining. Byles, Bills, (6th Ed.) 481, 482, and note 2; Wallace v. Jewell, 21 Ohio St. 163; Bower v. Briggs, 20 Ind. 139. They do not release from liability the additional co-maker, who has himself been in no way deceived or injured; *a fortiori* must this be true where, as in the present case, such co-maker enjoys part of the consideration. The remaining objections presented by counsel for appellant have been considered, but we do not deem them of sufficient importance to warrant discussion at length. The alleged mutilation of the note is explained. The asserted payment of \$45 by appellant upon this particular note is contradicted. The trial court accepted the explanation, and resolved the conflicts in testimony favorably to appellee. We cannot discredit his conclusions in these particulars. The court, as we have seen, erred in allowing interest upon the \$27 interest; but we do not deem it necessary on this account to order a new trial. The judgment will be reversed, and the cause remanded with directions that judgment be re-entered *nunc pro tunc* as of February 13, A. D. 1888, omitting the compound interest in question.

## CITY OF DURANGO v. REINSBERG.

(Supreme Court of Colorado. May 7, 1891.)

## PROSECUTIONS UNDER ORDINANCE — COMPLAINT — VALIDITY OF ORDINANCE.

1. A prosecution under a municipal ordinance for an offense not punishable by general statute is not a criminal proceeding, but a civil action, and a judgment in such action against the municipality may be reviewed on error.

2. A complaint for the violation of a municipal ordinance, which states the number of the section and title of the ordinance violated, together with the date of its passage, is sufficient under the statute, the proceeding not being a criminal prosecution.

3. A municipal corporation can exercise only such powers as are granted to it by its charter or by the general law of the state, either in express words or by necessary or reasonable implication, or such as are incidental to the powers expressly granted, or such as are essential to the objects and purposes of the corporation. A municipal corporation, under a general grant of authority, cannot adopt ordinances which infringe the spirit or are repugnant to the policy of the state, as declared in its legislation.

(Syllabus by the Court.)

Error to La Plata county court.

This action was originally commenced before the police magistrate of the city of Durango. The complaint upon which the action was based contains the following charge: "That one E. Reinsberg on or about the 22d day of June, 1890, said day being then and there a Sabbath day, at, to-wit, the said city of Durango, county of La Plata, state of Colorado, then and there being, did then and there violate section number one of ordinance number 229 of the city of Durango, being an ordinance entitled 'An ordinance requiring the observance of the Sabbath,' by keeping open his place of business on the said Sabbath day, and the display and sale of goods after nine o'clock of said day; the above ordinance having been adopted and approved May 20th, 1890." The ordinance under which the prosecution was instituted forbids in general terms all labor and business on Sunday except certain specified kinds. Upon appeal to the county court on defendant's motion the complaint was quashed, and the defendant was discharged, "on the ground," as set forth in the record, "that the city council had no authority to pass Ordinance No. 229 so far as relates to the charge against the defendant herein." The city brings the case to this court by writ of error.

Wm. E. Beck and O. S. Galbreath, for plaintiff in error. Baker & McHolland, for defendant in error.

ELLIOTT, J., (after stating the facts as above.) It has been expressly held by this court that a prosecution under a municipal ordinance for an offense not punishable by general statute is not a criminal proceeding, but a civil action, and that a judgment in such an action against the municipality may be reviewed by this court upon writ of error. *City of Greeley v. Hamman*, 12 Colo. 94, 20 Pac. Rep. 1. Neither the complaint nor any part of the record in this case discloses the kind of business which the defendant was accused of carrying on upon the Sabbath day. The complaint charges in substance that he kept his place of business open

and displayed and sold his goods on a certain Sabbath day in the city of Durango, contrary to the provisions of a certain ordinance, stating the section, number, and title of said ordinance, together with the date of its passage. The brief and argument of counsel for plaintiff in error are devoted to the question of the validity of the ordinance; but our decision must be controlled by a statutory provision not noticed by counsel in this court, and, so far as we can discover from the record, not presented to the consideration of the county court. The statute relates to the matter of pleading in cases of this kind. Under ordinary rules of pleading the complaint might have been quashed for insufficiency, as not stating a cause of action; that is, for not specifying a kind of business against the carrying on of which upon Sunday the sanction of the ordinance might properly be invoked. But section 114 of the towns and cities act (chapter 109, Gen. St. 1883) provides as follows: "In all suits brought for the recovery of any fines or penalties for violation of any ordinance it shall be sufficient to state in the complaint or affidavit the number of the section and title of the ordinance violated, together with the date of its passage, without stating said section or ordinance in full or the substance thereof." It must be remembered that this is a civil proceeding, originally instituted in a court not of record; hence the statute is not obnoxious to the constitutional requirement that the accused in criminal prosecutions shall have the right to demand the nature and cause of the accusation. Const. art. 2, § 16. Hence, giving effect to the statutory provision, the complaint must be held sufficient on its face, both in form and substance. The defendant, therefore, should not have been discharged upon motion. The kind of business which he was accused of carrying on upon Sunday should have been ascertained by evidence or otherwise as a matter of fact. If found guilty of violating the ordinance by the commission of some act which the city council had the power thus to prohibit, he should have been fined as the ordinance requires; otherwise he should have been discharged. The complaint having been quashed on the ground that the city council had no authority to pass the ordinance, "so far as relates to the charge against the defendant," we are asked to review this conclusion of the lower court. This cannot well be done, since the specific charge against the defendant does not appear in the record. An ordinance, like a statute, may be valid in part and void in part. *Cooley, Const. Lim.* 177, 178. For example, it must be conceded that such business as may by municipal authority be prohibited altogether may by such authority be prohibited on Sunday, on the ground that the greater includes the less, (Gen. St. c. 109, § 14,) even though there may be other kinds of business with which town and city governments are not intrusted with any supervision or control. A municipal corporation can exercise only such powers as are granted to it by its charter or by the general law of the state, either in ex-



press words or by necessary or reasonable implication, or such as are incidental to the powers expressly granted, or such as are essential to the objects and purposes of the corporation. Besides, there are certain well-recognized principles by which the powers of municipal corporations to pass ordinances in the nature of legislative enactments are limited or qualified. For example, municipal ordinances must not be "repugnant to the constitution and general laws of the state," nor can a municipal corporation, "under a general grant of authority, adopt by-laws (ordinances) which infringe the spirit or are repugnant to the policy of the state as declared in its legislation." 1 Dill. Mun. Corp. (3d Ed.) §§ 89, 316, 329. The ordinance in question may be tested by these and other legal principles for the purpose of determining its validity as to "the charge against the defendant" when the specific act of which defendant is accused shall become judicially known. But it is not incumbent upon this court to anticipate, discuss, or settle supposed legal controversies upon writs of error. We cannot undertake to determine the validity of the ordinance in question, "so far as relates to the charge against the defendant," until we are properly informed of the specific nature of such charge. The complaint having been prepared in statutory form, it was error to quash it upon motion before the particular act of which defendant was accused was ascertained. The judgment of the county court is reversed, and the cause remanded for further proceedings.

**ROCKY MOUNTAIN NAT. BANK *et al.* *v.* McCASKILL *et ux.***

(*Supreme Court of Colorado. May 7, 1891.*)

**PARTNERSHIP—DISSOLUTION—NEGOTIABLE INSTRUMENTS.**

1. The dissolution of a partnership will not affect the rights of holders of negotiable paper executed thereafter in the firm name by one of the partners, unless such holders had notice of the dissolution.

2. Nor can the defense be made to negotiable paper, executed in the firm name by one of the partners, that he had no authority to do so, unless it be shown that the holder had notice of his want of authority.

Commissioners' decision. Appeal from district court, Arapahoe county.

This was a suit in equity, brought by appellees against appellants, to set aside, declare void, and cancel two promissory notes and a trust-deed upon certain lands in the state of Kansas, executed by appellees to secure the payment of the notes. For many years prior to the summer of 1885 one William M. Roworth was a merchant doing an extensive business in Central City in this state. About the year 1870, Roworth and appellee John McCaskill formed a partnership for the purpose of breeding, raising, and dealing in cattle. By the terms of the contract of partnership McCaskill, who had very limited means, was to take charge of and give his attention to the business for a certain interest, and Roworth was to furnish the

necessary money. The business was prosecuted for some years in Colorado under the firm name of Roworth & McCaskill, was then transferred to Chase county in the state of Kansas, where the business was prosecuted under the same name, and was there continued until some date not definitely fixed, but prior to June, 1885, when the partnership was dissolved, and the business continued in the name of John McCaskill. Roworth was at all times a borrower of money in the conduct of his business; for years had done business with and been a borrower from the appellants the Rocky Mountain National Bank of Central City and the Colorado National Bank of Denver, by both of which he was usually carried for quite large sums; his notes at each of said banks being renewed from time to time, and the indebtedness continued almost indefinitely. On the 28th day of July, 1885, Roworth was indebted to the Rocky Mountain National Bank on a note of another person, the payment of which he had guaranteed, and which he had discounted, in the sum of about \$4,500, and for overdrafts in about \$1,500, in settlement of which he made the following note: "\$6,000. Central City, Colo., July 28, 1885. On demand, after date, we promise to pay to the order of Wm. M. Roworth, six thousand dollars at the Rocky Mountain National Bank, with interest at one percent. a month from date until paid. ROWORTH & McCASKILL. Value received. No. 7,075." And on the back of said note is the following indorsement: "For and in consideration of the sum of ten cents, the receipt whereof is hereby acknowledged, I hereby guaranty the payment of the within note, waiving demand and notice of non-payment and protest; and agree to pay all costs and expenses paid or incurred in collecting the same. Wm. M. ROWORTH." On June 30, 1885, Roworth was indebted to the Colorado National Bank of Denver in the sum of \$5,000, which had been of long standing, and frequently renewed, each time previously by his individual note, and on that date he gave to the bank the following note, and took up his own: "\$5,000. Denver, Colorado, June 30th, 1885. One day after date we promise to pay to the order of the Colorado National Bank of Denver five thousand dollars at the Colorado National Bank of Denver, with interest at one percent. per month from date until paid. ROWORTH & McCASKILL. Wm. M. ROWORTH. Value received. No. 42,626." Shortly after this Roworth failed. On the 31st day of August, 1885, Roworth, T. H. Potter, of the Rocky Mountain National Bank, and the attorney of the Colorado National Bank were at the place of residence of appellees in Kansas, to obtain from McCaskill security for the payment of the two notes due, respectively, to the two banks. Roworth had an interview with McCaskill, informed him of the existence of the notes, stated that he was embarrassed, needed help, and urged McCaskill to secure the two notes, and assist him in that way. McCaskill consented, met the agents of the banks, executed his notes, payable one year after date, for the sums respectively due on the former notes;

the note for the sum due the Rocky Mountain National Bank being made payable to Potter, and the sum due the Colorado National Bank made payable to Kountze, its president; both notes being secured by trust-deed on the lands of appellees in Kansas, William B. Berger being named as trustee; and the former notes were canceled. At the same time Roworth executed and delivered to McCaskill his note for \$12,000, to cover the indebtedness assumed and secured by McCaskill. It is alleged in the complaint that before the notes of June 30th and July 28th were made the firm of Roworth & McCaskill had been dissolved; that Roworth never had authority to make notes in the name of the firm; that the indebtedness for which the notes were given was the individual indebtedness of Roworth; and that such fact was known to the defendants at the time, and that Roworth executed the notes of the firm at their solicitation and instance, they having full knowledge that the indebtedness was not that of the partnership. Also that the two notes of McCaskill and the trust-deed were obtained by fraud and by misrepresentation of Roworth, Potter, and the attorney, Bartels, in regard to the financial condition of Roworth, they representing that Roworth's embarrassment was only temporary; that he had ample property to satisfy his debts, and only needed time, when in fact Roworth was hopelessly insolvent. Praying that the notes and trust-deed be declared void, and that they be canceled and delivered up. A very voluminous answer was filed, traversing every important allegation of the complaint. In an amendment to the answer defendants, by what may be treated as a cross-complaint, assert the validity of the two notes of June 30th and July 28th to the respective banks as the proper debts of the firm, and pray judgment against McCaskill for the amount of the notes and interest. Upon the trial a jury was impaneled, to which several issues of fact were submitted by a series of questions, 12 in number, in regard to the manner in which the notes and trust-deed were obtained from appellees, all of which were answered adversely to the defendants, (appellants,) and sustaining the allegations in the complaint that they were obtained by fraud, misrepresentation, and concealment of important facts; but no issues of fact were submitted to the jury in regard to the validity of the former notes executed with the firm name by Roworth. Much oral testimony was given, some of it quite contradictory and irreconcilable. The court found in favor of appellees upon all the issues, and decreed that the McCaskill notes be canceled and delivered up, that the trustee execute and deliver a deed of release freeing the land from the lien created by the trust-deed, holding the former notes invalid as against McCaskill, and refusing the prayer in the cross-complaint for a judgment against him upon them. From such decree, and the overruling of a motion for a new trial, an appeal was taken to this court.

*Lucius P. Marsh and Bartels & Blood, for appellants. L. C. Rockwell and D. McCaskill, for appellees.*

REED, C., (after stating the facts as above.) The established practice of this court precludes the review of questions determined in the lower court, unless exceptions were saved to the judgment, and error duly assigned. The only question submitted by the single assignment in this case for the determination of the court is the one of the validity of the notes as partnership paper at the time of their execution and delivery. The dissolution of the partnership before the making of the notes seems to have been unquestioned. Whether the officers of either bank knew of the dissolution of the partnership is left in doubt. It is not conclusively or satisfactorily shown that they had such knowledge. The dissolution of the firm could in no way affect appellants unless it were shown that they had knowledge of it. Regular customers and dealers with a firm are required to have special notice of the dissolution. Parties who, like appellants, only take for discount the paper of the firm, are not required to have special notice, but there must be a reasonable or general notice, sufficient to warn and notify the public, by publication of a notice of dissolution, or in some other public manner. 1 Daniel, Neg. Inst. § 369b; Lovejoy v. Spafford, 93 U. S. 439; Bank v. McChesney, 20 N. Y. 240. It does not appear from the evidence that any notice whatever was given of the dissolution, or that the fact was known to any one but the former members of the firm. It was contended by appellees that Roworth had no authority to bind the partnership in the making of promissory notes. This contention was not established by the proof. If his authority in this regard was limited by a special contract between himself and McCaskill, nevertheless, as to third parties, such a contract would have been a nullity, unless their knowledge of the fact was shown. The authority of a partner to bind the firm within the scope of its business is implied, and grows out of the fact that it is a firm, and each member is a general agent for the other copartners. 1 Daniel, Neg. Inst. §§ 355, 356; Greenslade v. Dower, 7 Barn. & C. 635; Swan v. Steele, 7 East, 210. There is this distinction to be made: A contract made between partners, that certain members of the firm only could bind the firm, might be valid as between themselves, and might make a debt which purported to be a firm debt an individual debt in the adjustment of the partnership affairs, while such debt would be a firm debt in the hands of a third party who had no knowledge of the want of authority of the partner executing the paper. Another well-settled rule of law is that without actual knowledge of the want of authority of a partner to make negotiable paper in the name of the firm, where paper properly executed in the name of the firm is discounted, the lender is not required to inquire into the intentions, or to see that the money is properly applied to firm uses; but if the lender knows that the paper is not made for the legitimate business of the firm, or knows that the money is obtained for the purpose of discharging an individual debt, the paper would be invalid in his hands as

against the firm. The burden of proving that the lender was aware of the wrongful use of the firm name and cognizant of the fraud is upon the party asserting the irregularity. 1 Daniel, Neg. Inst. § 357; Hayward v. French, 12 Gray, 453; Sedgwick v. Lewis, 70 Pa. St. 221. The testimony is very conflicting in regard to the knowledge of appellants at the time of the execution of the respective notes that they were not being used for the purposes of the firm, but for the individual benefit of Roworth; but sufficient appears in evidence in regard to what was said and done at the time, taken in connection with the established fact that the notes were substituted for the individual notes of Roworth, that had been frequently renewed before that time for indebtedness that was not created in the name of the firm, but in his individual name, to warrant the court in finding that the respective parties had the necessary knowledge that the paper was not being used in the legitimate business of the firm. Although there was much testimony opposed to this view, there was sufficient in its favor to warrant this court in refusing to disturb the finding; and, as before stated, this court, by reason of the absence of assignments of error, being precluded from examining the question of subsequent ratification and adoption of the notes by McCaskill, we recommend that the decree be affirmed.

RICHMOND, C., concurs. BISSELL, C., concurs in result.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

#### DOUGHERTY v. SEYMOUR.

(Supreme Court of Colorado. May 7, 1891.)

#### LEASE OF BAWDY-HOUSES — RIGHT TO RECOVER RENT.

No rent can be recovered under a written lease, where it is shown by extrinsic evidence that the premises were let to be used as a bawdy-house, and were used for that purpose.

Error to superior court of Denver.

Action to recover rent alleged to be due upon a written lease. Defense that the demised premises were leased to be used as a bawdy-house, and that they were so used with the knowledge and consent of the landlord. Judgment for defendant.

Wm. C. Ghost, for plaintiff in error. Coe & Freeman, for defendant in error.

PER CURIAM. At common law, the keeping of a house of prostitution is an indictable offense. Such places are regarded with so much disfavor that not only the keeper of the house, but also a landlord, knowingly leasing the same for the purposes of bawdry, is held to be guilty of a criminal offense when the house is actually put to such immoral use. 2 Whart. Crim. Law, (8th Ed.) § 1459; 1 Bish. Crim. Law, (7th Ed.) § 500; Com. v. Harrington, 3 Pick. 26. These salutary rules have received the almost universal sanction of the courts wherever the common law has been administered. Colorado, at an early

date, following the lead of many of the older states, adopted the common law of England, so far as the same might be found applicable and of a general nature. Gen. St. 1893, § 197. The keeping of a bawdy house tends directly to debauch the public morals. It is against public policy and unlawful, both at common law and under our statute. Id. § 839. It is said, however, that as the written lease upon which this action is founded is silent as to the purposes for which the house was to be used, it is a valid contract, and can be enforced, notwithstanding the use to which it was known that the house would be put. The contract is *prima facie* good, but extrinsic evidence shows it to have been tainted with moral turpitude, which overthrows its *prima facie* appearance, and exposes its baseness and illegality. As to whether or not the house was let to be used as a bawdy-house, it is true the evidence is conflicting. It was, however, the peculiar province of the trial judge to determine upon which side lay the greater weight. This court is not at liberty, under the circumstances, to substitute its judgment upon the mere weight of evidence for that of the trial court, with the superior advantages possessed by the latter by reason of the living witnesses appearing before it. Accepting the finding as correct, and we have a case in which both parties to the lease are shown to have entered into the same with the understanding that the leased premises were to be used for the purpose of prostitution. Such contracts, being *contra bonos mores*, cannot be enforced. Ralston v. Boady, 20 Ga. 449; Bish. Cont. § 506; 2 Chit. Cont. p. 981; Story, Conf. Laws, § 258; Dyett v. Pendleton, 8 Cow. 737; Lightfoot v. Tenant, 1 Bos. & P. 556; Thomas v. City of Richmond, 12 Wall. 349; Forsythe v. State, 6 Ohio, 20. The judgment of the district court is right, and must be affirmed.

#### KNOWLES v. INNMAN.

(Supreme Court of Colorado. May 7, 1891.)

#### LANDLORD AND TENANT—DENIAL OF LANDLORD'S TITLE.

Though the tenant is estopped to deny the landlord's title without surrendering possession of the leased premises, in an action for rent for occupancy under an agreement continuing the terms of an expired lease, where the tenant denies any such agreement, it is proper for the court to receive evidence of title in a third person, leaving its admissibility to be determined by its conclusion as to the existence of the alleged agreement.

Commissioners' decision. Appeal from district court, El Paso county.

Mr. L. B. France, for appellant.

BISSELL, C. In 1886 Mrs. Innman brought this suit against Jesse Knowles to recover \$250,—\$125 as rent due for the last six months of the term of a lease for three years upon certain property in Douglas county, and \$125 as rent for the use and occupation of the property for the half year following the expiration of the term named in the instrument,—alleging a continuing occupancy by Knowles under an arrange-

ment which would extend the conditions and general provisions of the lease to the new term. Sifted of all extraneous matter, the substantial defenses interposed to the recovery were two: *First*, a payment under garnishment proceedings by Knowles of a claim which had been established against the lessor; *second*, the expiration of the lease, the non-occupancy, under its terms and conditions, subsequent to the alleged surrender, and title in a third party. It is true that the defendant interposed a plea resembling that of *non est factum* at the common law, but upon demurrer this was very properly held bad, because, under our statute, it is incompetent for a party sued upon a written contract set out in the complaint to deny that it is his deed, unless he verifies his plea. It is plain that the defense of title in a third person was only permissible upon the hypothesis that the term had ended, that possession had been surrendered, and that Knowles was no longer a tenant of Mrs. Innman. The rule is too well settled and too familiar, to require either argument or citation of authority, that the tenant is estopped to question the title of the one from whom he leases and receives possession, and that a surrender must precede the defense of an outstanding title in any third person. Upon this hypothesis the court may have well refused to either consider or attach any importance whatever to the testimony offered concerning the title of James Innman. The defendant in his denials contested his occupation subsequent to the expiration of the term named in the original instrument under an agreement which embraced a continuing occupancy according to the terms of the original lease. Under this state of the pleadings it was entirely proper for the court to receive the testimony, leaving its admissibility or its value to be estimated and determined by the conclusion at which the court might arrive upon the proof concerning the agreement for the continued occupancy. It is evident from the judgment rendered that the court found as a matter of fact that there was such an agreement between the parties, and that Knowles, during the subsequent year, occupied the premises upon a convention which gave him the right to the use of the property for the ensuing year upon the terms and conditions named in the original lease. This must be true, because the other defense of the payment of a judgment under garnishment process seems to have been abundantly proved, and must have been adjudged by the court a sufficient defense as to part of the claim sued on. While there are no findings of fact by the court in the record upon which this conclusion can be predicated, yet as it is apparent that the court must have rendered its decision upon this basis, which is well sustained by the testimony, the presumption that it so decided will be so far indulged in as to uphold the judgment. The case was tried by the court without the intervention of a jury. The opinion of this court as to mere preponderance of testimony is not a proper basis for reversal. It is only in those cases where the finding

and judgment are clearly against the testimony, and evince gross error on the part of the trial court, that the judgment will be reversed upon that ground. As the testimony stands in print, without an opportunity to hear and see the witnesses, it is barely possible that a different conclusion might be reached; but the judgment is amply sustained by competent testimony. Other matters are discussed in counsel's brief, but they are not deemed of sufficient importance to necessitate a discussion. They are not errors which would operate to reverse the judgment, whatever might be the conclusion at which the court might arrive concerning them. The judgment should be affirmed.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

#### *In re* HOUSE BILL No. 10.

(Supreme Court of Colorado. March 30, 1891.)  
CONSTITUTIONAL LAW—BILLS—OPINIONS OF SUPREME COURT.

Where the promoters of a bill that has been presented to the supreme court for its opinion concede that in some important particulars it is unconstitutional, the court will not discuss its terms at length, as it is not the province of the court to indicate whether or not a constitutional measure might be prepared to embody the leading purpose of such bill.

A copy of house bill No. 10, "In relation to the weighing of coal at mines," was submitted to the court, requesting an opinion whether said bill, if enacted as a law, would operate to deprive persons affected thereby of their property without due process of law or without just compensation; and whether said bill, if passed by the legislature, could be sustained as a valid police regulation. The text of the bill is as follows: "House bill No. 10. By Mr. Bowman. A bill for an act in relation to the weighing of coal at mines. Be it enacted by the general assembly of the state of Colorado: Section 1. That hereafter all coal mined in this state by any corporation, company, or individual, whether as lessee or owner, shall be weighed in the box in which it is originally loaded, credited to the employee sending the same to the surface, and accounted for at the legal rate of weights as fixed by the laws of Colorado. Each and every violation of this section shall subject the offender to a fine of not less than fifty dollars nor more than two hundred dollars, to be paid into the treasury of the county in which said mine is situated, to be collected as other fines are collected. Sec. 2. The weighman employed at any mine shall subscribe an oath or affirmation before a justice of the peace, or other officer authorized to administer oaths, to do justice between employer and employe, and weigh the output of coal from the mines, as herein provided. The miners employed by or engaged in working for any mine-owner, operator, or lessee of any mine in this state shall have the privilege, if they desire, of employing at their own expense a

check-weighman, who shall have like rights, powers, and privileges in the weighing of coal as the regular weighman, and be subject to the same oath and penalties as the regular weighman. Said oath or affirmation shall be kept conspicuously posted in the weigh-office; and any weigher of coal or person so employed, who shall knowingly violate any of the provisions of this article, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than twenty-five nor more than one hundred dollars for each offense, or by imprisonment in the county jail for a period not to exceed thirty days, or by both such fine and imprisonment; proceedings to be instituted in any court having competent jurisdiction. Sec. 3. Any person having or using any scale or scales for the purpose of weighing the output of coal at mines, so arranged or constructed that fraudulent weighing may be done thereby, or who shall knowingly resort to or employ any means whatsoever by reason of which such coal is not correctly weighed and reported in accordance with the provisions of this act, shall be deemed guilty of a misdemeanor, and shall, upon conviction, for each such offense be punished by a fine of not less than two hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for a period not to exceed sixty days, or by both such fine and imprisonment; proceedings to be instituted in any court of competent jurisdiction. Sec. 4. The manner of weighing, as hereinbefore provided for, shall also apply to the class of workers in mines known as 'loaders,' engaged in mines wherein the mining is done by machinery, whenever the workmen are under contract to load coal by the bushel, ton, or any quantity, the settlement of which is had by weight. Sec. 5. All acts or parts of acts in conflict with this act are hereby repealed."

**PER CURIAM.** After hearing several arguments *amici curiæ* as to the validity of house bill No. 10, we adopt the concession made by the promoters of the measure who appeared before us,—that in one or more important particulars the bill as presented for our consideration must be held unconstitutional. It is unnecessary to discuss its terms at length, as it is not our province to indicate whether or not a constitutional measure might be prepared which would effectuate the leading purposes of the bill. We therefore refrain from expressing any further opinion upon the subject.

87 Cal. 561

SAN DIEGO FLUME CO. v. CHASE. (No. 13, 888.)

(Supreme Court of California. Feb. 25, 1891.)

In bank. On rehearing. For former report, see 25 Pac. Rep. 756.

**PER CURIAM.** A rehearing of this cause is denied, but so much of the opinion and decision heretofore filed as limits the respondent to the use of two 1½-inch standard pipes is set aside. The contract does

not limit respondent to any particular number of standard pipes in conducting his irrigation.

89 Cal. 333

WM. WOLFF & CO. v. CANADIAN PAC. RY. CO. (No. 13,242.)

(Supreme Court of California. May 30, 1891.)

JUDGMENT BY DEFAULT—APPLICATION TO SET ASIDE—CONDITIONS.

1. On July 19th defendant filed an application to set aside a judgment by default entered against him on July 16th. The hearing was postponed by consent, and on November 23d the motion was stricken from the calendar in the absence of both parties, but on defendant's motion it was restored on January 8th following. On January 12th defendant, discovering that the application was defective, filed a new application, with affidavits and a proposed answer, making the record of the first application part of the moving papers. *Held*, that the second application was substantially an amendment of the first, and was filed within a reasonable time, within the meaning of Code Civil Proc. Cal. § 473, requiring such an application to be made within a reasonable time, but in no case exceeding six months after the judgment was taken.

2. Such provision does not require the application to be heard within the time limited.

3. The dismissal by the court without prejudice, on defendant's motion, of his application to set aside a judgment by default because of a defect in the application, is not a refusal, in whole or in part, to grant the application, within the meaning of Code Civil Proc. Cal. § 182, providing that if an application to a judge for an order is refused, in whole or in part, no subsequent application for the same order shall be made, etc.

4. Where the court makes an order opening a judgment by default on condition that defendant pay plaintiff a certain attorney's fee, the refusal of plaintiff to accept the same, on the ground that his right of appeal from the order may be affected, does not warrant the court's vacating that part of the order requiring payment of the fee.

5. Where an order opening a judgment by default requires defendant to pay plaintiff a certain attorney's fee, a tender thereof to plaintiff's attorney is sufficient to preserve defendant's rights under the order until its validity is determined, but does not constitute payment unless it is kept good.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Code Civil Proc. Cal. § 473, provides that the court may relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, provided that application therefor be made within a reasonable time, but in no case exceeding six months after the judgment was taken. Section 182 provides that "if an application for an order, made to a judge of a court in which an action or proceeding is pending, is refused, in whole or in part, or is granted conditionally, no subsequent application for the same order shall be made to any court commissioner, or any other judge except of a higher court; but nothing in this section applies to motions refused for informality in the papers or proceedings necessary to obtain the order, or to motions refused with liberty to renew the same."

O'Brien, Morrison & Daingerfeld, for appellant. Edward S. Salomon and Lindley & Elckhoff, for respondent.

VANCLIEF, C. The appellant is a California corporation, and, as such, on June 30, 1888, brought an action in the superior court of the city and county of San Francisco against the respondent, a foreign corporation, to recover damages for an alleged failure safely to carry and deliver certain goods, the property of appellant, from New York to San Francisco. The summons was served upon Moses M. Stern, who is described in the affidavit of service as the business agent of the defendant. Judgment by default was rendered July 16, 1888. On the following day the defendant's attorney obtained an order staying execution pending a motion to set aside the default. On July 19, 1888, the attorney for defendant gave notice of appearance in the action, and also of a motion to set aside the default and judgment on the grounds of mistake and inadvertence; and upon the following day the papers served upon the plaintiff were filed. The hearing of the motion was postponed from time to time, by consent of both parties; and on November 23, 1888, the motion was stricken from the motion calendar by the court in the absence of both parties, and, on motion of defendant, was restored to the calendar on January 8, 1889. On January 12, 1889, the defendant, discovering that the first application was defective, filed a new application upon additional affidavits, accompanied by a proposed answer to the complaint. This application purported to be a present application to the court "to vacate and set aside the judgment heretofore entered in said action against defendant, to relieve said defendant from the default judgment and other proceedings taken against defendant in said action after the institution thereof, and for such other and further relief as may be proper, upon the ground that such proceedings, said default, and such judgment were made in said action because of the mistake, inadvertence, surprise, and excusable neglect of said defendant; upon the further ground that such judgment was improvidently rendered; and upon the further ground that said defendant has a good and substantial defense to said action on its merits, and that the granting of said application would be in furtherance of justice." It also contained a notice, by the attorneys for defendant, "that we shall move to have the application aforesaid heard, and said relief applied for granted, at the court-room of said court and department, in the new city hall, in said city and county, on Friday, the 18th day of January, 1889, at 10 o'clock A. M., or as soon thereafter as counsel can be heard. Said motion will be based upon all the papers and proceedings on file or of record in the above-entitled action, and upon the affidavits and the proposed answer of defendant herewith served and filed." Both the original and amended applications were brought to a hearing on January 25, 1889, when plaintiff filed counter-affidavits contradicting some of the facts stated in the affidavits for defendant, and stating additional facts tending to show that the last application might have been made at an earlier date. The

defendant then moved to dismiss without prejudice the first application, of which notice had been given on July 19th; and this motion was granted, against the objection of the plaintiff. The court thereupon proceeded to hear the second or amended application, and on January 25, 1889, made an order setting aside the default and judgment on the conditions that the defendant pay to the plaintiff \$16.50 costs, and \$75 for counsel fees, within 10 days, and further ordering that the proposed answer, filed with the application, stand as the answer of the defendant. On January 29, 1889, the \$75 for counsel fees was tendered to plaintiff's attorneys, who refused to receive the money, and at the same time gave, as the reason for refusing, that the right of plaintiff to appeal from the order setting aside the default and judgment might be prejudiced by accepting it. Upon an affidavit showing this tender and refusal, the court, on February 4, 1889, issued an order to plaintiff to show cause why the order of January 25th should not be modified by vacating so much thereof as directs the payment of \$75 counsel fees, which order was served February 5, 1889, but the affidavit upon which the order was made was not served with the order. The hearing upon the order to show cause was regularly continued, and finally set for March 8, 1889, when, there being no appearance for the plaintiff, the court modified the order of January 25th by vacating so much thereof as required the payment of \$75 attorney's fees. The plaintiff has appealed from both orders, and contends that, inasmuch as the first application was abandoned and dismissed, the second application must stand and be considered as if no earlier application had been made; and that it was not made within a reasonable time, because no motion was made in open court until after the expiration of six months from the date of the judgment; and that the modifying order was erroneous, for the reason that the moving affidavit was not served with the order to show cause, and that the money should have been tendered to plaintiff, and not to plaintiff's attorneys.

1. A view of the whole proceedings as disclosed by the record will show that the second application was substantially an amendment of the first by the addition of affidavits and a proposed answer, and, for the purpose of determining the question of diligence, must be so regarded. The second application expressly refers to and makes "all the papers and proceedings on file or of record" a part of the moving papers. The plaintiff consented to the delay of the hearing of the application as first made. There is nothing to show that the defect in the moving papers as first filed was discovered by the defendant any considerable time prior to the date of the amended application. The discovery was presumably made on the 8th of January, 1889, when the first application was restored to the calendar. The question as to what is "a reasonable time," short of the extreme limit of six months allowed by section 473 of the Code of Civil Procedure, within which applica-

tion may be made for relief "from a judgment, order, or other proceeding," etc., must depend upon the circumstances of the particular case, all of which should be considered by the court. Where a delay has been assented to by the other party, or does not appear to have been injurious to his rights, the six-months limitation prescribed by the Code should be considered as the only limit of reasonable time. In the matter of opening defaults, much is confided to the discretion of the trial court. *Dougherty v. Bank*, 68 Cal. 275, 9 Pac. Rep. 112; *Chamberlin v. County of Del Norte*, 77 Cal. 151, 19 Pac. Rep. 271. And where the circumstances are such as to lead the court to hesitate, it is better to resolve the doubt in favor of the application, so as to secure a trial and judgment upon the merits. *Watson v. Railroad Co.*, 41 Cal. 17; *Cameron v. Carroll*, 67 Cal. 500, 8 Pac. Rep. 45; *Lodtman v. Schluter*, 71 Cal. 94, 16 Pac. Rep. 540. The application having been made within six months after the judgment, and within a reasonable time, the jurisdiction of the court to hear and determine it could not be lost by the expiration of the six months before the hearing. The limitation prescribed by section 473 of the Code of Civil Procedure is a limitation of the time within which the application must be made, and not upon the time within which it must be heard or determined. *Conklin v. Johnson*, 34 Iowa, 266. The dismissal of the first application without prejudice, at the request of defendant's counsel, was not, under the circumstances, a refusal by the court, in whole or in part, to grant the application, in the sense of section 182 of the Code of Civil Procedure.

2. But I think the court erred in vacating that portion of its former order requiring the payment of \$75 to plaintiff as a condition of opening the default. Having, in the proper exercise of its discretion, imposed this condition, it should not have been revoked on the showing made, which was that plaintiff's attorneys declined to accept the money for the mere reason that they feared that such acceptance might prejudice the right of plaintiff to appeal from the order opening the default. Under the circumstances, the court might, perhaps, have required the defendant to deposit the money in court to abide the event of the proposed appeal; for plaintiff's attorneys may well have doubted as to the effect of their acceptance of the tender upon their right to appeal. *Cogswell v. Colley*, 22 Wis. 399; *Radway v. Graham*, 4 Abb. Pr. 468; *Lupton v. Jewett*, 19 Abb. Pr. 320. The tender to plaintiff's attorneys, however, was a sufficient performance of the condition to preserve the rights of the defendant under the order opening the default until the question of its validity should be determined. But, in order to constitute the tender a payment, it must be kept good; and the plaintiff is entitled to receive the amount tendered upon the affirmance of the order setting aside the default judgment. I think the order of January 25, 1889, setting aside the judgment by default upon the conditions therein stated, should be affirmed; and that the order of March 8,

1889, vacating so much of the order of January 25th as requires the payment of \$75 for counsel fees, should be reversed.

We concur: FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the order of January 25, 1889, setting aside the judgment by default upon the conditions therein stated, is affirmed; and the order of March 8, 1889, vacating so much of the order of January 25th as requires the payment of \$75 for counsel fees, is reversed.

89 Cal. 280

DAVIES v. OCEANIC S. S. CO. (No. 13,933.)  
(Supreme Court of California. May 28, 1891.)

NEGLIGENCE—PLEADING—EVIDENCE.

1. A complaint alleging that defendant negligently left open a hatchway on its vessel, and that plaintiff's intestate was struck and thrown down said hatchway by the negligence of defendant's employee in loading the vessel, states a cause of action.

2. The admission of evidence that said employee would get intoxicated when he came off a trip, though not relevant, as it appeared that at the time he was not intoxicated, is not ground for reversal, as it could not have influenced the verdict.

3. No one except said employee saw deceased at the time of the accident, and he did not do so until deceased was struck by the barrel, which the employee was swinging from the rail to the hatchway, but it appeared that, a short time before, deceased was caulking near the hatchway. *Held*, that the question of negligence on the part of the employee and deceased was one for the jury.

Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

*Milton Andros*, for appellant. *Geo. Lezinsky*, for respondent.

DE HAVEN, J. This is an action by the plaintiff, as administratrix, to recover damages for the death of H. B. Davies. The complaint alleges that said death was caused by the negligence of defendant, its servants and employees. Plaintiff recovered judgment for the sum of \$7,000.

1. It is claimed by the appellant that the complaint does not state a cause of action, in that it does not show that the defendant failed in the discharge of any duty it owed to the deceased. It is urged that the negligence with which appellant is charged is the leaving unprotected an open hatchway on its vessel, through which the deceased fell and was killed, and we have been referred to the cases of *Dwyer v. Steam-Ship Co.*, 17 Blatchf. 474,<sup>1</sup> and *The Germania*, 9 Ben. 356, which hold that so doing is not negligence for which an action will lie. These cases are not in point. It is true the complaint alleges that the hatchway through which deceased fell was negligently left unprotected, but this is only part of an averment, the gist of which is that deceased was lawfully employed on the vessel, and "by and through the carelessness and negligence of said defendant and its servants and employees in and about the said loading, and without any negligence or fault

<sup>1</sup> 4 Fed. Rep. 493.



of said H. B. Davies, said H. B. Davies was struck by a barrel of lime, which said defendant, its servants and employees, were engaged in loading into a hatchway near said H. B. Davies, and was precipitated down said hatchway in the said vessel." This, with the other averments, states a cause of action. The defendant did owe to deceased, lawfully on its vessel, the duty of not negligently throwing him down the hatchway.

2. The testimony of the witness Classen, to the effect that the witness Hulgerson would get intoxicated when he "came off a trip," though not relevant to any issue in the case, could not have prejudiced the case of the defendant. It was clear from Classen's evidence that Hulgerson was not intoxicated at the time of the accident, and the admission of the evidence complained of could not have influenced the verdict, and is therefore not a cause for reversing the judgment.

3. The plaintiff offered no evidence tending to show that the witness Luce had made before the trial the statement embodied in the question asked him, and which the witness denied; and therefore the rule laid down in *People v. Jacobs*, 49 Cal. 384, has no application.

4. It is also urged that the evidence is insufficient to sustain the verdict. No person saw the deceased at the time of the accident except the witness Hulgerson, and he does not seem to have done so until deceased was struck by the barrel of lime. He says: "I did not see him before the barrel struck. He must have come from aft." And this witness further stated that when he first saw him deceased was between him and the hatchway. But there was evidence tending to show that within a very short time before the accident the deceased was engaged in caulking near the hatchway, and it was for the jury to determine his position at the time, from all the circumstances appearing before them; and so it was for them to determine, from conflicting evidence, whether, in the mode in which the lime was being hoisted, the witness Hulgerson could manage and control the barrels while in transit from the railing to the hatchway. Assuming, however, that he could do so, as claimed by appellant, it was still a proper question for the jury whether, in view of all the facts surrounding him, he was not negligent in attempting to convey the barrel to the hatchway without looking to see if it would in its passage strike the deceased. The same may also be said of appellant's contention that deceased was guilty of contributory negligence. It makes no difference whether deceased was knocked into the hatchway while he was engaged in caulking, or whether he was struck while attempting to pass between the railing and hatchway, it would still be a question for the jury to determine whether at the time of the accident the deceased was exercising the degree of caution required of him by his situation. It is certainly a pure question of fact whether the deceased, while engaged in caulking near the hatchway, would have been in any danger, with the exercise of reasonable care upon the part

of the person handling the barrel from the railing to the hatchway; and if he would not, with such care, have been in danger, he was not guilty of any contributory negligence in working there. *Conroy v. Iron-Works*, 62 Mo. 35. And so also it cannot be said as a matter of law that the deceased, in the way the jury may have believed he attempted to pass between the railing and hatchway, would have been in any danger if at that time the person in charge of the barrel on the railing had exercised reasonable care, and looked to see whether he could safely proceed with the loading. The deceased was not guilty of negligence simply because he did not anticipate negligence on the part of the man at the railing in charge of the loading, unless he was in some way chargeable with notice that such person was indifferent or careless. He was only bound to exercise such care as a prudent man in his situation would ordinarily exercise for the protection of his life; and whether he did or not was a question, the decision of which was for the sound and impartial judgment of the jury. There are cases where the state of the evidence is such that the court can declare, as matter of law, that there was no negligence on the part of defendant, or that a plaintiff has been guilty of contributory negligence, but this is not one of them. When the evidence is conflicting, or when reasonable men might differ as to the inferences which ought to be drawn from the undisputed evidence, the question of negligence or contributory negligence is not one of law, but of fact. 1 *Shear. & R. Neg.* § 54; *Belton v. Baxter*, 58 N. Y. 411; *Hart v. Bridge Co.*, 80 N. Y. 622; *Railroad Co. v. Moore*, 24 N. J. Law, 832. While the evidence does not make a very strong case for the plaintiff, we cannot say that the verdict is without evidence to support it. The questions relating to defendant's negligence and plaintiff's contributory negligence were fairly submitted to the jury by instructions to which no exception is taken, and, as there is evidence upon which it can rest, the verdict is conclusive here. Judgment and order affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

80 Cal. 264

FOSTER v. MAGINNIS. (No. 13,009.)

(*Supreme Court of California*. May 28, 1891.)

SPECIFIC PERFORMANCE—VENDOR AND VENDEE.

In a suit for specific performance of a parol contract to convey land, followed by part performance, the evidence must show that the acts of part performance were done by complainant, and with defendant's consent, and that they were done in pursuance of the contract, and with a design of carrying it into execution.

Department 1. Appeal from superior court, Lake county; R. J. HUDSON, Judge. *Clitus Barbour*, for appellant. *R. W. Crump*, (James Wheeler, of counsel,) for respondent.

GAROUTTE, J. This is an action for the specific performance of a parol contract to convey land. Among other facts, the

court found: "Defendant verbally sold the land described in the complaint to plaintiff for two hundred dollars, which sum plaintiff then and there paid to defendant. That then and there defendant agreed to execute and deliver to plaintiff a deed thereto, and plaintiff immediately took possession of said land, with the knowledge and consent of defendant, and made valuable improvements thereon." After a careful examination of the evidence in this case we are satisfied that it does not support the foregoing findings. In the case of *Blum v. Robertson*, 24 Cal. 142, this court said: "It is a rule well settled that a party who claims a right to a conveyance of land under a parol or verbal contract upon the ground of part performance must make out by clear and satisfactory proof the existence of the contract alleged by him; and it is not enough that the acts of part performance proved are evidence of some agreement, but they must be unequivocal and satisfactory evidence of the particular agreement charged in the complaint." The terms of the contract in this case, under any aspect of the evidence, are vague and indefinite in the extreme. The plaintiff himself says that the defendant was to deed him all the land south of the road and fence, and there appears to be some of the tract claimed between the road and fence. It appears this particular tract of land was bought by defendant of Mrs. Reeves, and paid for at the time other tracts were purchased; and whatever promises defendant made to plaintiff as to deeding him this land were made without any consideration whatever, and partook of the nature of a gift without delivery. But, whatever the contract may have been, there is no evidence to support the finding that "defendant sold said land to plaintiff for two hundred dollars, and which sum plaintiff then and there paid to defendant." And again, there is no evidence to support the finding that "the plaintiff immediately took possession of said land with the knowledge and consent of defendant, and made valuable improvements thereon." The fact that he moved some personal property upon the land in the nature of fence-posts and loose lumber, is not a compliance with the rules of courts of equity requiring permanent and valuable improvements; and, according to the testimony of plaintiff himself, the defendant never consented to his possession, or authorized it in any way. Indeed, there is no evidence showing that he had any knowledge of it. Equitable fraud is the basis of this character of action; that is, fraud as a necessary consequence in setting up the statute as a defense, and the vendor thus securing for himself the benefits of the acts of part performance. It follows from this principle that the acts of part performance must be done by the party seeking to enforce the contract; and must be done in pursuance of the contract, and with a design of carrying the same into execution; and must be done with the consent and knowledge of the other party. While there may be some trust relation existing between these parties as to this land, the evidence fails to disclose sufficient facts

upon which to base a decree for specific performance. Let the judgment and order be reversed, and the cause be remanded for a new trial.

We concur: PATERSON, J.; HARRISON, J.

89 Cal. 321

SIDDALE v. CLARK. (No. 13,141.)

(Supreme Court of California. May 29, 1891.)

EXECUTORS AND ADMINISTRATORS—POWERS TO COMPROMISE.

In California an agreement by an executor or administrator to receive in full satisfaction of a judgment in favor of the estate an amount less than that due thereon is void, and hence the debtor's note executed and delivered to him pursuant to such agreement is without consideration.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

D. Wm. Douthitt, (Marcus Rosenthal, of counsel,) for appellant. Ben Morgan, for respondent.

BELCHER, C. This is an action on a promissory note. The defendant pleaded want of consideration for its execution. The court gave judgment for the defendant, and the plaintiff appeals. The facts are these: In 1879, the defendant, for a valuable consideration, executed to W. W. Traylor two promissory notes for sums aggregating \$2,950, and bearing interest at the rate of 1 per cent. per month. In January, 1883, Traylor died intestate, and in February following Mrs. Elizabeth D. Traylor was duly appointed administratrix of his estate. She qualified, and entered upon the discharge of her duties as administratrix, and in April, 1883, the said notes were inventoried and appraised as of no value. In July, 1883, no part of the notes having been paid, Mrs. Traylor commenced an action to recover the amount due thereon, and on September 18, 1883, judgment by default was entered in her favor, as administratrix, against defendant for the sum of \$4,372.50. On February 2, 1885, the defendant executed the note now in suit, which reads as follows: "\$750.00. San Francisco, Feb. 2, 1885. On demand, for value received I promise to pay to Mrs. E. D. Traylor seven hundred and fifty (\$750) dollars, with interest at the rate of six per cent. per annum payable monthly. This note is given by me in payment of all claims against me by the estate of W. W. Traylor. Not transferable. GEO. G. CLARK." When this note was taken, nothing had been paid on the judgment, and it was intended to have the note, by way of compromise, take the place of all existing indebtedness of the defendant to the estate. The attempted compromise was, however, never authorized or approved by the court having jurisdiction of the estate or a judge thereof, and the administratrix never satisfied of record the judgment or any part of it, but the same was in full force when this action was commenced, and remained so until it became barred by the statute of limitations. In July, 1885, defendant paid \$50 on his indebtedness to the estate, and in August of that year the whole estate was

distributed to Elizabeth D. Traylor in her own right and as assignee of other heirs. In October, 1885, Mrs. Traylor died testate, and, after administration of her estate, the note in suit, with other property, was distributed to the plaintiff, who commenced this action June 2, 1888. Conceding that executors and administrators have the legal right to compromise and discharge debts due the estates which they represent, without the approbation of the court or a judge thereof, when it appears to them to be just and for the best interest of the estates, (*Moulton v. Holmes*, 57 Cal. 337,) still it has been held in this state that a payment of a part of the amount due upon a money judgment, under an agreement that it shall operate as satisfaction in full, will not discharge the judgment, and that an agreement to discharge a judgment for a sum less than the amount for which it was rendered is void, (*Deland v. Hiett*, 27 Cal. 611.) It will be observed that the note in suit was not given, or intended to operate, as a mere part payment of the judgment against the defendant, but it was to take the place of and be a substitute for the whole judgment. This being so, the agreement on the part of the administratrix to accept it for that purpose was clearly null and void under the rule above stated. But a void promise on one side cannot constitute a consideration for a valid promise on the other side. The rule on this subject is thus stated in *Story, Cont. § 447*: "Mutual promises are concurrent considerations, and will support each other unless one or the other be void; in which case, there being no consideration on the one side, no contract can arise." See, also, 1 *Whart. Cont. § 498*. It follows, in our opinion, that the note was executed without any sufficient consideration therefor, and that the court below properly so held. The point is made that the want of consideration was not sufficiently pleaded in the answer, but we think it was. We advise that the judgment be affirmed.

We concur: TEMPLE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

89 Cal. 327

HARRISON v. McCORMICK *et al.* (No. 13,039.)

(Supreme Court of California. May 29, 1891.)

SALE—CONTRACT—PAROL EVIDENCE—FRAUD.

1. Where the contract for the sale of coal is in writing, and mentions the quality of coal sold by name, but nothing therein indicates that a sample was used or referred to, parol evidence is not admissible to show a sale by sample.

2. In an action for the purchase money, where there is nothing to show that the coal was not of the quality mentioned in the contract, but judgment goes for defendant, the admission of such parol evidence is reversible error.

3. Such evidence is not admissible as showing that a fraud was practiced on defendant, where there is no allegation in the answer that

the contract was induced by false representations.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

*Craig & Meredith*, for appellant. *H. C. Firebaugh*, for respondents.

DE HAVEN, J. The defendants had judgment in the court below; and from such judgment, and an order denying him a new trial, the plaintiff appeals. The action is for a balance alleged to be due plaintiff on account of the sale of 50 tons of coal, sold under the name of "Montana Lump Lehigh Hand-Picked Coal." The answersets up, among other defenses, that the coal was sold by sample, and not by name, and that the coal delivered did not correspond with the sample. The plaintiff proved that an agreement for the sale of the coal was reduced to writing, and executed in duplicate, and that the one retained by him was lost. He then proved the contents of this written agreement by a witness who refreshed his memory from a letter-press copy of the written portion of said agreement, and a blank memorandum of contract similar to that upon which the agreement was written. The contract, as thus proven, is as follows: "San Francisco, January 12, 1882. Messrs. McCormick & Lewis ordered from J. W. Harrison fifty tons Montana Lode Lump Lehigh Hand-Picked Coal, early lading in New York. Ship to be named, original cost, etc. To be paid on receipt of bills of lading, etc., and the freight to be paid on receipt of coal here, at \$13.50 per ton per 2,240 pounds, gold coin, payable as above, delivered from ship's side when landed. Any shortage in excess of 2 per cent. to be paid by the seller." The record does not disclose any conflict in the evidence as to the fact that there was a written agreement, or that its written terms were as above set forth. The defendants, however, were permitted to show by parol evidence that the contract was for coal of the same kind and quality as the defendants had previously bought from plaintiff, and which they were then using in their foundry, and that the coal delivered was not of the kind or quality thus referred to as a sample; and the question presented by this appeal is whether this parol evidence was properly admitted.

1. We do not see how the admission of this evidence can be sustained. Its effect was to show that coal was sold by sample, and thereby to import into the contract a warranty that the coal sold was to be equal to the sample. When the contract is in writing, and nothing in the written contract indicates that a sample was used or referred to, parol evidence cannot be allowed to show a sale by sample. *Tied. Sales*, § 188; *Wiener v. Whipple*, 53 Wis. 298, 10 N. W. Rep. 433; *Thompson v. Libby*, 34 Minn. 374, 26 N. W. Rep. 1. In *Wiener v. Whipple*, supra, the written contract was as follows: "Bought of Cass Whipple about 300 bushels of barley, at 65 cents per 50 pounds, to be delivered by the 15th of September next. Paid on same, \$25." And it was held not competent to add to the terms of this agree-

ment by parol evidence that the sale was made by sample. In *Thompson v. Libby*, supra, it is distinctly held that in a sale of personal property a warranty of its quality, if made at all, forms a part of the contract of sale, and is not a collateral contract; and therefore proof of such warranty cannot be added to the written agreement by parol evidence. It is claimed that the agreement proven by plaintiff was a mere informal memorandum, incomplete upon its face, and not intended to contain all the terms of the contract, and that for this reason the oral evidence was proper. We do not so regard the writing under consideration. It contains within itself all that is necessary to constitute a contract; and this being so, in the absence of any averment in the answer of defendants that there was an omission or mistake made in reducing it to writing, it is not competent to show by oral evidence that it does not state all of the terms of the agreement. The question whether a writing is upon its face a complete expression of the agreement of the parties is one of law for the court, and the rule which governs the court in its determination has been well stated as follows: "If it imports on its face to be a complete expression of the whole agreement,—that is, contains such language as imports a complete legal obligation,—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed." *Thompson v. Libby*, 34 Minn. 377, 26 N. W. Rep. 2. See, also, *Naumberg v. Young*, 44 N. J. Law, 339. In 1 Greenl. Ev. § 275, it is said: "When parties have deliberately put their engagement in writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing." Tested by this consideration, it is clear that the agreement here is to be deemed complete, as it imports a clear legal obligation, and without any uncertainty as to what the parties thereto undertook to perform. It states an agreement for the sale and delivery of 50 tons of coal of a particular name; and it contains, either expressly or by implication, everything necessary to make the mutual obligations of the parties, arising out of a contract of sale, complete. This is therefore to be deemed a written contract; and other terms and conditions which might have been introduced into it by the parties, but were not, cannot be added by parol. The abbreviation, "etc.," found in the sentences: "Ship to be named, original cost, etc. To be paid on receipt of bills of lading, etc.,"—does not render the writing incomplete as a contract of sale, nor justify the conclusion that it was not intended by the parties as a memorial of all the terms of their contract. In the connection used, the abbreviation used is meaningless, and in no

manner affects the legal construction of the agreement, and is therefore to be disregarded as surplusage.

2. The respondents further insist that this evidence was proper because it tended to show that a fraud was practiced upon them in the making of the contract. This would be so if such a defense had been made in the answer. The answer denies the execution of the contract alleged in the complaint, and avers that the contract of sale was by sample; but it contains no averment that defendants were induced to enter into the contract alleged in the complaint by any fraudulent representation, as that the coal described in such contract by name was the same kind and quality of coal previously bought by defendants from plaintiff; and without such averments, or an allegation of mistake in reducing the contract to writing, this evidence was irrelevant and immaterial.

3. The court does not find as a fact that the coal delivered to respondents was not merchantable. It is true, one part of the finding is to the effect that it "was filled with slate and dirt and foreign matter;" but this is said in connection with the statement that it was not as good as the sample by which the court finds it was sold. In another portion of its findings the court declares that it was not as good as the sample referred to, "but it was of the kind, variety, and class known as 'Montana Lump Lehigh Hand-Picked Coal.'" If it was, then the respondents got what was called for by the written contract, unless it was not equal in quality to coal of that brand. There is no finding that it was not. In this state of the findings, we cannot hold that the admission of the oral evidence as to the sale by sample was immaterial, as it would have been if the court had found that the coal delivered was not merchantable, nor equal in quality to that called for by the contract alleged in the complaint, and that plaintiff had been paid its full value. Judgment and order reversed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(3 Cal. Unrep. 412)

FLYNN v. DOUGHERTY. (No. 12,032.)<sup>1</sup>

(Supreme Court of California. May 30, 1891.)

CONTRACT—CONDITIONS—BREACH.

Wherein an action for a breach of contract it appeared that defendant verbally accepted plaintiff's written offer to furnish stone for a building defendant had undertaken to build, and that plaintiff was required, as one of the conditions, to execute a bond for the performance of the work and to commence the work as soon as possible, the failure of plaintiff to furnish or tender the bond within eight or nine days precludes his right to recover prospective profits, when nothing has been done under the bid.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

*Jarboe, Harrison & Goodfellow*, for appellant. *Charles F. Wilcox*, for respondent.

VANCLIEF, C. This is an appeal from a judgment of nonsuit, and from an order

<sup>1</sup>Reversed in banc. See 27 Pac. 1080, 91 Cal. 669.

denying plaintiff's motion for a new trial. The complaint alleges, in substance, that in July, 1886, the plaintiff contracted with the defendant to cut, furnish, and deliver to the defendant the stone required for the construction of the state asylum about to be erected in the county of Santa Clara, for the sum of \$6,883; that plaintiff was at all times ready and willing to perform the contract on his part, but that the defendant refused to accept the stone, and gave plaintiff notice of such refusal, and prevented plaintiff from performing the contract, and wholly repudiated it, to the damage of plaintiff in the sum of \$2,000. The answer specifically denied each allegation of the complaint. Upon the trial, the plaintiff testified that on the 9th day of July, 1886, he presented to the defendant a bid or offer in writing, of which the following is a copy: "San Jose, July 9, 1886. The undersigned propose to cut, furnish, and deliver the stone-work of the asylum to be built at Agnew station, according to the plans and specification of Mr. Jacob Lenzen & Son, architects, for the sum of six thousand eight hundred and eighty-three (\$6,883.00) dollars. THOMAS FLYNN." Plaintiff admitted that there was no contract or memorandum in writing between him and the defendant for the stone-work mentioned in the complaint; and further testified that the defendant was himself bidding for the construction of the state asylum at Agnew station, and a few days thereafter informed plaintiff that the contract for its construction had been awarded to him, (defendant,) and that plaintiff's bid for the stone-work was accepted, telling him at the same time that a bond would be required of him, (plaintiff,) and that he should make arrangements to commence work as soon as possible, so as not to delay the construction of the asylum; that on July 20th plaintiff came to San Jose, and after meeting with the defendant was informed by him that the contract for the stone-work had been given to another person; that he was at all times ready to carry out and perform the contract on his part, and for that purpose had brought his foreman to San Jose, and instructed other workmen to follow; that the cost of the work would not have exceeded \$4,500, and that if he had completed the contract he would have realized therefrom a profit of over \$2,000; that he had quite a lot of stone on hand already quarried that could have been used, which it would have cost between \$500 and \$600 to quarry, and which he had previously quarried while he was getting out other work, the most of which is still on hand, that if the stone had been cut according to his bid and the specifications, and had not been used in the construction of the asylum, it would not have been available for other purposes or salable in the general market, but that none of the stone was so cut, and none of it was delivered, nor was any money paid therefor by defendant. Another witness testified to a conversation with the defendant in which he told the witness that Flynn had got the contract for cutting, furnishing, and delivering the stone for the asylum. No other evidence was given or offered in the case,

and defendant moved for a nonsuit on the ground that the alleged contract was for the sale of goods and chattels, and as there was no note or memorandum thereof in writing signed by defendant, nor any acceptance or receipt of the goods or any part thereof, nor any payment of any part of the purchase money, as required by the fourth division of section 1624 of the Civil Code, the contract was invalid, and on the further ground that the plaintiff failed to prove that he had sustained any damage. The court sustained the motion, and plaintiff excepted. I am inclined to the opinion that the alleged contract was not within the statute of frauds, but it is unnecessary to decide that question, since, according to plaintiff's own testimony, the acceptance of his offer by the defendant was only conditional, the condition being that plaintiff must give a bond for the performance of the work. There is no evidence tending to prove that plaintiff ever gave or offered to give the bond, without which even the proposed verbal contract was incomplete. It appears that the negotiation was opened by the uninvited offer of plaintiff to do the stone-work according to certain specifications for a certain price. At the same time that defendant said he accepted the offer he also said that plaintiff should give a bond, and commence the work as soon as possible. About eight or nine days thereafter, without having given or offered to give the bond, the plaintiff returned to San Jose, when he was told that the work had been let to another party; but even then he did not offer to give the bond, nor does he testify that he then offered to commence the work, but only that "he was at all times ready to carry out and perform the contract on his part," by which he may have intended to be understood that he offered to commence the work. But his offer to commence the work, if he did so offer, before he tendered the bond, was nugatory. He claimed no other damage than being deprived of prospective profits, but, as he signally failed to prove a contract, he is not entitled to even nominal damages. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

*In re* KNOX. (No. 14,002.)

(Supreme Court of California. June 3, 1891.)

BEATTY, C. J. Counsel for the petitioner in the above-entitled matter having consented that the proceedings against the respondent be dismissed, it is so ordered

(89 Cal. 385)

DEWAR V. RUIZ, (GARDNER, Intervenor.)  
(No. 13,721.)

(Supreme Court of California. June 1, 1891.)

SWAMP LANDS—RIGHT TO PURCHASE—EVIDENCE.

1. An application to purchase swamp and overflowed land, made before segregation of the land, is void, and it is proper to refuse to admit

it in evidence in an action to determine the rights of the parties thereto to purchase.

2. In such action it is competent to show that the land in question, though granted to the state as swamp land, has been so far changed by natural causes as to have become suitable for cultivation.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge. N. O. Bradley and W. B. Wallace, (Wells, Guthrie & Lee, of counsel,) for appellant. Lamberson & Taylor and T. M. McNamara, for respondent.

McFARLAND, J. This action was brought by respondent against Ruiz, defendant, to determine the rights between said parties to purchase certain swamp and overflowed land. Gardner intervened as successor in interest to Ruiz. Judgment went in the lower court in favor of respondent, and against the defendant and intervenor, and the latter appeals.

1. There was no error committed in refusing to admit in evidence the application of defendant, Ruiz, to purchase, and subsequent papers dependent upon it, because, waiving all other objections, it appeared, and is not contradicted, the said application was made before segregation of the land, and was therefore void. Since the briefs in the case at bar were filed, this court has, in *Buchanan v. Nagle*, 26 Pac. Rep. 512, in *Wren v. Mangan*, id. 100, and in later cases, approved the doctrine stated in *Garfield v. Wilson*, 74 Cal. 175, 15 Pac. Rep. 620, that the Code makes no provision for an application to purchase prior to segregation.

2. There was no error in allowing respondent to show that the land in contest, although granted to the state as swamp and overflowed land, and purchasable as such, had been so far changed in its character by natural causes as to have become "suitable for cultivation." *Fulton v. Brannan*, (Cal.) 26 Pac. Rep. 506.

3. The evidence warranted the findings, and the latter clearly show that the defendant was entitled to purchase.

We see no material error committed at the trial of the cause. The judgment and order denying a new trial are affirmed.

We concur: DE HAVEN, J.; HARRISON, J.; GAKOUTTE, J.; PATERSON, J.

30 Cal. 376

HORN v. HAMILTON. (No. 13,342.)

(*Supreme Court of California*. May 23, 1891.)

ATTORNEY AND CLIENT—NEGLIGENCE—FAILURE TO COLLECT CLAIMS—TRIAL.

A complaint against an attorney alleged that he had received the full amount of a note left with him by plaintiff for collection, that he had surrendered the note to the maker, and refused to pay over the amount received. The answer denied receiving any money, and alleged that defendant, being a creditor of such maker, had, with the consent of plaintiff, taken an assignment of a contract held by such maker to secure both claims. Upon the trial plaintiff testified that he gave the note to defendant to collect or obtain security, that he pointed out property for the satisfaction of the note, and that the maker offered to give a second mortgage on his property, having a sufficient margin, as defendant knew, and that he understood the contract was assigned to defendant as security. Defendant

was allowed to prove that the assignment of the contract was all he could get, and the court charged that, unless the jury found defendant had failed to collect or get good security when he could have so done, and thereby the debt was lost, they should find for the defendant. A verdict was rendered for plaintiff. Held, that the case having been tried and submitted, without objection, on the theory of negligence in collecting the note, defendant received the benefit of a defense that the note could not have been collected, and as that was more favorable than he was entitled to under the issue in the complaint, he cannot complain of the verdict.

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; JAMES E. MURPHY, Judge.

L. F. Cooper and Sawyer & Burnett, for appellant. Lucas & Miller, for respondent.

TEMPLE, C. Appeal from judgment and order denying defendant's motion for a new trial. Action to recover money alleged to have been collected on a note by defendant as plaintiff's attorney. It is charged that the defendant received from the debtor payment and satisfaction in full, both principal and interest, and thereupon canceled and surrendered the note to the maker; that defendant has failed and refused to pay to plaintiff the amount recovered, or any part thereof, "and now refuses to pay the same, or any part thereof, and now wrongfully withholds the same from plaintiff." The defendant admits receiving the note, but denies receiving it as plaintiff's attorney, and avers that plaintiff and defendant were both creditors of one White, and consulted in regard to the prospect of collecting their debts, and that defendant, with the full consent of plaintiff, finally agreed with White to surrender all the notes held by himself and plaintiff to White in consideration of the assignment to them of White's interest in a certain contract, to which White was a party; that the contract was assigned to defendant with plaintiff's knowledge and consent, in pursuance of this agreement, defendant agreeing to hold it for himself and plaintiff in proportion to the amount of their respective claims. He denies that he has collected any money whatever upon the note, and avers an offer to assign to plaintiff the contract transferred to him by White, and his readiness still to so assign it. He also avers that at the time of the transfer White had no other property except a dairy farm, which was mortgaged for more than it was worth, and some personal property, which was then under attachment. That plaintiff and defendant, then, consulting as creditors of White and not as attorney and client, agreed to take the assignment in payment of their indebtedness, and, in pursuance of this understanding, plaintiff delivered the note in question to defendant, and not otherwise. The action was tried by a jury, who returned a verdict for plaintiff. The plaintiff testified, in effect, that he gave the note to defendant, as an attorney, to collect or obtain security; that he pointed out to defendant sufficient property from which the money might have been made, and that White offered to secure the debt by a second mortgage on

his ranch, and that there was ample margin for that purpose, as defendant knew; that he understood that the contract was assigned as security, and not in payment, and afterwards discovered that his note had been surrendered and canceled. The evidence is abundantly sufficient to sustain a verdict against the defendant, if it can be held to be consistent with the allegations of the complaint. The complaint is for money had and received, on the theory that, as defendant had surrendered the note to be canceled as paid, he may be charged as for a collection. On the trial both parties, as well as the court, appear to have tried the case as though the issue were whether defendant had failed to collect through negligence. That the defendant so regarded the issue is conclusively established by the instructions he asked for, as well as by the evidence he offered. That the court so understood it, is shown by the instructions given of its own motion. If the plaintiff recovered, the amount would be the same in either form of action. The main difference would be that, in an action for damages, the defendant would have had the benefit of a defense that the debt could not have been collected. As a matter of fact, he had the benefit of such defense. The instruction of the court was to the effect that the jury should find for the defendant, unless they found that he had failed to collect or to get good security, when he could have collected or obtained security, and thereby plaintiff had lost his debt. This instruction was more favorable to defendant than he was entitled to have. If, having no authority to accept in payment anything but money, he took, in his own name, property in full payment, and discharged the debt, the client was at liberty to regard it as a collection. Here he was allowed to prove that it was all he could get, or that the debt could not have been collected. The trial was not in accordance with the issue tendered in the complaint, but there was no objection made at the trial, and the case was in all respects tried as though the pleadings covered the matters actually in contest. The defendant has evidently sustained no injury. The objections to the sufficiency of the complaint cannot be made after verdict; undoubtedly it is good enough to support the judgment. We think the judgment should be affirmed.

We concur: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

39 Cal. 427

SMITH v. BELSHAW *et al.* (No. 13,021.)

(*Supreme Court of California.* June 6, 1891.)

MASTER AND SERVANT—WHERE RELATION EXISTS—DEFECTIVE MINE.

In an action for negligence in suffering the roof of a drift in a coal mine to remain without support, whereby it fell upon and injured a miner, it appeared that several months prior to the accident, defendant, being the owner, turned over the possession and management of the mine to one D., who from that time employed and paid the workmen and operated the mine for his own ben-

efit. *Held*, that there was no relation between the parties whereby a liability could arise, and the fact that the miners were paid at defendant's store, and that some of them thought they were working for defendant, was immaterial.

Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Action by John Smith, a minor, by his guardian *ad litem*, James Smith, against Mortimer W. Belshaw, Charles Belshaw, and James Dickenson, doing business under the firm name and style of Belshaw & Co.

Fred B. Lake, (J. E. Foulds, of counsel,) for appellants. Leander Quint, for respondent.

GAROUTTE, J. This is an action to recover damages from defendants on account of their negligence in suffering the roof of a drift in a coal mine to remain without support, by reason whereof a portion of said roof fell upon plaintiff, who was a laborer in the mine, and injured him. A verdict for damages was rendered against M. W. Belshaw and Dickenson, and a judgment in favor of defendant Charles Belshaw. This appeal is prosecuted by M. W. Belshaw from the judgment and order denying his motion for a new trial. Under the law, as applied to the facts of this case, it plainly appears that no liability rests against the appellant Belshaw. While we will not disturb the verdict of a jury where the evidence is conflicting upon substantial matters, yet in all cases the verdict must have some meritorious support from the evidence, or be set aside and disregarded. In this case the evidence is undisputed that at the time of the accident, and for some months prior thereto, the mine was in the exclusive possession and control of defendant Dickenson, under a contract with Belshaw, who was the owner thereof. That under such contract Dickenson employed and paid the workmen; had entire charge of and authority over the mine, and received a fixed rate per ton from Belshaw, for the coal taken therefrom, when the same was delivered to him. The principle of law is so well settled that, where one carries on an independent employment in pursuance of a contract, by which he has entire control of the work, and the manner of its performance, his employer is not liable for any negligence of which he may be guilty in the course of his employment, that the citation of authorities is unnecessary labor. Indeed, respondent's counsel concedes the law, but insists that the evidence is sufficient to sustain the verdict. As already stated, we are unable to find it in the record. The fact that the miners were paid their wages at defendant Belshaw's store, where they had been paid prior to the contract with Dickenson, and the further fact that some of the miners thought they were working for Belshaw, are circumstances too slight to defeat the express and uncontradicted testimony as to the terms of the contract, and the labor performed under it. What the miners thought as to who was their employer is entirely immaterial. There is no question of estoppel involved in the case, and appellant,



in order to escape liability for the negligence of Dickenson, was not bound to give any notice to the miners that he had given up the control of the mine. This is not an action on contract, based upon ostensible agency, but is an action in tort, and must rest upon the actual facts and the actual relations existing between the parties. *Samuelson v. Mining Co.*, 49 Mich. 164, 13 N. W. Rep. 499; *Rourke v. Colliery Co.*, 2 C. P. Div. 206. In *Guizoni v. Tyler*, 64 Cal. 336, this court said: "If the defendants were the owners of the boat, but had not the possession, control, or management of it themselves, or by their agents or employees, they cannot be held responsible for the negligence or mismanagement of whosoever had the exclusive control, possession, and management of it." In *Johnson v. Owen*, 33 Iowa, 515, it is said: "A bare belief of plaintiff, though founded on a reasonable cause, that Nash was defendant's servant, which in no way had influenced his action, which was not intended to be created, and which was not the natural result of his acts, could not make him liable as the employer of Nash. It would be a very dangerous rule to hold that inferences and opinions concerning men's actions, although founded upon reasonable cause, would render them liable for the acts of others." It is further contended by respondent that the appellant was liable as owner of the mine. (1) That the accident occurred in an old drift that was used simply for the purposes of egress and ingress to that portion of the mine from which the coal was being extracted, and therefore it remained under the control of Belshaw. (2) That the mine was in an unsafe condition at the time appellant turned the possession of it over to Dickenson. Neither of these positions can be successfully maintained. The entire mine, as disclosed by the evidence, was turned over to Dickenson; and he had the same control, possession and management of the old drifts, used for the purposes of ingress and egress, as he had over the portions where the miners were actually engaged in extracting the coal. And there is no testimony in the case indicating that this drift was in an unsafe condition at the time Dickenson assumed control. He had been in possession some months when the rock, which finally caused the injury, was noticed to be dangerous. The case in 49 Mich. 164, 13 N. W. Rep. 499, heretofore cited, is quite similar to the one at bar in many respects, and we quote: "That the mine at no time was a place of absolute safety is conceded, but the danger was not peculiar to this mine, and by itself raised no presumption of negligence. The question is whether the defendant, at the time of delivering possession to the contractors, had neglected any precaution which ought to have been taken to guard against danger. \* \* \* The negligence, if any, must, on this showing, have consisted in the failure to inspect the roof frequently, and to bar down any rock that seemed likely to detach itself and fall, or to erect timbers to prevent the fall. Some personal fault must be involved, or neglect of duty, before there can be a personal liability." It follows from the foregoing

views that the judgment and order must be reversed as to defendant M. W. Belshaw, and cause remanded for a new trial. It is so ordered.

We concur: PATERSON, J.; HARRISON, J

89 Cal. 23

CITY AND COUNTY OF SAN FRANCISCO v. PACIFIC BANK. (No. 14,146.)

(*Supreme Court of California*. May 23, 1891.)

REHEARING—POINTS NOT BEFORE PRESENTED.

A petition for a rehearing, filed by counsel whose names are not on the record, and based upon grounds not presented in the original argument, will not be considered. *Affirming 26 Pac. Rep. 615.*

On rehearing.

PER CURIAM. A petition for rehearing has been filed in this cause by counsel other than those whose names appear in the record, or who participated in the oral argument. In their petition they do not question the correctness of the opinion filed upon the decision of the cause, but ask for a reversal of the judgment upon grounds entirely different from those which were presented at the oral argument, or in the briefs then submitted. Petitions for rehearing are permitted by the rules of the court for the purpose of correcting any error which the court may have made in its opinion, or of enabling counsel to direct the attention of the court to matters presented at the argument which may have been overlooked in the decision. When counsel have once argued and submitted a cause for the decision of the court, it must be assumed that they have presented all the reasons upon which they rely for an affirmance or a reversal of the judgment. The court will not consider a petition for a rehearing that attempts to discuss the case upon grounds which were not presented in the original argument, or discussed in its opinion. *Kellogg v. Cochran*, 87 Cal. 192, 25 Pac. Rep. 677. Rehearing denied.

SUNNY SIDE LAND & IMP. CO. v. WILLAMETTE BRIDGE RY. CO.

(*Supreme Court of Oregon*. April 30, 1891.)

ACTION FOR BREACH OF CONTRACT—COMPLAINT.

1. Where a complaint sets up a contract and alleges a breach thereof, a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action is not well taken, since plaintiff is entitled to nominal damages at least.

2. If the allegations by which plaintiff seeks to lay down the rule for the measure of his damages are insufficient or irrelevant, the defect cannot be reached by demurrer so long as the other parts of the complaint contain a sufficient statement.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

The complaint in this action alleges, substantially, that on March 24, 1888, plaintiff, being the owner of a tract of land in East Portland known as "Sunny Side," entered into a written contract with the defendant company for the construction

within 4 months from said date, and the operation for 30 years from June 1, 1887, of a street railway from the foot of Morrison street in the city of Portland to said tract of land, and as a consideration for which plaintiff was to pay to said defendant the sum of \$10,000, and furnish the right of way for said road; that by the terms of said agreement, among other things, it was provided that defendant should cause cars to be run over said railroad each and every day from 6 o'clock A. M. until 8 o'clock P. M. so that a car shall pass every point on said railroad every 15 minutes in each direction, and between the hours of 8 o'clock P. M. and 11 o'clock P. M. cars shall pass every 30 minutes in each direction, and that it should not charge for transporting passengers on said line more than 5 cents for each passenger going in one general direction, and that no further fare shall be charged or compensation demanded for transporting such passengers across the Willamette river. By said agreement it was further provided that "for the due and faithful performance of the conditions of this agreement on the part of each of the parties hereto they respectively bind themselves, each to the other, in the sum of ten thousand dollars, to be paid by the failing party;" that plaintiff has duly performed all the conditions of said contract on its part; that the object of plaintiff in securing the railway services contracted for in said agreement was to render said tract of land desirable for residence purposes, and make it more valuable and salable, all of which defendant well knew; that defendant entered upon the performance of the contract on its part, but has failed and neglected to perform the same in that it does not cause cars to be run over said railway in each direction oftener than every 30 minutes between the hours of 6 o'clock in the morning and 8 o'clock in the afternoon, nor oftener than every 60 minutes between 8 and 11 o'clock P. M., nor does it transport passengers on said line at the rate of 5 cents for each passenger while going in one direction, but has repeatedly charged passengers at the rate of 10 cents for such transportation; that since entering into said contract plaintiff has sold one-half of its tract of land for \$160,000, which was all that could be obtained, and is still the owner of the remaining half, which is of the value of \$300,000; that if defendant had caused the cars to run on said line as provided in the contract, and had only charged the fare therein provided, plaintiff would have received for the portion of the land sold the sum of \$170,000, and the part remaining unsold would be worth \$310,000, and plaintiff's land would have been benefited by the construction and operation of the road in the manner provided in the contract in the sum of \$20,000; that by reason of the failure and neglect of the said defendant above set forth the plaintiff was prevented from selling the portion of its land which has been sold for \$170,000, which sum would have been the market value thereof, and is now prevented from

selling the portion of its land remaining unsold for the sum of \$310,000, which would be the market value thereof, and plaintiff is thereby and otherwise damaged in the sum of \$20,000. A demurrer being sustained and complaint dismissed, plaintiff appeals.

*Sears & Beach*, for appellant. *Dolph, Bellinger, Mallory & Simon*, for respondent.

BEAN, J., (after stating the facts as above.) The respondent's counsel contends that the items going to make up plaintiff's damages are so speculative, remote, and uncertain as to form no basis for damages in this case, and therefore the complaint does not state a cause of action. If we concede that his premises are correct, the conclusion drawn by him does not follow. The complaint sets out a contract between the parties, and avers a breach thereof by defendant. The demurrer admitting the truth of the complaint, the plaintiff is entitled to nominal damages at least, and this is sufficient on demurrer. 1 *Suth. Dam.* 759. If the allegations of the complaint in which plaintiff seeks to lay down the rule by which the damages are to be estimated are insufficient or irrelevant, the defect cannot be reached by demurrer so long as the other parts of the complaint contain a sufficient statement. If these damages are sought to be recovered at the trial, defendant may then object to the evidence. An erroneous claim of damages does not make a complaint demurrable. 1 *Suth. Dam.* 762; *Cowley v. Davidson*, 10 *Minn.* 392, (Gil. 314;); *Leland v. Tousey*, 6 *Hill*, 328; *Telegraph Co. v. Hopkins*, 49 *Ind.* 223. The allegation of damages in the complaint is "that by reason of the failure and neglect of the said defendant above set forth [that is, the failure to run the cars and carry passengers according to the contract] the plaintiff was prevented from selling the portion of its said land which has been sold for \$170,000, which sum would have been the market value thereof, and is now prevented from selling the portion of its land remaining unsold for the sum of \$310,000, which sum would be the market value thereof, and plaintiff is thereby and otherwise damaged in the sum of \$20,000." Omitting therefrom the portions objected to by defendant the allegation would read, "that by reason of the failure and neglect of the said defendant as above set forth [that is, the failure to run cars and carry passengers according to contract] plaintiff is thereby and otherwise damaged in the sum of \$20,000;" and this under all the authorities is a sufficient allegation of general damages. *Wisner v. Barber*, 10 *Or.* 342; *Wilson v. Clarke*, 20 *Minn.* 367, (Gil. 318;); 1 *Suth. Dam.* 763. Whether the demurrer was well taken is the only question before us, and we therefore forbear to express any opinion upon the measure of damages, a question to which the demurrer does not extend. Judgment of the court below is therefore reversed, and the cause remanded with directions to overrule the demurrer.

## STATE v. MCDANIEL.

(Supreme Court of Oregon. April 30, 1891.)

## GAMING—FARO.

A person who bets money at a game of faro dealt by another, "plays" faro within the meaning of section 3526, Hill's Code.

(Syllabus by the Court.)

Appeal from circuit court, Lake county; L. R. WEBSTER, Judge.

The defendant was indicted for playing at faro for money and checks as representatives of money and value. The evidence offered on the part of the state tended to prove that the only way in which the defendant played was to bet money against the game, which was a banking game, set up, carried on, and dealt by others. The court instructed the jury as follows: "I instruct you that betting at a game of faro is playing it, within the meaning of the law," to which an exception was taken, and this presents the only question on this appeal.

H. K. Hanna, Warren Trulitt, W. A. Wilshire, and C. A. Cogswell, for appellant. W. M. Colvig, Dist. Atty., for the State.

STRAHAN, C. J., (after stating the facts as above.) The indictment in this case is drawn under section 3526, Hill's Code, which provides that each and every person who shall deal, play, or carry on, open, or cause to be opened, or who shall conduct, either as owner, proprietor, or as employe, whether for hire or not, any game of faro, etc. Counsel for appellant contend that the term "play" has by the usages of persons engaged in gaming a peculiar meaning,—one different from that which is ordinarily employed; hence, in construing this statute, it should be given that meaning which it is accustomed to receive by the usage of persons engaged in gaming. And counsel remark: "When we speak of persons engaging in a game of whist, seven-up, or poker, we do not say they set up, deal, or carry on the game, but use the word 'play.' In regard to 'faro,' when speaking of it, we say 'dealing faro.' Never are the words 'play faro' employed. If one desires to express the idea of betting at faro, he says 'bet' or 'buck' at it." This is the gist of the appellant's contention. While it is both original and critical, we cannot accept it as sound. We cannot accede to counsel's proposition that the usages of gamblers can have anything to do with the interpretation of this statute. It was designed to suppress gambling, and it would be altogether paradoxical to say that the usages and customs of the class against whom it is directed should control or influence its construction. If that argument were conceded, it would not be long before such usages and customs would prevail to such an extent as to render the statute altogether nugatory. In this case the ordinary rules of construction must prevail. It must be intended that the words in this act were used in the sense and meaning ordinarily attached to them; and when the whole tenor and manifest object of the act in question are considered we can have no doubt that to bet at a game of faro is to play it. In

State v. Light, 17 Or. 358, 21 Pac. Rep. 132, this court held that to bet money at a game of stud poker, dealt by another, was in violation of the statute, and that the dealer was an accomplice,—a *particeps criminis* with the player. This could only be upon the theory that both were guilty, each performing a separate, but necessary, part in the violation of the statute. We think that case was correctly decided, and adhere to it. It results that the court did not err in giving the instruction excepted to, and its judgment must be affirmed.

## STATE v. ADAMS.

(Supreme Court of Oregon. April 30, 1891.)

## GAMING—EVIDENCE—GRAND JURY—INSTRUCTIONS.

In a prosecution for gambling it is not proper for the defense, on cross-examination of the state's witnesses or otherwise, to introduce evidence tending to prove that the particular act of gambling investigated by the grand jury was different, and occurred on a different day in the same month, in a different place in the same town, from the one then being investigated before the trial jury; and an instruction based on such evidence is properly refused.

(Syllabus by the Court.)

Appeal from circuit court, Lake county; L. R. WEBSTER, Judge.

By the indictment in this case the defendant was charged with the crime of dealing, playing, and carrying on a game of faro on the 29th day of September, 1890, in Lake county, Or. Upon a trial before a jury he was convicted, from which judgment he has appealed. The other facts appear in the opinion.

H. K. Hanna, Warren Trulitt, W. A. Wilshire, and C. A. Cogswell, for appellant. W. M. Colvig, Dist. Atty., for the State.

STRAHAN, C. J. The first question made by the appellant is disposed of by State v. McDaniel, 26 Pac. Rep. 837, (decided at this term,) and need not be further noticed. Upon the trial in the court below counsel for the defendant was permitted to ask some of the state's witnesses on cross-examination in relation to what particular act of gambling they testified to before the grand jury, and, it appearing that the act then under investigation before the jury occurred at a different place in the same town, and on a different day, from that laid in the indictment, defendant's counsel moved to strike out all the evidence in relation to it, but the court overruled the motion, to which an exception was taken. At the conclusion of the evidence the defendant's counsel asked several instructions, each of which was designed to present the same question. It will therefore be necessary to notice but one of them. Number 5, which was asked and refused, is as follows: "(5) The defendant cannot be convicted of any other crime than the one for which he is indicted. He cannot, under this indictment, be convicted of a similar crime, committed on another day, or in another place. If the defendant was indicted for dealing, playing, and carrying on a particular game of faro, which was played on September 29, 1890, at Stanley's club-room, in the town of Lakeview, Oregon, he cannot

be convicted of the crime of dealing, playing, or carrying on the game of faro on September 12, 1890, at the club-room adjoining the saloon of Lane, in said town. The evidence elicited on cross-examination of some of the state's witnesses as to what particular place the game of faro testified to by them before the grand jury was conducted was clearly improper. It was not proper cross-examination, and raised an inquiry that could not be permitted. If that step were taken, the entire secrets of the grand-jury room would be opened to inquiry, and the policy of the law on that subject thwarted. This kind of investigation has never been permitted in any case that I have been able to find, nor has counsel setting up this right been able to fortify it by a single decision of any court. On the contrary, whenever this line of investigation has been attempted, the courts have decided against it. *State v. Fasset*, 16 Conn. 458; *State v. Baker*, 20 Mo. 339; *People v. Hulbut*, 4 Denio, 133. Both time and place must be alleged in every indictment; but the only object of alleging time, unless it enters into the nature of the offense, is to show that the prosecution is not barred by the statute of limitations; and generally the only object of alleging place is to show that the offense was committed within the political subdivision of the state over which the court has criminal jurisdiction. These principles are elementary and statutory, and need no citation of authorities. It follows that there was no error in the judgment appealed from, and it must be affirmed.

#### MUNROE V. MUNROE *et al.*

(*Supreme Court of Oregon.* April 30, 1891.)

#### MARRIAGE AND DIVORCE—FRAUD—DESERTION.

Facts examined, and held, that plaintiff was entitled to a decree dissolving the marriage, and also for \$1,487, and interest, money advanced at defendant's request, before said marriage, upon the fraudulent representations and statements of the defendant.

(*Syllabus by the Court.*)

Appeal from circuit court, Washington county; F. J. TAYLOR, Judge.

This is a suit for divorce. The plaintiff has also joined in the same suit a claim to recover \$1,487, advanced by him at the defendant's request to pay off a certain mortgage on real property in Washington county then owned by defendant's mother, and for other equitable relief. It is charged that the defendant induced the plaintiff to pay and advance \$1,487 by means of fraudulent statements, promises, and representations, all of which are particularly alleged. The answer denies most of plaintiff's allegations, and then recriminates desertion of the defendant by the plaintiff; and there is no objection that there is a misjoinder of causes of suit. The court dismissed the complaint, as well as the defendant's cross-complaint; from which decree, dismissing the complaint, the plaintiff has appealed.

*S. B. Huston and Gilbert & Snow*, for appellant. *T. H. Tongue*, for respondents.

STRAHAN, C. J., (*after stating the facts as above.*) After carefully considering the evidence in this case, we have no doubt that the plaintiff is entitled to a decree of divorce on the ground of desertion. The parties were married at Vancouver, and returned to Portland, where they spent one night together, and then the defendant returned to her home in Washington county, and never thereafter lived with the plaintiff, and it satisfactorily appears from all the circumstances that at the time of the marriage she did not intend to do so. It is unnecessary to recapitulate the evidence. It must be painful enough in its details to both parties. The plaintiff must also have a decree for the \$1,487, and its interest. Justice would not be complete without it. This money was advanced at the request of the defendant upon the most delusive hopes and promises, which she did not intend to fulfill, but they were made only for the purpose of overreaching the plaintiff and obtaining his money. Under the circumstances, the so-called release executed at the moment of the marriage ceremony cannot be permitted to stand in the way of this result. It was a part and parcel of the same fraudulent means and purpose which characterized defendant's conduct with the plaintiff in all of these transactions. Let the decree of the court below be reversed, and a decree be entered here in accordance with this opinion.

STATE INS. CO. V. OREGON RY. & NAV. CO.  
(*Supreme Court of Oregon.* April 30, 1891.)

#### PARTIAL ASSIGNMENTS—ACTIONS—PARTIES.

1. Where the value of property destroyed by fire occasioned by the act of a wrong-doer is in excess of the amount of insurance money paid thereon, and the owner assigns his claim against the wrong-doer, to the extent of the insurance money paid, to the insurer, the latter has only a joint interest with the owner in a single cause of action, and cannot sue at law thereon alone.

2. Code Or. § 381, which provides that "if the consent of any one who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason thereof being stated in the complaint," does not apply to actions at law.

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

*R. Eakin & Bros. and Cox, Teal & Minor*, for appellant. *W. W. Cotton and Zera Snow*, for respondent.

LORD, J. This is an action to recover the sum of \$515, paid by the plaintiff as insurance money to R. J. Rodgers and S. B. Williamson on account of certain hay valued at \$1,600 which had been destroyed by the negligence of the defendant. To the extent of the insurance money paid thereon Rodgers and Williamson duly assigned to the plaintiff their claim against the defendant. It thus appears that the total value of the property destroyed by the negligent act of the defendant was greatly in excess of the amount of insurance money paid by the plaintiff to Rodgers and Williamson for which the assignment was taken. As assignee of a portion of such claim or liability against the defendant as a wrong-doer the plaintiff has

brought this action in its own name for its recovery. The question is, has the plaintiff a right to sue alone upon such a state of facts? As in this state it is the distinction between forms of action at law only that is abolished, and not the distinction between actions at law and suits in equity, as in several of the Code states, it is contended that the assignment, being of a portion of a claim or liability in tort, is purely equitable, and can only be enforced in equity in a suit in which all the parties interested in the cause of action are made parties; that, by reason of this, when our Code provides that "every action shall be prosecuted in the name of the real party in interest" in actions at law it applies only to those holding the legal right or title and not those holding an equitable right or title,—hence, as the assignment confers merely an equitable title upon the plaintiff, it can only be enforced by the plaintiff by a suit in equity in his own name, jointly with Rodgers and Williamson as plaintiffs, or as defendants, if they refuse to join, because the plaintiff has no right or interest which is recognized at law. But the subrogation of the insurer, upon payment of the insurance, to the rights and remedies of the insured—the party holding the legal title—to the extent of such payment is purely an equitable result and the creation of equity, which, operating as an equitable assignment, authorizes the plaintiff to bring an action at law in the name of the insured for his benefit. Why, then, may not the plaintiff, under the provision of the Code cited, whether he acquires his right or interest in the liability of the defendant for its wrongful act by an assignment purely equitable, or by subrogation which operates as an equitable assignment, pursue his remedy at law in his own name, joining Rodgers and Williamson as plaintiffs, upon the same principle that the plaintiff could, at common law, bring his action at law in the name of the insured? In either case the singleness of the action is preserved and the rights of the parties are the same, the remedy only being varied as it may be affected by the provision of the Code. However that may be, there is but one wrongful act complained of, causing one loss and creating but one liability. It is a single wrongful act giving rise to but one liability upon a claim which is admissible. It is immaterial whether the insurer acquires his right or interest by subrogation or assignment. When the property destroyed exceeds the value of the insurance money paid, he only acquires a joint right or interest with the owner of such property in a single cause of action or liability. Where there is but one liability or cause of action, those united in interest must adjust their loss in a single action. "The logic of the general requirement," says Mr. Bliss, "that actions should be brought in the name of the real party in interest, and that all who are united in interest should unite as plaintiffs, clearly demands the union of the assignor with the assignee of a part." Bliss, Code Pl. § 65. Together they constitute the real parties in interest upon a claim which is indivisible. "To hold that these plaintiffs cannot unite in

one action," said LYON, J., "to enforce what is really but one liability or cause of action, but that each must bring a separate suit, would open the door to litigation which would be more oppressive to the defendant, and which would produce much mischief." *Swarthout v. Railroad Co.*, 49 Wis. 625, 6 N. W. Rep. 814. Equally as emphatic is Judge DILLON that the insurance company cannot sue the wrongdoer, who occasioned the loss, in its own name. "The wrongful act," he said, "was single and indivisible, and gives rise to but one liability. If one insurer may sue, then if there are a dozen each may sue, and if the aggregate amount of all the policies falls short of the actual loss the owner could sue for the balance. This is not permitted." *Aetna Ins. Co. v. Hannibal & St. J. R. Co.*, 3 Dill. 1. Likewise Judge LAWRENCE said: "If the property is burned through the carelessness of some third person, can such person be liable to as many suits as there are insurances? Is there more than one cause of action against him? And can that be indefinitely divided? What is the measure of damages? Is it the injury done by him to the property, or the amount the insurance companies have paid? Clearly, the former. If the insurance companies have paid more than the actual loss they cannot make him liable for what they have paid. He is liable to the owner of the property for the injury he has done to it, and, although a wrongdoer, it is still his right to have the loss adjusted in a single suit." *Insurance Co. v. Frost*, 37 Ill. 336. All this goes to show that in cases of this sort, where the wrongful act is single and indivisible, there can arise but one liability or cause of action. While at common law this liability would be enforced in the name of the insured under the Code, except where the insurance company has paid the full value of the property, the loss of which was occasioned by the negligent act complained of, and the insurer by reason thereof has no interest, the insurer and owner of the property may join to recover the whole loss in one action. Together they have a united interest in a single cause of action or liability to which the negligent act of the defendant gave rise. The insurer acquires, not a new and separate cause of action, but only a right or interest with the owner of the property in a single cause of action or liability, and cannot therefore, in such case, sue in his own name alone. It is upon this principle, which preserves the indivisibility of the action arising out of one loss and one liability, that under the old practice the action would have been brought in the name of the insured for the benefit of all concerned, but, the Code requiring the action to be brought in the name of the real party in interest, the insurance companies and the owners of the property destroyed, constituting such party, would have to join in the recovery. In other words, the insurance companies would join the owner in bringing one action to determine the liability of the defendant. But it is said, if the owner or some one of the companies should refuse to join, there is no authority under our Code in actions at

law to compel parties jointly interested to join in the action. While we have a section which provides that "of the parties to the suit those who are united in interest must be joined as plaintiffs or defendants, but if the consent of any one who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason thereof being stated in the complaint," (section 381, Code,) it does not apply to actions at law. In states where all distinctions between law and equity are abolished, as in Wisconsin, where there is a similar provision to our section 381, *supra*, there is no difficulty about compelling parties to join, as the case of *Pratt v. Radford*, 52 Wis. 114, 8 N. W. Rep. 606, illustrates. Unless the parties united in interest are willing to join there is no provision in our Code in actions at law to compel them. Ordinarily reliance may be placed upon the interest of parties to voluntarily join when they are united in interest, but if some one should refuse, as has happened in cases of other sort, resort will have to be sought in equity until the legislature shall obviate the difficulty, if any change is desirable. To allow separate actions to be brought where there is but one liability would be illogical, and contrary to established legal principles, and would be productive of mischief and oppression. As the court said in *Swarthout v. Railroad Co.*, *supra*: "For a single wrongful act which gave rise to but one liability the defendant might be harassed with a dozen different actions." As well on principle as to avoid useless litigation this ought not to be permitted.

The judgment must be affirmed.

(20 Or. 547)

**HARDWICK V. STATE INS. CO.**

(*Supreme Court of Oregon.* April 30, 1891.)

**INSURANCE—ORAL CONTRACT—ACTION.**

1. In an action on an insurance policy the complaint must state that plaintiff had an insurable interest in the premises, failing which a cause of action is not stated.

2. Where application is made for insurance, and the premium fixed, and the agent orally agrees that in consideration of the necessary delay in procuring the execution of the policy the insurance shall begin from the date of the application, this is a valid contract of insurance, on which a recovery may be had if the property is destroyed before the policy issues, and not a mere agreement for a contract, to be executed by execution and delivery of the policy.

3. While the insurer, in the absence of a provision to that effect in the contract, cannot demand the premiums before the policy issues, in an action for breach of the oral contract to insure the plaintiff must allege and prove payment or tender of the premium before he can recover.

4. Where there is evidence that plaintiff had no knowledge of any limitations on the agent's authority, and the court has properly instructed on the law of agency, it is not error to leave it to the jury to determine whether the agent had authority to make the oral contract sued on.

Appeal from circuit court, Yamhill county; R. P. Boise, Judge.

This is an action to recover the sum of \$1,000 on a preliminary oral contract of insurance, alleged to have been made by defendant. The complaint, in substance, alleges that on March 6, 1889, defendant executed and delivered to plaintiff its cer-

tain policy, by which it agreed to and did insure against loss by fire for the term of three years from that date the following described property, to-wit: "On plaintiff's dwelling or residence, \$700; on beds and bedding, while in said house, \$200; on household furniture in said house, the sum of \$100." That at the time of the delivery of the policy the plaintiff paid defendant \$5 in cash, and delivered to it his notes for the balance of premium to be paid on the policy, to-wit, \$25. That afterwards some question or dispute arose in regard to the validity of the policy on the grounds that the property was described as a dwelling-house or residence, when in fact it was a hotel or boarding-house. That the dispute was finally settled as follows: The plaintiff agreed, through the agent of defendant at Newburg, Or., viz.: N. C. Maris to surrender up the said policy for cancellation, and to make application through said agent for a new policy for the term of one year, and to pay as a premium thereon \$44, in addition to the \$5 already paid, and defendant was to surrender to plaintiff the notes executed by him for cancellation. That, pursuant to said agreement, plaintiff did surrender up said policy, and on the 20th day of July, 1889, made an application for a new one, which was received and agreed to by defendant's agent, with the agreement on his part that the new policy should be executed and delivered as soon as could conveniently be done, and the additional premium of \$44 should be paid on the delivery of the policy. That it was agreed that, inasmuch as it would take some time to execute and return the new policy from Salem, the principal office of defendant, the insurance should commence on the 20th day of July, 1889, at the hour of 12 o'clock M., and, in case said property should be destroyed by fire before said policy could be delivered to plaintiff, the sum of \$1,000—the amount thereof—was to be paid as though it had already been delivered, and the policy was to run from said date, instead of the actual day of its execution or delivery. That owing to the sickness of defendant's agent, who received the application, the policy was not written out, executed, or delivered to plaintiff. That on August 18, 1889, the property was destroyed by fire, and defendant refused to execute or deliver the policy as agreed to, and refused to pay for said loss. A general demurrer was filed to the complaint, which, being overruled, defendant answered. The answer admits the execution of the first policy, but denies *in toto* everything in the complaint relating to the alleged contract to insure the property by a second or new policy, and affirmatively alleges that Maris had no authority to make any contract or agreement for or on behalf of defendant, which plaintiff well knew. A trial resulted in a verdict and judgment in favor of plaintiff for the sum of \$1,000, from which this appeal is taken.

*Geo. H. Burnett and W. W. Thayer*, for appellant. *Caples, Hurley & Allen and James McCain*, for respondent.

BEAN, J., (after stating the facts as above.) It is contended by appellant that

the complaint does not state facts sufficient to constitute a cause of action, because (1) it does not allege that the plaintiff had any insurable interest in the property at the time of the loss; (2) it appears that both parties contemplated an agreement in writing, which was never executed; and (3) it is not alleged that plaintiff either paid or tendered the premium agreed upon for the second policy. The rule is well settled that in fire insurance the assured must have an insurable interest in the property both at the time of the insurance and at the time of the loss. In the case of *Ruse v. Insurance Co.*, 23 N. Y. 516, it was distinctly enunciated that a policy obtained by a party who has no interest in the subject of insurance is a mere wager policy. It was said in that case that, aside from authority, this question would seem easy of solution. Such policies, if valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptations to the party interested to bring about the event insured against. In respect to insurances against fire, the obvious temptation presented by a wagering policy to the commission of the crime of arson has generally led the courts to hold such policies void. The contract of insurance is one of indemnity only, and, unless the plaintiff has an insurable interest in the property at the time of the loss, he cannot be injured in any way. *Howard v. Insurance Co.*, 3 Denio, 301; *Murdock v. Insurance Co.*, 2 N. Y. 210. The plaintiff's right to maintain this action depending upon his having an insurable interest in the property at the time of the loss, it follows that his complaint must contain an averment of such interest in order to state a cause of action. *Freeman v. Insurance Co.*, 14 Abb. Pr. 398; *Fowler v. Insurance Co.*, 26 N. Y. 422; *Quarrier v. Insurance Co.*, 10 W. Va. 507. In *Chrisman v. Insurance Co.*, 16 Or. 283, 18 Pac. Rep. 466, it was held by this court that, the plaintiff's interest in the property insured being one of the essential facts upon which his right of recovery depends, in an action founded on a policy against damage by fire such interest must be alleged in the complaint. In that case the question was raised on a motion of the defendant for judgment notwithstanding the verdict, and the court held the objection fatal. The complaint before us fails to allege that plaintiff had any interest in the property destroyed, either at the time the insurance is alleged to have been effected or at the time of the loss. Nor is there any sufficient allegation of an insurable interest at the time the first policy was issued. The allegation that defendant insured his dwelling-house or residence is an insufficient allegation of this interest, and the more obviously so as it is not alleged, even in this way, that the beds and bedding and household furniture in the house, which were also insured, were his. It is not averred, either directly or indirectly, that on July 20, 1889, at the time the contract upon which this action is founded is alleged to have been made, plaintiff had any interest in the property whatever, nor that he had any interest at the time of the loss. Without

these allegations the complaint fails to state a cause of action. The decisions, as far as we have been able to ascertain, without exception sustain the position that in cases of this kind the complaint must distinctly allege an insurable interest when the policy is taken out, and also when the property was damaged by fire.

The next objection made to the complaint is that it appears that both parties contemplated an agreement in writing, which was never executed, and hence it is argued there was no contract. We do not understand this action to be based upon an oral contract of insurance, but upon an alleged preliminary oral contract, by which it was agreed that defendant should insure plaintiff upon the property for one year, for the sum and at the rate agreed upon, from the time of making the contract; and that a policy should thereafter be made out by the defendant company, at its home office, to take effect from that time. That such a contract is valid and binding on an insurance company when made within the real or apparent scope of the agent's authority, has been too often decided to leave it an open question. Thus, in *City of Davenport v. Insurance Co.*, 17 Iowa, 276, an agreement of insurance was entered into between the parties, by their agents, on the 20th of March, the insurance to date from noon of that day, the policy to be executed and delivered the next day. On the night of the same day the property was destroyed by fire. On the morning of the 21st the policy was executed and delivered and received in perfect accord with the agreement, both parties being ignorant of the fire. Held that the company was liable for the loss. So, in *Audubon v. Insurance Co.*, 27 N. Y. 216, it appeared that plaintiffs sent certain of their engravings to a bookbinder, on Saturday, to be bound, and in the afternoon of the same day sent their agent to defendant's office to effect an insurance on them, at a valuation of \$1,500, for one month. It appeared that on January 10th preceding the defendants, by an ordinary policy, had insured plaintiff on certain sets of the same work, at the same bindery, for one month, at a valuation of \$1,000, the premium being at the rate of 30 cents per \$100. That, when plaintiff's agent applied to defendant's secretary for the insurance, and asked him if defendant would insure the property, the secretary replied, "We will;" and agreed that the policy would be sent to plaintiffs on the following Monday. The engravings were burned on the following Sunday, and defendant refused to issue or deliver the policy. Held, that the insurance took effect from the date of the oral application, and the company was liable for the loss, notwithstanding no definite agreement was made as to the premium. So, in *Fish v. Cottenet*, 44 N. Y. 538, it appeared that on October 20, 1864, the plaintiff applied to Wilber, as agent of defendant, to insure him upon brewery buildings against loss and damage by fire, to the amount of \$5,000; and it was there verbally agreed between the plaintiff and Wilber, who assumed to act in behalf of the company, that the company from



that time forth, and for the space of one year therefrom, would insure the plaintiff upon the brewery buildings against loss and damage by fire, the sum of \$5,000, and would deliver its policy of insurance accordingly, and that, when requested, plaintiff would pay the premium. The plaintiff after this frequently called upon Wilber to get the policy, and upon each and every occasion Wilber said the policy had not yet come, but that it would come; that he need not give himself any trouble about it; and that he was just as much insured as if he had the policy. The plaintiff acted in good faith, and relied upon the agreements and statements of Wilber. On January 24, 1865, the buildings were destroyed by fire. Held, that defendants were liable for the loss, although no policy of insurance upon the buildings was ever delivered by the company to the plaintiff; nor was the premium ever demanded or paid; nor did Wilber ever communicate to the company the application of the plaintiff for insurance, nor the agreement made with him. In *Angell v. Insurance Co.*, 59 N. Y. 171, the plaintiff entered into an agreement with the agent of the defendant company to insure his building for \$1,000 for three years for the sum of \$30, and to make out and deliver a policy, the premium to be paid when the policy was delivered. The agent did not make out the policy, and the premises having been destroyed by fire, the plaintiff tendered the premium, and demanded the policy. The defendant refused to execute or deliver the policy, and an action was brought to recover for the breach of the contract to insure, and the court held the company liable. *GROVER, J.*, in delivering the opinion of the court, said: "The counsel for the appellant is mistaken in supposing the action based upon an oral contract of insurance for three years. There was not sufficient evidence to show that Carpenter was authorized to make such a contract for the defendant. It was alleged in the complaint, and the evidence tended to prove, that a preliminary contract was made, by which it was agreed that the defendant should insure the plaintiff upon the property against damage by fire for a sum and at a rate agreed upon, for the term of three years from the time of making the contract, and that a policy should shortly thereafter be made out, to take effect from that time." Without stopping to quote from other authorities upon this question, it is safe to say that in all cases where parol contracts of this kind are not prohibited by statute, a parol contract of insurance is valid and binding, as well as parol contracts to effect an insurance by issuing policies; and the latter class of contracts will be enforced by compelling specific performance by the company, or in an action for the breach of the agreement, in either of which a recovery for a loss of the property agreed to be insured will be awarded the plaintiff. *Ellis v. Insurance Co.*, 50 N. Y. 402; *Angell v. Insurance Co.*, 59 N. Y. 171; *May, Ins.* § 565. In such case the risk attaches from the date of the application, or from the time designated as the commencement of the risk;

and the only effect that can be given to the additional promise to execute a written policy is that, upon the tender of such a policy, and a demand of the premium, the oral contract should cease. 1 *Wood, Ins.* § 4; *Kelly v. Insurance Co.*, 10 Bosw. 82; *Insurance Co. v. Shaw*, 94 U. S. 574; *Sanborn v. Insurance Co.*, 16 Gray, 448; *Baptist Church v. Insurance Co.*, 19 N. Y. 305; *King v. Insurance Co.*, 58 Wis. 508, 17 N. W. Rep. 297; *Putnam v. Insurance Co.*, 123 Mass. 324. That contracts of insurance are not usually made in this way is no evidence that they cannot be so made. As was said by *COMSTOCK, J.*, in *Baptist Church v. Insurance Co.*, supra: "There is nothing in the nature of insurance which requires written evidence of the contract. To deny, therefore, that parol agreements to insure are valid, would be simply to affirm the incapacity of parties to contract where no such incapacity exists, according to any known rule of reason or of law." It seems now well settled that, if an application is made for insurance, whether in writing or by parol, and the risk is accepted, the contract is complete, and the risk attaches from the date of the application or from the time designated as the commencement of the risk, and the company would be liable for loss if it occurred after that and before the contract was consummated by the formal execution and delivery of the policy. 4 *Field, Lawy. Briefs*, 245, and cases there cited. 1 *Wood, Ins.* § 20.

The next objection to the complaint is that it is not alleged that plaintiff paid or tendered the premium agreed to be paid, and it is contended that the payment or tender of the premium by him is a condition precedent to his right to recover. From an examination of the cases heretofore cited, when actions have been brought and sustained on preliminary parol contracts to insure, it will be seen that in nearly all of them the premium was not paid or tendered until after the loss, when the premium was tendered, and the policy demanded. It is not considered essential, unless expressly required by the agent, that the premium should be paid at the time the oral contract is entered into, in order to constitute a valid contract to insure. "The rule is," says *Mr. Wood*, "that in case of a mere oral contract of insurance, supported by a sufficient consideration, which is to take effect forthwith, although it may be entered into contemporaneously with an agreement by the insurer to deliver, and the assured to accept, subsequently, as a substitute therefor, a written policy by the former, in the form usually adopted by them, becomes binding, and remains in force until the delivery or tender of such policy. Until then, the condition usually inserted in such policies, requiring prepayment of the premium to make them binding, unless expressly adopted by the parties in such oral contract, forms no part of the insurance between them. A mere demand of the premium, without insisting upon it, or tendering a valid policy, does not terminate the oral insurance." 1 *Wood, Ins.* § 30. In a leading case upon this question a defective policy was issued and deliv-

ered to plaintiff after a loss had occurred and the premium paid. The plaintiff, admitting that the policy was invalid, brought an action upon the oral contract. The defendant denied its liability under the oral contract because the premium was not paid until after the loss, when the policy required it to be paid before the risk attached. The action was upheld, and a recovery permitted under the oral contract. ROBERTSON, J., speaking on this question, said: "The defendants at the time [of the loss] could have sued him [plaintiff] for the premium, and recovered. There was no reason why they should not be equally held for the insurance, unless, upon a tender of the policy and a peremptory demand by them for the premium, the plaintiff had refused to pay it. \* \* \* It is clear that for such premium the defendants intended to have taken the risk. They had a right to stop the credit for the premium and the oral contract by presenting a perfect policy and demanding the former. They did not exercise the right, and, when a loss occurred, they seek to evade it." *Kelly v. Insurance Co.*, 10 Bosw. 82. See, also, opinion of DENIO, C. J., in *Audubon v. Insurance Co.*, supra, in which he says: "It is true that in this case the consideration was not paid, but the owners of the property were ready to pay it when the policy should be delivered. In the mean time it was a debt against the owners, for which credit was given until delivery of the policy." The current of decisions seem to be that the premium is not payable, unless expressly made so by the contract, until the policy issues; and then the assured must accept the policy and pay the premium. *City of Davenport v. Insurance Co.*, supra; *Hamilton v. Insurance Co.*, 5 Pa. St. 339; *Insurance Co. v. Robinson*, 25 Ind. 536. It follows, therefore, that plaintiff was not compelled to pay or tender the premium before the loss, in order to recover; but, since this is an action to recover damages for the breach of an alleged oral contract, by which it was agreed that defendant should insure plaintiff's property from the time of making the contract, and that a policy should thereafter be issued by defendant, to take effect from that time, it necessarily follows that before plaintiff can recover for such breach he must allege and prove performance, or an offer of performance, of the contract on his part. The payment of the premium was by the contract a condition precedent to his right to the policy. There could be no breach of the contract on the part of defendant until payment or tender of the premium by plaintiff. The delivery of the policy and payment of the premium were to be concurrent acts, and neither party could insist upon performance by the other without performance or an offer to perform on his part. The defendant had no right to demand the premium until it tendered the policy, nor the plaintiff the policy until he paid or tendered the premium; and hence there could be no breach of the contract by defendant until such payment or tender. The complaint fails to allege the tender or payment of the premium by plaintiff, or any facts which will excuse a tender; and

hence does not show a breach of the contract by the defendant, or state a cause of action. From the views already expressed the case must be reversed, but the probability of another trial renders it important that we examine the other assignments of error.

In the ruling of the court sustaining the motion to strike out that portion of the answer alleging that the action was not commenced within six months after loss, and refusing to give the instruction asked by defendant, to the same effect, there was no error. This action is not based upon the terms of any policy, but upon the breach of a contract. Although plaintiff testified that the policy to be issued was to be in terms the same as the former one, except as to length of time and amount of premium, defendant refused to issue or deliver the policy according to contract, and hence this action. Having failed to issue the policy, it can claim no exemption from liability on account of any provisions the policy might or would have contained had it been issued.

The other errors alleged are in giving and refusing certain instructions. In order to a correct understanding of the questions involved, a brief reference to some of the facts is necessary. About July 1, 1889, plaintiff ascertained from agents of other insurance companies that there was some doubt about the validity of the policy issued by defendant in March, because the building was described as a dwelling, when in fact it was an hotel or boarding-house. He applied to Maris, defendant's agent at Newberg, for information about the matter, and was told that the policy was not valid, and the company would not continue the risk. He then told Maris that he would like to cancel the policy, and get his notes back, and Maris said he would write to the company about the matter. Maris was defendant's agent at Newberg, with an office and sign out as agent of State Insurance Company. The evidence tended to show that he was engaged in soliciting insurance, delivering policies, taking applications for insurance, collecting and remitting money, and doing other business in relation to insurance, and generally holding himself out as the agent of defendant. That by his commission of appointment he was given "authority to solicit and receive applications for insurance on such property in such amounts and at such rates as are permitted by the rules and instructions furnished by the company, and not otherwise, and to receive and transmit the premium therefor;" but there was no evidence that plaintiff had any knowledge of this commission, or of any limitation on Maris' authority, except that he did not write policies, but he supposed Maris was the general agent of defendant. In accordance with his understanding with plaintiff, Maris wrote to defendant, inclosing a diagram of the property, and in reply received a letter giving the terms upon which the old policy would be canceled, and also the terms upon which a new one would issue. On July 20th Maris called upon plaintiff, and showed him the letter, and plaintiff

agreed to cancel the old policy, and take out a new one, on the terms stated in the letter, and did surrender up the old policy to Maris. The details of the contract or agreement between Maris and plaintiff were questions of fact for the jury, and are not necessary for us to consider, further than stated. On the trial in the court below the defendant denied the authority of Maris to make the contract sued on, and this was one of the principal issues in the case. On this question the court instructed the jury that, "as to whether or not Maris made the contract sued on, and whether he had authority to make it, if made, are questions of fact for the jury to determine from the evidence." Considered by itself, this instruction is not strictly correct. The scope of an agent's authority is not wholly a question of fact, but one of law and fact. 2 Wood, Ins. § 870. But this instruction must be construed in connection with the entire charge of the court, and, viewed in that connection, we think it is unobjectionable. The jury were instructed fully, and, in the absence of objection, we must assume correctly, as to the law of agency applicable to the facts of this case. The detached portion of the charge objected to was in effect saying to the jury that, "whether Maris had authority under the law as given to you, to make the contract sued on, if made at all, is a question of fact for you to determine from the evidence," and in this we think there was no error. The defendant requested the court to instruct the jury: "If Mr. Maris, as agent of the defendant, only had authority to receive applications for insurance, and transmit them to the defendant at its home office, and collect the premium, and was the medium through which policies were delivered to parties insured, the plaintiff would not, upon these facts, be justified in treating him as having authority to make contracts of insurance binding upon the company, because the very fact that the application is required to be made and forwarded to the company is notice that the plaintiff reserves the right to judge and determine for itself whether or not the risk shall be taken." This request may be conceded to be good law, but, as applied to the facts of this case, we think it was properly refused. As we read the record, plaintiff claims that he had no knowledge of the limitation on the powers of Maris, nor that his duties were only to receive applications for insurance, and forward them to the home office. It is true plaintiff knew, perhaps, that Maris did not write policies; but that he knew the reason does not appear. Maris was not the agent through whom the first policy was secured, and therefore plaintiff obtained no information as to Maris' authority in that way. Maris was acting as defendant's agent. To him plaintiff applied for information concerning the validity of the first policy. Maris wrote to the company stating the facts, and received a reply giving the terms upon which it would cancel the old policy and issue the new one. Armed with this letter Maris sought plaintiff, and he agreed to accept the terms, and surrender up the

old policy; and, as he claims, Maris made the contract sued upon. The terms were those proposed by the company itself, and it would no doubt have issued the policy to take effect from the date of application if the illness of Maris had not prevented him from making out and forwarding the formal application according to understanding with plaintiff. In the absence of notice to plaintiff of any limitation in Maris' authority, or of facts amounting to notice, we think it was a question of fact for the jury, under proper instructions from the court, as to whether plaintiff had a right to assume that Maris had authority to make the contract sued on, if he did make it; and the request under consideration entirely withdrew this question from the jury. 2 Wood, Ins. § 423; Putnam v. Insurance Co., 123 Mass. 324; Palm v. Insurance Co., 20 Ohio, 537; Cooke v. Insurance Co., 7 Daly, 555; Ellis v. Insurance Co., 50 N. Y. 402. Where insurance companies deal with the community through a local agency, persons having transactions with the company are entitled to assume, in the absence of knowledge as to the agent's authority, that the acts and declarations of the agent are as valid as if they proceeded directly from the company. 2 Amer. Lead. Cas. 922; Insurance Co. v. Wilkinson, 13 Wall. 222. And a person who is clothed with power to act for them at all is treated as clothed with authority to bind them as to all matters within the scope of his real or apparent authority, and persons dealing with him in that capacity are not bound to go beyond the apparent authority conferred upon him, and inquire whether in fact he is authorized to do a particular act. It is enough if the act is within the scope of his apparent authority. 2 Wood, Ins. § 408, and authorities there cited. In Insurance Co. v. Wilkinson, supra, Mr. Justice MILLER, in speaking on this question, uses the following appropriate and very apt language: "The agents are stimulated by letters and instructions to activity in procuring contracts; and the party who is in this manner induced to take out a policy rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who persuaded him to effect insurance as the full and complete representative of the company, in all that is said and done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this, and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy. This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them seeking assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine in its full force to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading,

as it has done in numerous instances, to the grossest frauds, of which the insurance companies receive the benefits, and the parties supposing themselves to be insured are the victims." This rule proceeds upon the theory that, if any party is to suffer by reason of the wrong-doing of such agent, it should be the company who clothed him with apparent authority, and for whom he was acting, rather than the assured, who acted in good faith, and innocently became a party to the contract. The public regard such persons as agents, clothed with authority to make contracts of insurance; and the companies certainly are aware of that fact. They must be held responsible for the acts of such agents within the scope of the business intrusted to them, and cannot limit their liability by any secret limitations or instructions, not known to the party dealing with the agents. *City of Davenport v. Insurance Co.*, 17 Iowa, 276; *Insurance Co. v. McGowan*, 18 Kan. 300; *Ellis v. Insurance Co.*, 50 N. Y. 402; *Palm v. Insurance Co.*, 20 Ohio, 537. An insurance company which clothes a person with authority to hold himself out to the community as its local agent with authority to effect insurance is bound by the acts of the agent within the apparent scope of his authority. This authority need not be expressed, but may be implied from circumstances, and may thus exist as to third parties, although not as between the agent and the company. As said by Mr. Justice MILLER in *Insurance Co. v. Wilkinson*, supra: "The powers of the agent are, *prima facie*, co-extensive with the business intrusted to him, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment, as if they proceeded from the principal." The decided tendency of the recent decisions, and, we think, properly, is to hold the insurer bound by the acts and conduct of the local agent whenever it can be done consistently with the rules of law. Such local agent is expected, both by the company and the assured, to receive applications, to examine the premises, determine the character of the risk, agree upon the amount to be insured and premium, and in fact to represent the company in the matter of effecting the insurance. He is the only person, from the nature of the case, who can be presumed to have information necessary to act for the company, and is the only person with whom the party applying has anything to do. His principal is usually remotely located. Its patrons in his vicinity naturally look to him for direction, generally, as to the insurance obtained through him; and persons insured in his company, with few if any exceptions, would, in the absence of notice that his powers were limited, regard his statements or contract as to any matter relative to such insurance as authoritative and binding upon the company. They look to the agent through whom they have obtained insurance as

the complete representative of the company in everything connected with that insurance. If they did not have a right to so consider the authority of the local agent, it would undoubtedly create distrust, and cripple the business, and contracts of insurance would in many instances prove a snare and a delusion and a fraud of the grossest kind, of which the supposed assured would be the victim. The fact that the agent may not have authority to issue the policy, which is simply the written evidence of the contract, does not of itself prevent him from making a valid preliminary oral contract to insure; and it is said in such cases the courts will take judicial notice of the usage to make such contracts date from the application. *Palm v. Insurance Co.*, 20 Ohio, 529; *Fish v. Cottenet*, 44 N. Y. 538; *Ellis v. Insurance Co.*, 50 N. Y. 402; *Post v. Insurance Co.*, 43 Barb. 381; *Sanborn v. Insurance Co.*, 16 Gray, 448. Where the authority of an agent is limited, and the person with whom he contracts has notice of such limitation, of course the principal is not bound beyond the agent's authority; but whether plaintiff in this case had notice of the limitation on Maris' authority was a question of fact for the jury. The other instruction, the refusal of which is assigned as error, was, we think, substantially given by the court in paragraph 6. The judgment will be reversed, and a new trial ordered.

(20 Or. 536)

#### DRAINAGE DIST. No. 4 OF WASHINGTON COUNTY v. CROW.

(Supreme Court of Oregon. April 30, 1891.)

##### TRIAL BY THE COURT—FINDINGS.

In the trial of an action by the court without the intervention of a jury, there must be findings of fact sufficient to sustain the judgment. All of the material issues made by the pleadings should be passed upon. *McFadden v. Friendly*, 9 Or. 223, so far as it states a different rule, is overruled.

##### (Syllabus by the Court.)

Appeal from circuit court, Washington county; FRANK J. TAYLOR, Judge.

This is an action to recover a tax of \$10.30, commenced before a justice of the peace of Washington county. The grounds upon which plaintiff seeks a recovery are stated in its complaint substantially as follows: That plaintiff has been and is now a drainage district, duly organized and existing under the laws of Oregon providing for the drainage of lands in Washington county, Or., said drainage district being organized for the purpose of clearing Dairy creek and Lousignot lake, in said county and state, of driftwood and other obstructions, to the full flowage of water in the channels of said streams. That the defendant is and was, during the year 1889, the owner of 63 acres of land lying within the boundaries of said drainage district, being subject to overflow, and of the assessed value of \$588. That during the year 1887 the supervisor of drainage of said district performed certain labor and expended moneys in hiring labor in clearing the obstructions, as aforesaid, from the channels of said streams, and charged up the cost of such work to

said district, and the lands lying therein, and said charges are made in proportion to the assessed value of said lands, to-wit, 1½ cents on the dollar on the assessed value of said lands. That the amount so charged against the lands of the defendant herein was \$10.30, and that said supervisor of drainage duly reported his proceedings as such, including the charge against the lands of defendant, to the regular meeting of the land-owners of said district held March 5, 1888, and said charges were approved and found to be correct by said meeting. That a copy of said supervisor's report, and a synopsis of the proceedings of said meeting, were thereafter duly filed with the clerk of the county court of the aforesaid county by the secretary of said drainage district. That the defendant has not paid said sum so charged, nor any part thereof; and that there is now due and owing from the defendant to the plaintiff the said sum of \$10.30, for which plaintiff prays judgment, etc. The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and for the further reason that the plaintiff had not legal capacity to sue; which being overruled, the defendant answered, denying each material allegation of the complaint. The defendant had judgment before the justice, from which plaintiff appealed to the circuit court, and upon a trial in that court the defendant again had judgment, from which this appeal is taken.

*S. B. Huston, R. Williams, and C. H. Carey, for appellant. Thomas H. Tongue, for respondent.*

STRAHAN, C. J., (after stating the facts as above.) There is no bill of exceptions in this case, and therefore the main questions argued upon the trial were not permitted to examine, because the same are not presented by the record. The only question that is presented by the judgment roll is the sufficiency of the findings of fact to support the judgment. The findings of fact are as follows: The court now finds that the allegations of the complaint are not sustained; that said drainage district is not legally organized; that said alleged tax has not been legally levied; and, as conclusions of law, the court finds that the defendant is entitled to judgment against the plaintiff, etc. Section 219, Hill's Code, provides: "Upon the trial of an issue of fact by the court, its decision shall be given in writing, and filed with the clerk during the term, or within 20 days thereafter. The decision shall state the facts found and the conclusion of law separately, without argument or reason therefor; \* \* \*" and section 220 says such finding shall be deemed a verdict. The object of this statute was to enable the parties to have placed upon the record the facts upon which the rights litigated depend, as well as the conclusion of law, separately stated, which the court drew from the facts found. The facts found are conclusive upon the appellate court, but the conclusions of law are reviewable here on appeal. So that we conclude the purpose of

this statute is to aid or enable the parties to have the questions of law arising upon the facts found reviewed and re-examined in an easy and expeditious manner. If there is no question as to the admissibility of evidence, a bill of exceptions may, in many cases, be entirely dispensed with. Of course, if questions arise upon the trial, and exceptions are taken, and the findings, either of law or fact, cannot properly show what rulings the court made thereon, the same can only be reviewed on bill of exceptions, as in an ordinary jury trial. This statute received a construction in this court in *Fink v. Road Co.*, 5 Or. 311, and the views here presented are in strict harmony with that construction. It was said in that case: "Where a cause is tried by the court without the intervention of a jury, there must be findings of fact sufficient to sustain the judgment. All the material issues should be passed upon. It is needless to cite authorities upon points so obviously clear and so thoroughly settled." The citation of this case would seem to be all that is necessary, were it not that *McFadden v. Friendly*, 9 Or. 222, seems to state a contrary doctrine. It is said in the head-note to that case that "a finding of fact in a trial court, which shows that a cause of action set up in the complaint had been made out, and that the defense set up in the answer is untrue, is sufficient." This case seems to state a different rule from that of *Fink v. Road Co.*, supra. There can be no doubt that the safer and better rule of practice is that announced in *Fink v. Road Co.*, supra. These findings take the place of a special verdict, and such verdict must find facts sufficient to support the judgment. *Sisson v. Barrett*, 2 N. Y. 406; *Casey v. Dwyre*, 15 Hun, 153. And the rule is distinctly stated in *Railroad Co. v. Reynolds*, 50 Cal. 90, that, when the facts are found, it must affirmatively appear that they support the judgment. So in *Campbell v. Buckman*, 49 Cal. 362, it was held, under the Code of that state, that, where findings of fact are made, the court must find on all the material issues made by the pleadings. And in *Dowd v. Clarke*, 51 Cal. 262, it was held that a judgment could not stand unless there were full findings, which respond to all the material issues made by the pleading. And *Watson v. Cornell*, 52 Cal. 91; *Roeding v. Perras*, 62 Cal. 515; and *Paulson v. Nunan*, 64 Cal. 290,—are to the same effect. *McFadden v. Friendly*, supra, so far as the same conflicts with this opinion, must be regarded as no longer authority. The findings in this case do not in any particular conform to the requirements of the Code, and leave us no alternative but to reverse the judgment and award a new trial.

#### BEASLEY v. SHIVELY.

(Supreme Court of Oregon. April 30, 1901.)

#### DEFECT OF PARTIES—DISMISSAL ON APPEAL.

When it appears from the record that the real merits of the suit cannot be determined without essentially affecting the rights of persons in the subject-matter, who are not parties, and whose names nowhere appear in the record, this court

will refuse to examine the facts, but dismiss the complaint for want of parties.

(*Syllabus by the Court.*)

Appeal from circuit court, Clatsop county; FRANK J. TAYLOR, Judge.

Geo. H. Burnett and A. R. Kazaga, for appellant. Sidney Dell, for respondent.

BEAN, J. John M. Shively, being the owner of the donation land claim upon which the city of Astoria is now located, prior to 1881 laid the same out into lots, blocks, and streets, and caused a plat thereof to be duly recorded. The plat of the town as laid out by Shively included, not only his donation claim, but the tide-land on the Columbia river in front of the same. Upon this plat is block No. 4, containing 12 lots, numbered from 1 to 12, respectively. Lot No. 2 of this block is situate and lying on the bank of the river, and extends below the line of ordinary high tide. Immediately in front of block No. 4 is a street named "Hemlock Street," and between this street and the channel of the river is block 146, which is on the tide-land, and extends into the river below the line of ordinary low water. Prior to May 6, 1881, Shively sold and conveyed the whole of block 146, and the purchasers have since acquired tide-land deeds from the state for the same. On May 6, 1881, lot No. 2 of block 4, together with the appurtenances thereto belonging or in any wise appertaining, was conveyed to Elias Hoff, who, assuming that he was the owner of the riparian and wharfage rights in front thereof, conveyed the same to plaintiff. The defendant is the owner by means conveyances of whatever riparian and wharfage rights, if any, Shively had after conveying away lot 2 in block 4, and his interest in block 146, and by virtue thereof is laying claim to the riparian and wharfage rights on the Columbia river in front of block 146. The object of this suit is to enjoin defendant from erecting wharves on said property, and that plaintiff be decreed to be the owner of the riparian and wharfage rights lying in front of lot 2, block 4, below the line of ordinary low tide of the Columbia river. From this statement it will be noticed that the property in controversy is not adjoining any land owned by either of the parties to this suit, or by their predecessors in interest. This is not the case of a shore owner claiming the right to erect wharves in front of his property, but is a controversy between plaintiff and defendant as to who shall construct a wharf in front of tide-land purchased of the state, and owned by strangers to this suit. The proposed wharf is to be constructed below the line of ordinary low tide, and in front of block 146, which is held by persons who are not parties to this suit, and whose names nowhere appear in this record under deeds from the state, as tide-lands. A complete determination of this controversy requires the presence of the owners of this tide-land. Their interests are so essential to the merits of the controversy, and may be so affected by the decree, that the court cannot proceed to a final decision of the cause un-

til they are parties. The legitimate result of the contention of the parties to this suit is that the owner of land on tidal waters has vested riparian rights, among which is the right to build a wharf, or use it for any purpose not inconsistent with the right of the public navigation, and that he may sell and transfer the same, and that as a consequence the state holds its title to the tide-land subject to such riparian rights, and cannot sell or use it except for the purpose of navigation or fishing. This must, it seems to us, inevitably be so, or neither of the parties have any interest in the subject-matter of this suit. Where such important interests are involved, certainly this court ought not to decree that either of the parties before it have a right to construct wharves upon the property in controversy, until the rights of the tide-land owners may be decided. They are not parties to this suit, and of course we can make no decree affecting their interests which would be binding upon them. But if this court should decide that either plaintiff or defendant had the right to construct wharves as claimed, it would, to say the least, throw a cloud upon the title of the tide-land owner. A court may determine any controversy between the parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, it may dismiss the complaint, or cause them to be brought in, as the exigencies of the case may require. Section 41, Hill's Code; Russell v. Clark's Ex'r, 7 Cranch, 69; Young v. Cushing, 4 Bliss 456. The better practice in the circuit courts is to order the necessary parties to be brought in, and that should always be done under ordinary circumstances. But we have no such authority, and could only in a proper case, and where the equities justify, remand the cause to the court below for that purpose. While the record before us discloses the fact that there are other parties whose rights will be materially affected by a decree in this case, their names nowhere appear in the record, and we do not feel authorized to remand this case to the court below for the purpose of having them made parties. Nor does it matter that the parties to this suit make no objection on account of a want of parties. Where that fact appears, as in this case, the court will on its own motion refuse to proceed further in the case. A decision of the case now before us in favor of either of the parties would in effect be an adjudication that the tide-land owner does not have the right to construct wharves in front of his property,—a question we are unwilling to examine on this record. In justice to the court below it is proper to say that this cause was determined in that court on a demurrer to the answer, which the record discloses counsel refused to argue, or point out the grounds thereof. The judgment of the court below is reversed, and plaintiff's complaint dismissed.

## BUMP V. COOPER.

(Supreme Court of Oregon. April 30, 1891.)

EVIDENCE OF VALUE — UNRESPONSIVE ANSWER—  
IRRELEVANCY—ACCOUNT STATED.

1. In proving the commercial value of hops at Independence on a particular day, a witness stated the value at Buena Vista on that day, a town about five miles above Independence, on the Willamette river. *Held* not error.

2. A witness was asked if he thought he knew what the price of hops was at Independence, November, 1888, and he answered: "Seventeen and a half cents. I knew of one man getting that who lived within two miles of Independence." *Held* not error to refuse to strike out the answer.

3. In an action to recover the value of hops sold in November, 1888, where there was no issue in the pleadings as to who was the real party in interest, evidence that in December of the same year plaintiff made a bill of sale of the hops to another was irrelevant; and *held, further*, that the applicability of said evidence to an issue in the cause not being apparent, upon objection being made to its irrelevancy, counsel for appellant should have pointed out to the court the issue to which he claimed such evidence was applicable.

4. Although a paper offered in evidence for a particular purpose may be an account stated, yet, if it has not been pleaded and relied upon by either party as such, it cannot control or limit the rights of the parties as an account stated.

(Syllabus by the Court.)

Appeal from circuit court, Benton county; M. L. PIPES, Judge.

This is the second appeal in this case. The opinion of the court on the former appeal is reported in 19 Or. 81, 23 Pac. Rep. 806, where the facts are stated. Other facts necessary to understand the questions presented on this appeal are stated in the opinion.

John Kelsay, and J. J. Daly, for appellant. J. R. Bryson, W. S. McFadden, and John Burnett, for respondent.

STRAHAN, C. J. After reversal of this case upon the former appeal, it was remitted to the court below, where the plaintiff was permitted to amend her complaint by alleging that on the 15th day of November, 1888, the market price of hops in the town of Independence was 17 cents per pound, and that on that day she elected to take that price for said hops, and closed the sale to the defendant at that figure. Upon the second trial in the court below the plaintiff recovered a judgment for \$1,753.60, from which this appeal is taken.

1. The appellant took several exceptions to the introduction of the evidence, which will be separately noticed. Joseph Miller a witness for the plaintiff, testified that Buena Vista and Independence were both situated on the Willamette river, and are about five miles apart. He then testified, under an exception by the appellant, that he knew the price of hops at Buena Vista, but not at Independence; that the prices were about that time 17 and 17½ cents in the vicinity of Buena Vista, between there and Independence. Buena Vista and Independence are situated in such close proximity, and both on the river, that there could be no material difference in the market value of a staple production like hops, between the two places. Jurors are practical men, and

they could not possibly be misled by such a slight discrepancy. They were bound to know, when they learned the market value of hops at one of those towns, practically the same rates would rule in the other. There was therefore no error in the admission of this evidence.

2. One Robert G. Moore was called as a witness in behalf of the plaintiff, and he was asked: "Do you think you know what the price of hops was at Independence, November, 1888?" And he answered: "Seventeen and a half cents. I know of one man there getting that, who lived within two miles of Independence." The defendant moved to strike out this evidence as not responsive to the question, which was overruled, and defendant excepted. Strictly speaking, Moore's answer was not responsive to the question asked him; but, practically, but few witnesses would observe the form of the question, so as to confine their answer within its precise limits. If a witness were to show a disposition to volunteer evidence by relating facts not required by the questions put to him, he would soon injure the cause his swiftness was endeavoring to serve. Besides, it would be the duty of the court, which it would no doubt promptly do, if requested, to admonish such witness to confine his answers to the questions propounded to him. But where the evidence given is competent, and the witness has volunteered an expression beyond the scope of the question, we cannot see that the appellant is in any manner prejudiced, and for that reason this exception cannot be sustained.

3. Another exception was taken by the defendant to the ruling of the court in refusing to allow M. Merwin to answer the following question: "State whether or not you went with Mr. Lilly under the direction of Mr. Bump, as agent for the plaintiff, to Mr. Cooper, the defendant, and witnessed a tender of money for the picking of the hops in question, and demanded the possession of them under the bill of sale." The witness was not allowed to answer the question, and an exception was taken. Counsel for appellant here offered to prove by this witness that, acting under the instructions of Wilson Bump, as the agent of the plaintiff, he went with Mr. Lilly in the month of December, 1888, to the defendant in Independence, Polk county, Or., and witnessed Mr. Lilly tender to the defendant an amount of money for picking the hops in question in this case; and saw Mr. Lilly then and there tender bill of sale from the plaintiff in this case, conveying said hops to said Lilly, and then and there demanded the possession of said hops under the bill of sale,—all of which was refused by the court, and an exception duly taken. It was argued here that this evidence, if admitted, would have tended to prove that the action was not prosecuted in the name of the real party in interest, and therefore would be necessarily fatal to the plaintiff's case; but there was no issue in the pleadings to which this evidence could apply. Besides, it was for the admission of evidence for such purpose, where there was no issue, that this court reversed the



court below in *Derkeny v. Belfils*, 4 Or. 258. The denial in the answer of the sum alleged to be due from the defendant to the plaintiff is no such issue. The allegation in the complaint is a mere legal conclusion, predicated on the antecedent part of the pleading, and the denial in the answer is nothing more. It tenders no issue of fact whatever.

4. It is now argued that such evidence, if admitted, would have had a tendency to rebut the plaintiff's allegation that she exercised the right of election reserved under the contract. Whether such evidence would have had that tendency it is not necessary now to decide. It is sufficient to say that its relevancy to that issue is not apparent to us in the present state of the record, and, if this evidence were offered for that purpose, the court should have been notified of it at the time the offer was made.

5. Counsel for the appellant argued upon the trial before us, that the statement of account sent by the defendant to the plaintiff on the 6th day of March, 1889, not having been objected to by the plaintiff within a reasonable time, became a stated account, and that the rights and liabilities of the parties are to be determined by what is therein contained. We have several times lately had occasion to consider what is a stated account, and its effect upon the rights of the parties, and we adhere to what has been decided on that subject. But the same has no applicability to this record, for the reason that there is no issue in the pleadings in relation to such account. We could not, therefore, give this statement the effect of a stated account if the facts otherwise justified or required it, for the reason that neither party has set it up in the pleadings or relied upon it as a cause of action or defense. Our examination leads to the conclusion that the judgment appealed from must be affirmed, and it is so ordered.

(20 Or. 491)

NEPPACH V. JONES.

(*Supreme Court of Oregon*. June 4, 1891.)

On rehearing. For former report, see 26 Pac. Rep. 569.

PER CURIAM. The point suggested as to the assignee is immaterial. It is the statement of the proceeding, under the circumstances, which influenced the judgment of the court.

(21 Or. 15)

RILEY V. PEARSON *et al.*

(*Supreme Court of Oregon*. May 11, 1891.)

REPLEVIN—PLEADING—EXHIBIT.

In an action of replevin, an exhibit containing a description of the property, in order to become a part of the complaint, must be annexed and attached thereto. It is not sufficient to file the same as a separate paper, although referred to in the complaint, and alleged to be a part thereof.

(*Syllabus by the Court*.)

Appeal from circuit court, Wallowa county; MORTON D. CLIFFORD, Judge.

*Ivanhoe & Sheahan*, for appellant. *A. C. Smith*, for respondents.

v.26P.no 1—54

BEAN, J. An action was brought in justice court, by respondents against appellant, to recover possession of personal property. A judgment for want of an answer was entered, to reverse which this proceeding was brought. On the return of the writ, the proceedings were dismissed by the circuit court, and the judgment of the justice's court in effect affirmed. The petition for the writ of review contains several assignments of error, and, among others, that the complaint does not state facts sufficient to constitute a cause of action, because it contains no sufficient description of the property to recover the possession of which the action was brought. The property is described in the complaint as "certain personal property, consisting of household goods, furniture, books, pictures, wearing apparel, and sundry other articles, particularly set forth and described in bill of particulars herewith filed, marked 'Exhibit A,' and made a part of this complaint." There appears in the record a list of various items of personal property, and opposite each item are figures supposed to be the value thereof; but this paper is in no way attached to the complaint, and cannot be considered a part thereof. In *Caspary v. City of Portland*, 19 Or. 496, 24 Pac. Rep. 1036, we held that schedules referred to in a complaint in an action of this kind, but not attached to and made a part of it, could not be used in aid of the description of the property contained in the complaint. We there held that, in actions to recover possession of personal property, a bill of particulars or schedule of the property annexed to the complaint, marked so it could be identified with certainty, and referred to in, and made a part of, the complaint, would constitute a part of the pleadings, not for the purpose of supplying necessary allegations therein, but for the purposes of description and itemizing the values. There are many authorities which hold that, in actions at law, exhibits cannot be made part of the pleading; but, for reasons stated in the case above cited, we have adopted, in cases of this character, a different rule, but are unwilling to carry it any further than as expressed in *Caspary v. City of Portland*. The statement in the complaint that the paper is "marked 'Exhibit A,' and made a part of this complaint," does not make it so. It should have been attached before it could have become in any sense a part of the pleading. Without this bill of particulars, the complaint, confessedly, does not contain a description of the property sought to be recovered, and hence does not state a cause of action. We do not deem it necessary to notice the other assignments of error, as they will probably be avoided if the cause should proceed anew, further than to say that the proceedings in the justice's court, as disclosed by the record, seem to have been unusual, and somewhat irregular, and not calculated to promote the ends of justice. Judgment reversed, and cause remanded to the court below, with directions to vacate and annul the judgment of the justice's court.

## HENSILL V. SPILLMAN.

(Supreme Court of Oregon. April 30, 1891.)

## CANCELLATION OF DEED—MISTAKE OF LAW—EVIDENCE.

Evidence examined, and held insufficient to sustain the allegations of the complaint.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

This is a suit to cancel and set aside a deed from plaintiff to her husband, S. M. Hensill, to lot 5, in block 137, in the city of Portland. The complaint alleges, in substance, that on September 9, 1886, plaintiff was the owner in fee of lot 5, block 137, but that S. M. Hensill was in possession thereof, collecting the rents and profits. That he represented to her that he desired to raise money for his own use, and asked her to give him power to mortgage the lot. That at first she refused, but that her husband threatened to sue her, and, in order to avoid the annoyance and trouble thereof, she consented to give him such power. That he procured the paper hereinafter set forth to be drawn up and presented to her for her signature. That at the time it was so presented she was told that the same would not convey the land therein described to her husband, but would simply give him the power to mortgage the same, and that, believing and relying upon the said representations, and being ignorant of legal forms, she signed the same, as follows: "Know all men by these presents, that I, Mary Jane Hensill, in consideration of one dollar and other valuable consideration to me paid by S. M. Hensill, do hereby remise, release, and forever quitclaim unto said S. M. Hensill, and unto his heirs and assigns, all my right, title, and interest in and to the following described parcel of real estate, situated in the city of Portland, county of Multnomah, and state of Oregon, to-wit: Lot No. five, (5,) in block No. one hundred and thirty-seven, (137,) with the provision that the above-described property shall not be sold by the said S. M. Hensill, but with the understanding that he may mortgage the said property; to have and to hold the same, together with all and singular the hereditaments and appurtenances thereto belonging, or in any wise appertaining, to the said S. M. Hensill, and to his heirs and assigns, forever." That in January, 1889, S. M. Hensill died leaving a will, by the terms of which he authorized his executors to sell the property at public or private sale. That the executors offered said property at public auction, and that at the time of offering it plaintiff objected, and gave notice that she claimed the same. That, disregarding the said notice, the defendant purchased the property for \$3,750, and in due time received from the executors a deed therefor. Defendant denies most of the allegations of the complaint, and sets up six separate defenses. Defendant admits that plaintiff gave the deed because of a threat to begin suit; denies that plaintiff was misinformed or mistaken; denies that there was not full consideration. Defendant claims that the deed was given as a family settlement of a controversy between husband and

wife; that plaintiff intended to convey a fee; that she has acquiesced in the transaction for nearly three years; that she has ratified the deed by the following acts: (1) By reacknowledging the deed 13 months after it was given; (2) by secretly bidding at the public auction almost the full value of the property; (3) by offering the defendant to buy the property of him at its full value; (4) by presenting against the estate of her deceased husband a claim on account of a loan to him, she knowing there was nothing with which to pay her claim, unless paid from the proceeds of the sale of this lot to the defendant. Defendant also claims that he is a *bona fide* purchaser for value without notice. The cause was referred to a referee, who reported that the deed was good and valid, and that defendant is the owner of the property. This report was confirmed by the circuit court; hence this appeal.

J. C. Moreland and W. Y. Masters, for appellant. F. D. Chamberlain, for respondent.

BEAN, J., (after stating the facts as above.) It is conceded by appellant that the provision in the deed from her to her husband, that he should not sell the property, is void, as being in restraint of alienation; but it is insisted that she only agreed to give him the right to mortgage the property, and that at the time she executed the deed she was informed and believed that the provision was valid, and that he could only mortgage the property. It is not alleged in the complaint, nor does the evidence show, a mutual or any mistake in drafting the instrument; nor is there any allegation or evidence of fraud or deceit practiced upon plaintiff; but she admits, both in her complaint and testimony, that she knew the contents of the deed before and at the time she signed, but claims she was misinformed as to its legal effects, and seeks relief on that ground alone. Conceding, without deciding, that a mistake of that kind is sufficient ground for the interposition of a court of equity, we do not think the evidence supports her contention. On behalf of plaintiff, it is contended that her husband, who had a life-estate in this property, was desirous of mortgaging it, for the purpose of raising money for his support, and that she agreed to permit him to do so; that the deed in question was drawn by his attorney, who represented to her that it only gave her husband the right to mortgage the property. The contention of defendant is that in January, 1886, plaintiff gave a mortgage on the property in controversy, and lots 6, 7, and 8 of block 137, to the son of plaintiff and her husband, to secure the sum of \$1,150, payable in five years; that the son died in June, 1869, unmarried and intestate, leaving his father his sole heir, and that at the time of the execution of the deed the husband of plaintiff was threatening to institute proceedings to foreclose this mortgage, and that the deed was given in satisfaction of the amount due on the mortgage. The testimony is somewhat conflicting, but the referee who heard

the witnesses testify, and saw their appearance on the witness stand, found in favor of defendant, and we think, after a careful examination of the evidence, that the decided weight of the testimony sustains his findings. The plaintiff and her husband were married in 1837, and at the date of the deed in controversy were each about 70 years of age, but had been living separate and apart for some time, and were not on friendly terms. Plaintiff never had any conversation or contract whatever with her husband about the deed, but all the negotiations were with his attorney. That the mortgage, from plaintiff to her son, was an existing obligation, at the time the deed was executed, unless barred by the statute of limitations, is admitted by plaintiff; and she also admits that her husband's attorneys were threatening to institute proceedings to foreclose it. It is true there had been some attempt to release this mortgage prior to that time, but, whatever the effect of such attempted release may have been as to third parties, it could avail this plaintiff nothing; for she was fully cognizant of the circumstances of its execution, and admits in her testimony that nothing had been paid on the mortgage. Her husband was claiming this to be a valid mortgage, and threatening to commence proceedings to foreclose it, while she claimed it was barred by the statute of limitations; and it is evident from the testimony that the deed in controversy was intended as a compromise of this dispute. The provision in the deed against alienation was inserted at her request, because she was afraid that her husband, who seems to have been careless about financial matters, would sell the land, squander the money, and she would have to support him. Hence she desired that he be prevented from selling the land during his life, and to satisfy her this provision was inserted. It is clear that it was the intention of the parties that the fee should pass from plaintiff to her husband by this deed. This conclusion is strengthened by all the circumstances surrounding the matter, as well as by plaintiff's own actions. She demanded and received from her husband, as a condition to the execution of the deed, a release of the mortgage given to her son, as well as a quitclaim deed to lots 6, 7, and 8; reacknowledged the deed in October, 1887, on account of some defect in former acknowledgments; paid no attention whatever to the property, although she lived next door, after the death of her husband, when she learned he had made a will not in her favor; made no objection to the executors taking steps to sell the land; had a secret bidder at the sale, although her attorney had notified persons present that the executors had no title; offered to return defendant the money paid for the land, although it was largely in excess of the amount due on the mortgage given by herself and husband, if he would transfer it to her. These and many other circumstances, which are unnecessary to state, indicate that plaintiff fully understood what she was doing when she executed the deed, and it is in the form she

intended it to be, and was executed for the purpose of settling the controversy between her and her husband concerning the mortgage in favor of her son. The decree of the court below is therefore affirmed.

### HELMS *et al.* v. GILROY *et al.*

(*Supreme Court of Oregon.* April 30, 1891.)

PRELIMINARY INJUNCTION—RIGHT OF APPEAL—ASSIGNMENT FOR BENEFIT OF CREDITORS—FIXTURES.

1. A preliminary injunction is a provisional remedy, the sole object of which is to preserve the subject in controversy in its then condition; and courts of equity, in granting or refusing the same, should in no manner anticipate the ultimate determination of the question of right involved.

2. An order granting or refusing a preliminary injunction does not ordinarily partake of the nature of a final judgment to such an extent as to warrant an appeal therefrom; but when the court not only refused the injunction, but entered a decree settling the rights of the parties, an appeal will lie.

3. An assignee, under the general assignment law, takes no better title than his assignor, and is affected by all the equities existing as against him.

4. As between mortgagor and mortgagee, machinery necessary for, and used in the operation of, a sash and door and planing mill, when affixed to the building by screws, bolts, pulleys, and bands, is a "fixture," and subject to the lien of the mortgage.

(*Syllabus by the Court.*)

Appeal from circuit court, Jackson county; L. R. WEBSTER, Judge.

The property in controversy in this suit is certain machinery, necessary for and used in operating what is known as a sash and door factory and planing-mill, at Ashland, Or. This machinery was purchased on April 22, 1887, of the Parke & Lacy Machinery Company, of Portland, by defendant William Gilroy and one Yule, who were the owners of the real estate, water-power, and building in which the machinery was placed. The agreement between the Parke & Lacy Machinery Company and Gilroy & Yule was, in form, a lease for 12 months, at a stipulated rental of \$2,093, payable \$900 in cash, and balance at stated times during the year; and, upon the payment of this rent, Gilroy & Yule were to have the right to purchase the property for \$2. By this lease, Gilroy & Yule agreed that they would not permit the machinery, or any part thereof, to be affixed to real estate. After said machinery was received at Ashland it was placed in the building prepared for it, and attached thereto by screws, bolts, pulleys, and bands, in the manner such machinery is usually attached to buildings. Gilroy & Yule used and operated said mill and machinery for some time, when Gilroy purchased the interest of Yule, and continued to use and operate the same until May 13, 1889, when he and his wife executed and delivered to one G. F. Pennebaker their mortgage to secure the payment of the sum of \$3,500, on or before one year after date, which mortgage was subsequently assigned to plaintiffs. This mortgage, in terms, only describes the real estate upon which said mill is situated and its

appurtenances. Two days after the execution of the mortgage, Gilroy made a general assignment, for the benefit of his creditors, to defendant Rogers, of all his property. On January 30, 1890, there remaining due from Gilroy & Yule to the Parke & Lacy Machinery Company, on the purchase price of said machinery, \$879.89, Rogers paid the same from money in his hands as assignee, and received from the company a bill of sale of said machinery. On May 13, 1890, no payments having been made on the mortgage, plaintiffs commenced a suit to foreclose the same, making Gilroy and wife and Rogers defendants, but neither of them appeared or made defense thereto. That, on August 11, 1890, plaintiffs filed an amended complaint, which, among other things, particularly described said machinery, and alleged that it was a part of the realty, and subject to the lien of plaintiffs' mortgage; and that defendant Rogers, as assignee of Gilroy, was in possession of the property, and threatened to remove the machinery, sell and dispose of the same, and would do so, unless enjoined by order of the court, and praying for a preliminary injunction. Rogers answered, denying that the machinery was a part of the realty or subject to the lien of plaintiffs' mortgage, and alleging the purchase by him of the Parke & Lacy Machinery Company. A reply having been filed, the cause was heard before the court, on the 26th of August, 1890, and a decree entered adjudging that the machinery was not part of the real estate described in plaintiffs' mortgage, nor subject to the lien thereof; and hence this appeal.

*H. K. Hanna and Francis Fitch*, for appellants. *Hammond & Briggs*, for respondents.

BEAN, J., (after stating the facts as above.) This case comes here on appeal from an order denying a preliminary injunction. The record is in a very unsatisfactory condition. In place of trying the issue between the parties in the original suit to foreclose plaintiffs' mortgage, as it should have been done, it seems it was tried in a proceeding for a preliminary injunction in aid of the original suit. In this proceeding the court, after hearing the evidence, not only denied the writ, but entered a decree determining the question as to whether the property in controversy was subject to the lien of plaintiffs' mortgage, thereby splitting up the original cause of suit,—in the original suit entering a decree foreclosing the mortgage, and ordering the real property sold to satisfy the amount due plaintiff, and in the ancillary proceedings for an injunction determining the question as to whether the machinery was part of such realty, where the entire question should have been put in issue either by the original or an amended complaint, and determined by one decree. A preliminary injunction is only a provisional remedy, the sole object of which is to preserve the subject in controversy in its then condition, and, without determining any question of right, merely to prevent the further perpetration of wrong, or the doing of any

act whereby the right in controversy may be materially injured or endangered. In granting or refusing temporary relief by preliminary injunction, courts of equity should in no manner anticipate the ultimate determination of the question of right involved. They should merely recognize that a sufficient case has or has not been made out to warrant the preservation of the property or rights *in statu quo* until a hearing upon the merits, without expressing a final opinion as to such rights. 1 High, Inj. §§ 4, 5; Hill's Ann. Laws, §§ 408, 411. The granting or refusing such an injunction rests largely within the discretion of the court, and, being merely an interlocutory order, made during the progress of the cause, does not, ordinarily, partake of the nature of a final judgment or decree, to such an extent as to warrant an appeal therefrom. 2 High, Inj. § 1693. But in this case the court not only refused the injunction, but entered a decree settling the rights of the parties, and, in effect, determined the suit, so as to prevent a decree therein, so far as this machinery is concerned; and therefore it must necessarily be an appealable order or decree, under section 535, Hill's Ann. Laws; Smith v. Walker, 57 Mich. 456, 22 N. W. Rep. 267, 24 N. W. Rep. 830, and 26 N. W. Rep. 783; Toledo, A. A. & N. M. Ry. Co. v. Detroit, L. & N. R. Co., 61 Mich. 9, 27 N. W. Rep. 715. From what has already been said it follows that so much of the decree of the court below as adjudges and decrees "that the machinery referred to and described in plaintiffs' complaint for injunction is not a part of the real estate in controversy in this suit, and not included in plaintiffs' mortgage," must be reversed. But since the question seems to have been determined in the court below, on a full hearing of the evidence, which is made a part of the transcript, and both parties expressed a desire on the argument that we should examine the case on its merits, we have concluded to do so.

It is argued for respondents that, under the agreement between the Parke & Lacy Machinery Company and Gilroy & Yule, the machinery in controversy did not become "fixtures," but retained its character as chattels, notwithstanding its annexation to the building in which it was placed, and was therefore not subject to the lien of plaintiff's mortgage. Before discussing this question, it will be well to understand the relationship of the parties to this record. The defendant Rogers, who alone is contesting plaintiffs' claim, is the assignee of the defendant Gilroy, plaintiffs' mortgagor, under the general assignment law of this state. As such assignee, he succeeds only to the rights of his assignor, and is affected by all the equities existing as against him. He takes the property subject to all existing valid liens and charges. He acquires no better title than his assignor, and, in this suit, can make no defense to the mortgage that his assignor could not make. Jacobs v. Ervin, 9 Or. 57; Gammon v. Holman, 11 Or. 284, 3 Pac. Rep. 676; Burrill, Assignm. § 891. The fact that he may have paid the Parke & Lacy Machinery Company with funds belonging

to him, as assignee, the balance due to it from Gilroy & Yule on the purchase price of the machinery, does not change his relationship to the property in any way. It is, in effect, the same as if Gilroy himself had made the payment. He does not acquire title to this property by virtue of the bill of sale from the Parke & Lacy Machinery Company, but by virtue of the deed of assignment from Gilroy. While the agreement between the Parke & Lacy Machinery Company and Gilroy & Yule was, in form, a lease, it was, in effect, a sale, and whatever rights, if any, the company may have had, as against this property, was never asserted by it. It follows, therefore, that if the property in controversy was subject to the lien of plaintiffs' mortgage, as between them and Gilroy, such lien exists as against this defendant. The question, then, as to whether this machinery became a "fixture" as to the Parke & Lacy Machinery Company is immaterial in this case, and we forbear to express any opinion thereon. It has often been remarked that the law of "fixtures" is one of the most uncertain titles in the entire body of jurisprudence. The line between personal property and fixtures is often so close and so nicely drawn that no precise rule has or can be laid down to control in all cases. Each case must depend largely on its own particular facts. The reports and text-books are filled with decisions and discussions of this question, but none of the rules laid down are infallible, or of universal application. We shall not attempt to quote from them, nor enter into any detailed discussion of the question. We could not hope to throw any new light upon the vexed question. The weight of modern authority, keeping in mind the exceptions as to constructive annexation admitted by all the authorities to exist, seems to establish the doctrine that the true criterion of an irremovable fixture consists in the united application of several tests: (1) Real or constructive annexation of the article in question to the realty; (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, and the policy of the law in relation thereto, the structure and mode of the annexation, and the purpose or use for which the annexation has been made. *Henkle v. Dillon*, 15 Or. 610, 17 Pac. Rep. 148; *Ewell, Fixt.* 21; *Teaff v. Hewitt*, 1 Ohio St. 530; *Thomas v. Davis*, 76 Mo. 72; *Clare v. Lambert*, 78 Ky. 224; *Southbridge Sav. Bank v. Stevens Tool Co.*, 130 Mass. 547. Applying these rules to the facts in hand, it is clear that the property in controversy, as between the mortgagor and mortgagee, must be regarded as "fixtures." Its annexation to the realty was sufficiently permanent to enable it to be used for the purposes intended, and was of the character usual with such machinery. It is true the screws and bolts with which it was annexed could have been taken out,

and the machinery removed, without serious damage to it or the building, but so, no doubt, could have been the doors and windows. It was, in its very nature, adapted to the business for which the land was used. The party making the annexation must have intended that it should remain as long as it continued servicable, as the convenience and usefulness of the property would have been seriously impaired by its removal. So much of the decree of the court below as adjudges and decrees that the machinery in controversy is not part of the realty, and not subject to the lien of plaintiffs' mortgage, is therefore reversed.

(20 Or. 538)

ROWLAND v. McCOWN *et al.*

(Supreme Court of Oregon. April 30, 1891.)

EJECTMENT—EVIDENCE—MAP—PAROL EVIDENCE—INSTRUCTIONS.

1. In an action of ejectment, a map or diagram of the premises in controversy, made by a competent surveyor who had surveyed the premises, is competent evidence. It is explanatory of the survey of the premises.

2. A deed which does not refer to a particular survey, that is unambiguous in its terms, cannot be enlarged, changed, or in any manner modified by the introduction of parol evidence tending to prove that one of the parties to it understood its descriptive words to have reference to a particular private survey.

3. It is not error in the trial court to refuse to give instructions which are inapplicable to the case made by the pleadings or to the facts disclosed by the evidence, though correct as abstract propositions of law.

4. In an action of ejectment, it is not error to refuse an instruction asked by the defendant in relation to the statute of limitations, where there is no evidence before the jury tending to prove that the possession of the defendant had been adverse to the true owner for at least 10 years.

(Syllabus by the Court.)

Appeal from circuit court, Marion county; R. P. Boise, Judge.

This is an action of ejectment to recover two small parcels of real estate situate in Marion county, Or., in which it is alleged the plaintiff owns an undivided interest as a tenant in common with certain others who are named in the complaint. The complaint is in the usual form in such case. The answer denies the allegations of the complaint specifically, and then pleads title in the defendant C. W. McCown as to each parcel. The answer further alleges, as a separate defense, that 22 years ago said lands were surveyed by the deputy United States surveyor John W. Meldrum, while acting in his official capacity as such surveyor, and that at the time said survey was made said deputy-surveyor, at the request of the parties then owning said lands, made a survey of various tracts, and among them, at the special instance and request of C. McCown and Josiah Franklin, said John W. Meldrum, as such officer, made an actual survey of the lands in question, and established the center of section 7, township 7 N., range 2 E., at the point claimed and owned by the defendant C. W. McCown; and said lands above described, and the whole thereof, were fenced by the said defendant C. W. McCown when he became the purchaser thereof; and the greater

part of the same has been under fence ever since said time, and has always been claimed and owned by the defendant C. W. McCown, and his grantors, ever since; and in all transfers said center corner of said section, as established by said John W. Meldrum, was and is the legal monument which has been known and used by all parties as the center of said section of said township, and all parties interested have conformed thereto without question up to the time of the commencement of this action. Then follows a separate defense of the statute of limitations. The reply denies the new matter in the answer. Both parties claim to deraign title from one Labam Maulding. The plaintiff's deeds from Maulding are dated April and May, 1887, and convey the land by legal subdivisions, being "the N. E. qr. of the N. W. qr., and the S. E. qr. of the N. W. qr., and the N.  $\frac{1}{4}$  of the N. E. qr., of section 7, T. 7 S., R. 2 east, of Willamette meridian, and in Marion county, state of Oregon." The defendant claims under a deed from Maulding dated February, 1884, in which the land conveyed is described as follows. "Commencing in the center of section 7, township 7 S., R. 2 east, W. M., county of Marion, state of Oregon, running thence east 240 rods, north 80 rods, thence west 240 rods, thence south 80 rods, to the place of beginning, containing 120 acres." Other facts appear in the opinion.

*Ronham, Holmes & Hayden*, for appellants. *S. T. Richardson and Tillmon Ford*, for respondent.

STRAHAN, C. J., (after stating the facts as above.) The points argued on the appeal will be noticed in the order in which they were presented.

1. A map of section 7, drawn by two surveyors and testified to by them to be correct, was used upon the trial before the jury without objection; but before the plaintiff closed his case this map was offered in evidence and allowed by the court, to which an exception was taken. Counsel for appellant argue in their brief: "A diagram or a map would be a continual or constant witness always in the presence of the jury. It is the testimony of the witnesses that is the evidence, and that alone. You cannot manufacture evidence by giving a diagram or picture of anything. It can be referred to only for the purpose of demonstration." This reasoning is not supported by authority. On the contrary, the rule constantly observed in practice in this state as well as the one more in consonance with reason is the other way. It was held in *Hoey v. Furman*, 1 Pa. St. 295, that the draft of a survey proved to be correct is admissible in evidence, as explanatory of what the surveyor testified he had done in making the survey. The following cases authorize the introduction of maps and diagrams in evidence: *Stouter v. Railway Co.*, 6 N. Y. Supp. 163; *Goodwin v. McCabe*, 75 Cal. 584, 17 Pac. Rep. 705; *Tillotson v. Prichard*, 60 Vt. 94, 14 Atl. Rep. 302; *Armendauz v. Stillman*, (Tex.) 3 S. W. Rep. 678; *Archer v. Railroad Co.*, (N. Y.) 13 N. E. Rep. 318; *Brown v. Tile Co.*, (Ill.) 24 N. E. Rep. 522.

In the two following cases, photographs of the *locus in quo* were admitted in evidence: *Dyson v. Railroad Co.*, 57 Conn. 9, 17 Atl. Rep. 137; *Archer v. Railroad Co.*, (N. Y.) 13 N. E. Rep. 318.

2. The next error assigned is the refusal of the court to give instructions numbered 1, 2, and 3, asked by the appellant. The first instruction refused is as follows: "In this case there is some testimony tending to show that, something over 22 years ago, Mr. Meldrum, at the instance of interested parties, run a line, and established what he represented to be the center of section 7, township 7 S., range 2 E., which is the section in which the land in controversy is situated. There is some testimony tending to show that when the defendant purchased his land, part of which is the subject of this controversy, from Mr. Maulding, he purchased with reference to the said center as established by Meldrum, making that the initial point intended by his deed. I instruct you if you find from the evidence that said Maulding sold said land to the defendant with reference to said line as run by Meldrum to the terminus of the same in the center of the section, and put him in possession of the said land so sold, and allotted to him by measurement, then the plaintiff cannot recover." There is not a syllable in Maulding's deed in reference to the Meldrum survey. On the contrary, the initial point mentioned in the deed is the center of the section without reference to Meldrum's survey. If appellant's contention were to be sustained, the effect would be to introduce additional words in the descriptive part of the deed by parol evidence, which would necessarily give it a different effect from what the language actually used could have, and different from what the maker says he intended. This would clearly be inadmissible where there is no mistake or imperfection in the deed alleged in the pleadings. A question was suggested on the argument whether or not there is enough shown in the evidence to bring the case within the principle of the *dictum* in *Spaur v. McBee*, 19 Or. 76, 23 Pac. Rep. 818; but a careful examination of the pleadings and evidence satisfies us that question is not presented. If the defendant had relied upon an equitable title created by a mistake in the description in his deed, since the amendment of the statute referred to in *Spaur v. McBee*, supra, we must have allowed that defense to have prevailed if the jury, under proper instructions, had been of the opinion that it was made out by the evidence. But that is not the defense relied upon here. The appellant's line of defense is that he has a legal title which can be made to appear by proving the Meldrum survey, and then supplementing that by parol evidence that the deed was executed with reference to that survey. Under the view we take of this case, the court did not err in refusing to give this instruction.

3. The second instruction, which was refused by the court, is as follows: "Under the law applicable to cases of this kind, a grantee cannot be put in a better condition than his grantor was at the time of executing the grant, and, if Maulding sold

the land in controversy by warranty deed to the defendant, and put defendant in possession of the same, and described it by metes and bounds in the deeds, then and thereafter Maulding had nothing in said land to convey, and the plaintiff took nothing by operation of any deed which he received from Maulding purporting to convey the same lands which he had subsequently [previously?] deeded to the defendant; and I leave it to you to say whether, as a matter of fact, Maulding did deed by prior conveyance the land in controversy to the defendant." This instruction was inapplicable to the case made by the defendant's pleadings; besides, it is not universally true. A grantee who takes under a warranty deed and for a valuable consideration, without notice of any latent defect in his title, or of any outstanding equity, or of some fraud of his grantor, is always in a better position than his grantor. In such case he takes the estate discharged of the equity with which it was incumbered in the hands of his grantor. Whether the plaintiff stood in such relation to the property we cannot inquire, because the question is not before us; and for that reason the instruction was inapplicable, and was properly refused.

4. The third instruction which was asked by counsel, and refused by the court, is as follows: "I instruct you that if the lands in controversy were intended to be conveyed and were conveyed by said Maulding to the defendant by a prior conveyance, and you find from the testimony that the defendant and Maulding, who was his grantor, was in the peaceable occupation of the particular premises in controversy for a period of ten years or more prior to the commencement of this suit, then the plaintiff is barred by the statute of limitations, and you should return a verdict in favor of the defendant." There is much confusion in this instruction. By the first part of it the appellant apparently wished to submit to the jury the legal effect of Maulding's deed. If the lands in controversy were conveyed by Maulding by prior conveyance, the plaintiff could not recover, without any regard whatever to the statute of limitations. On the other hand, if the defendant thought that his possession was protected by the statute of limitations, it was his right to ask the court to define to the jury what would constitute adverse possession, and how long it must continue to bar an entry. Again, if the appellant's defense rested on his deed, he had the right, and it would have been the duty of the court to have declared its legal effect, and the jury would have been bound by that declaration. The instruction under consideration did neither, and we think was properly refused. It is proper to add that it was properly refused for another reason. The defendant's possession was only seven years, and he was not in privity with any other person who had held adversely to the true owner for the other requisite three years to complete the statutory bar. If, therefore, the instruction under consideration had stated a correct proposition of law in a proper case, it was inapplicable to the facts of

this case. These conclusions are reached with the less hesitancy for the reason that it seems to be tacitly conceded that, if the calls in defendant's deed are followed, he is without title to the land in controversy. On the other hand, if he has an equitable title, the result of this litigation will not bar it. Let the judgment appealed from be affirmed.

*SPEAKE et al. v. HAMILTON et al.*

(*Supreme Court of Oregon. May 21, 1890.*)

WATER-RIGHTS — APPROPRIATION ON THE PUBLIC LANDS.

A person has the right to go upon the public lands of the United States, and to appropriate the waters to the purposes of mining, milling, agriculture, or any other lawful purpose, and priority of appropriation gives priority of right, and the rights of the riparian owners, when they attach, are subject to the rights thus acquired.

(*Syllabus by the Court.*)

Appeal from circuit court, Baker county; JAMES A. FEE, Judge.

The complaint alleges that in the year 1877 the plaintiffs, and a grantor of the plaintiffs, Mary H. Speake, appropriated 60 inches of the waters of Fox creek for mining, mechanical, and agricultural purposes; that said appropriation was prior in time and right to all other appropriations, except to 15 inches owned by the defendants Hamilton; that in the same year they dug a ditch of sufficient capacity to take and carry away said waters to the lands of the plaintiffs, and used the same for mining and agricultural purposes; and that the plaintiffs and their grantors have used said water ever since said date; that Mary H. Speake is the owner of five-eighths of said ditch and water, and that William H. Speake is the owner of three-eighths of said ditch and water. The answer denies all the allegations of the complaint, and then sets forth that the defendants W. B. and A. N. Hamilton are joint owners in certain farming lands in Baker county, Or., through which said Fox creek flows, in a well-defined channel, for about one-half mile; that said lands will produce no crops without irrigation; that the water of Fox creek is the only water supply to be had on said premises for either domestic or irrigating purposes; that the defendants Hamilton have growing on their said lands about 3,000 fruit-trees, and 100 acres of said lands are under cultivation; that they and their grantors, for 18 years last past, have been riparian owners of the stream, and have used the waters of Fox creek each year during all that time; that, in the year 1875, the ditch claimed by the plaintiffs was dug to carry the waters from Fox creek to certain placer mines on Hibbard creek, known as the "Hibbard Creek" or "Speake and Campbell" diggings, and said ditch was to take the surplus waters of Fox creek only; that said waters were taken by the plaintiffs and their predecessors in interest, by and with the consent of defendants' grantors, for mining purposes only, and that when said mine was worked out all the waters of said creek were to come back to the channel of said creek, and that, at all times when the wa-



ters of said creek were not used at the mine, they were to flow in the channel of said creek; that said mines have long since been worked out, and that all said water ought to flow in the channel of said creek; that, shortly prior to the acts of trespass complained of by plaintiffs, said plaintiffs had obtained permission of the defendants to use, for irrigating, a part of the waters of the creek through the old mining ditch, and that, under cover and guise of such permission, plaintiffs took all the water of the creek, and totally deprived the defendants thereof, leaving their crops and domestic animals to suffer. The defendants Hamilton then allege that they and the other defendants, their employes, went up to the point where the plaintiffs were wrongfully diverting the water, and turned it back into the channel of the stream, and that, at the time they so restored the water by the plaintiffs so wrongfully diverted, there were only about 20 inches all told in the creek, and that he needed it all for his use at his farm, and that said acts last named are the trespass complained of, and not otherwise. The reply denies the new matter in the answer. The court found that the plaintiffs were entitled to one-half the water in said creek, and the defendants Hamilton were entitled to the other one-half thereof, and entered a decree accordingly, from which decree the defendants Hamilton appeal.

*M. L. Olmsted*, for appellants. *J. J. Balleray*, for respondents.

*STRAHAN, C. J.*, (after stating the facts as above.) For all the purposes of this case, it may be assumed, and I think the facts sufficiently appear from the record, that the land on Fox creek, in the year 1877, was all public lands of the United States; that Fox creek was a small stream, carrying not more than 120 inches of water upon an average; that some of the predecessors in interest of the appellants had diverted about 20 inches of water from said stream prior to 1877, and that the appellants have succeeded to whatever interest the said original appropriators had therein; that, about the year 1877, the plaintiffs or their grantors appropriated 60 inches of water from said stream, which was first used for mining purposes, and afterwards for the purposes of irrigation, for agricultural purposes, and for other purposes; that, for the purposes of appropriating and utilizing said 60 inches of water, the plaintiffs or their predecessors in interest dug a ditch of sufficient capacity to carry said water so appropriated to the plaintiffs' land, and that the grantors of the plaintiffs and plaintiffs have used said water without interruption, except the acts complained of herein, continuously since that time. I think it also sufficiently appears that, at the time of the alleged interruption of the use of said water by the defendants, there were only about 20 inches of water flowing in said stream, all of which was, by the plaintiffs' dam, diverted into their said ditch; and that what the defendants did was to cut a trench around said dam of sufficient

depth to allow all of said water then in said stream to flow back into and down the channel thereof. It also appears that, after said water-rights accrued, one of said plaintiffs and one of the defendants acquired homesteads under the laws of the United States, on the respective places where they now reside, and that they have, respectively, perfected their titles thereto; and that the defendants' claim lies on both sides of said Fox creek, at a point below where the plaintiffs' ditch diverts said water. The defendants claim a right by appropriation, and also as riparian owners. They also claim that the plaintiffs can have no right to said water, unless it be by some special usage or custom, which must be pleaded and proven.

1. It is useless to discuss, at this day, the origin of the doctrine which prevails in all the Pacific states and territories in relation to the appropriation of water on the public lands of the United States for mining, milling, agricultural, and other lawful purposes. Its appropriation was first made for mining purposes, and was, step by step, extended until appropriations were made for any lawful uses to which the water might be applied. Vast properties were thus developed and grew up under this system until the courts were compelled to recognize and protect the rights thus acquired. It was claimed that the United States, by acquiescence, had given an implied license to make such appropriations, and, recognizing the justice of this claim, congress passed the act of July 26, 1866. By that act it was provided: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and respected in the same; and the right of way for the construction of ditches and canals, for the purposes herein specified, is acknowledged and confirmed." Rev. St. U. S. § 2339. And by act of July 9, 1870, congress further provided: "All patents granted, or pre-emptions or homesteads allowed, shall be subjected to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section." Rev. St. U. S. § 2340. In 1874 the case of *Atchison v. Peterson*, 20 Wall. 507, came before the supreme court of the United States. It involved the right to appropriate water for mining purposes, and the court declared that, "by custom which had obtained among miners in the Pacific states and territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the govern-

ment, as the source of title in all controversies relating to the property." And in *Basey v. Gallagher*, Id. 670, the right to appropriate water for the purposes of irrigation was upheld. In the head-note to that case it is said: "In the Pacific states and territories, a right to the running waters on the public lands of the United States, for the purposes of irrigation, may be acquired by prior appropriation, as against parties not having the title of the government. The right, exercised within reasonable limits, having reference to the condition of the country and the necessities of the community, is entitled to protection." And Mr. Justice FIELD, speaking for the court, said: "No distinction is made in those states and territories by the custom of miners and settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one." A long array of authorities might be cited, from all the Pacific states and territories, but these from the highest court in the land must suffice. But it is said by the appellant that this right has its foundation in some particular usage or custom which ought to be pleaded and proven. No doubt it had its origin in usage or custom among miners, but that usage has grown to be a part of the public history of the states and territories where it prevails, and is of such universal application that the courts must take notice of it, and they do that by recognizing and protecting the right. This I understand to be one of the ways in which this customary law may be shown. On this very point it is said in *Basey v. Gallagher*, supra: "It is very evident that congress intended, although the language used is not happy, to recognize as valid the customary law, with respect to the use of water, which had grown up among the occupants of the public lands under the peculiar necessities of their condition, and that law may be shown by evidence of the local customs, or by the legislation of the state or territory, or the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right of priority." These rights have been constantly recognized in the courts of this state, whenever they have been assailed or questioned. The principle upon which these rights depend was fully approved and sanctioned by this court in *Kaler v. Campbell*, 13 Or. 596, 11 Pac. Rep. 301. The complaint admits that the appellants are entitled to 15 inches before the plaintiffs are entitled to take any water from said stream, and that the appellants, and those under whom they claim, acquired this right by appropriation prior in time to the plaintiffs'. The decree will be framed in accordance with this admission. The plaintiffs are next entitled to 60 inches of water to be taken out of said stream, and conveyed to their premises by means of the ditch mentioned in the complaint, and the appellants, their agents and servants, will be enjoined perpetually from interfering with the plaintiffs in the use of said water; and that the appellants' predecessors in interest had appropriated the residue of said water,

to whose rights the appellants have succeeded. Of course, what is here said only applies to the facts disclosed by this record and the parties before the court, and could in no wise affect the rights of persons not parties to this suit. The plaintiffs obstructed the appellants in the use of the 15 inches of water to which they admit defendants had a prior right, and in that particular they were not without fault. It further appears that the rights of the parties had become seriously complicated, and perhaps could only be definitely ascertained and declared by means of a suit. Under all the circumstances, therefore, we have concluded that each party to this suit ought to pay one-half of all the costs thereof. The decree of the court below will be modified in accordance with this opinion.

Decree affirmed, upon rehearing, May, 1891.

### HOME MUT. INS. CO. v. OREGON RY. & NAV. CO.

(*Supreme Court of Oregon*. April 30, 1891.)

#### FIRE INSURANCE—SUBROGATION OF INSURER—ACTION—PARTIES.

Where property is insured for less than its value, and is destroyed by the negligence of a third party, the insurance companies who have paid the owner the insurance money must, in an action to recover damages for the destruction of the property, be joined with the owner, or if he refuses to join he must be made a party defendant, under the provision of the Oregon Code that an action shall be brought in the name of the real party.

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

The complaint states in substance that on the 30th day of April, 1888, the plaintiff had executed to one J. H. Koontz three insurance policies for the aggregate amount of \$20,000 on his mill and its contents at Echo, Or.; that on that date the said mill and its contents were totally destroyed by fire caused by the negligence of the defendant; that on May 22, 1888, and June 1, 1888, upon proof of loss, the plaintiff paid said Koontz the amount of said policies in full; and that the value of said property so destroyed was the sum of \$39,361.72. Judgment is asked for the full sum of \$19,888.14 and interest, and for costs and disbursements. The defendant, after denying the material facts as alleged, set up as a defense, in substance, that on the 21st day of December, 1888, the said Koontz commenced his action against defendant in the circuit court for Umatilla county for the recovery of the sum of \$39,361.72 as damages for the destruction of said mill and its contents, and that subsequently a verdict was rendered therein by the jury in favor of said Koontz for the sum of \$17,500, which was affirmed on appeal to the supreme court, and that the defendant thereafter in that action paid the said Koontz the amount so found as damages for the destruction of said property, and that by reason thereof the said Koontz was fully compensated for the total amount of the injury to him caused by the defendant, and that said Koontz holds said money in trust for the use and

benefit of the plaintiff, etc. And the defendant set up as a further defense that, prior to the commencement of the action of said Koontz against the defendant herein, the plaintiff herein, the Home Mutual Fire Insurance Company, had full knowledge of the circumstances of the destruction of said property, and that an action was about to be commenced by the said Koontz against said railroad company to recover damages for such loss, and was notified by said Koontz and his attorneys of such fact, and was requested by them to prosecute, or join with him in prosecuting, the action against the said company; that the said insurance company neglected and refused to prosecute either severally or jointly with said Koontz, and disclaimed all interest therein, and permitted said action to be prosecuted alone by said Koontz against said railroad company. The defendants in the present action allege that at the time of the commencement of said action, and until after the trial thereof as aforesaid, neither of the defendants had any knowledge that the property alleged to have been destroyed was insured in the plaintiff company, or that said Koontz had received any sum whatever on account of said loss; that after the judgment was recovered, and while said action was pending upon appeal, the defendants for the first time became aware of the fact that the property was insured in said company, and immediately notified the insurance company of the recovery of the judgment in favor of Koontz, and requested it to take such steps as it might deem necessary to protect any interest or claim upon the proceeds of the judgment which it might have; that the insurance company, upon the receipt of such notice, disclaimed any right, title, or interest in the said judgment in favor of Koontz, or the proceeds thereof, and declined to take any steps, legally or otherwise; that by reason of the failure of the insurance company to unite with the said Koontz in the prosecution of said action, and failure to disclose their interest and to take any steps to prevent the collection of said judgment, whereby Koontz was permitted to receive the entire proceeds of said judgment, the insurance company was guilty of a fraud upon the rights of the defendant, and is estopped from prosecuting this action. To these last two defenses, the plaintiff demurred that they were insufficient to constitute a defense, which being overruled by the trial court, the appeal is taken from the judgment rendered therein.

*John M. Gearin*, for appellant. *W. W. Cotton* and *Zera Snow*, for respondent.

**LORD, J.**, (*after stating the facts as above*.) The question presented by the contention for the plaintiff is that, if a loss under a policy of fire insurance is caused by the wrongful act of a third person, the insurer, upon making payment to the insured *pro tanto*, is subrogated to the rights and remedies of the insured and may maintain against the wrong-doer an action in his own name, and need not prosecute it in the name of the insured. This action is brought by the plaintiff in its

own right upon the assumption that the effect of the insurance was to create in the plaintiff a pecuniary interest in the property insured, and that when it was destroyed by the wrongful act of the defendants, whereby it became liable and was required to pay for the loss to the extent of the insurance to the insured, it became entitled to a legal remedy against the defendants in its own independent right to the extent which it was compelled to pay for such loss occasioned by the defendant's wrongful act. This involves an inquiry into the nature of the rights which the insurer acquires upon the payment of the insurance for a loss caused by the wrongful act of a third person.

The right of the insurance company that has paid a loss to recover of the wrong-doer after payment of such loss rests upon the doctrine of subrogation, in its application to insurance companies. "Every day," said Lord MANSFIELD, "the insurer is put in the place of the insured." *Mason v. Sainsbury*, 3 Doug. 63. Subrogation is purely an equitable result. It is the creation of equity, is not dependent on contract, and is enforced for the purpose of attaining the ends of justice. It grows out of the relation which the parties sustain to each other; the party subrogated acquires no other or greater rights than those of the party for whom he is substituted. As the contract of insurance is one of indemnity, when a loss occurs by the negligent or wrongful act of a third party, and the insurer pays the insured, he is entitled upon equitable principles to be subrogated to the rights of the insured against the wrong-doer. Hence the general rule that when property which has been insured is lost or destroyed by the negligent or willful act of another an action accrues in favor of the insured, and if the insurer pays the loss he is subrogated to the rights of the insured as against the wrong-doer, with all his rights as well as his remedies.

"Where the property insured," says Mr. Wood, "is destroyed by the negligence of a third person, so that the assured has a remedy against him therefore, the insurer by payment of the loss becomes subrogated to the rights of the assured to the extent of the sum paid under the policy. The assured becomes trustee for the insurer, and by necessary implication the payment of the loss operates as an equitable assignment to the insurer to the extent of the sum paid under the policy." *Wood, Ins.* § 499. The owner and insurer, in respect to the ownership of the property and the risk incident thereto, are considered but one person, having together the beneficial right to an indemnity against the wrong-doer whose negligent act occasioned the loss or destruction of the property. The liability of such wrong-doer to the owner is first and principal, and that of the insurer secondary; not in order of time, but of ultimate liability. *Hart v. Railroad Corp.*, 13 Metc. (Mass.) 99; *Hall v. Railroad Cos.*, 13 Wall. 370. The insurer standing in no relation of contract or privity with those who are responsible for the loss, his rights arise out of his contract of indemnity, and are derived from the assured

alone, and can only be enforced in the right of the latter. "In any form of remedy," says Mr. Justice GRAY, "the insurer can take nothing by subrogation but the rights of the assured." *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 321, 8 Sup. Ct. Rep. 750, 1176. The reason for the doctrine that the insurer must enforce his rights in the name of the owner against the wrong-doer, or party first liable as principal, TENNEY, J., said, was "wholly inconsistent with the principle that the insurer can in his own name recover for money paid on the contract of insurance in an action against the wrong-doer, for, the insurer and assured being in effect one person, each cannot maintain an action at the same time and for the same loss where there can be but one satisfaction." *Insurance Co. v. Bosher*, 39 Me. 256. "It has long been settled," said DYER, J., "both in England and in this country, that such a cause of action is single and indivisible, and that in a caselike the present the insurer could not at common law sue the wrong-doer in his own name to recover the amount paid the assured, but must bring this action in the name of the assured." *First Presbyterian Soc. v. Goodrich Transp. Co.*, 7 Fed. Rep. 258. Where the insurance company has paid the owner for the destruction of his property by fire occasioned by the fault of a railroad company, and afterwards the owner receives the amount from the company in satisfaction of his damages, he holds it in trust for the insurance company, and it may recover it from him by a suit in equity. So, too, if the railroad company has not paid the owner his damages for the loss, or has paid it to him, knowing that he had received the amount of the insurance from the insurance company, the railroad company is liable to the insurance company in an action at law, which it has a right to bring in the name of the owner, without his consent, to repay it the damages to the amount of the sum paid by it, and that a release from the owner would be no defense to such an action. *Monmouth, etc., Ins. Co. v. Hutchinson, etc., Transp. Co.*, 21 N. J. Eq. 108. The subrogation of the insurer to the remedies of the insured for the destruction of the insured property upon the payment of the loss operates as an equitable assignment to the insurer to the extent of the amount paid. "It is in the nature," said SHAW, C. J., "of an equitable assignment, which authorizes the assignee to sue in the name of the assignor for his own benefit." *Hart v. Railroad Corp.*, supra.

It results, then, that the right, resting on the doctrine of subrogation and not depending upon contract or privity, must be worked out through the right of the insured or the owner of the property destroyed; that the remedy must be prosecuted in his name, unless the Code of Procedure, which permits an action to be brought in the name of the real party, has changed this rule. The case of *Connecticut Fire Ins. Co. v. Erie Ry. Co.*, 73 N. Y. 399, is relied upon to support this position. But in that case the owner had fully settled his claim against the railroad company,

but the contract showed that the amount of the policy was deducted from the amount of the loss in the settlement, so that the insurance company was the only remaining party in interest. The action being under the Code of that state, which requires the action to be brought in the name of the real party in interest, by this settlement, the owner having no interest, it was held that the insurance company might properly bring the action. In *Ætna Ins. Co. v. Hannibal, etc., Ry. Co.*, 8 Dill. 1, it was held by DILLON, J., that, in a case where the property destroyed exceeded in value the amount insured, the rule of law had long been settled that the insurance company, on the payment of the loss, cannot sue the wrong-doer in his own name, saying: "The suit, though for the use of the insurer, must be in the name of the person whose property was destroyed. The wrongful act was single and indivisible, and gave rise to but one liability. If one insurer may sue, then, if there are a dozen, each may sue, and, if the aggregate amount of all the policies falls short of the actual loss, the owner could sue for the balance. This is not permitted, and so it was held nearly a hundred years ago." And again: "But it is insisted that the provision of the Missouri statute that every action shall be prosecuted in the name of the real party in interest, though it declares that the provision shall not authorize the assignment of a thing in action not arising out of contract, changes the rule. However it might be if the amount paid by the insurer to the assured had equalled or exceeded the value of the property, and the assured had made a full assignment, it is plain that this case falls within the reasons of the rule itself as expounded by BULLER and MANSFIELD in the Case in Douglas, above cited, and which is the foundation of the law on this subject." In *Marine Ins. Co. v. St. Louis, etc., Ry. Co.*, 41 Fed. Rep. 644, it was held, under the Arkansas statute providing that "every action must be prosecuted in the name of the real party in interest," that an insurance company which has paid the insured the full value of the property destroyed may maintain an action in his own name against the wrong-doer causing the loss. CALDWELL, J. said: "Under the reformed Codes of Procedure, the action of the insurance company, in cases of this sort, may be brought in the name of the insurer, [citing *Swarthout v. Railway Co.*, 49 Wis. 625, 6 N. W. Rep. 314; *Connecticut Fire Ins. Co. v. Erie Ry. Co.*, 73 N. Y. 405.] But, as it is alleged in the complaint that the plaintiff has paid the insured the full value of the property destroyed, it is plain that the latter have no interest in the present controversy, and hence they are not necessary parties." The opinion is, however, expressed in that case, if the value of the property destroyed exceeds the insurance money paid, that the insurer might join or be joined with the owner in the action to recover for its loss, and would not be required, as held by Judge DILLON, supra, in such case, to prosecute the action in the name of the insured. A like view was sustained in *Crandall v. Transportation*

Co., 16 Fed. Rep. 75, where DYER, J., held that in an action to recover the value of a building destroyed by a fire caused by the alleged negligence of the defendant, the owner of the building and an insurance company that has paid the amount of the insurance of such building, and taken an assignment of the claim from the owner to that extent, may join as parties to the action when the value of the house exceeds the amount for which it was insured. In *Swarthout v. Railway Co.*, several insurance companies united with Swarthout, to whom they had paid the amount of their policies for property destroyed by the negligence of the defendant, in an action to recover for the value of such property. The defendant demurred on the ground that the plaintiffs could not sue in one action, but each must sue separately. The demurrer was overruled, and the correctness of this ruling was the subject of the controversy. The court say: "It is said, if the defendant is liable at all, it is separately and distinctly liable to each insurance company to the amount paid on its policy. But it seems to us that it would be an intolerable rule to allow each insurance company to bring a separate suit. The railroad company might well say, were this attempted: 'The claim is indivisible. There is but one wrongful act complained of, one loss, and one liability.' It might well insist that the whole matter should be litigated in one action. And what objection there can be to allowing the owner to unite with the insurance companies in bringing one action to determine the liability of the defendant, we fail to perceive. Under the old practice the action would probably have been brought in the name of the assured for the benefit of all concerned; but the Code requires the action to be brought in the name of the real party in interest. Now, it appears that Swarthout has made an assignment in writing to each insurance company of a part of his claim against the railroad company for the alleged wrongful destruction of his property. It is obvious, if one of the insurance companies may bring a separate suit for the amount of its claim, each may; and, as the aggregate amount of the policies falls short of the actual loss, Swarthout may sue for the balance. As we have said, a rule of law which would allow this to be done would operate most oppressively upon the railroad companies. For a single wrongful act, which gave rise to but one liability, it might be harassed with a dozen different actions." In a later case, (*Pratt v. Radford*, 52 Wis. 118, 8 N. W. Rep. 606,) the court, after citing the section of their statute which provides that "every action must be prosecuted in the name of the real party in interest," and the further section, that, "of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants, but, if the consent of any one who should be joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint," say: "Under the statutes above cited the insurance companies could maintain an action against such

wrong-doer in their own names, or be joined with the insured as plaintiff in such action. \* \* \* Where the common law procedure prevails, the action of the insurance companies would necessarily be brought in the name of the insured. It could be so brought without his consent, and he would have no control over it. But under our Code of Procedure the companies would sue in their own names, joining the insured as plaintiff or making him defendant, according to the exigencies of the case."

It would appear, then, from these last cases, that where the property is insured for less than its value, and is destroyed by the negligence of a third party, the insurance companies, who have paid the owner the insurance money, must be joined with him in an action to recover damages for the destruction of such property, and that, upon a refusal of such parties to join as plaintiffs, they must be made defendants. The action, though, would be brought in their own name, joining the insured as plaintiff or making him defendant, accordingly as he stood related to the facts. From all this the conclusion results that, where the wrongful act is single and indivisible, there can be but one liability or cause of action. Since the Code, the cause of action remains as before, single and indivisible; and the insurer acquires only a right or interest with the owner of the property in the cause of action or liability, and not a new and separate cause of action. He cannot, therefore, sue in his own name alone, in any case, under the Code, except where the amount paid by him has exceeded or equaled the value of the property destroyed, and no interest remains in the owner. When the amount of the insurance money paid is less than the value of the property destroyed by the negligent act, all the authorities agree that the insurer must either sue in the name of the insured or join with him in bringing an action against the wrong-doer. None allow that in such case he can sue in his own name alone, for the reason, that the wrongful act is single and indivisible, and gives rise to but one liability or cause of action. In that cause of action he acquires a joint right with the owner therein, and not a new and separate right of action, and therefore must prosecute it jointly with him. They have a joint interest in a single liability, and, united, are the real parties in interest. Now, the facts disclosed by this record concede that the property destroyed by the wrongful act of the defendant greatly exceeded in value the amount of the insurance money paid by the plaintiff. To the extent of that payment the plaintiff became subrogated to the right of the owner in the property, but the cause of action remained single and indivisible, and the plaintiff acquired only a joint right with the owner therein, and not a new and independent right of action, and could not, therefore, prosecute the action in his own and separate right. Yet this is exactly what the plaintiff has done, and claims it has a right to do. If this were so, it would establish an intolerable rule, and expose

the defendant to be harassed by a dozen different actions, which it seems to us would be contrary to legal principles, and be productive of mischief and oppression. The judgment must be affirmed.

(21 Or. 35)

**BOWICK et al. v. MILLER.**

(*Supreme Court of Oregon. May 14, 1891.*)

**RECORD OF PRIVATE CORPORATION — SECONDARY EVIDENCE—JUDGMENT.**

1. Before a party can give secondary evidence of the contents of the records of a private corporation, he must show that he cannot produce the original in a reasonable time, and with reasonable diligence.

2. The existence of a judgment or execution cannot be proven by parol, but only in the manner provided in section 730, Hill's Code.

(*Syllabus by the Court.*)

Appeal from circuit court, Baker county; JAMES A. FEE, Judge.

M. L. Olmsted, for appellants. W. B. Gilbert, for respondent.

**BEAN, J.** Action to recover possession of personal property, both parties claiming title. In November, 1889, the property in controversy belonged to the Eastern Oregon Gold Mining Company, an English corporation operating mines in Baker county. The plaintiff J. R. Bowick, being the general manager of the company, undertook to sell the property to his co-plaintiff, T. G. Bowick, and one Parsons, who were directors of the company, and he now claims to have succeeded by purchase to Parsons' interest in the property. In order to prove the authority of J. R. Bowick to make the sale to his brother and Parsons, plaintiffs, on the trial, offered in evidence what purported to be a copy of the record of the meeting of the directors of the mining company held at the Monumental mine on July 25, 1889, appointing him general manager, with power to buy and sell supplies and machinery at his own discretion. No attempt was made to account for the original record, except that the books of the company and secretary's office were in London; but whether the record of the meeting of the directors held at the mine in July, 1889, when Bowick was appointed general manager, and authorized to sell the property of the company, was at the London office, does not appear. By section 691, Hill's Code, it is provided that "there shall be no evidence of the contents of a writing, other than the writing itself, except in the following cases: \* \* \* When the original cannot be produced by the party by whom the evidence is offered in a reasonable time, with proper diligence, and its absence is not owing to his neglect or default." The record before us does not disclose that any effort whatever was made to procure the original record, and until the diligence required by law is shown, secondary evidence of its contents is not admissible. The fact, if it is a fact, that the original may be in the possession of a person without the jurisdiction of the court, does not excuse a reasonable effort by the party by whom the evidence is offered to procure the original. *Wiseman v. Railroad Co.*, 26 Pac. Rep. 272, (March,

1891, not officially reported.) The next assignment of error is that the defendant was permitted to prove by parol, under plaintiffs' objection, the judgment and execution under which he claims title. It needs no authority or argument to show that such testimony was clearly incompetent, and should not have been admitted. The defendant was claiming title as a purchaser at a sheriff's sale, under an execution issued on a judgment by him recovered against the mining company. The existence of such judgment or execution could not be proven by parol, but only in the manner prescribed in section 730, Hill's Code. Reversed, and new trial ordered, costs to abide the final result.

(21 Or. 17)

**BARRETT v. FURNISH, Sheriff, et al.**

(*Supreme Court of Oregon. May 11, 1891.*)

**JUDGMENT LIEN—DEATH OF THE PARTY—ISSUANCE OF EXECUTION.**

1. Section 269, Hill's Code, makes a judgment, rendered and docketed as therein provided, a lien upon all the real property of the defendant within the county or counties where the same is docketed, or which he may afterwards acquire therein during the time an execution might issue thereon, and such lien is not affected or displaced by the death of the party.

2. When a partnership creditor has, by proceedings at law, acquired a judgment, execution, or other lien upon the separate property of one of the partners, or has taken any proceedings whereby, at law, he has secured the right to appropriate such separate estate to the satisfaction of an obligation incurred by the partnership, equity will not, at the instance of any individual creditor of such individual partner, wrest such right from the partnership creditor, nor compel him to postpone his proceedings until the individual creditors of the partner whose separate estate has been levied upon have first received satisfaction therefrom.

3. Under section 281, Hill's Code, an execution may issue on a judgment rendered against a party in his life-time, notwithstanding his death at any time after six months from the granting of letters testamentary or of administration, and be levied on any real property of the defendant upon which such judgment was a lien.

(*Syllabus by the Court.*)

Appeal from circuit court, Umatilla county; M. D. CLIFFORD, Judge.

The object of this suit is to enjoin the sale of certain real property upon execution owned by John P. Miller in his life-time. It is alleged that the judgment upon which said execution issued was rendered in the circuit court in favor of one William Noyes and against said John P. Miller, now deceased, and A. B. Robley, formerly partners under the firm name of Miller & Robley, and that said judgment was for a partnership debt; that the plaintiff is administrator of said Miller's estate, and has the same in his possession for the purposes of administration. It is further alleged that said Miller died seised of the real property levied upon, and also owned certain individual property of the value of \$1,400, and owed individual debts to the amount of \$1,400, and also that he owned an undivided half of all the property of Miller & Robley; that at the time of Miller's death the firm of Miller & Robley were indebted in about the sum of \$7,000, and that said A. B. Robley was then and is now the owner in fee

of certain real estate in Umatilla county; that said partnership estate is in the hands of the administrator of the partnership, and in course of administration, and is not yet fully administered; that none of the individual debts of Miller have been paid, for the reason that all of the personal estate of said Miller is involved in litigation, and the plaintiff is unable to say when the same will be determined, or whether in favor of or against said estate; that the plaintiff does not know what the costs and expenses of the administration of said individual estate will be, nor whether there will be anything left after paying the individual debts, and the costs and expenses of administration, to apply in payment of the partnership debts; that Ida Miller is the widow of said John P. Miller, and one-third part in value of all said real estate has been set apart to her as her dower by the county court; that Noyes' judgment is a first lien upon the real estate of said A. B. Robley; that, after satisfying all the individual debts of said Miller out of his estate, if any then remain, the balance will be applied to the partnership debts, and then a large part of the partnership debts will remain unpaid; that the individual property of said Robley is much less in value than that of said Miller, and that Robley's real estate, upon which Noyes' judgment is a first lien, is about of the value of \$1,000, and that Miller's individual estate is of about the value of \$4,000, one-third of which represents the dower of Ida Miller; that Noyes' judgment has never been presented to plaintiff as administrator for approval or rejection. The levy on the property by the sheriff is then alleged, and that the same has been advertised for sale. Various other matters not material to this statement are also alleged. The defendants demurred to the complaint, which being sustained, and final decree entered dismissing the suit, the plaintiff has appealed.

*W. F. Butcher*, for appellant. *J. J. Bal-leray*, for respondents.

*STRAHAN, C. J., (after stating the facts as above.)* Several questions were presented on the argument by appellant's counsel, but we will only notice such as we deem material to a proper disposition of this appeal. In *Bower v. Holladay*, 18 Or. 491, 22 Pac. Rep. 553, this court considered, to some extent, the various sections of the Code in relation to the enforcement of a judgment after the death of the defendant, which was rendered during his life-time, by execution, and the conclusion was reached that the judgment creditor had the right to his execution, at any time after the expiration of six months from the granting of letters testamentary or of administration. Whether the several sections in the Code in relation to the presentment and payment of claims by an executor or administrator, and the order of payment, in any way affect or modify section 281, Hill's Code, which expressly authorizes the issuance of an execution in such case, though somewhat considered, was not decided; nor, in the view we take of this case, is it necessary to be decided

here, for the reason that the property levied on is real estate, upon which the judgment became a lien at the time it was docketed, under section 269, Hill's Code. And when such lien attaches it cannot be displaced or affected by the death of the party. The rights of the parties have become fixed by the law, and by the entry and docketing of a judgment pursuant to its provisions, and the accidental circumstances that one of the parties dies before satisfaction of the judgment in no manner impairs or affects the party's rights acquired under it, except to defer its enforcement by the execution for six months after the granting of letters testamentary or of administration. It was insisted by appellant's counsel that the judgment in this case was against Miller and Robley as partners for a partnership debt, and that, therefore, an execution could not be levied upon the individual property of one of the partners until the individual debts of such partner were first paid; but this contention could not prevail without displacing the lien acquired by the docketing of the judgment, under section 269, *supra*. And this seems to be the effect of the authorities. In a note to *McCulloh v. Dashiell's Adm'r*, 18 Amer. Dec. 271, the learned annotator observes: "But we apprehend that a levy and sale under a writ, against the members of a copartnership, of the separate property of either member, will pass a title paramount in law to any which can be acquired under a subsequent levy upon the same property, under a writ to enforce the separate and individual debt of the partner to whom the property belonged as his separate estate; and, further, that when a partnership creditor has, by proceedings at law, acquired a judgment, execution, or other lien upon the separate property of one of the partners, or has taken any proceeding whereby at law he has secured the right to appropriate such separate estate to the satisfaction of an obligation incurred by the partnership, equity will not, at the instance of any individual creditor of such individual partner, wrest such right from the partnership creditor, nor compel him to postpone his proceedings until the individual creditors of the partner whose separate estate has been levied upon have first received satisfaction therefrom." And this proposition is supported by a large number of authorities cited at page 283. No doubt cases may arise presenting such persuasive equities that chancery would interfere for the purpose of controlling or preventing an unconscionable use of an execution; but this case is entirely destitute of such equities, and is wholly wanting in any facts or circumstances authorizing or requiring the interposition of equity. It is the ordinary case of a waiting and indulgent creditor, who, having acquired a prior lien upon all the real property of each of the defendants, is now seeking satisfaction by a levy upon the real property of one only of such defendants. No reason has been shown why he may not pursue this remedy. Of course, if the entire claim is collected from Miller's property, his administrator will have a claim for



contribution which he may enforce against Robley. This view of the subject disposes of every question necessary to be considered on this appeal, and requires an affirmation of the decree appealed from.

(21 Or. 21)

**CARROLL v. GILHAM et al.**

(Supreme Court of Oregon. May 14, 1891.)

**VENDOR'S LIEN—BONA FIDE PURCHASER.**

Facts examined, and held, that defendant is a *bona fide* purchaser of the property in controversy, for value, without notice of the latent equity set up by the plaintiff, and that the defendant took said property freed from such equity.

(Syllabus by the Court.)

Appeal from circuit court, Union county; M. D. CLIFFORD, Judge.

This is a suit to enforce a grantor's lien on real property for the purchase money. One Stansell, in his life-time, sold the real property in controversy to the defendant J. G. Berry, which was about June 17, 1881. Afterwards said Stansell died intestate, in Union county, Or., and the plaintiff was appointed his administrator. At the time of the sale of said land to Berry, he executed his promissory note to said Stansell for \$700, due on the 1st day of October, 1882, to secure the purchase money. The defendant demurred to the complaint, which being overruled, Berry refused to answer further. The defendant Gilham filed his separate answer denying the material allegations of the complaint, and then, for a separate defense, pleaded that he was a *bona fide* purchaser of said premises for value, and without notice of the alleged lien. This part of the answer concisely stated all the facts necessary to protect the interest of defendant as a *bona fide* purchaser in said premises. He also pleaded the statute of limitations. The cause was referred by the court below, and, the findings of the referee being in favor of the defendant, the same was confirmed by the court, and a final decree entered dismissing the suit, from which the plaintiff has appealed.

J. W. Shelton, for appellant. R. Earlin, for respondents

STRAHAN, C. J., (after stating the facts as above.) We do not deem it necessary in this case to say anything in relation to the grantor's lien, or whether the defense of the statute of limitation was waived by pleading over. The sole question necessary for us to determine arises upon the separate answer of the defendant Gilham. That answer brings defendant within the principles of law defining a *bona fide* purchase, for value, without notice, heretofore stated and recognized in several cases in this court, (Wood v. Rayburn, 18 Or. 3, 22 Pac. Rep. 521; Weber v. Rothchild, 15 Or. 385, 15 Pac. Rep. 650; Hyland v. Hyland, 19 Or. 51, 23 Pac. Rep. 811;) and the only question under these authorities is one of fact. We have carefully looked into the evidence, and think the defendant has fully and satisfactorily sustained his plea. The evidence shows that Berry was in possession of the premises at the time he sold to the defendant under a warranty

deed from Stansell; that he sold the same to Gilham, and gave a warranty deed therefor, and that defendant entered into possession thereunder, and paid the consideration agreed upon, which was \$1,200; that at no time before or pending any of said negotiations or proceedings did the defendant have any notice of the fact that Berry had not paid the purchase price of said land. Under these facts, we have no hesitancy in saying Gilham is a *bona fide* purchaser, and is entitled to be protected. We have assumed, without deciding, that the grantor's lien exists in this state, but as to that the members of the court are not agreed; but the decision of the question is not necessary in this case, for the reason that, conceding its existence, the plaintiff could not prevail against Gilham, who holds the legal title freed from such latent equity. Let the decree appealed from be affirmed.

(21 Or. 24)

**BASCHE v. PRINGLE et al.**

(Supreme Court of Oregon. May 14, 1891.)

**APPEALABLE ORDER — DENYING MOTION TO DISSOLVE INJUNCTION.**

An appeal will not lie from an order overruling a motion to dissolve a preliminary injunction and to vacate an order appointing a receiver, in a suit for the dissolution of a partnership and for an accounting.

(Syllabus by the Court.)

Appeal from circuit court, Baker county; JAMES A. FEE, Judge.

Williams & Smith, for appellants. M. L. Olmsted, for respondent.

BEAN, J. On February 10, 1891, plaintiff commenced a suit for the dissolution of a copartnership existing between him and defendants, and for an accounting. On the filing of the complaint the court ordered a preliminary injunction to issue, enjoining and restraining defendants from in any manner interfering with the property or assets of the copartnership, and appointing a receiver thereof. After answering the complaint, the defendants moved on the pleadings, and certain affidavits filed, before the judge of said court at chambers, for the dissolution of the injunction, and the vacation of the order appointing a receiver, which being denied, defendants appeal to this court. "An order or judgment from which an appeal will lie must be one affecting a substantial right, and which, in effect, determines the action or suit, so as to prevent a judgment or decree therein. It is one which concludes the parties as regards the subject-matter in controversy in the tribunal pronouncing it. It must be one which not only affects a substantial right, but which, in effect, determines the action." Hill, Code, § 535; State v. Brown, 5 Or. 119. The order from which this appeal is taken is not such final judgment. The object and purpose of the preliminary injunction and the appointment of the receiver was only to preserve the property pending the final determination of the suit. It did not in any manner determine, or attempt to determine, the rights of the parties, nor does it in any way preclude a final decree

upon the hearing on the merits. It follows, therefore, that the appeal must be dismissed.

# WEBSTER V. WEBSTER.

(*Supreme Court of Washington*. June 8, 1891.)

## DIVORCE—DISPOSITION OF PROPERTY.

Under Code Wash. § 2007, providing that, "in granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the merits of the parties, their condition after divorce, and to the party through whom the property was acquired," the court has power to dispose of the separate, as well as the joint, property of husband and wife.

Appeal from superior court, King county.

*Richard Osborn and Thompson, Edsen & Humphries*, for appellant. *Jacobs & Jenner and Ronald & Piles*, for appellee.

DUNBAR, J. The main question to be decided in this case involves the construction of section 2007 of the Code of Washington, which is as follows "Sec. 2007. In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage." This statute was passed in 1863, prior to the passage of the community property law, and has ever since been the law of the territory, and of the state. It is contended by appellant that this must be construed to mean that the court shall make such division of the joint property of the parties as shall appear just and equitable, and that the separate property of either spouse is not to be considered in making such disposition. We are unable to see how this construction can be sustained by any rule for the interpretation of statutes. The language of the statute seems to be plain and unambiguous, and the words must be given their ordinary meaning. The statute does not say that the court shall make such disposition "of their joint property," etc., but shall make such disposition "of the property of the parties." This language is comprehensive; it is an equitable division of the property rights of the parties that the court is authorized to make. One statute defines what separate property is, another what community property is, and who shall have control of separate property, and who of real property, both separate and community; but these statutes relate to property rights during coverture. This statute, however, provides that when coverture is to be broken, and the marriage relations dissolved, that the parties shall bring into court all their property, and a complete showing must be made. Each party must lay down before the chancellor all that they have, and, after an examination into the whole

case, he makes an equitable division. This view is strengthened, and it seems to me established beyond controversy by the succeeding provision of the section, "having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired." If the court has no jurisdiction over the separate property, and cannot take it into account in making the division, that portion of the statute which says it shall have regard to the party through whom the property was acquired is meaningless. The law does not require an equal division of the property, but a "just and equitable" division, and as no general rule for a just and equitable division can be laid down, but each case must be adjusted according to its own merits and the particular circumstances surrounding it, the court investigates all of the circumstances—*First*, as to who is to blame, or, if neither party is blameless, the degree of blame to be attached to the respective parties; *second*, who is the more proper party for the custody of the minor children, if any; *third*, if there is a disposition of the property to be made, the manner in which it was acquired, whether derived principally from the husband, or the wife, or by their joint exertions, the condition of the parties as to age and health, and a great many considerations which will necessarily enter into the discretion of the court in making the division. The separate property of the husband or wife is simply a circumstance for the court to take into consideration in making the division. This subject is now regulated very largely by statute, and there is great similarity in the statutes, all of them investing the court with large discretionary powers. In Iowa, under a statute substantially like ours, which provides that, "when a divorce is decreed, the court may make such order in respect to the children and property of the parties, and the maintenance of the wife, as shall be right and proper," it is held that, when a divorce is in favor of the wife, a part of the husband's lands may be set off to her to be held by her in fee-simple. *Jolly v. Jolly*, 1 Iowa, 9. In Kentucky and Alabama, the courts have refused to divide the separate property of either spouse; but, in the statutes of each of those states which give the court substantially the same discretion that ours does, there is a special provision or saving clause, to the effect that "nothing herein contained shall be construed to authorize the court to compel either party to divest himself or herself of the title to real estate." This very provision is, at least, a legislative recognition that without it the court would have power to divest the title; and even these courts, in the exercise of their discretion, award the use of the separate estate of one spouse to the other for life. In Alabama the wording of the statute is: "The court pronouncing a decree shall order and decree a division of the estate of the parties in such a way as to it shall seem just and right, having due regard to the rights of each party, and their children, if any;" with the pro-

vision quoted above. And the supreme court, in construing this statute in *Lovett v. Lovett*, 11 Ala. 763, says that the estate of the parties was the estate held by either husband or wife, or by them jointly.

We are clearly of the opinion that section 2007 of the Code confers upon the court the power, in its discretion, to make a division of the separate property of the wife or husband. With this view of the law of the case, and seeing no abuse of discretion by the court in its findings or conclusions, we are of the opinion that the judgment should be affirmed. The point raised by the appellant, in regard to the refusal of the court to discharge the receiver after the appeal in this case had been taken, we think is not properly before us, and we have therefore not considered it. Judgment of the lower court is affirmed.

ANDERS, C. J., and SCOTT, HOYT, and STILES, JJ., concur.

#### KILROY v. MITCHELL.

(*Supreme Court of Washington*. June 2, 1891.)  
EQUITY—TRIAL BY COURT—FINDINGS—MECHANIC'S LIENS.

1. While findings of fact and law are necessary in an action at law tried by the court without a jury, they are not essential to the validity of a judgment in a suit in equity.

2. A suit to foreclose a mechanic's lien is equitable in its nature, and is not transformed into an action at law by defendants interposing a legal defense by way of counter-claim.

Appeal from superior court, Pierce county.

Suit by D. A. Mitchell against J. B. Kilroy to foreclose a mechanic's lien. There was judgment for plaintiff and defendant appeals.

*Judson, Sharpstein & Sullivan*, for appellant. *G. W. Van Fossen and Parker & Williamson*, for appellee.

HOYT, J. The sole ground upon which it is sought to reverse the judgment entered in this cause in the court below is that there were no findings of fact and law to support the same. That such findings are necessary in actions at law, when tried by the court without a jury, is clear from our statute, and has become the established law of this state. See *Bard v. Kleeb*, 25 Pac. Rep. 467, (decided at the last session of this court.) We think, however, that such findings, although orderly and proper in cases in equity, are not essential to the validity of the judgment. Judgments at law are founded upon general or special verdicts of juries, or findings of the court which take the place thereof. Without such verdicts or findings, there is nothing to support the judgment. Cases in equity stand upon a different basis. The decrees therein, while founded upon facts the same as in cases at law, are placed upon a broader basis than any technical determination of what has been proven by the testimony; such judgments really stand upon the entire evidence in the cause. It will thus be seen that the reasons for holding findings essential in a law case do not obtain in a

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cause in equity. Besides, on review in this court, a judgment at law will usually stand or fall upon the verdict or findings, without any reference to the evidence as a whole; while in equity it is the duty of this court to retry the cause, not upon verdicts or findings, but upon the testimony introduced in the court below. Section 451 of the Code of Washington is reasonable and proper, if held to apply only to suits in equity, and we think should be thus construed. Appellant, seeing the force of the reasoning above suggested, sought to show that this action, though commenced as a suit in equity, was, by the action of the defendant in setting up a legal defense by way of counter-claim transformed into a suit at law. We do not think that this view of the case is warranted. A court of equity, having once obtained jurisdiction of a cause, will retain it until final determination thereof. See *Loan Co. v. Wentworth*, 25 Pac. Rep. 298, (decided at last October session.) It follows that findings of fact and law were not necessary to the jurisdiction of the court in rendering judgment in this cause, and that the judgment of the court below must be affirmed.

ANDERS, C. J., and DUNBAR, SCOTT, and STILES, JJ., concur.

#### STATE ex rel. ROHDE v. SACHS, Judge.

(*Supreme Court of Washington*. May 21, 1891.)

CONTEMPT—PUNISHMENT—MANDAMUS.

Where the trial court has fined an attorney for contempt in using disrespectful language, it has no authority to further order that he shall purge himself of the contempt by apologizing; and *mandamus* will lie to compel the vacation of an order denying him the right to practice until he does so apologize, the fine having been duly paid.

Application for writ of *mandamus*.

*R. A. Ballinger*, for relator. *John Trumbull*, for defendant.

HOYT, J. By his demurrer to the alternative writ issued herein the respondent admits the entry of an order, as follows: "On this 28th day of March, A. D. 1891, in open court, while the Hon. MORRIS B. SACHS, a judge of the superior court of the state of Washington, was engaged as such judge in deciding a motion pending in the case of *Nickelsburg v. Stencil et al.*, then pending in the superior court of Jefferson county, Wash., over which the said MORRIS B. SACHS was then presiding as judge thereof, one William J. Rohde, an attorney of record of said court, and an attorney for the defendants in said cause, interrupted the said judge in said proceedings, and, while said judge was deciding said motion, addressed said judge, and spoke in a disorderly, contemptuous, and insolent manner, the following words: 'I wish the court would not talk to me.' And whereas, the said William J. Rohde in said matter was guilty of disorderly, contemptuous, and insolent behavior towards the said judge, while holding said court, which said behavior of said William J. Rohde tended to impair the authority of said court, and of said judge

thereof, and to interrupt in an unbecoming, disorderly, contemptuous, and insolent manner the due course of the said proceedings before said court: Now, therefore, it is ordered by the said court that said William J. Rohde be and he is hereby, by reason of the aforesaid behavior, declared guilty of contempt of said court, and that he pay a fine of twenty dollars, and that he stand committed to the custody of the sheriff of Jefferson county, Wash., until the same is paid; and that it is further ordered that said William J. Rohde purge himself of said contempt." That, upon the entry thereof, the relator, the said William J. Rohde, fully paid the fine therein imposed. That afterwards the said William J. Rohde, in behalf of a certain client, appeared in said court, and asked to be heard as to the matter therein pending. Whereupon the judge thereof refused to allow said Rohde so to be heard therein, and caused to be entered on the records of the said court the further order, as follows, to-wit: "This court having on the 28th day of March, A. D. 1891, duly entered of record, and which said order adjudged and decreed, that the said William J. Rohde, an attorney of record in this court, was guilty of contempt of court, and adjudged that said William J. Rohde be fined the sum of twenty dollars, and is ordered to purge himself of such contempt; and whereas, afterwards, to-wit, on the said 28th day of March, A. D. 1891, the said William J. Rohde paid to the clerk of this — the fine assessed against him in said matter, and has neglected, failed, and refused to comply with the said order of said court, and failed, neglected, and refused to purge himself of said contempt, by apologizing for his said disrespectful conduct: Now, on this 21st day of April, A. D. 1891, the said William J. Rohde appeared in open court, before the judge thereof, and the judge thereof, to-wit, MORRIS B. SACHS, thereupon called the attention of said William J. Rohde to the order of this court so as aforesaid made and entered on the 28th day of March, A. D. 1891, and further called the attention of said William J. Rohde to the fact that he had so failed, neglected, and refused to comply with said order; and thereupon the said William J. Rohde, still failing, neglecting, and refusing to comply with said order: Wherefore it is ordered, adjudged, and decreed that said William J. Rohde has violated his official oath of office as an attorney at law, and has failed to maintain the respect due to this court, and the judicial officer thereof; and it is ordered, adjudged, and decreed that the said William J. Rohde is and will not be permitted to appear as an attorney or counselor before this court until he does comply with said order, and until the further order of this court."

The question presented is as to the validity of said orders, and the regularity of the action of the court in said matter. The contention of the respondent is that, although the latter part of the first order above set out, and all of the second order, may be irregular, and the action of the court in entering the same may be ground

of reversal on appeal, yet as the court had jurisdiction of the subject-matter, and of the person of the relator, there can be no relief against such orders by *mandamus*. This contention is doubtless correct, if the orders entered were such as, under any state of facts connected with the proceedings, the law would authorize. We think however, that the latter part of the said first order, if it required anything at all more than the payment of the fine mentioned in said order, required something which the court had no right, under any circumstances, to order, and that this portion of said order was therefore not only voidable, but absolutely void, and that for that reason there was absolutely no foundation for any of the proceedings which led to the entry of the second order, and that the said second order was therefore absolutely void as an entirety. This being so, we think this court could properly intervene, and by its writ of *mandamus* require said court to vacate and set aside said last-named order, especially where, as in this case, the effect of said order was to deprive the relator of his right to appear in said court as an attorney thereof. His right so to appear was property, and could not be taken from him excepting by due process of law, and this court can intervene by this writ to prevent such deprivation. It follows that the peremptory writ of *mandamus*, commanding substantially the same as the alternative writ, must issue, and it is so ordered.

ANDERS, C. J., and STILES, DUNBAR, and SCOTT, JJ., concur.

#### NORTHERN PAC. R. CO. v. HESS *et al.*

(*Supreme Court of Washington. May 29, 1891.*)

#### CARRIERS—ACCIDENTS TO PASSENGERS—NEGLIGENCE—PLEADING.

1. In an action by a passenger against a railroad company for injury received by the falling of a berth while she was away from her seat and standing by the stove, it is not necessary for her to allege and prove necessity for her absence from her seat, contributory negligence being a matter of defense.

2. The accident happened on a car on which it was understood that the passengers should look after their own berths, and were accordingly charged a low rate of fare. Soon after the accident, plaintiff wrote the company that she was injured by the carelessness of one of its employes. Shortly afterwards, in a letter to the company, she said that it was a newsboy who pushed the berth up. On the trial she testified that she thought it was a brakeman. *Held*, that there was sufficient evidence that the injury resulted by reason of the negligence of an agent of the company to sustain a verdict for plaintiff. ANDERS, C. J., and STILES, J., dissenting.

3. An allegation of the complaint that plaintiff had been compelled to expend a certain amount for medical treatment and nursing was sufficient without pleading it as a distinct cause of action.

Appeal from superior court, Lincoln county.

*Mitchell, Ashton & Chapman* and *N. T. Caton*, for appellant. *Blevins & Neal*, for appellees.

SCOTT, J. Appellee was a passenger from St. Paul to Sprague on one of appellant's cars, which was one of a class

known as "free emigrant cars;" and during the passage she was injured by the falling of an upper berth while away from her seat, and standing by the stove. Just before she left her seat at that particular time, some person passed through the car and raised the upper berth nearest to the stove, but did not push it up far enough so that the fastenings caught or locked. The berth might remain in such a position temporarily, but would be in constant danger of falling. The fastenings of such berths were so arranged as to be further secured by locking with a padlock. As to whether it was customary to keep them so locked when raised, was not shown, but this one was not locked in this way at the time. The conductor testified, however, that if the berth had been pushed up high enough for the fastening to catch it could not have fallen. Appellee testified that she left her seat and went to the stove, and that while standing there the train started, giving a quick jerk; that she put out her hand and caught hold of the post by one of the berths, when the upper berth came down and caught two of her fingers and crushed them; that the injury caused her a great deal of pain, and one of the fingers was in danger of remaining permanently stiff; and that she thought her medicine and nurse bill would amount to \$200. On cross-examination she testified that she thought it was a brakeman who pushed up the berth. The testimony of the physician who treated her was introduced. He said that her forefinger might remain permanently stiffened as an effect of the injury.

Appellant contends that appellee had no right to leave her seat unless there was a necessity for so doing, and that such necessity should have been pleaded in her complaint and supported by proof, and that without such an allegation any proof thereof was inadmissible. Appellee testified that she went to the stove for the purpose of getting warm. This testimony was objected to by appellant upon the ground aforesaid, that there was no allegation thereof in the complaint, which objection was overruled. This point was subsequently again raised by a request to charge, submitted by appellant, that "the seats constructed in the cars used in the operation and running of trains by defendant railroad company are constructed for the convenience of passengers, and by such passengers to be occupied while the train is moving, and not to be left or deserted while the train is in motion except where a necessity therefor arises; and if an injury occurred to any passenger after having left his or her seat which would not have occurred had such passenger remained in his or her seat the railroad company would not be liable except when a necessity arose for leaving the seat, which necessity should have been pleaded and sustained by evidence." This instruction was refused by the court, and rightfully so. Of course, if the plaintiff's proof had shown that she was guilty of any negligent act which contributed to the injury, she could not recover unless the defendant, with knowledge of the situation,

could by reasonable care and diligence have prevented the accident. Her leaving her seat as she did, according to her testimony, was not negligence upon her part, under the circumstances, and she was not bound to show in making her case that she was not guilty of contributory negligence. This was a matter for the defense to establish, if it was relied upon, and consequently there was no necessity for an allegation in the complaint of the kind contended for, and the proof of the plaintiff as to why she left her seat was incidental and immaterial. As to the burden of proof being upon the defense to show contributory negligence, see *Hocum v. Weitherick*, 22 Minn. 152; *Railroad Co. v. Hoehl*, 12 Bush, 41; *Railroad Co. v. Gladmon*, 15 Wall. 401; *Railway Co. v. Pointer*, 14 Kan. 37. We are aware that there is a conflict of authority upon this point, but deem the above rule the better one, after an examination of many authorities thereon *pro* and *con* submitted to us.

Appellant further contends that the following instruction given to the jury is erroneous, to wit: "You are instructed that if you find from the evidence that the bunk in question was so arranged that it might be raised up, and when so raised would so remain temporarily without being fully locked, and when so raised was in a dangerous condition, and was so at the time plaintiff was injured, and the injury was caused thereby, you may from this find negligence upon the part of defendant,"—because it does not contain the further requirement that the berth must have been so raised by an employee of the company, or by the direction of one of its agents or employees, in order to make it liable, unless by due care and diligence it could have known of its unsafe situation had it been raised by another party. Standing alone, this instruction may be faulty in the particular claimed, but from the whole charge we do not think that the court intended to eliminate that condition from the elements of liability, or that the jury could have so understood it, for the court elsewhere in its instructions expressly told the jury that the mere occurrence of the accident did not raise a presumption of negligence on the part of the railroad company; that it must appear that the injury was the result of negligence on the part of the defendant, its agents or employees; and that if the berth, the falling of which caused the injury, was loosened or negligently pushed up by some person not in the employ of the company that it would not be liable,—and said further that the defendant was bound to exercise the highest degree of care and skill to preserve the safety of the passenger.

Taken as a whole, these instructions were as favorable to the defendant as it could ask, and there was no error therein that it could complain of, either as to the point above mentioned, or as to the degree of care required. It is a fundamental principle of the law pertaining to passenger carriers that those thus engaged are under an obligation, arising out of the nature of their employment, and on grounds of public policy, to provide for the safety of passengers whom they have

assumed for hire to carry from one place to another. Public policy and safety require that they be held to the greatest care and diligence in order that the personal safety of passengers be not left to chance or the negligence of careless agents; that, although the carrier does not warrant the safety of passengers against all events, yet his undertaking and liability as to them go to the extent that he, or his agents where he acts by agents, shall, so far as human care and foresight can go, transport them safely, and observe the utmost caution characteristic of careful, prudent men; that he is responsible for injuries received by passengers in the course of transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, and this caution and vigilance must necessarily be extended to all agencies or means employed by the carrier in the transportation of passengers.

It was claimed that no one was appointed to look after cars of this class, and for this reason a less rate of fare was charged upon them than upon other passenger cars; that this fact was generally known, and was understood by plaintiff at the time she bought her ticket; and that she selected this class of cars from choice by reason of the cheapness of the fare. But this would not excuse the company from liability for any negligence imputable to it, and it was a part of its duty to use due care to see that the berths were properly secured, and that the passengers therein were reasonably protected from injury. It was further contended by the company that it would not be liable unless the injury in question resulted from the carelessness or negligence of one of its agents or servants in raising the berth, and that the proof showed that it was raised by a newsboy; that, although the appellee testified upon cross-examination that she thought it was a brakeman who raised it, she also testified that she would have known better soon after the accident occurred as to who did it than she would at the later time of the trial. Certain exhibits were offered in evidence by the defendant below, being letters written by appellee to the superintendent of the company, in one of which she stated she was injured by the carelessness of one of the company's employees, which was written a short time after the injury. A few days later she wrote another letter, stating therein that it was a newsboy who pushed up the berth. Appellant contends that this testimony showed clearly that it was a newsboy who raised the berth, and that there was no evidence that it was raised by an employee of the company, and consequently the company would not be liable, there being no evidence to sustain the claim that the injury resulted by reason of the neglect of an agent of the company. We think, however, that there was sufficient evidence in this particular to sustain the verdict. The jury might have believed the testimony of the plaintiff where in she stated that it was a brakeman who raised the berth. No proof was introduced as to the duties of a newsboy or brakeman in this particular. The plaintiff

did state in one of her letters to the superintendent of the company that the act was performed by an employee of the company, and a few days later she stated that it was a newsboy who raised the berth. This, also, was some evidence that it was an employee of the company who performed the act.

It was claimed in the argument of the cause here that the damages allowed were excessive; that the injury could not have been serious, as the appellee was able to write with the injured hand soon after the accident. But this point was waived in consequence of its not being saved or raised in appellant's brief. There was no proof, however, as to which hand was injured, or that she used the injured hand in writing the letters aforesaid.

It was further argued that the evidence of the amount incurred for medical treatment and nursing was inadmissible under the pleading; that it was in the nature of special damage, and should have been specially pleaded. Appellant moved to strike this testimony, but the record does not show that any ground was stated for the motion. The court denied it. The evidence was admissible, as the complaint did contain an allegation that the plaintiff had been compelled to expend \$150 for medical treatment and nursing. It was not necessary that it should have been separately pleaded as a distinct cause of action, but, unless an amendment was asked and permitted, the amount of the recovery therefor should have been limited to the sum claimed in the complaint. But the appellant did not ask to have this done, either by a ruling of the court at the time, or by requesting an instruction to that effect to the jury; and no point over it, of which this court can take notice, was raised. The charge does seem to have been exorbitant, and no special circumstances appear to account for it; but the matter was not inquired into upon cross-examination, nor was the amount claimed to have been incurred disputed or questioned in any way except by the motion, as stated, nor do we know what the jury in fact allowed therefor. None of the points claimed by appellant are well taken, and the judgment is affirmed.

HORT and DUNBAR, JJ., concur.

STILES, J., (*dissenting*.) The car in which the plaintiff was injured was one of a peculiar, cheap class, run for the accommodation of persons who did not wish to pay the usual first-class passenger rates; and it was understood that passengers traveling in it were to serve themselves, at least so far as taking care of the sleeping berths provided were concerned. It was not the duty of any railroad employee either to raise, lower, or secure the berths. Therefore the fact that the berth in question fell, carries with it no presumption that any agent of the company was the cause of its falling, in the absence of any showing that its construction was faulty. Therefore I dissent from the opinion of the majority of the court in this case, because it seems to me that, considering the instructions of the lower court as on the

whole harmonious, and therefore not objectionable in those parts wherein he instructed the jury as to the facts necessary to constitute negligence towards the defendant, the jury by their findings seem to have entirely disregarded the charge, and to have rendered a verdict not justified under its instructions. The testimony was not brought up to this court, but the evidence is here in the form of a narrative statement of facts. This statement shows very clearly that the plaintiff below, shortly after the accident to her, wrote a letter to an agent of the railroad company, and complained that she had been injured by the negligence of one of the company's employees. The agent to whom she wrote immediately requested further particulars. Whereupon she replied, stating the manner of her injury, and that it was a newsboy who had raised the berth, and left it either not fastened at all, or insufficiently fastened. Upon the trial she did not state with any degree of positiveness, or to the best of her knowledge and belief, that it was a brakeman who so insufficiently raised the berth, but simply that she thought so; and, upon her attention being called to the letter she had written in which she stated that it was a newsboy, she admitted having written the letter, and stated that her recollection as to who it was that raised the berth would probably have been better when she wrote the letter than at the time she was testifying. This, it seems to me, left the matter substantially as though the plaintiff had not testified at all on the subject. When she wrote the letter, she had no definite knowledge, and she stated nothing which could have warranted the jury in supposing that she had been better informed since; and therefore her testimony as to the person whose act indirectly caused the accident was entirely worthless. In such case, under the charge of the court, it was for the plaintiff to make out with reasonable certainty, by a preponderance of the evidence, that it was an agent of the company whose negligent act caused her injury. This she failed to do, and I think the court should have set aside the verdict upon that ground. This court in its opinion says that the jury might have believed the testimony of the plaintiff wherein she stated it was a brakeman who raised the berth. If she had stated that, perhaps the jury might have been warranted in doing so, but she did not so state. She simply stated she thought so, which, in the presence of her earlier—and, as she admitted, better—statement, carried no force with it. The jury had no right to disregard her admittedly better statement, and base their verdict upon the inferior one. The court charged the jury over and over again that if the berth, the falling of which caused the injury complained of, was loosened or negligently pushed up by some person not an employe of the defendant, and over whom the defendant had no authority or control, then in that case the plaintiff had failed to establish her allegation; and it also charged that a news agent was not an employe of the railroad company, or a passenger thereof,

and that if it appeared from the evidence that the berth was pushed up by a news agent at his own motion, or at the request of some person not in the employ of the defendant, then their verdict should be for defendant. When a jury thus disregards the law as given to it by the court, the latter should instantly set its verdict aside.

ANDERS, C. J., concurring.

(2 Wash. St. 376)

NORTHERN PAC. R. CO. v. HAAS et ux.

(Supreme Court of Washington. May 23, 1891.)

EMINENT DOMAIN—STATUTES—REPEAL.

Though the charter of the city of Spokane Falls (Sess. Laws Wash. 1885-86, p. 304, § 11) adopts expressly the provisions of Code Wash. §§ 2478-2476, which allow actions for damages to abutting property from building railroads in streets to be recovered before a justice of the peace, the charter is to this extent repealed by Act Wash. Feb. 1, 1888, which provides a remedy by proceedings in the district court, and declares it exclusive of all others.

Appeal from district court, Spokane county.

*Mitchell, Ashton & Chapman and Griffiths, Moore & Feighan*, for appellants.  
*William A. Taaffe and Thomas B. Higgins*, for appellees.

SCOTT, J. This proceeding was commenced in July, 1890, by petition under sections 2473 to 2476, inclusive, of the Code of 1881, before a justice of the peace of Spokane county by the appellees, who were residents of the city of Spokane Falls, to obtain damages from appellant for its appropriating a certain street, or a portion thereof, in said city, for the purpose of laying its railroad track thereon, said street adjoining certain land within said city, of appellees', which was claimed to have been damaged thereby. Section 11 of the charter of Spokane Falls, to be found at page 304 of the Session Laws of 1885-86, empowered the city to authorize the locating of railroad tracks upon its streets, and contained a provision that any person or corporation laying down such railway should be liable, to the owners of property abutting on such street, for all damages or injury caused thereby, to be ascertained on petition of the property owner or owners in the manner provided by the sections of the Code aforesaid. An act of the legislature approved February 1, 1888, (see Sess. Laws 1887-88, p. 58,) provided a general and complete method of ascertaining and obtaining damages in consequence of the appropriation of land or other property by corporations for railway or other purposes, and required the proceeding therefor to be instituted in the district court of the district wherein the land was situated, or before the judge thereof, and purported to make the same exclusive of all other remedies, but did not refer expressly to the special provisions of said or any other city's charter. Appellant appeared before the justice of the peace, and objected to his jurisdiction in



the premises, claiming that the proceedings must be had in accordance with the provisions of the latter act, which objection was overruled. Appellees contend that the sections of the Code aforesaid were, in effect, adopted in the city charter by the reference thereto in the provision of section 11, and, inasmuch as the last act did not expressly refer to said provision, that the same, and said Code sections, are still in force as to such matters arising in said city, and cite several authorities bearing more or less upon the proposition, and supporting their contention. As a rule, it will not be held that a special act is repealed by implication by a general one upon the same subject. The intention of the legislature, however, in enacting the several laws, is what is to be arrived at, and, if it sufficiently appears that it was intended that a subsequent general law should supersede all prior legislation upon the same subject, general or special, though not expressly so stated, effect should be given to such purpose. It was at first, and for quite a long time, customary, in our territorial legislation, to grant special charters to different cities with widely varying provisions, both in respect to each other and to the general laws of the state. Later, such a course, as is usually the case, was found to be unsatisfactory, and there was a tendency to enact general laws to supplant such special provisions, which were becoming recognized as contrary to public policy. This general sentiment has subsequently found further expression by the limitation in our state constitution preventing the legislature from granting corporate powers or privileges by special acts, and prohibiting special legislation in many other instances. The said sections of the Code, while in force, prescribed the general law of the state upon that subject. The legislature, by referring to them in the provision of section 11 of the charter of the city of Spokane Falls, showed an intention to provide the same particular remedy for residents of that city as existed there and elsewhere in the state in cases where land was taken for railway purposes, being the remedy provided by the Code upon the same general subject. The later general law in force when this proceeding was instituted provided a remedy in all cases for the taking of land, or injuriously affecting it, for such purposes. Under it, proceedings could have been commenced before the district court or its judge for lands so taken or damaged within the limits of said city. There is no reason why the additional remedy should exist in said city of proceeding before a justice of the peace according to the sections of the Code formerly generally in force. It is contrary to public policy that the special law should continue, the general law affording a complete remedy; and, in view of all the circumstances, we must hold that the act of 1887-88 was intended to supplant or repeal the special provision relating to the remedy or procedure in such cases, and that the justice of the peace had no jurisdiction in the premises. As to the effect of general acts upon special ones,

see 1 Dill. Mun. Corp. § 87. *Encl. Interp. St. § 230.* and authorities there cited.

Judgment reversed.

ANDERS, C. J., and DUNBAR, HOYT, and STILES, JJ., concur.

GERLACH V. TURNER. (No. 13,222.)

(*Supreme Court of California.* June 10, 1891.)

PRESUMPTION OF MARRIAGE—PHYSICIANS—EMPLOYMENT BY HUSBAND TO ATTEND WIFE.

1. In an action against a husband for medical treatment of his wife, it appeared that the parties had been formally married and cohabited until they learned that a divorce from a former wife was invalid, whereupon they discontinued cohabitation, but still acknowledged each other as husband and wife. The evidence as to the invalidity of the divorce, and that the first wife was living, was elicited by defendant on cross-examination, and was hearsay. *Held* not sufficient to rebut the presumption of marriage, although no objection to the evidence was made.

2. A physician called by a man to attend a woman, supposed to be his wife, can recover for his services from the person summoning him, although the parties are not in fact legally married.

3. One who calls a physician to attend a person whom he represents to be his wife is estopped to deny that fact in an action for services rendered on the faith of such representation.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

A. P. *Needles*, for appellant. A. N. *Drown*, for respondent.

BEATTY, C. J. This is an action to recover \$850 for medical services alleged to have been rendered at the special instance and request of the defendant in attending his wife, or reputed wife, Mary J. Turner, during her last illness. In a former action against the administrator of Mary J. Turner for the value of the same services, the plaintiff was defeated by proof of her marriage to this defendant, and of an employment by him; from which it followed that he, and not her estate, was liable for the demand. *Gerlach v. Terry*, 75 Cal. 290, 17 Pac. Rep. 207. Thereupon this action was commenced in which the plaintiff has been nonsuited upon the ground that Mary J. Turner was not the wife of defendant, although so reputed, and that plaintiff's services were rendered at her request, and solely upon the faith of her promise to pay for them out of her separate estate. In other words, the plaintiff has lost his suit this time because, in the opinion of the superior court, he did not prove a marriage or an employment by the reputed husband, while he lost it before because such marriage and employment was proved. Certainly this is a hard case, but it is one that is legally possible. The defendant, not having been a party to the first suit, is not estopped by the decision therein made that he was the husband of Mary J. Turner, and contracted with the plaintiff; and if in this suit the contrary appears the plaintiff cannot claim to recover merely because in the former action the representative of Mary J. Turner succeeded in evading her just obligation by the false pretense that the defendant, as her husband, was the party bound for the debt. It

will be necessary, therefore, in order to determine whether nonsuit was properly granted, to confine our attention exclusively to the evidence produced by the plaintiff on the trial of this action.

Before considering the evidence, however, we will notice briefly a preliminary objection of counsel for the respondent, who contends, as we understand him, that the appellant has not specified the ruling of the court granting the motion for a nonsuit as an error of law, and consequently that it cannot be reviewed. *Schroeder v. Schmidt*, 74 Cal. 460, 16 Pac. Rep. 243. But in this contention counsel is evidently mistaken, for, in fact, the statement of the case not only shows that plaintiff duly and in time excepted to the order granting a nonsuit, but also distinctly specifies the ruling as an error of law, in both of which particulars it totally differs from the record in *Schroeder v. Schmidt*. The question is therefore properly presented whether upon the evidence a nonsuit should have been granted.

The evidence shows that in 1872 a clergyman, in pursuance of a regular license, performed the ceremony of marriage between defendant and Mary J. Mason, afterwards and until her death known as Mary J. Turner. But there was some testimony—*hearsay* and incompetent, as it appears to us, but admitted without objection—that at the date of this supposed marriage defendant had a wife living from whom he erroneously supposed himself to have been divorced; and it was upon the assumption of the truth and sufficiency of this testimony that the judge of the superior court held that he had never been the husband of Mary J. Mason. But it appears that for about eight years after the marriage ceremony they both believed themselves to be husband and wife, and so conducted themselves towards each other, and before the world. At the end of that time the defendant testifies that he discovered that no decree divorcing him from his former wife had been entered; that he communicated this discovery to Mary J. Turner; that they took advice of counsel, and, finding they were really not husband and wife, they ceased to live together in that relation, and he gave her the sum of \$6,000 for her support. It appears, however, that, although they may have put an end to their conjugal relations as between themselves, they still continued, for the purpose of avoiding scandal and publicity, to hold themselves out to the world as husband and wife. They lived on his ranch in Sonoma county, where, he says, he paid her to act as his housekeeper, but she retained and was known by the name of Mrs. Turner; and when in November, 1882, she was attacked by the fatal illness which occasioned the employment of the plaintiff, the defendant came with her to San Francisco, took her to the house of Mrs. Beanston, her daughter by a former marriage, and himself called the plaintiff to see her. The plaintiff wrote down the name and address of the house where he was directed to call, writing Vincent by mistake for Beanston, and, without waiting to inquire by whom he was to be paid for his services, com-

menced and continued his attendance. For a whole month—from November 3d to December 3d—he noted his daily visits in his account-book under the name of Vincent; after that, under the name of Mrs. Turner. He says that he did not at any time feel any concern about his bill. His patient was in the house of a daughter, and constantly attended by the defendant, who demeaned himself as her husband, and spoke of her to the plaintiff and to the nurse and others as his wife. He supposed he would be paid, of course, and never thought of inquiring by whom. He says it would have made no difference who came for him or sent for him he would have rendered his services just the same. He seems, indeed, during his long attendance, and it is much to his credit, to have been intent only upon the relief of his patient, and wholly oblivious to the collection of his fees. During the latter part of Mrs. Turner's illness—from three to six weeks before her death—the plaintiff was informed of the peculiar relation between her and the defendant, and was at the same time informed that she had plenty of means of her own to pay him for his services. This information seems to have been volunteered by both the defendant and by Mrs. Turner, and not to have been elicited by any inquiries from the plaintiff, who continued his attendance as before. After Mrs. Turner's death the defendant claimed a portion of her property as heir, and actually applied for letters of administration on her estate, describing himself in his sworn petition, as her surviving husband. He abandoned his application, however, when he found himself opposed by her son, Mr. Terry, who received the appointment as administrator. The plaintiff having been convinced, apparently, that Mrs. Turner's estate was liable to him for his services, presented his claim to her administrator, and upon its rejection sued Terry, with the result above stated, *i. e.*, that he was defeated, on the ground that her husband, this defendant, owed the debt, and that her promise to pay it was invalid.

Upon this state of facts, we think, the superior court erred in granting a nonsuit, for two reasons: *First*. There was abundant evidence of a marriage between the defendant and Mrs. Turner, and nothing to rebut the conclusion that they were, in fact, husband and wife, except *hearsay* evidence that he had a former wife living at the date of their marriage. And this *hearsay* evidence was not put in by the plaintiff, but was called out on cross-examination, and allowed in the absence of any objection by the plaintiff, who might properly have objected that it was not cross-examination, but a part of the defendant's own case. *Second*. Even if it had been clearly proven by competent evidence that defendant was not the husband of Mrs. Turner, he is still liable, if he employed the plaintiff to attend her; and the evidence shows that he did. A man may employ a physician to attend a total stranger, and a *fortiori* one whom he chooses to have known as his wife. And, besides, the defendant's conduct—at least, up to the time when Mrs. Turner, towards

the last of her sickness, promised plaintiff that she would pay him—was such as to amount to an explicit representation that he was her husband, and, after the plaintiff has rendered services on the faith of such representation, defendant is estopped to assert its falsity. We are not unmindful of the claim that plaintiff's own testimony shows that he did not rely on the defendant. But we do not think his testimony shows any such thing. He expected confidently to be paid, and he simply did not consider the legal aspects of his contract. He was entitled to rely on the defendant, and must be presumed to have done so. He may not have a right to invoke this principle of estoppel as to the value of services rendered after he was informed that defendant was not Mrs. Turner's husband, but, even as to these services, the defendant is liable if he originally employed the plaintiff, and did not plainly and unequivocally put an end to that employment at the time he informed him of his true relation to the woman he called his wife. The judgment and order appealed from are reversed.

We concur: HARRISON, J.; GAROUTTE, J.

(89 Cal. 303)

RANKIN v. AMAZON INS. CO. (No. 12,807.)  
(Supreme Court of California. May 26, 1891.)

FIRE INSURANCE—REPRESENTATIONS.

1. In an action on a fire insurance policy running to O. & Co., (owners,) loss payable to R. & Co., (plaintiffs,) it appeared that, at the time of making application for insurance, plaintiffs promised to furnish a survey and diagram, without which the company refused to take the risk. A rider to the policy provided: "Reference is hereby made to a survey and diagram on file in the office of M. & Son, [insurance brokers acting on behalf of plaintiffs,] which is made a part of this policy, and a warranty on the part of the assured." The policy also provided: "For further particulars, reference is hereby made to an application and survey, No. —, furnished by, and a warranty on the part of, the assured, which is hereby made a part of this policy." Held, that the admission in evidence of the survey and diagram, consisting of questions and answers, could not be objected to on the ground that the insurance was effected before it was furnished to the company; as, if it was thereby deprived of its force as a warranty, it still had effect as a representation of facts made as an inducement for the issuance of the policy, the falsity of any material part of which would warrant the rescission of the insurance.

2. The survey having been furnished in accordance with plaintiffs' agreement, they could not object to it on the ground that the parties furnishing it had no authority from the owners of the property.

3. The provision of the policy that understood and agreed that, during such time as the above mill is idle, a watchman shall be employed by the insured, to be in and about the premises day and night, "being free from ambiguity with respect to the time the premises were to be watched, it was error to submit the question to the jury whether plaintiffs had complied with the condition; it appearing that while the mill was idle for two months but one watchman was hired, and he was not instructed to watch the mill at night, and, as a matter of fact, slept every night in a building several hundred feet from the mill.

4. If it was material whether the watchman was on duty at the time of the fire, the burden of proving it was on plaintiffs, defendant having shown that the mill was idle.

In bank. Appeal from superior court, city and county of San Francisco; J. W. ARMSTRONG, Judge.

Haggin, Van Ness & Dibble, for appellant. Doyle, Galpin & Zeigler, (Philip A. Galpin, of counsel,) for respondent.

PATERSON, J. This is an action on a fire insurance policy to recover the sum of \$548.24. The policy contained the following clause: "Reference is hereby made to a survey and diagram on file in the office of J. C. Mitchell & Son, which is made a part of this policy, and a warranty on the part of the assured." The application for the policy was made on November 21st, but was not countersigned or delivered until November 24, 1884. Mitchell & Son, who were insurance brokers, acted on behalf of plaintiffs in procuring the policy, and they promised at the time the application was made to furnish the survey and diagram. The company refused to take the risk unless the brokers would agree to furnish such a survey. A survey and diagram was made by the owners of the property, and a copy thereof dated December 4, 1884, was presented to the agents of the defendant, but at what precise time it was presented does not appear. On December 3, 1884, the policy was taken to the office of the defendant and the written portion thereof was changed, increasing the amount of the insurance, and another rider, which was duly authenticated and attached, was substituted, which contained the same reference, quoted above. The survey and diagram consisted of many questions and answers. It was written on the blank form of another insurance company, and was signed, "Owens River M. G. & S. Co., by Hoyt & Son, applicants." The policy ran to the Owens River Iron & Smelting Company, (owners,) "loss, if any, payable to Rankin, Brayton & Co." When this document was offered in evidence, plaintiffs objected to it on the grounds that the insurance had been effected prior to the time the survey was presented to the company, and that Hoyt & Son had no authority to act on behalf of the mining and smelting company. The objection was sustained. The defendant excepted. The ruling was erroneous. The loss was not payable to the owners of the mine, but to their creditors, Rankin, Brayton & Co., and the question as to the authority of Hoyt & Son is immaterial. Plaintiffs promised to furnish the survey, and it was furnished in accordance with their agreement, and became a part of the contract. The admissibility of the evidence does not depend solely upon the reference contained in the rider. The policy itself provides: "For further particulars reference is hereby made to an application and survey, No. —, furnished by and a warranty on the part of the assured, which is hereby made a part of this policy." The delay of the plaintiffs in furnishing the survey should not be held to entirely destroy its efficacy as a part of the contract. The fact that the survey was not furnished until after the policy was delivered may have deprived it of any force or effect as a warranty, under section 2605 of the Civil

Code; but conceding this to be true, it does not destroy its effect as a representation of facts made as an inducement for the issuance of the policy, and as such it is evidence which the jury should consider on the issue as to rescission. If any of the material representations were false, the defendant's tender of the premium and notice that the policy was canceled before the commencement of the suit operated to rescind the contract. Sections 2580, 2583, Civil Code.

The policy, as first printed and written, contained this clause: "It is understood and agreed that, during such time as the above mill is idle, a watchman shall be employed by the insured to be in and upon the premises day and night." At the request of the plaintiff, this provision was changed by inserting the word "about" in lieu of the word "upon." The object of the change doubtless was to avoid any controversy, in case of loss, as to whether it was necessary that the watchman should be actually upon the premises on which the insured buildings stood. The change, however, did not accomplish the full purpose intended, for the watchman slept a distance of 300 or 400 feet from the mill; and the word "about," as used, is so uncertain in signification that it cannot be determined therefrom exactly what territory was intended to be covered by it. But, however uncertain the promissory warranty may be as to the premises upon which the watchman was required to be, there is no ambiguity in the language with respect to the time he was required to watch the premises. Where the language of a policy may be understood in more senses than one, it is to be construed most strongly against the insurer, because he frames it, and is supposed to make it as potent as possible in his own favor; but, where there is no imperfection or ambiguity in the language, it must be construed, like any other contract, according to the intention of the parties.

The court instructed the jury that, "if the assured employed a watchman to be in and about the premises day and night while the mill was idle, then the plaintiff is entitled to recover," and submitted to them for determination the question whether plaintiffs had performed the conditions of the contract. Cases are cited by respondent in support of the action of the court which hold that under certain watchman clauses it is proper to receive evidence of usage, and to submit to the jury the question whether the insured employed a watchman to look after the property in the manner in which men of ordinary care in similar departments of business manage their own affairs of like kind. But they all go off upon the proposition that the terms of the warranty are not explicit as to the time and manner of keeping a watch. Thus in the Massachusetts case (*Crocker v. Insurance Co.*, 8 Cush. 79,) the language of the clause was, "a watchman kept on the premises;" and in the Illinois case (*Insurance Co. v. Shipman*, 77 Ill. 189,) "a watchman to be on the premises constantly during the time until September 1, 1872." In the latter case plaintiff had employed a day watch-

man and a night watchman, and the only question considered was whether it was necessary for the watchman to be actually on the premises on which the insured buildings were situated. In the case before us the terms of the warranty are explicit as to the time of keeping a watch, and, on the undisputed evidence, we think the court ought to have held that the plaintiffs had not complied therewith. The mill was idle for two months prior to the destruction thereof by fire, and the evidence shows that plaintiffs did not employ a watchman "to be in and about the premises day and night." A watchman was employed, but he was not instructed to watch the premises at night, and, as a matter of fact, slept every night in a building distant 300 or 400 feet from the mill. Mr. Minear, the superintendent, testified that McMurray, the watchman, was not instructed to watch the premises during the night; that his instructions were not special, "either at day or night." In the nature of things, it could not be expected that one man could watch the buildings day and night, (only one watchman was employed,) but, if it be assumed that he could, no one was employed to do so. There is no ambiguity in the phrase "day and night." "We do not need a dictionary, nor a law-book, nor the testimony of an expert, to tell us that a man who is employed to watch in the day-time, and who is permitted to sleep at night, is not a watchman at night." *Brooks v. Insurance Co.*, 11 Mo. App. 349; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 39. It is not a case of mere negligence. If a loss is occasioned by the mere fault or negligence of the watchman, unaffected by fraud or design on the part of the insured, it is within the protection of the policy; but, to entitle the insured to recover, it must appear that he has in good faith employed a watchman to perform the duties required by the terms of the warranty. *Trojan Min. Co. v. Fireman's Ins. Co.*, 67 Cal. 27, 7 Pac. Rep. 4; *Wenzel v. Insurance Co.*, 67 Cal. 438, 7 Pac. Rep. 817; *Cowan v. Insurance Co.*, 78 Cal. 181, 20 Pac. Rep. 408; *Waters v. Insurance Co.*, 11 Pet. 219. It does not appear whether the watchman was actually on duty at the time the fire occurred. If the fact be considered as material, it is sufficient to say that, defendant having shown the mill was idle, the burden of proving a compliance with the warranty rested upon the plaintiffs. *Cowan v. Insurance Co.*, supra; *Wood, Ins.* (2d Ed.) p. 1136. The judgment and order are reversed, and the cause is remanded for a new trial.

WE CONCUR: GAROUTTE, J.; HARRISON, J.; DE HAVEN, J.; MCFARLAND, J.

BEATTY, C. J. I concur in the judgment, and in the conclusion that the evidence does not show that a watchman was employed as stipulated.

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BULL v. BRAY et al. (No. 12,695.)

(Supreme Court of California. May 28, 1891.)

FRAUDULENT CONVEYANCES—INTENT—FINDINGS.

Civil Code Cal. § 3439, provides that "every transfer of property \* \* \* made \* \* \*

with intent to delay or defraud any creditor \* \* \* is void." Section 3442 provides that in all cases arising under this section "the question of fraudulent intent is one of fact and not of law," and that no transfer shall be adjudged fraudulent solely on the ground that it was not made for a valuable consideration. Held that in an action to set aside a conveyance, although a court has found that it was made without consideration by an insolvent debtor, and that his creditor was thereby defrauded, a failure to also find a fraudulent "intent" is fatal.

In bank. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Action by Alpheus Bull against Watson A. Bray, Julia A. Bray, Emma B. Cohen, and Alfred H. Cohen to set aside certain conveyances as fraudulent. After trial by the court and judgment for plaintiff, a new trial was granted. Plaintiff appeals.

Wm. H. Sharp and J. F. Wendell, for appellant. Chickering & Thomas, (J. P. Phelan and Garber & Bishop, of counsel,) for respondents.

GAROUTTE, J. This is an appeal from an order granting defendants a new trial. The action was brought by plaintiff, a judgment creditor, to set aside two certain deeds of gift made by defendant Watson A. Bray, the judgment debtor, to Julia A. Bray, his wife, May 20, 1880, and August 3, 1881, respectively, of lands in Contra Costa county, as being void against prior creditors. Plaintiff's debt had been reduced to judgment; execution was issued thereon, and returned wholly unsatisfied. In the lower court, plaintiff had judgment, as prayed for, declaring said deeds null and void as against his judgment, and that he be entitled to enforce his execution against the property in said deeds described. Defendants moved for a new trial, and their motion was granted upon the ground that the findings as filed omitted to find upon the issue of intent raised by the pleadings in the case; that is to say, there is no finding on the issue made by the pleadings, whether the conveyances from Bray to his wife, referred to in the pleadings, were made or accepted with intent to hinder, delay, or defraud the plaintiff or other creditors of said Bray. The question presented by this appeal is, therefore, whether, in view of the facts found by the court, it was necessary to make a further finding as to the fraudulent intent; for, if the facts found by the court necessarily establish the fraudulent intent, that satisfies the law. If probative facts only are found, yet, if the ultimate fact flows as a necessary conclusion therefrom, the findings are sufficient. *Osborne v. Clark*, 60 Cal. 623; *Biddell v. Brizzolara*, 56 Cal. 381; *People v. Hagar*, 52 Cal. 189; *Coveny v. Hale*, 49 Cal. 555. The only findings of the court necessary to consider in the investigation of this most important question are as follows: (1) That said deeds were entirely voluntary, and there was no valuable consideration whatever for the making and delivery of the same, and said deeds were deeds of gift. (2) That at the times of the making of said deeds the defendant Watson A. Bray was insolvent, and has ever since remained insolvent. (3) That defendant Bray, at the time he made and delivered

said deeds, was not fully aware, and did not know his actual financial condition, and his inability to pay and discharge in full his then outstanding debts and liabilities. (4) That by the making and delivery of said deeds Watson A. Bray did hinder, delay, and defraud this plaintiff in the collection of his debt.

This action rests upon section 3439 of the Civil Code: "Every transfer of property \* \* \* made \* \* \* with intent to delay or defraud any creditor \* \* \* is void." "Every transfer of personal property \* \* \* is conclusively presumed if made by a person having \* \* \* the possession or control, \* \* \* and not accompanied by an immediate delivery \* \* \* to be fraudulent and therefore void against those who are his creditors, while he remains in possession." Civil Code, § 3440. Then, to exclude all possibility of misconception arising out of the conflicting decisions of other states as to whether the question of intent is a matter of law or of fact, section 3442 provides that in all cases arising under section 3439 "the question of fraudulent intent is one of fact, and not of law." It further provides that no transfer shall be adjudged fraudulent solely on the ground that it was not made for a valuable consideration. It also expressly excepts transfers of personal property arising under section 3440, for that section makes the question one of law by providing that transfers made in a certain way shall create a conclusive presumption of fraud. The general contention of appellants in this case is fairly illustrated by the doctrine laid down by Bump, in his work on *Fraudulent Conveyances*, (3d Ed. 271, 272:) "If the act necessarily delays, hinders, or defrauds his creditors, then the law presumes that it is done with fraudulent intent. The intent is to be assumed from the act. The circumstances of the act, or rather the act itself, is conclusive evidence of fraud, for no man is permitted to say that he does not intend the necessary consequences of his own voluntary act. The law will not speculate about what is actually passing in the donor's mind, for the act need not be immoral or corrupt. The law does not concern itself about the private or secret motives which may influence the debtor. \* \* \* He may make a conveyance with the most upright intentions, really believing that he has a right to do so, and that it is his right and duty to do it, and yet, if the transfer is voluntary, and hinders, delays, or defrauds his creditors, it is fraudulent. \* \* \* The presumption in such a case is conclusive, and against it all other evidence is unavailing. The debtor may have some other purpose in view, but the intent to defraud is a part and parcel of his act. It is upon these principles that the law relating to voluntary conveyances rests. In the construction of the statute, they are deemed within its operation, when they necessarily tend to defeat the just rights of creditors, even though they are made *bona fide* and with the intention of conferring a gratuitous benefit upon some meritorious object. The law stamps a man's generosity

with the name of fraud when it prevents him from acting fairly towards his creditors, and presumes fraud if he disables himself from paying his debts. In such case the presumption of fraud arises and may exist without the imputation of moral turpitude. The principle is, that persons must be just before they are generous, and that debts must be paid before gifts can be made." This doctrine, ever since the celebrated case of *Reade v. Livingston*, 3 Johns. Ch. 500, decided by Chancellor KENT, has been recognized and accepted by many judges in many states of the Union.

Respondents insist that "the question of intent is a question of fact, and that the intent or purpose of the grantor in making the transfer in all cases is a question for the jury, and that it is material to the issue to determine whether the act done is a *bona fide* transaction, or whether it is a trick or contrivance to defeat creditors." "That the question of solvency or insolvency of the grantor at the time of the making of the deeds is a matter of evidence to be given its due weight in determining the ultimate fact as to the fraudulent intent of the grantor; that a rich man may make a fraudulent deed as well as one who is insolvent; and that while a voluntary conveyance by an insolvent may be *prima facie* fraudulent, it cannot be conclusively fraudulent, for that would make the question of intent a question of law, and thus be in violation of that provision of the Code which says it shall be a question of fact." These views, to a great extent, are supported by the exhaustive case of *Seward v. Jackson*, 8 Cow. 450, and by other authority, both English and American. The cases in this country passing either directly or indirectly upon the questions involved in this litigation are practically numberless, and, as we have already seen, are greatly at variance. But, as has been said by Bigelow on Fraud, (Preface, iv, and v., Ed. 1877:) "The law here to be applied is statutory law, and, as to the statutory law concerning fraud on creditors and purchasers, each state of the Union, with few exceptions, has a Code of its own, interpreted by independent tribunals, and enforced by distinct and diverse penalties and procedure. With deference to the views of others who have attempted to present a harmonious view of the statutes of the different states, the author is satisfied that such efforts are both unsatisfactory and dangerous. The decisions of the courts of New York concerning the interpretation of an ambiguous statute of that state,—that is, concerning the intention of the legislature of that state in the passage of the act,—cannot be safe authority in another state, even upon a question of the meaning of a statute framed in the very same words. The legislature of New York meant one thing by the language used, and the legislature of another state may have meant something else, and so the courts of each state may have declared, and rightly. To say, therefore, that the decisions are in conflict is incorrect, and to attempt to deduce the true rule of law as applicable to both states is vicious." Without attempting

to deduce the true rule from the many authorities of many states, we will discuss this case by the authority of our statutes and Codes, and in the light of the decisions of our own judicial tribunals.

Having found the fact that the conveyances were voluntary conveyances, that the defendant Watson A. Bray was insolvent at the time he made the conveyances, and that these conveyances delayed and defrauded the plaintiff in the collection of his debt, was it still necessary for the court to find the further fact that the intent of the grantor in making the conveyances was to delay and defraud creditors, and was the court justified in granting a new trial by reason of its failure to make such finding? Appellant contends that the absence of a finding of intent is immaterial, because the conveyance being voluntary, the grantor being insolvent, and the conveyance having defrauded the creditor, the intent to delay and defraud follows as an absolute and conclusive presumption, and the intent, being the ultimate fact, necessarily results from such probative facts. In order to support this contention the ultimate fact must follow necessarily—that is, as a matter of law—from the other facts. In *Coreny v. Hale*, 49 Cal. 556, the court said: "Of course, it is only when the conclusion follows as a matter of law that such a finding will be held sufficient." "The only inferences which we can draw from the findings," said the court in *De Cellis v. Porter*, 65 Cal. 10, 2 Pac. Rep. 257, and 3 Pac. Rep. 120, "are inferences of law. We are not allowed to draw inferences of fact from the facts found. If this court would infer a fact from other facts, it would be usurping the province of the trial court, which alone can find the facts in issue. This is the rule with regard to special verdicts, and we are of opinion that the same rule applies to findings of fact." To the same effect are the cases of *Chandler v. Bank*, 65 Cal. 499, 4 Pac. Rep. 502; *Salisbury v. Shirley*, 66 Cal. 228, 5 Pac. Rep. 104; *Hibberd v. Smith*, 67 Cal. 556, 4 Pac. Rep. 473, and 8 Pac. Rep. 46. It may be conceded that it would have been perfectly proper for the trial court to have drawn an inference of fact as to the fraudulent intent of the grantor from the other facts found; that this court might be justified in setting aside a finding to the contrary as not being supported by the evidence, (*Judson v. Lyford*, 84 Cal. 505, 24 Pac. Rep. 286;) but that does not dispense with the necessity of an actual and express finding as to the ultimate fact, as a fact, by the lower court, nor authorize this court to exercise what would be original jurisdiction by supplying a finding upon this most vital and essential matter. As section 3442 of the Civil Code declares that the question of fraudulent intent is "one of fact and not of law," it is not entirely plain that this court can under any state of facts, however plain they might be, hold that the ultimate fact might flow from the probative facts as a matter of law. But, assuming that the ultimate fact of "intent to defraud" may flow as "matter of law" from the probative facts, yet to obviate a finding of this ultimate fact the facts found must necessarily and

conclusively indicate that the grantor was possessed of the intent to defraud at the time the conveyances were made. If the facts found do not absolutely exclude all possibility of the absence of fraudulent intent in the mind of the grantor, then the want of the finding of such intent cannot be dispensed with in this court. Thus, in the case of *Emmal v. Webb*, 36 Cal. 204, the court, in considering whether it could infer a fact from other facts, said: "To warrant us in so doing, the fact to be inferred must follow inevitably from the facts found, or, in other words, the non-existence of the fact to be inferred must, upon every conceivable theory of which the case will admit, be inconsistent with the existence of the facts which are found." And to the same effect are *Coveny v. Hale*, 49 Cal. 556; *Younger v. Pagles*, 60 Cal. 520; *Walker v. Buffandeau*, 63 Cal. 312; *Coglian v. Beard*, 35 Cal. 63, 2 Pac. Rep. 737; *Water Co. v. Richardson*, 72 Cal. 601, 14 Pac. Rep. 379. We then proceed to consider whether there is any possible state of facts consistent with the findings of the court heretofore quoted, and also consistent with the absence of fraudulent intent in the mind of the grantor at the time of the making of the deeds sought to be set aside in this action. The finding of the court "that the defendant Bray by the making of these deeds did hinder, delay, and defraud the plaintiff in the collection of his debt" throws no special light upon the solution of the question as to the actual intent of the grantor; while important as evidence of the intent, by reason of the presumption that every man intends the usual and ordinary consequences of his voluntary acts, yet our statute requires that a conveyance shall not only delay and defraud creditors, but that it was made with the intent to delay and defraud, and the statute appears to recognize the intent as the prevailing and controlling element in measuring the *bona fides* of the transaction. Bray did actually defraud Bull in the making of the deeds, by depriving him of property which would otherwise have been applied to the satisfaction of the execution; but it does not necessarily and conclusively follow therefrom that the intent was present in his mind to defraud, or that in making the transfer he may not have been actuated by the most honest motives.

Appellant insists that the existence of the facts, to-wit, "that the grantor was insolvent at the time of the transfer, and that the conveyances were deeds of gift, render the inference of fraudulent intent absolute and conclusive, and a conveyance under such circumstances, therefore, would be void under any and all conceivable states of facts; and this is the important and determinative question in this case." Very many of the authorities from other states relied upon by appellant to support this contention rest in whole or in part upon the presumptions "that every man intends the usual and natural consequences of his voluntary act," and that "every man is presumed to know the condition of his own business;" and, applying those presumptions, it is said that the natural consequence of an insolvent giving away

his property is to defraud his creditor, and that, therefore, the insolvent must have intended to defraud; and, again, "a man is presumed to know the condition of his own business affairs, and therefore if, as a matter of fact, he is insolvent, he must know of such insolvency." Best, in his work on Evidence, section 307, speaking of the changes which this subject of presumptions has undergone in our legal history, says: "Certain presumptions which in earlier times were deemed absolute and irrebuttable have, by the opinion of later judges, acting on more enlarged experience, either been ranged among *presumptiones juris tantum*, or considered as presumptions of fact, to be made at the discretion of the jury. On the whole, modern courts of justice are slow to recognize presumptions as irrebuttable, and are disposed rather to restrict than to extend their number. To conclude a party by an arbitrary rule from adducing evidence in his favor is an act which can only be justified by the clearest expediency and soundest policy, and some presumptions of this class ought never to have found their way into it." According to the provisions of the Code of Civil Procedure, (sections 1961-1963,) the foregoing presumptions are disputable presumptions, and may be controverted by other evidence; and, indeed, the presumption that every man knows the condition of his own business affairs has no standing in this case, for the trial court has found as a matter of fact that "the defendant Bray did not know that he was insolvent." And, not knowing his insolvency, how can it be presumed from the existence of his insolvency that he intended to defraud? For no man can be presumed to intend a consequence which he does not know, of which he is ignorant, and which, therefore, he cannot contemplate. It may be conceded that one who acts recklessly and regardless of consequences is not to be exonerated. The fraud in this case rests upon the insolvency of the grantor; for, while there is no allegation, proof, or finding as to the value of the property conveyed, still, if he was solvent, a gift of this character, in the absence of an actual fraudulent intent, would be upheld. If defendant Bray did not know that he was insolvent, then he did not know that this property was required to pay his debts, and the finding of the court that he was ignorant of his insolvency is absolutely inconsistent with the presumption that he intended the consequences of an act, which consequences depended upon insolvency. Appellant's counsel insist that a voluntary conveyance by an insolvent is void under all circumstances, and that the intent to defraud is conclusively presumed. If that be so, it must be by reason of some presumption of law; but, if it be said that fraud can be conclusively presumed in any case, except as provided by section 3440, Civil Code, then fraud is again made a question of law, and this would amount to an abrogation of section 3442, Id., which provides that "fraudulent intent is a question of fact," and would be creating a class of conclusive presumptions not recognized or justified by either section



3440, Id., or section 1962, Code Civil Proc.

As has been remarked at the inception of this opinion, the great number of cases from the courts of other states, cited by appellant's counsel to support this contention, will not be reviewed. Some of them directly sustain such position; others merely affirm the decisions of *nisi prius* courts, that a gift by an insolvent is sufficient evidence to justify the setting aside of a conveyance by a creditor; others hold the insolvent guilty of a fraudulent intent as a matter of law; and many others are based upon the two presumptions heretofore referred to, and holding that such presumptions were conclusive presumptions, and that therefore the fraudulent intent necessarily resulted therefrom; and this was the reasoning adopted by this court in the case of *Swartz v. Hazlett*, 8 Cal. 118. The court held in that case that "every man must be held to know the law and the facts regarding his own business." In other words, if the debtor is insolvent, he is conclusively presumed to know that fact; and, the necessary consequences of a transfer of his property being to delay and defraud his creditors, the fraudulent intent follows in all cases. The important distinction between that case and the one at bar is that in this case the lower court not only recognized the presumption that "every man is presumed to know the condition of his own affairs," as being rebuttable, but absolutely rebutted it by finding as a fact that "the defendant Bray did not know the condition of his own affairs, and did not know that he was insolvent." In 1 Whart. Cont. § 377, subd. 4, is used this language: "As a condition of fraudulent intention, insolvency known to the grantor must be shown. A party who believes himself to have the pecuniary ability to make a gift can make such gift without the risk of its being subsequently impeached, supposing his belief is not negligently adopted." In the case of *Swartz v. Hazlett*, supra, this court really held that a transfer of property by a grantor who knew of his insolvency was conclusively fraudulent; and, while we are not inclined to even adopt that view of the law under our statutes, yet, from the reasoning of the court in that case, if there had been a finding as to the grantor's ignorance of his insolvency, it does not appear that the case could have been reversed, and judgment ordered for the plaintiff. As we have already seen, (*Emmal v. Webb*, supra,) if, upon any conceivable theory, the inference of fraudulent intent would be inconsistent with the fact of insolvency, then this court cannot find the intent as matter of law. Now, it appears from the record in this case, in addition to the findings already discussed, that the liabilities and assets of the defendant Bray approximated three-quarters of a million dollars, respectively; that he continued in business for years after these deeds were made, and before he made an assignment for the benefit of his creditors; and, in addition to these facts, we will suppose that he honestly believed at all times that he had ample property remaining to pay his debts after this property was transferred, and that the property transferred was of

merely nominal value. A state of facts could be imagined even much more favorable to the grantor, Bray, than the foregoing, and which would be perfectly reconcilable with the fact of actual insolvency, and the absence of fraudulent intent at the time of the making of the conveyances; and, conceding the trial court would be justified in drawing the inference of fraudulent intent from such a state of facts, this court would not and could not say that such intent would flow therefrom as a matter of law. It is difficult to see how trivial gifts, made with fair, honest intentions, can be adjudged to have been made with a fraudulent intent, when intent is declared to be a matter of fact in all cases.

In the case of *Carpentier v. Mendenhall*, 28 Cal. 494, it was held that a finding of a demand by one tenant in common to be let into possession, and a refusal by his co-tenant, was not a finding of ouster. The court said: "The law will not presume from either the one or the other, nor from both combined, that there was an intent to oust. That intent must be established as a fact by the finding of the jury. Conversion is one of the points to be established in actions of trover, but it is settled that demand and refusal is not conversion, but only evidence of it, for the consideration of the jury. In the absence of all explanation, the court would be justified in directing or advising the jury to infer a conversion or an ouster, in a case like the one at bar, from the fact of demand and refusal, but the inference is to be made by the jury and not by the court." There appears to be no reason why the legal principles declared by this court in the criminal case of *People v. Mize*, 80 Cal. 44, 22 Pac. Rep. 80, are not applicable here. The defendant was charged with an assault with intent to commit murder. It is a statutory offense, and the intent is the essential ingredient. The trial court gave the following instruction. "The jury are instructed that the natural and probable consequence of every act deliberately done by a person of sound mind is presumed to have been intended by the author of said act; and if the jury believe from the evidence, beyond a reasonable doubt, that the defendants, or either of them, did shoot at said Henry Coffey, as charged in the information, and that the natural and ordinary consequences of said shooting would be the death of said Henry Coffey, then the presumption of law is that the defendant so shooting did shoot at said Coffey with intent to kill him." This court said: "It is doubtless true that a man is presumed to have intended the immediate and natural consequences of his act, but, when an act becomes criminal only when it has been performed with a particular intent, that intent must be alleged and proved. It is for the jury, under all the circumstances of the case, to say whether the intent required by the statute to constitute the offense existed in the mind of the defendant." This charge withdrew from the jury the consideration of the question whether the defendants intended to kill Coffey. The defendants claimed that they

were acting in self-defense, and upon real and apparent danger. To tell the jury, therefore, if they believed that the defendants had shot at Coffey, and that the natural and ordinary consequences of the shooting would be the death of Coffey, the law would presume them guilty of an intent to kill, was erroneous, because it entirely disregards the question whether the defendants acted in good faith, and to defend themselves against real or apparent danger. So, in the case at bar, if a voluntary transfer by the defendant insolvent carries with it a conclusive fraudulent intent, the defendant would be precluded from showing his motives and good faith in making the conveyance, and the question of intent, which a jury may have been called to try, which in all cases is a question of fact, and which is the fact in the case, would be driven from the case by the court calling to its aid presumptions which, as we have already seen, are not only liable to attack, but are put to flight at the moment they come in contact with a substantial fact. The case of *Hager v. Shindler*, 29 Cal. 58, 59, holds that insolvency is but a circumstance from which fraud may be inferred or argued; evidence of fraud, but not by any means conclusive or irrebuttable evidence. In that case the court said: "In a case like the one at bar, insolvency is not a fact of jurisdictional consequence, nor is it *per se* a condition of relief. \* \* \* A complaint framed for the purpose named, while stating that the deed was without consideration, should aid or help out the averment, not by averring insolvency, for that is but a circumstance, not by averring generally that the deed was fraudulent, for that is but a conclusion of law, but by averring the fact superadded by the statute, to-wit, that it was made with 'intent to hinder, delay, or defraud creditors.' The state of the grantor's worldly affairs may be used as evidence to elucidate the intent, if disputed; but as matter of pleading it is not necessary that insolvency should be averred in the complaint, and for the obvious reason that the fact does not enter as a term into the legal proposition. A rich man may make a fraudulent deed as well as one who is insolvent."

The Civil Code provides that the mere want of consideration does not of itself render a conveyance fraudulent as to creditors; and considering this section in connection with the presumptions recognized by the court in *Swartz v. Hazlett*, supra, the distinction between sales for an inadequate consideration and voluntary conveyances is entirely imperceptible, and the question in both cases at once becomes one of intent to be decided from all the evidence in the case. The difference in these two classes of conveyances is only in degree; for as the grantor must upon appellant's theory be presumed to know his condition, and to know that the consideration is inadequate, and that he is thereby depriving his creditors of the portion of the "fund" which is represented by the difference between an adequate and inadequate consideration, he must be presumed conclusively to intend to defraud them *pro tanto*, for the conveyance is vol-

untary to that extent. But *McFadden v. Mitchell*, 54 Cal. 629, holds that inadequacy of price and insolvency of the debtor are only circumstances more or less potential in the determination of fraud as a question of fact; and, referring to certain instructions given by the trial court, Justice McKee says: "By these instructions the court in effect took away from the jury the consideration of fraudulent intent as a question of fact, and as they are contrary to the plain rule established by the Code the cause is remanded for a new trial." Appellant's position in this case takes away from the jury the consideration of fraudulent intent as a question of fact. In *Jamison v. King*, 50 Cal. 136, the court, speaking through Justice McKim, said: "Doubtless the concurrence of insolvency on the part of the assignor, and inadequacy of price, would be a circumstance strongly tending to establish fraud; but inadequacy or failure of consideration is not of itself sufficient, even as against the creditors of an insolvent assignor, to authorize a court to find fraud as a conclusion of law. By our statute it is provided: 'The question of fraudulent intent, in all cases arising under the provisions of this act, shall be deemed a question of fact and not of law; nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded upon a valuable consideration.' In the case before us the district court did not find fraud as a fact or as a conclusion of law, nor does the amended complaint allege it." In *Miller v. Stewart*, 24 Cal. 504, the court uses this language: "Whether the transactions in question were entered into by the Millers with intent to hinder, delay, or defraud their creditors is a question which the statute leaves to the determination of the jury upon such evidence as may be presented for their consideration. The intent is expressly declared to be a question of fact, and must therefore be for the jury, and not the court. In the instruction above quoted the court in effect takes the question from the consideration of the jury, and assumes the decision thereof." In *Harris v. Burns*, 50 Cal. 141, it appears, the trial court instructed the jury that certain facts, if proven, were conclusive as to the intent of the assignor to hinder, delay, and defraud his creditors. In the opinion of this court, Chief Justice WALLACE says: "This instruction cannot be supported. The question of fraudulent intent is a question of fact; it is so declared by the statute. \* \* \* The instruction, in effect, took away from the jury the decision of the question of fact, and established the fraudulent intent by mere legal conclusion from an isolated circumstance. This we held erroneous in *Jamison v. King*, Id. 132, at the present term." This decision is not based upon the theory that the facts referred to by the trial court in the instruction were in themselves too weak to justify a conclusive presumption of a fraudulent intent; but it decides that, the intent being a question of fact, such a presumption could not be indulged in under our statute.

If the legislature had intended a gift by

an insolvent to constitute a constructive fraud or fraud in law, it was easy to have said so. Instead of that, they expressly legislated away all the reasons upon which the decisions so holding profess to stand. When the legislature did intend to preserve the doctrine of fraud in law, they did so in express language, by section 3440, Civil Code, and then provided that in all other cases the question of fraudulent intent is one of fact, and not of law. It is impossible to comprehend how any decision or series of decisions of other states can make the question of fraud in this state, and in this character of action, a question of law. No decision or series of decisions can repeal a statute. Let the order be affirmed.

We concur DE HAVEN, J.; HARRISON, J.; MCFARLAND, J.; PATERSON, J.

BEATTY, C. J. I concur. It does not seem possible to avoid the conclusion that the law of California on the subject of voluntary conveyances by insolvent debtors is such as in the opinion of Justice GAROUTTE is declared to be. But I cannot refrain from expressing the belief that it is most unfortunate that the court should be forced to that conclusion. When an insolvent debtor makes a gift of his property to a donee of his own selection, there can be but one result, so far as his creditors are concerned. They are necessarily deprived of what is rightfully theirs, and the law ought to pronounce such a transaction *ipso facto* fraudulent and void as to them. Our legislature, however, has deliberately chosen to make the rights of creditors in such case depend, not upon the proof of facts susceptible of demonstration, and from which the injury is a necessary result, but upon proof of the secret intent of the debtor; in other words, upon the whim of a jury. Such a law invites fraud, puts a premium upon perjury, and multiplies fruitless litigation. It ought to be changed, but the legislature alone has the power to change it. In the mean time the courts should give the utmost force and effect to so much of the law for the protection of creditors as remains. There should be no hesitation in stating, and in every where insisting upon, the proposition that a voluntary conveyance by an insolvent debtor is *prima facie* proof of a fraudulent intent, which throws upon the donee the necessity of rebutting the inference of fraud; and it ought not to be held or intimated that such inference will be rebutted by the mere fact that the debtor was at the date of the conveyance ignorant or uncertain as to his insolvency. It ought to be made clear, on the contrary, that he believed, and had good reason to believe, that his property remaining after the conveyance would be amply sufficient to enable him to meet and discharge his obligations as they matured.

89 Cal. 351

THRELKEL v. SCOTT. (No. 13,817.)

(Supreme Court of California. May 30, 1891.)

FRAUDULENT CONVEYANCES — SETTING ASIDE BY GRANTOR'S ADMINISTRATOR.

In an action by an administrator under Code Civil Proc. Cal. § 1589, to recover property

fraudulently conveyed by his intestate in his life-time, the fraudulent intent of the grantor must be alleged in the complaint, and it will not be inferred from the facts set out therein that the conveyance was voluntary, and that intestate was insolvent. BEATTY, C. J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Placer county; B. F. MYRES, Judge.

F. P. Tuttle, for appellant. Hale & Craig, for respondent.

FITZGERALD, C. Appeal from a judgment of the superior court of Placer county. This action was brought by plaintiff as the administrator of the estate of Robert N. Scott, the deceased husband of the defendant, to compel her to convey to him certain real property described in the complaint, and alleged therein to have been conveyed to her as a gift by her said husband on the day preceding his death, while fatally ill, and when he was indebted largely beyond his ability to pay. It is further alleged that the whole of the said property so conveyed should be restored to the estate, in order that the value and proceeds thereof may be applied in due course of administration to the payment of the debts and claims due and payable out of the funds of the said estate. The defendant demurred to the complaint, upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled by the court below, and, upon defendant filing her answer, judgment was given for the plaintiff on the pleadings in the case, upon which judgment defendant prosecutes this appeal.

A question as to pleading, of much importance, is here raised by the demurrer in this case, which seems to have been overlooked by counsel, as no reference whatever is made to it in their briefs, and that is whether the fraudulent intent of the grantor when he executed the conveyance, and which must be proved before plaintiff will be entitled to recover, is a fact necessary to be alleged in the complaint. The power of the administrator to bring this action is derived solely from section 1589 of the Code of Civil Procedure, and in the exercise of it he is expressly limited by its provisions to actions for the recovery of property fraudulently conveyed by the decedent in his life-time. And the question here naturally suggests itself whether the fraudulent intent, which is expressly declared by our statute to be a question of fact, is one, the allegation of which is necessary to the sufficiency of the complaint. We think it is, for the very obvious reason that the allegation of fraudulent intent is indispensable for the purpose of showing the plaintiff's authority under the law to bring the action. Nor will such fraudulent intent, which is itself a question of fact, be inferred from the facts stated in the complaint, either for that or any other purpose, for the further reason that a voluntary conveyance by an insolvent debtor is not necessarily fraudulent and void as to creditors. Jamison v. King, 50 Cal. 136; McFadden v. Mitchell, 54 Cal. 628; Bull v. Bray, (No. 12,695,) 26 Pac. Rep. 873, (filed May 28, 1891.)

Hence it follows that the fraudulent intent is a fact necessary to be alleged in the complaint. As the complaint in this case contains no such allegation, we are of the opinion that the court erred in overruling the demurrer. We therefore advise that the judgment be reversed, with direction to the court below to sustain the demurrer.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, with direction to the court below to sustain the demurrer.

I dissent: BEATTY, C. J.

(89 Cal. 354)

MCLAUGHLIN v. MENOTTI. (No. 12,475.)

(Supreme Court of California. May 30, 1891.)

PUBLIC LANDS — RAILROAD GRANTS — RIGHTS OF SETTLERS.

1. Act Cong. July 1, 1863, provides "that there be and is hereby granted" to a certain railroad company certain sections to be afterwards located, depending on the route to be established, and that after the company has designated the general route of its road, and filed a map thereof with the secretary of the interior, he shall cause the lands to be withdrawn from pre-emption, private entry, and sale. *Held*, that the filing of such map, and the order of the secretary withdrawing the lands, precluded the subsequent inception of any rights in favor of any one else.

2. After such order of the secretary of the interior the land department had no authority to hold that the land was subject to selection by the state.

3. After the company had accepted the terms of the grant, and acted upon them, congress could not divest it of its rights in the lands.

4. To entitle a person to the exception in favor of a *bona fide* settler contained in a land grant, (Act Cong. July 2, 1864,) it is not enough to show that he occupied and improved the land.

In bank. Appeal from superior court, city and county of San Francisco; JAMES D. THORNTON, Judge.

A. L. Rhodes, for appellant. T. H. Lane & Hatch, for respondent.

PATERSON, J. This is an action of ejectment. The complaint is in the usual form, and the answer is a general denial. The plaintiff claims title under a patent from the United States to the Central Pacific Railroad Company issued April 3, 1872, and a deed from that company to plaintiff's testator dated April 3, 1873. The defendant claims under a patent from the state of California dated February 25, 1875.

The facts, which are not disputed, are in substance as follows: In 1858, when the land was unoccupied public land of the United States, Philip Hiram settled on the land, and built thereon a dwelling-house, fences, and corrals, cultivated a portion of it, and remained in possession until he conveyed to one Jean Peter, March, 1866. The latter went into possession of the land, and held the same until it was conveyed by him to the defendant herein, March 20, 1867. On June 13, 1864, Hiram applied to the locating agent of the state to locate the land in controversy under the provisions of the act of the legislature of April 27, 1863, entitled "An act

to provide for the sale of certain lands belonging to the state," as a lieu school-land location. This application was in due form, and accompanied by the affidavit of loyalty, and was accepted on the 16th day of June, 1864. At some time prior to January 30, 1865, (the exact date is not found,) the Western Pacific Railroad Company filed a map in the office of the secretary of the interior, designating the general route, and a copy of this map was received at the land-office in San Francisco on the 30th day of January, accompanied by the proper order to the register and receiver, withdrawing the odd-numbered sections, including the lands in controversy, from pre-emption, private entry, and sale. The official map of the township was filed by the United States surveyor general in the local land-office on February 27, 1865. The assignment which the Central Pacific Railroad Company had made and executed in 1864 to the Western Pacific Railroad Company of its right to the land in controversy was affirmed by the act of congress of March 3, 1865. On February 28, 1865, the state's agent located, in lieu of a portion of the school lands of the state which had been lost, the land in controversy, at the request and for the use of Hiram, by filing an application for the same in the name of the state in the United States land-office at San Francisco, and the location so made was filed in the state land-office on the 4th day of April, 1865, and was approved by the surveyor general of the state May 13, 1865. On June 24, 1865, Hiram made payment to the treasurer of the 20 per cent. of the purchase money, and one year's interest on the balance, as required by law; and on the 31st day of August, 1865, a certificate of purchase for the land was issued to him by the state. The line of the Western Pacific Railroad Company was definitely located not earlier than the 1st day of September, 1866. On June 22, 1870, the two railroad companies referred to were consolidated under the name of the Central Pacific Railroad Company. On March 13, 1872, the defendant applied to the officers of the United States land department for a confirmation of the right of the state to the land under the provisions of the act of congress, entitled "An act to quiet land titles in California," approved July 23, 1866. The Western Pacific Railroad Company, and parties claiming under it, were notified; and after proceedings had in the department, the commissioner of the general land-office, under the direction of the secretary of the interior, on May 15, 1874, listed over and certified to the state the land as confirmed to the state of California. A patent of the lands issued from the United States to the Central Pacific Railroad Company April 3, 1872, and on April 3, 1873, the company conveyed the land to the plaintiff. On December 31, 1874, full payment was made to the state by Hiram, and on February 25, 1875, he received from the state a patent of the same.

The question is, upon these facts, which party has the better title? The defendant claims that the act of congress to

quiet land titles in California, passed July 23, 1866, confirmed the state location, and granted the land in controversy to the state and her assigns, the state having prior to the passage of the act, and prior to the definite location of the line of the road, made a selection of the land, in lieu of school lands which had been lost, and disposed of the same to defendant, who purchased it in good faith; that the patent to the railroad company is void as to the land in controversy, because at the time the grant to the company took effect the land had been "otherwise disposed of by the United States," within the meaning of section 3 of the act of July 1, 1862. These contentions are the logical result of the defendant's erroneous views as to the operation and effect of the Pacific Railroad acts of July 1, 1862, and July, 1864. Although the amendatory act of 1864 enlarged the grant of 1862, it was done in such a way as to give the same operation and effect to the grant of the enlarged quantity as if it had been included in the provisions of the original act, and there is no longer any question as to the operation and effect of the act of 1862. Referring to a similar grant, the supreme court of the United States, in *Railroad Co. v. U. S.*, 92 U. S. 741, said: "There be and is hereby granted" are words of absolute donation, and import a grant *in present*. \* \* \* They vest a present title in the state of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it, and attach to it any particular tract." In *Missouri, etc., Ry. Co. v. Kansas Pac. Ry. Co.*, 97 U. S. 491, Mr. Justice FIELD, delivering the opinion of the court, considered very carefully the purposes of the act of 1862, of the amendatory act of 1864, and the nature and effect of the grant, and said: "The act of July 1, 1862, passed to the company a present interest in the lands to be designated within the limits there specified. Its language is, 'that there be and is hereby granted' to it the odd sections mentioned, words which import a grant *in present*, and not one *in futuro*, or the promise of a grant. \* \* \* The grant was of sections to be afterwards located, and their location depended upon the route to be established. When that was settled the location became certain, and the title that was previously imperfect acquired precision and attached to the lands." Section 7 of the act of July 1, 1862, provides that the "said company shall designate the general route of said road as near as may be, and shall file a map of the same in the department of the interior, whereupon the secretary of the interior shall cause the lands \* \* \* to be withdrawn from pre-emption, private entry, and sale." This map was filed in the office of the secretary of the interior prior to January 30, 1865, and on the day last named a copy thereof was filed in the United States land-office at San Francisco, with an order of the secretary withdrawing the lands from pre-emption, private entry, and sale. The purpose of this requirement and the effect of the withdrawal are to preclude the acquisition or initiation of any right other than that of

the company in any of the odd-numbered sections of land until the line of the road has become definitely fixed, and when so definitely fixed the grant becomes specific by attaching itself to every odd-numbered section. If, therefore, Hiramman had no lawful claim at the time of the withdrawal,—which at the latest was January 30, 1865,—he never had any, for he could not acquire or initiate any thereafter. *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. Rep. 100; *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. Rep. 336. In those cases the court held, giving convincing reasons therefor, that the route is definitely fixed so that the grant attaches when a map, approved by the directors, designating the route of the proposed road, is filed with the secretary of the interior, and that no right could be initiated between the time it was so filed and the time when notice of the order was received at the local land-office.

Hiramman's application to the state locating agent was made and accepted in June, 1864. At that time the lands were unsurveyed, and the application and approval were therefore void. *Collins v. Bartlett*, 41 Cal. 380. It is true the application was on file when the agent made application to the United States land-officers to locate the land, February 28, 1865, one day after the official map of the township had been filed by the surveyor general; but this did not make the application or location valid. The lands had been withdrawn by the secretary, and thereafter no right of any kind could attach to the lands through any act of the state, or its agent. On January 30, 1865, if not before, the company's grant attached in such a manner that its indefeasible right to the land depended only upon the filing of the map of definite location, and the completion of the road. For the same reasons the decision of the officers of the land department in approving and listing the land to the state was void. The title had passed to the company before the listing. The definite location of the line of the road identified the odd-numbered sections within the limits of 25 miles on each side of the road, and the patent to the company took effect by relation as of the date of the passage of the act of July 1, 1862. *Missouri, etc., Ry. Co. v. Kansas Pac. Ry. Co.*, *supra*. The application to the land department for confirmation under the act of July 23, 1866, was made on March 13, 1872. The land had passed out of the public domain several years prior to that time, and the grant thereof to the company could not be divested or in any manner limited by the action of the officers of the land department.

It is claimed by respondent that the question as to whether the land was subject to selection by the state was a question of fact within the jurisdiction of the land department, and that its decision cannot be attacked in this action. In *Smelting Co. v. Kemp*, 104 U. S. 641, the court held that if the lands had been previously disposed of, or if congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and

its attempted conveyance would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. In establishing any of these particulars the judgment of the department upon matters properly before it is not assailed. Its authority to act at all is denied, and shown never to have existed. *Wright v. Roseberry*, 121 U. S. 519, 7 Sup. Ct. Rep. 985; *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228. The act of August 3, 1854, provides that, if the lists embrace lands not granted to the state or territory, "said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby." 10 U. S. St. 346.

The confirmatory act of July 23, 1866, did not give to defendant's claim any additional assurance. There is nothing in that act indicating an intention on the part of congress to make its provisions applicable to any lands which had been withdrawn from sale; and, if there were, it would be a nullity so far as the lands granted and withdrawn from sale under the Pacific Railroad acts are concerned, for congress could not, after the company had accepted the terms of the acts of 1862 and 1864, and acted upon them, divest the company of its right in the lands.

Some of these questions have been considered recently in the United States circuit court, ninth circuit. In a thorough and elaborate opinion by Judge SAWYER, (Justice FIELD concurring,) the decisions of the national courts and the provisions of the several acts of congress bearing on the subject were carefully reviewed, and the conclusions reached which we have expressed above. *U. S. v. Curtner*, 38 Fed. Rep. 1.

Section 4 of the act of July 2, 1864, provides that "any land granted by this act, or the act to which this is amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral land, or the improvements of any *bona fide* settler, or any lands returned and denominated as mineral lands," etc. Defendant insists that if the lands were not "otherwise disposed of by the United States" (section 3, Act July 1, 1862,) through the selection made by the state, he acquired at least a "lawful claim" and became a "*bona fide* settler," within the meaning of those words, by the listing over to the state and by operation of the act of July 23, 1866, and therefore the patent to the company was issued without authority of law and is void. The language of the act shows that the "other lawful claim" referred to is a claim which has become in some way so connected with the paramount source of title as to be recognized as a claim by the laws of the United States. A pre-emption claim is a lawful claim because regularly initiated under the laws of the country; so are homestead and swamp-land claims; and the "other lawful claim" referred to must be of equal dignity and force. "Lawful claim" would include a Mexican grant, or the claim of the state to lands granted to it after selection of the lands and before

patent; but one who has simply entered upon a parcel of public land, and improved it, without complying with the laws providing for the acquisition of the title, cannot be said to be possessed of a "lawful claim." *Railroad Co. v. Tevis*, 41 Cal. 494.

Was the defendant a "*bona fide* settler?" Counsel for appellant said at the argument that the act as enrolled reads, "or the improvements of a *bona fide* settler on any lands returned and denominated as mineral lands," etc., but assumed that the court would be bound to read it as printed in the volumes of the United States Statutes at Large, and that, if the defendant was a *bona fide* settler at the time the land was withdrawn from sale by the secretary of the interior, the judgment of the court below should be affirmed. We consider the case from this standpoint. No case was referred to, nor have we been able to find one, in which the words "*bona fide* settler" have been construed. We think, however, that they must refer to one who has done something more than merely occupy the land, and put a few improvements upon it; and that is all the court has found here. It cannot be said that every one who enters upon land, and builds a fence and a cabin or a house, is a *bona fide* settler. If congress had intended to exclude from the grant all lands upon which there were settlers having improvements, without regard to the question whether their entry and possession were lawful, it is not likely that it would have employed the term "*bona fide*." Some effect must be attributed to those words. There certainly must be shown an intention in good faith to proceed diligently to comply with the laws, and acquire title. Appellant contends it must be shown that the settler entered upon the land for the purpose of acquiring title thereto from the government, and that he possessed the necessary qualifications to entitle him to connect his claim with the paramount source of title, and in support of his contention cites the case of *U. S. v. Railroad Co.*<sup>1</sup> recently decided in an oral opinion by Judge SAWYER, in the United States circuit court. There appears to be sound reason in the contention, but the exigencies of the case before us do not require us to hold that it must always be shown that the settler was 21 years of age, or the head of a family, or had served the requisite time in the army or navy, and that he was a citizen of the United States, or had declared his intentions to become such. The question whether a settler is a *bona fide* settler is one of fact. In this case the ultimate fact is not found. Hireman went upon the land and made improvements thereon in 1858, seven years prior to the time the land was reserved from sale, but for what purpose it is not found, except inferentially. Whether he was possessed of the qualifications necessary to enable him to initiate a valid claim is not found. It is true, it was in the power of congress to exempt from the grant to the companies lands occupied by aliens, and that the legislation of congress has been very liberal in enabling them to qualify themselves to acquire title to the

<sup>1</sup> Not reported.

public lands,—perhaps too liberal; but it has never been the policy of the government to encourage settlement without an intention on the part of the settler in good faith to proceed diligently in all the steps necessary to be taken in order to obtain the title. The facts that a settler has occupied and improved the land are merely evidentiary matters. Good intentions alone, added to settlement and improvements, will not establish the ultimate fact. A party who has entered upon public land to acquire the title from the government must show his good faith by diligently complying with the requirements of the law under which he expects to secure the title. *Mott v. Hawthorn*, 17 Cal. 58; *Railroad Co. v. Tevis*, supra. The evidence fails to show that the defendant has done so. The failure of the court to find the ultimate fact referred to left the question as to which party has the better title uncertain and unsettled, and entitled the plaintiff to a new trial. The appeal from the judgment was taken more than six years after the entry of the judgment. It is therefore dismissed. *Langan v. Langan*, (Cal.) 26 Pac. Rep. 764, (filed May 25, 1891.) The order appealed from is reversed.

WECONCUR: MCFARLAND, J.; GAROUTTE, J.; HARRISON, J.

DE HAVEN, J. I concur in the judgment. There is no finding in this case of the ultimate fact of ownership of the land in controversy, nor is it found as a fact that Hirleman, under whom the defendant claims, was a *bona fide* settler on the land in controversy on January 30, 1865, at which date there was filed in the United States land-office at San Francisco the order of the secretary of the interior, withdrawing from sale and location lands within 25 miles on either side of the general route of the Western Pacific Railroad Company, as shown upon its map of such general route, theretofore filed. If he was such settler, then the land in controversy did not pass to the railroad company; otherwise, it did. The court, therefore, should have found, in addition to the other evidentiary facts, either that he was or was not a *bona fide* settler, in so many words. A *bona fide* settler, within the meaning of section 4 of the act of congress of July 2, 1864, is one who has made an actual settlement upon public land, intending in good faith to acquire the title therefrom to the United States. The words should be held to apply to any actual settler upon land affected by the act at the date of the order of withdrawal, provided for in section 7 of the act, and who had settled thereon and made improvements with the intention, in good faith, of taking at the proper time the necessary steps to acquire the title of the government in any of the modes allowed by the laws of the United States, and, as thus defined, are broad enough to include one who has made a settlement with the intention of procuring its location in part satisfaction of any grant made by the United States to the state, and then purchasing from the state. This reservation of land occupied by *bona fide* settlers is not a grant to

such persons. They must show themselves entitled to enter it before they are permitted to acquire the title, but it is a withdrawal of such occupied land from the grant made to the railroad company.

I think, also, that as there was no evidence tending to show that Hirleman was not a citizen of the United States the court would have been justified in finding, from the facts before it, that he was possessed of the qualifications entitling him to purchase land from the state, and that upon January 30, 1865, he was a *bona fide* settler upon the land in controversy, within the meaning of the act of July 2, 1864.

WECONCUR: BEATTY, C. J.; SHARPSTEIN, J.

89 Cal. 373

CASHMAN v. ROOT *et al.* (No. 13,152.)

(Supreme Court of California. June 1, 1891.)

GAMBLING CONTRACTS—SPECULATION IN STOCKS—MARGINS—ACTION TO RECOVER MONEY LOST.

Const. Cal. art. 4, § 28, providing that "all contracts for the sale of shares of the capital stock of any corporation or association, on margin or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered," applies to a transaction wherein a broker purchases stock for a customer with his own money, charging only commissions and interest thereon, and retaining the stock as security until its sale, the customer putting up only a certain margin, and receiving the profit or paying the loss.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action by William F. Cashman against George B. Root and one Hooker, to compel a conveyance of certain real estate. From a judgment for defendants plaintiff appeals.

P. Reddy and W. H. Metson, for appellant. Pillsbury & Blanding, M. C. Baum, and Chas. J. Heggerty, for respondents.

TEMPLE, C. This action is brought to compel a conveyance to plaintiff of certain real estate, which it is averred was conveyed by plaintiff to defendant Root on the 18th of June, 1884, in trust to secure the payment by plaintiff to defendant Hooker of any indebtedness which might exist within six months after the 14th of July, 1885. The complaint alleges that plaintiff was not, at the commencement of the suit, and for a long time prior had not been, indebted to Hooker in any amount whatever. Demand for a deed and refusal are also averred. The answers admit that the conveyance was made in trust, as charged in the complaint, but charge that plaintiff is still indebted to the defendant Hooker in the sum of \$2,347. Defendant Hooker was a stock broker engaged in buying and selling mining stocks in San Francisco, on margin or otherwise, as required. Plaintiff had been a regular customer of Hooker for many years, and had lost heavily in stock speculations. Being, as Hooker testified, rather short of money, he conveyed the property sued for in trust to defendant Root, who was in Hooker's employ, to cover margins, and to enable plaintiff to continue his speculations in stock. Hooker states that he



valued it at about \$3,000, and to that extent plaintiff could buy on margin without actually putting up money. They continued to deal together until Hooker's business was closed by his insolvency in December, 1886, at which time Hooker held certain stocks for plaintiff, and, according to Hooker's books, plaintiff owed him \$2,347. Plaintiff does not dispute the correctness of the account according to the course of dealing between the parties or their understanding at the time, but claims that the debt is illegal, and the contract to pay void, under section 26 of article 4 of the constitution of this state. It reads as follows: "All contracts for the sale of shares of the capital stock of any corporation or association, on margin or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." Plaintiff's dealings with Hooker were altogether on margin. When the estimated value of the land did not afford sufficient margin, it was put up in cash, and was kept good as the market fluctuated. Upon purchasing stock, the cost price was charged to plaintiff, less the amount of margin put up in cash. When sold, his account was credited with the amount realized. He was, of course, charged with the broker's commissions and the interest on the money advanced. The result, of course, was that plaintiff, aside from the commissions and interest, simply received or paid the differences between the buying and selling values. It was not contemplated that he should ever receive the stock, although he might, had he been able, have paid his debt and demanded the securities at any time. Stock ordered was always purchased by Hooker, paid for in full, and delivered to him, except when he had orders to sell the same stock for another customer, in which case the stock was simply transferred from one account to the other at market rates. The account was generally balanced monthly, when, as Hooker testified, plaintiff could tell whether he had lost or won in stocks. Hooker did not keep the stock of his customers separate, or preserve its identity, but always had under his control sufficient to satisfy the claims of his customers.

It is evident from these facts that the only purpose of these dealings was to enable plaintiff to speculate in the fluctuations of the market. If there were no break in the proceedings, it was indifferent to plaintiff whether any stock was bought or not, provided the entries were made in his account according to the market rates. It was quite a different matter, however, to Hooker. Had he not purchased, the transaction would have been a continuous wager between himself and his customer as to the future of the market. By purchasing he secured himself, and had no other interest than his commissions and the interest on his money. So, too, had there been a break anywhere in the deal, it might have been important to determine whether the stock was purchased by Hooker as agent and belonged to plaintiff, or was purchased

for himself simply to make himself safe upon his contract to give plaintiff the advantage of the fluctuations of the market. The respondent contends that the relation of vendor and vendee did not exist between plaintiff and Hooker; that they neither bought nor sold stock to each other; that Hooker, as agent for plaintiff, purchased and paid for the stock, receiving immediate delivery for plaintiff, and thereafter held it subject to his order upon the payment of the price and commissions. The further contract, by which he held it as security for a loan, constituted the relation of pledgee and pledgee, which is not prohibited by the constitution. This view was adopted by the learned judge of the trial court, and the findings are carefully drawn upon that theory. They find that the stock was purchased by Hooker as agent of and belonged to plaintiff, and that Hooker never sold stock to, or bought from, plaintiff. No part of the indebtedness, therefore, arose from the sale of stock on margin or otherwise.

This view of the relation between the broker and his customer in such a transaction is sustained by the weight of authorities, in this country and in England, but the decisions are by no means uniform. The first prominent case on the point is *Markham v. Jaudon*, 41 N. Y. 235. The question there was whether the stock in the hands of the broker was a pledge. In order to determine this question, an analysis is made of the contract relations, separating the powers and obligations of the parties. It was held that the broker undertook (1) to purchase for his customer; (2) to advance the money required beyond the margin; (3) to carry the stock, the margin being kept good, the customer to receive the gain or suffer the loss; (4) to retain the stock, or an equal amount of the same kind of stock; (5) to deliver to customer when required, upon payment; or (6) to sell when required, accounting for the proceeds. That the customer contracts: (1) To pay the stipulated margin; (2) to keep the margin good; and (3) to take the shares when required, and pay the amount due the broker. This statement of the rights and obligations of the parties has been generally followed in other cases, in which similar questions have arisen; and stockboards and brokers have adopted it as correctly stating the nature of the relation between broker and customer. It is evident, however, that the court in this analysis assumes the conclusion which it desired to reach. Its correctness has been questioned. In that case there were two strong dissenting opinions, in which the relation between the broker and his customer was regarded simply as a contract relation, by which the fact of agency was ignored or denied. Mr. Justice Grover says: "The contract contemplated that the title should at all times remain in the defendants (brokers.)" Mr. Justice Woodruff refers for his views of the relation to his opinion in *Morgan v. Jaudon*, 40 How. Pr. 368. He there states his opinion to be that "it does not contemplate, in the first instance, that the customer shall ever ac-

quire the title to the stock. It is a pure speculation in the rise and fall of stocks, \* \* \* and the broker is employed to provide the means, either from his own funds, \* \* \* or by borrowing in his own name and on his own credit, by pledge of the very stock which he buys, the required amount; and the whole expectation and intention of the parties is satisfied, if, when directed to sell, he produces the required number of shares, and sells them for the very purpose for which the speculation is made, viz., to realize the profits or determine the loss which results to the party employing him for that purpose. It is entirely clear that in these transactions the party employed, though he belongs to a class commonly called 'brokers,' does not act as broker merely. In such business they are more than brokers; and all arguments imputing to them a mere agency, so far as they rest upon the facts that they are called 'brokers,' are unsound and fallacious." In *Pennsylvania* it has been held that the relation of principal and agent does not exist between the broker and his customer, but both are principals. *Ruchisky v. De Haven*, 97 Pa. St. 202; *North v. Phillips*, 89 Pa. St. 250; *Dickson v. Thomas*, 97 Pa. St. 278; *Gheen v. Johnson*, 90 Pa. St. 88. In *Ingraham v. Taylor*, 58 Conn. 503, 20 Atl. Rep. 601, it was held that the broker, under such a contract, was not bound to purchase the stocks at all. It was enough if he could procure them when called for, at the market rate, when ordered. It is said: "By such contracts the plaintiff bought the right to demand at his option as to the time the delivery of shares at the price of the day of agreement. The defendants, in consideration of his payments upon margins, assumed the risk of an undertaking to deliver shares upon demand at that price." These citations are made to show that it is not universally admitted that the broker in such transactions purchases the stock as the agent of the customer. Looking at it from the point of view of the customer only, it is clear that by this device he has been able to purchase stock on margin. This phrase has come to have a peculiar or technical meaning among stock dealers, and it is applied to just these transactions between broker and customer.

It is a matter of public history that the constitutional provision was adopted just after a period of remarkable stock speculation, in which a large part of the community had been set wild with the apparent prospect of great gain, and the rapid fluctuations of stock afforded unusual inducement to stock gambling. By skillful manipulation of the markets, a few fortunate ones had been able to take advantage of the existing mania, and make large fortunes for themselves, at the cost of wide-spread financial ruin and distress. People of small means were enabled by brokers to speculate largely at that time, through these very purchases on margin. Of these matters this court will take judicial notice, and, doing so, cannot doubt that this inhibition was intended to strike down this practice. If it does not do this, it simply beats the

air. Although an isolated case or two might occur, where a transaction directly between vendor and vendee is upon like terms, certainly we know there was no practice of that kind which could have been regarded as an evil of sufficient importance to be prohibited in the fundamental law. Such a prohibition is of little worth if it can be evaded by so simple a device. A party wishing to purchase on margins has but to interpose his broker, who is to carry the stock instead of the original owner. This would not diminish the evil. In fact, it is the very form of the evil mainly intended to be prohibited. It may be said that if the relation be not one of principal and agent, but simply a contract relation, by which the broker agrees to speculate in stocks, the customer indemnifying him against loss, and taking the profits, still there is no sale. It would be, it may be said, a contract to enable the customer to speculate in differences of market values. It is only sales on margin that are prohibited and made void. It is not easy to characterize by a name the relation between the broker and his customer. For all ordinary purposes, it may be admitted that the broker purchases as the agent of his customer, and then holds the stock as a pledge to secure a debt; but if by the transaction the customer is enabled to do that which is prohibited, to-wit, purchase stock on margin, it must be held to be within the prohibition; and, if Hooker did not himself sell to plaintiff, but was only the instrument through whom the illegal end was accomplished, he being privy to the design, the same result would follow. *Irwin v. Williar*, 110 U. S. 510, 4 Sup. Ct. Rep. 160. In the accomplishment of the unlawful purpose, he took the place of the vendor, and carried the stock as the vendor might have done; and the end was thus reached *per interpositam personam*. The end attained, and not the form of the transaction, must determine the question. It is claimed that it does not appear that the stock was the capital stock of a corporation or an association; but it is so found, and the respondent is in no position to complain of the finding. We think the court erred in holding, from the evidence, that plaintiff was indebted to Hooker or his assignee. We therefore recommend that the order and judgment be reversed, and a new trial ordered.

We concur. FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are reversed, and a new trial ordered.

89 Cal. 304

McVERRY v. BOYD et al. (No. 12,916.)

(Supreme Court of California. May 28, 1891.)

STREET IMPROVEMENTS — ASSESSMENTS — VALIDITY — ENFORCEMENT OF LIEN.

1. Acts Cal. 1871-72, § 7, relating to the granting of contracts for street improvements by the board of supervisors of the city and county of San Francisco, provides that, if the contractor desires to have the time for completing his contract extended, he must make application to the board of supervisors, and "under the direction of

the board" the superintendent of streets may extend the time, and that on passage of the resolution by the board, the superintendent shall cause the same to be recorded. *Held*, that the duties of the superintendent are ministerial only the extension being granted by the board, and his failure to record the resolution of extension during the life of the contract does not render the extension invalid, if the resolution was passed in time.

2. After a contract for street improvement has been completed, a property owner cannot, in an action to enforce the lien of the assessment, question the sufficiency of a power of attorney under which the contract was entered into.

3. Where a statute gives the board of supervisors authority to order a street "graded or regraded," they may order the regrading though the property owners have already borne the expense of grading.

4. St. Cal. 1869-70, p. 482, and Civil Code Cal. § 498, requiring the owners of a railroad to improve a certain portion of the streets over which their track is laid, do not require that they shall be assessed with any portion of the expense of improving the street under a contract between the city and contractors.

5. Where a property owner contests the validity of an assessment for street improvements on the ground that the expense of improving a portion of the street occupied by a railroad should have been assessed against the railroad company, the burden is on him to show that such expense was included in the assessment against him.

In bank. Appeal from superior court, city and county of San Francisco; *WALTER H. LEVY*, Judge.

*W. W. Cope*, for appellant. *J. M. Wood*, (*J. C. Bates*, of counsel,) for respondent.

*GAROUTTE, J.* This is an action to foreclose the lien of a street assessment upon a lot on Clay street, in the city of San Francisco. The appeal is by defendant *Boyd* from the judgment and order denying his motion for a new trial. Findings of fact were waived. April 3d was the day upon which the contract of plaintiff for the completion of the work expired, and upon that day the board of supervisors passed the following resolution: "Resolved, that the superintendent of public streets, highways, and squares, be and is hereby directed to grant the following extensions of time on street contracts, viz.: To property owners or assigns, 30 days for regrading Clay street from Jones to Leavenworth." The street superintendent did not, in pursuance of the foregoing resolution, issue a certificate of the 30-day extension until April 10th. The extension must be granted within the life of the contract in order to be valid. *Raisch v. City and County of San Francisco*, 80 Cal. 1, 22 Pac. Rep. 22; *Beveridge v. Livingstone*, 54 Cal. 54.

1. It is contended by the appellant that the extension to the contractor is granted by the street superintendent, and that the resolution of the board of supervisors is merely permissive or directory of such action, and that therefore in this case the contract was dead upon the 10th day of April, the date upon which the superintendent acted upon the resolution of the board. But upon a careful consideration of section 7 of the acts of 1871-72 it would seem that such contention is untenable. The law vests in the board of supervisors, acting judicially, the right to

determine when additional time should be granted to the contractor; and whatever the statute requires the street superintendent to do under an order of the board directing an extension, he does as a ministerial act, and the statute is merely directory in that respect. Section 6 of the Act (St. 1871-72, p. 807,) provides that before the awarding of any contract by the board of supervisors the clerk shall cause to be posted a notice inviting sealed proposals, "which notice shall specify the time within which said work is to be performed," and also provides that prior to the publication of that notice the superintendent of streets shall furnish specifications "and the time within which the contract must be completed." These acts of the superintendent are not conclusive upon the board of supervisors in the matter of awarding the contract, but are merely advisory to it. The board is the legislative body, and the authority by which the contract is finally awarded. The time within which the work is to be completed is as much a part of the contract as is the manner of its performance. The superintendent, in entering into the contract, is but the ministerial officer of the board and can enter into only such contracts as have been authorized by it. After the contract has been awarded, he has no power to change the specifications, or the time within which the work shall be completed. If the contractor desires to have the time for its completion extended, he must make application to the board of supervisors, "and under the direction of the board of supervisors" the superintendent may extend the time originally fixed for the completion of the contract. After such "direction" the superintendent has no discretion in the matter, but may be compelled to carry out the "directions" of the board. The statute does not specify in terms the mode in which such extension shall be made; the only requirement being that, "on the passage of a resolution by the board of supervisors directing an extension of time to be granted to complete a contract," he shall "cause the same to be recorded in the office of the county recorder." This is the only act which the statute requires of the superintendent in the matter of extending the contract after he has been so "directed" by the board of supervisors. The statute, however, implies that the extension may be indorsed upon the original contract, but there is no direct requirement that such indorsement be made. Such indorsement, however, is not the extension of the contract, but merely an evidence of the fact that the contract has been previously extended by the board of supervisors, the only party having authority to grant the extension. In causing this resolution of extension to be recorded in the office of the county recorder, as well as in making an indorsement thereof upon the contract itself, the superintendent is but giving expression to the act of the board of supervisors, and not in the exercise of any original authority conferred upon him. The statute does not say that the extension shall not be effectual until it is indorsed upon the contract, and the fact that such indorsement

was not made for several days "could not, as we concede, prejudice defendant's rights, and should not be permitted to prejudice the rights of plaintiff, who had no control of the matter." *Himmelmänn v. Reay*, 38 Cal. 165. This construction of the statute is corroborated by a subsequent clause in section 7, which provides that the county recorder shall keep books of record in which "all extensions of time granted by the board of supervisors, as certified to by the superintendent, shall be recorded."

2. We do not think that the appellant can question in this action the sufficiency of the power of attorney from Jones to Jackson to enter into the contract with the superintendent of streets. After the board of supervisors have acquired jurisdiction to order the work done, and a contract has been awarded at a fixed price, unless the property owner himself desires to do the work, it is a matter of indifference to him by whom it is done, provided it is completed in accordance with the terms of the contract to the satisfaction of the superintendent. The burden upon his land is not affected in any respect by the fact that the work has been done under the contract with one person rather than with another. If there was any controversy between different property owners concerning their respective rights to enter into contract with the superintendent, or if the person to whom the contract had been awarded disputed the right of those claiming to be property owners to enter into the contract, the sufficiency of the power of attorney might be questioned; but after the contract has been completed, and the work accepted, the defendant in an action to enforce the lien of the assessment cannot make this objection as a defense. *Miller v. Mayo*, 26 Pac. Rep. 864. (No. 13,978, filed April 1, 1891.)

3. The objection by the appellant to the jurisdiction of the supervisors to order the work done, upon the ground that the street had been previously graded, is untenable. The statute in question (section 8)<sup>1</sup> gives to the board of supervisors the same authority for regrading as for grading a street. There is no limitation upon its powers in this respect. It is left to the discretion of the board to determine what work it will order done in any particular instance. Section 14 of the act does not in terms purport to give to the superintendent exclusive or any jurisdiction to order the regrading of a street; but is limited to the improvement of a street in front of individual lots. Whenever the condition of a street is such as, in the estimation of the board of supervisors, it is proper that the burden of regrading the same should be borne by the entire block, it has authority to order such improvement, even though a similar expense has previously been borne by the property owners.

4. Appellant urges that the assessment is void for the reason that no part of the expense was assessed against the railroad company whose track occupied a

portion of the street. The statute referred to, (St. 1869-70, p. 482,) as well as the Civil Code, § 498, provides that the owners of the railroad shall improve a certain portion of the street over which their track is laid, but does not require that any portion of the expense incurred under a contract with the municipal authorities shall be assessed to it. Indeed, under the provision that the expenses shall be assessed "upon the lots and lands fronting" upon the work, such portion of the expense could not be assessed to the railroad company. There is nothing, however, upon the face of the assessment, from which it can be determined that any portion of the expense of regrading that portion of the street occupied by the railroad company was included therein. Being *prima facie* correct, it was incumbent upon the appellant to show wherein it was defective. The mere fact that a portion of the street was occupied by a railroad company whose duty it was to improve, or to bear the expense of improving, a part of the street, does not impair the *prima facie* correctness of the assessment. The apportionment of the expense of the work is given by the statute to the superintendent of streets; and the defendant, if dissatisfied with the assessment, should have appealed to the board of supervisors, as provided by section 12 of the act in question. Having failed to do so, he cannot now complain of any matters from which he could have obtained relief by applying at the proper time to the proper authorities. *Hewes v. Reis*, 40 Cal. 264; *Himmelmänn v. Hoadley*, 44 Cal. 279; *Dorland v. McGlynn*, 47 Cal. 51; *Boyle v. Hitchcock*, 66 Cal. 129, 4 Pac. Rep. 1143; *Blair v. Luning*, 76 Cal. 135, 18 Pac. Rep. 153; *Jennings v. Le Breton*, 80 Cal. 11, 21 Pac. Rep. 1127. Let the judgment and order be affirmed.

We concur: HARRISON, J.; McFARLAND, J.; DE HAVEN, J.; SHARPSTEIN, J.

(39 Cal. 421)

Ex parte WILLIAMS. (No. 20,794.)

(Supreme Court of California. June 4, 1891.)

CRIMINAL LAW—SECOND CONVICTION—SENTENCE—HABEAS CORPUS.

1. Pen. Code Cal. § 461, declares that burglary in the second degree is punishable by imprisonment in the state-prison for not more than five years, and section 666 provides, among other things, that one twice convicted of felony may be punished by 10 years' imprisonment therein. *Held* that, where an indictment charged three former convictions, and these were admitted of record, a judgment reciting a conviction of burglary in the second, and affixing a sentence of 10 years, was valid, without reciting the former convictions.

2. In proceedings upon *habeas corpus*, the court will not determine that the document under which the petitioner is detained, and which is certified by the clerk to be a true and correct copy of the judgment "entered" on the minutes of the court, is to be disregarded on the production of another document, certified by the same officer to be a correct copy of the entry of judgment "filed" in the clerk's office.

Department 1. Application for *habeas corpus*.

Pen. Code Cal. § 461, provides that burglary in the second degree is punishable by

<sup>1</sup>Section 8 authorizes the board, in terms, to order the streets, etc., "graded or regraded."

imprisonment in the state-prison for not more than five years. Section 666 provides that a person, having been convicted of any offense punishable by imprisonment in the state-prison, committing a crime thereafter, if the subsequent offense is such that on a first conviction he would be punishable by imprisonment for a term exceeding five years, he is punishable by imprisonment for not less than 10 years, but, if the subsequent offense is such that on a first conviction he would be punishable by imprisonment for 5 years or less, then he shall be imprisoned not exceeding 10 years.

*Carroll Cook and J. E. Foulds*, for petitioner. *W. H. H. Hart*, Atty. Gen., for the People.

**HARRISON, J.** Application for discharge on *habeas corpus*. In his return to the writ issued herein, the warden of the state-prison produces, as his authority for the detention of the petitioner, a certified copy of the judgment of conviction, as follows: "Commitment. In the superior court of the city and county of San Francisco, state of California. Department No. 11. Saturday, February 19, 1887. Present: Hon. D. J. Toohey, Judge. The People of the State of California vs. Gus Williams, convicted of burglary in the second degree. The district attorney, with the defendant and his counsel, Mr. O'Brien, came into court. The defendant was duly informed by the court of the information duly presented and filed on the 26th day of January, 1887, by the district attorney of the city and county of San Francisco, charging said defendant with the crime of burglary, and three prior convictions; of his arraignment and plea of 'not guilty as charged in said information;' of his trial and the verdict of the jury on the 16th day of February, 1887, 'Guilty of burglary in the second degree;' and defendant's motion for a new trial having been denied by the court, and said prior convictions having been admitted by defendant, the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which defendant replied he had none; and, no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment that whereas, the said Gus Williams having been duly convicted in this court of the crime of burglary in the second degree, it is therefore ordered, adjudged, and decreed that the said Gus Williams be punished by imprisonment in the state-prison of the state of California, at San Quentin, for the term of ten (10) years. The defendant was then remanded to the custody of the sheriff of the city and county, to be by him delivered into the custody of the proper officers of said state-prison at San Quentin. Office of the county clerk, city and county of San Francisco. I, William J. Ruddick, county clerk of the city and county of San Francisco, and *ex officio* clerk of said superior court thereof, do hereby certify the foregoing to be a true and correct copy of a judgment entered on the minutes of said court in and for the city and county of San Francisco, state of California, in the above-entitled cause, as appears of

record in my office. Attest: My hand, and the seal of the said superior court, this 19th day of Feb., 1887. [Seal.] WILLIAM J. RUDDICK, Clerk. By BERT McNULTY, Deputy-Clerk." To counterveil the effect of this, the petitioner presented the following document: "In the superior court of the city and county of San Francisco, state of California. Department No. 11. Saturday, February 19, 1887. Present: D. J. Toohey, Judge. The People of the State of California vs. Gus Williams, convicted of burglary, second degree. This being the day set for sentence, the defendant and counsel being present in court, the defendant was asked if he had any legal cause to show why judgment should not be pronounced against him, to which defendant replied that he had none. Thereupon the court renders its judgment that whereas, the said Gus Williams having been duly convicted of the crime of burglary, second degree, it is therefore ordered, adjudged, and decreed that the said Gus Williams be punished by imprisonment in the state-prison at San Quentin, for the term of ten (10) years. The defendant was then remanded to the custody of the sheriff of the city and county, to be by him delivered into the custody of the proper officers of said state-prison at San Quentin. I, Wm. J. Blattner, county clerk of the city and county of San Francisco, state of California, and *ex officio* clerk of the superior court in and for said city and county, hereby certify the foregoing to be a full, true, and correct copy of the original minute entry of judgment in the above-entitled cause, filed in my office on the 19th day of February, A. D. 1887. Attest: My hand and seal of said court this 27th day of January, A. D. 1891. [Seal.] WM. J. BLATTNER, Clerk. By B. F. JONES, Deputy-Clerk."

It is claimed on behalf of the petitioner that the latter document must be taken as the judgment in the case, and, inasmuch as the maximum term of imprisonment for burglary in the second degree is fixed by the statute at five years, that, with proper deductions for good behavior, that term has expired, and he is entitled to his discharge. We cannot, however, in proceedings upon *habeas corpus*, determine that the document under which the petitioner is detained, and which is certified by the clerk to be a "true and correct copy of the judgment entered on the minutes of said court," is to be disregarded, or held of no effect, by the production of another document certified by the same officer to be a "full, true, and correct copy of the original minute entry of judgment, filed in the clerk's office." A stipulation by the attorney for the petitioner and the attorney general was filed herein at the hearing to the effect that the information upon which the petitioner was convicted, in addition to the charge of burglary, charged him with three prior convictions; and that upon being arraigned he pleaded not guilty to the crime charged, and admitted the prior convictions; that such plea and admission were entered in the minutes of the court; that the cause was thereupon set down for trial upon a sub-

sequent day; and that the judgment roll made up by the clerk included copies of these entries in the minutes, as well as copies of the judgment and minute entry hereinbefore set out. It is thus seen that it appears upon the record of the case that the court did not exceed its jurisdiction in sentencing the prisoner to imprisonment in the state-prison for the term of 10 years. *Ex parte Young Ah Gow*, 73 Cal. 438, 15 Pac. Rep. 76.

It was not necessary that the entry of the judgment in the minutes should repeat the entries that had already been made in previous proceedings in the case. These had already become a part of the record, and would obtain no greater validity by being a second time recited in the minutes. "From the mere fact that these several papers are taken into and made a part of the record, it is clear that each one was intended merely to tell its own story, or, rather, to relate its particular branch of the whole history. Thus, the indictment states the jurisdictional facts, the nature of the offense, and the facts and circumstances so far as they are material. The other papers give the history of the trial, including the verdict; and the judgment, which constitutes the last chapter, merely finishes the account by stating of what offense defendant was finally convicted, and the penalty imposed by the court. The judgment need not, and it was not intended that it should, repeat anything contained in the papers which precede it, for, in view of the fact that they go into the record and make a part of it, such repetition would be idle and serve no useful purpose. The only material parts of a judgment are the statement of the offense for which the defendant has been convicted, omitting therefrom all that is contained in the previous papers, and therefore not necessary to be repeated, and the sentence of the court." *In re King*, 28 Cal. 253. It therefore appearing that the petitioner is detained in custody by virtue of process issued upon the "final judgment of a competent court of criminal jurisdiction," the provisions of section 1486 of the Penal Code require that he be remanded, and it is so ordered.

**WE CONCUR: GAROUTTE, J.; PATERSON, J.**

(83 Cal. 410)

**RIVERSIDE WATER CO. v. GAGE. (No. 13, 426.)**

(*Supreme Court of California. June 3, 1891.*)

**WATER-RIGHTS—IRRIGATION—PLEADING—FINDINGS.**

1. An allegation in a complaint that plaintiff is owner of and entitled to all the water above defendant's dam in excess of 200 inches, and that by its construction, and a ditch diverting the flow, he has been deprived of over 450 inches of water, does not limit his claim to 450 inches, nor in any way qualify it.

2. A finding that plaintiff is the "owner" of all the water above defendant's dam in excess of a certain quantity is not in conflict with the rule that an appropriator of water does not become the owner until he has acquired its control by diverting it into conduits, when plaintiff is not seeking to recover the value of the water, but is seeking the determination of defendant's claim of a right to divert it.

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3. Where the complaint alleged ownership and right of use in a certain portion of the waters of a river, an adverse and unfounded claim by defendant to, and a wrongful diversion of, a portion thereof, and the answer admits defendant's adverse claim, alleges that it is valid, and denies the wrongful diversion, a judgment that plaintiff has acquired a prescriptive right is not affected by a failure to find the facts as to prescription and the statute of limitation, since these issues are not raised by the pleadings.

4. An answer alleging that defendant was the owner of land through which the river flowed for a distance of about three miles, and that most of it was susceptible of, and would be benefited by, irrigation, is insufficient to raise any issue as to his right to take water by virtue of his riparian ownership, in the absence of an allegation that he was entitled as riparian owner to any definite amount of water, or what portion of the stream he could exhaust for irrigating, nor whether his land was located above or below the point of plaintiff's diversion.

**In bank. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.**

*Byron Waters, (Kellogg & King, of counsel,) for appellant. Curtis & Otis, (R. E. Houghton, of counsel,) for respondent.*

**BEATTY, C. J.** The plaintiff, a California corporation organized for the purpose of appropriating, owning, selling, and distributing water for the irrigation of lands, and for domestic and other purposes, brings this suit to determine the adverse claim of the defendant to a portion of the waters of the Santa Ana river, and for an injunction restraining the defendant from diverting water in excess of his right. The findings and decree of the superior court were in favor of the plaintiff, and the defendant appeals from the judgment, claiming that the findings do not correspond with the allegations of the complaint, and that they are insufficient to support the decree. The substance of the decree is that the plaintiff is, as against the defendant, the owner and entitled to the use of all the water flowing in the Santa Ana river at the head of defendant's ditch during the irrigating season of each year, *i. e.*, the months of May, June, July, August, and September, except 289½ inches, which the defendant owns and is entitled to use, and the defendant is perpetually enjoined from diverting or obstructing the flow past his ditch of any water in excess of that quantity.

It is contended, in the first place, that this decree is erroneous because it goes entirely beyond the case made by the allegations of the complaint. But we think counsel for appellant misconstrues the complaint. It alleges very clearly and explicitly that the plaintiff at the commencement of the action was, and for more than 10 years prior thereto had been, the owner and entitled to the use of all the waters flowing in the Santa Ana river, at the point where defendant's dam was erected, in excess of 200 inches, measured under a 4-inch pressure; that defendant claimed some estate, title, or interest in said waters in excess of said 200 inches, which claim was wrongful and unfounded; and that he had wrongfully and without right placed obstructions in the river which prevented the water from flowing down to

plaintiff as it was of right accustomed to flow, whereby plaintiff had been deprived of the use of upwards of 450 inches of water. This is not a claim, as appellant's counsel contends, that the plaintiff is owner and entitled to the use of 450 inches, and no more, of the water flowing in the Santa Ana river at the defendant's dam, but on the contrary is a claim of all the water flowing at that point except 200 inches, and that the defendant's claim to any water in excess of that quantity is wrongful and unfounded. The allegation that plaintiff has been deprived of the use and enjoyment of upwards of 450 inches of water by the acts of defendant in erecting the dam does not limit the plaintiff's claim to that quantity, or in any manner qualify the allegation that it owns all the water in excess of 200 inches. The issue tendered on this point was very clearly defined by the express admission of the defendant in his answer that he did claim all the water flowing in the Santa Ana river at the point of his dam, and his allegation that his claim was lawful and valid. The findings of the court were exactly responsive to this issue, and the decree follows the findings.

The second point made by appellant is a refinement upon the first, and consists of a criticism upon the allegation and finding that the plaintiff was the owner of a quantity of water at the defendant's dam. It is urged that an appropriator of water does not become the owner of the very body of the water as his personal property until he has acquired the control of it in conduits or reservoirs of his own. Citing Canal, etc., Co. v. Hoyt, 57 Cal. 46. The proposition, as stated, is undoubtedly correct; and if in this case, as in the case cited, the plaintiff's right of action depended upon its ownership of the *corpus* of the water at defendant's dam as its personal property, the objection to the findings would be material. But in this case the plaintiff is not seeking to recover the value of water which had become its personal property. It is seeking the determination of the adverse claim of defendant to the right to divert and use a portion of the stream; and the allegation and finding of ownership and right of use of all water flowing in the stream at defendant's dam in excess of a certain number of inches is only a mode, and a very apt and sufficient mode, of designating the quantity of water, to the unobstructed flow of which the plaintiff is entitled.

The remaining points urged by the appellant all relate to various specific findings of the court to the effect that plaintiff has acquired by prescription certain rights as against the defendant, and the defendant is barred by certain sections of the statute of limitations from the assertion of any rights he may have had as a riparian owner.

It is contended by the appellant that it is not enough to find that the plaintiff has acquired a prescriptive right to water as against the defendant, but that the facts must be found from which a prescriptive right arises; and it is further contended that, although the bar of the statute of limitations may be pleaded by a bald alle-

gation that a claim or defense is barred by a particular section of the Code, a finding upon such issue is not sufficient unless it shows the existence of every fact necessary to bring the party pleading the statute within the provisions of the section relied on. All this may be so in a case where the fact of prescription or the bar of the statute is directly and necessarily in issue; but if a finding on these points is not necessary to support the decree, and is not made necessary by the pleadings, as we think is the case here, the insufficiency of the finding becomes immaterial. The complaint in this case alleges ownership and right of use in a certain portion of the waters of the Santa Ana river, an adverse and unfounded claim by defendant to, and a wrongful diversion of, a portion of such waters. The answer admits defendant's adverse claim, alleges that it is valid, and denies the wrongful diversion. The findings of the court are as broad and as specific on these points as the pleadings themselves, and contain everything necessary to support the judgment. If the findings as to prescription and the statute of limitations are not sufficient as findings on those points, they may be left out of consideration, and still the judgment is sustained by the findings that remain. Of course, if there was anything in the findings in question inconsistent with those which are required to support the judgment, they could not be left out of consideration, but they present no such inconsistency. They also support the judgment, so far as they go, and the only fault found with them is that they are not sufficiently specific. It may be contended, however, and no doubt that is the view of appellant's counsel, that the matters alleged by the defendant in his answer rendered full and specific findings on those points necessary. The answer of defendant sets up the facts, among others, that the Santa Ana river rises in the mountains, and flows through a narrow canon for about 30 miles to the point where it debouches into San Bernardino valley; that immediately below the point where it enters the valley, its waters were diverted by appropriators, not parties to this suit, as early as 1857, who have ever since continued so to divert and use such waters; that other appropriators made subsequent appropriations lower down on the stream by means of ditches, and for purposes sufficient to more than exhaust its entire flow; that the plaintiff's pretended claim is subsequent and subordinate to all these appropriations, and his point of diversion below them on the stream. To certain of these earlier rights by appropriation the defendant claims to have succeeded, and by reason thereof to have a right superior to that of the plaintiff. He plants himself, in other words, upon the ground of prior appropriation and prescriptive right. As to all these matters the findings of the court are full and specific. It is found that there were such earlier appropriations; that the defendant has succeeded to the rights of certain of the appropriators, and the water awarded to him by the decree is the quantity which it is found was appropriated by his grantors



prior to the appropriation under which the plaintiff claims. There can be and there is no complaint that the findings are insufficient as to the rights of the defendant as an appropriator. But, in addition to the appropriations, upon which the defendant seems mainly to have relied, he did allege in his answer that he was the owner of a tract of land, containing about 2,600 acres, through and over which the Santa Ana river flowed for a distance of about 8 miles, and that most of the tract was susceptible of, and would be benefited by, irrigation. He did not, however, allege that he was entitled as a riparian owner to any definite quantity of water for the irrigation of his riparian lands, nor did he allege any facts showing or tending to show what proportion of the waters of the stream he could reasonably exhaust for that purpose. Nor is it alleged whether his land was above or below the point of plaintiff's diversion. In short, we think the answer insufficient to raise any issue as to the extent of defendant's right as a mere riparian proprietor to divert and exhaust any portion of the waters of the stream. The finding on this point is as full as and no fuller than the allegation, and does not conflict with the general finding in favor of plaintiff as to ownership of the water decreed to it. It was not necessary, therefore, to support the conclusions and judgment of the court, to find that the plaintiff had gained a prescriptive right, or that the defendant was barred of his riparian right; and, conceding these findings to be as insufficient as appellant contends they are, we think the other findings cover all the material issues, and fully support the judgment. Judgment affirmed.

We concur: MCFARLAND, J.; PATERSON, J.; GAROUTTE, J.; SHARPESTEIN, J.

89 Cal. 387

BATES v. GREGORY *et al.* (No. 13,168.)

(Supreme Court of California. June 1, 1891.)

MUNICIPAL BONDS — CHANGE OF CORPORATION — LIMITATION OF ACTION.

1. By Act Cal. March 26, 1851, the city of Sacramento was incorporated, and provision made that it might sue and be sued under its corporate name of the "Mayor and Common Council of the City of Sacramento." Under provisions of acts of April 26, 1853, and April 10, 1854, it issued bonds payable July 1, 1874. By Act May 1, 1858, the city and county of Sacramento were united under the name of the "City and County of Sacramento," the act providing that the city and county was thereby made the successor of the mayor and common council, and the property and rights of the latter corporation transferred to and vested in the former. It was also provided that the city and council should not be subject to suit, or its property liable for debt. By Act April 25, 1863, the inhabitants within the limits of the city of Sacramento as defined in the act of March 26, 1851, were made a body politic under the name of the "City of Sacramento," and all property which on April 30, 1858, was vested in the "Mayor and Common Council," etc., and such as had since been acquired within the described city limits for municipal purposes, was transferred to the new corporation, and provision made that it might be sued on any bond or contract thereafter made. *Held*, that the holder of the bonds could not be deprived of the right to sue their maker, and that at no time since July

1, 1874, was he prevented by a statutory prohibition from bringing action thereon within Code Civil Proc. § 356, providing that when the commencement of an action is stayed by injunction or statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

2. The corporations created by the acts of 1853 and 1863 were respectively, in law, the successors of the corporation that issued the bonds, and liable to be sued thereon.

3. Although Act Cal. March 22, 1864, providing that the holders of all claims against the city of Sacramento which accrued prior to January 1, 1859, might present the same to the board of trustees, and it should issue bonds payable February 1, 1906, for all such claims as it might consider legal and just, does not limit the time within which an application for refunding should be made, still a failure to present them and demand new bonds in their place until after they had become barred by limitations would give the board the right to refuse to issue them.

In bank. Appeal from superior court Sacramento county; JOHN HUNT, Judge.

A. C. Freeman and W. C. Belcher, for appellant. A. P. Catlin, for respondents.

HARRISON, J. This was an application for a writ of mandate to compel the defendants, as trustees of the city of Sacramento, to issue to the petitioner new bonds of the city, in accordance with the provisions of the act of March 22, 1864, in exchange for unpaid bonds held by him that had been issued under the provisions of the acts of April 26, 1853, and April 10, 1854. The city of Sacramento was incorporated by the act of the legislature passed March 26, 1851, entitled "An act to incorporate the city of Sacramento." St. 1851, p. 391. The government of the city was vested in a mayor, recorder, and council, and by section 3 of the act it was declared that "the said mayor, recorder, and councilmen shall be a body politic and corporate by the name and style of the 'Mayor and Common Council of the City of Sacramento,' and by that name they and their successors shall be known in law, have perpetual succession, sue and be sued in all courts and in all actions whatsoever." By the act of April 26, 1853, (St. 1853 p. 117,) authority was given to the municipality to create loans upon the faith and credit of the city at the discretion of the city council. Under the provisions of this act the mayor and common council of the city of Sacramento issued a certain bond, dated the 6th day of May, 1854, for the sum of \$544.45, payable on the 1st day of July, 1874, with 40 semi-annual coupons attached for \$27.22 each. By another act, passed April 10, 1854 (St. 1854, p. 196,) the mayor and common council of the city of Sacramento were authorized to issue city bonds payable 20 years from the 1st day of July, 1854, and drawing interest at 10 per cent. per annum. Under the provisions of this act, two bonds for the sum of \$1,000 each were issued by the mayor and common council of the city of Sacramento, dated respectively the 24th and 26th day of April, 1854, made payable on the 1st day of July, 1874, and to each there were attached 40 semi-annual coupons of \$50 each. April 24, 1858, the legislature passed an act to take effect May 1,

1858, consolidating the city of Sacramento with the county of Sacramento, under the name and style of the "City and County of Sacramento." St. 1858, p. 267. Section 2 of this act declares that "the city and county of Sacramento is hereby made and constituted the successor of the corporation by this act dissolved, and heretofore known as the 'Mayor and Common Council of the City of Sacramento.' The lands, public and private buildings, property, rights of property, actions, rights of actions, moneys, revenues, income, and trusts now vested in or belonging or in any wise appertaining to the corporation known as the 'Mayor and Common Council of the City of Sacramento' are hereby transferred to and vested in, and are declared to appertain and belong to, the city and county of Sacramento, as hereinafter provided." It was also provided in said act that the city and county should not be sued in any action whatever, nor should any of its lands, buildings, improvements, property, franchises, taxes, revenues, actions, choses in actions, and effects be subject to any attachment, levy, or sale, or any process whatever, either mesne or final. April 25, 1863, the legislature passed an act entitled "An act to incorporate the city of Sacramento," (St. 1863, p. 415,) by which the inhabitants of the territory embraced within the limits of the city of Sacramento, as defined in the act of March 26, 1851, were made a body politic under the name and style of the "City of Sacramento." By this act the lands, tenements, hereditaments, moneys, and property which on April 30, 1858, were vested in or held by the "Mayor and Common Council of the City of Sacramento," and such as had since that date been derived or acquired within the described city limits for municipal purposes or with municipal funds, were transferred to this new corporation. The government of the city was vested in a board of three trustees, and it was provided by the act that the body politic might sue and be sued and defend upon any bond, covenant, agreement, contract, matter, or thing whatever, provided such bond, agreement, contract, or thing that is the cause of action had been made or entered into after the passage of that act. On the 22d of March, 1864, the legislature passed "An act to provide for the liquidation of the indebtedness of the city of Sacramento which accrued prior to January 1, 1859." St. 1864, p. 217. By this act it was provided that the holders of all claims against the city of Sacramento which accrued prior to the 1st day of January, 1859, might present the same to the board of trustees, and that the said board should cause to be issued bonds, payable to bearer on the 1st day of February, 1903, for all such claims as they might upon examination consider legal and just. The plaintiff, having become the owner of the three bonds mentioned above, made a demand on the 17th of October, 1887, upon the board of trustees of the city of Sacramento that it issue to him bonds as contemplated by this last-named act for the amount of the principal of said bonds, and for all of the coupons thereon which

matured on or before January 1, 1859. Upon the refusal of the board to issue him the bonds as demanded, he commenced this proceeding to compel the same. The court before which the cause was tried found that the petitioner's claim was barred by the statute of limitations, and rendered judgment in favor of the defendant, from which the plaintiff has appealed.

By the terms of the bonds, they matured on the 1st day of July, 1874, and consequently would be barred by limitation on the 1st day of July, 1878, unless, as claimed by appellant, the statute of limitations has no application. The appellant, however, contends that the statute of limitations is not applicable, for the reason that by the provisions of the act of 1858, incorporating the "City and County of Sacramento," and also of the act of 1863, incorporating the "City of Sacramento," hereinabove mentioned, he was prevented from bringing any action to enforce their collection, and invokes the provisions of section 356, Code Civil. Proc., which declares: "When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." He also urges that inasmuch as the act of March 22, 1864, above mentioned, does not limit the time within which an application for refunding under its terms may be made, the statute of limitations has no application.

The provisions in the act of March 26, 1851, that the body politic then created might "sue and be sued in all courts and in all actions whatsoever," entered into and made a part of the contract of the municipality in the issuance of the bonds in question. The legislature could not thereafter, without impairing the obligation of this contract, pass any act which would deprive a holder of these bonds of the right to sue their maker. This principle is so familiar and so fully settled as hardly to require the citation of authorities. It was said by the supreme court of Massachusetts in *Call v. Hagger*, 8 Mass. 430: "If the legislature of any state were to undertake to make a law preventing the legal remedy upon a contract lawfully made, and binding on the party to it, there is no question that such legislature would by such act exceed its legitimate powers. Such an act must necessarily impair the obligation of the contract, within the meaning of the constitution, and the courts of law would be bound, therefore, to construe it as a void act of legislation, and as having no force or authority." In *Von Hoffman v. City of Quincy*, 4 Wall. 535, the supreme court of the United States, discussing this subject, says: "It is also settled that the laws which subsisted at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement." And in the same case the

court further says: "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution against invasion. The obligation of a contract 'is the law which binds the parties to perform their agreement.' The prohibition has no reference to the degree of impairment. The largest and the least are alike forbidden." See, also, *Edwards v. Kearzey*, 96 U. S. 595; *People v. Bond*, 10 Cal. 563; *Wolff v. New Orleans*, 103 U. S. 358. If, then, it be admitted that it was the intention of the legislature, by the acts aforesaid, to prevent the institution of any action against the municipality upon the bonds in question, such act would have been unconstitutional, and beyond the power of the legislature to enact. The legislature has not in direct terms declared that no action shall be brought upon these bonds. It is only by an inference drawn from the fact that in the acts of 1858 and 1863 a limitation was imposed upon the bringing of actions against the corporations created by those acts that counsel claim such intention was manifested. It is not to be presumed that the legislature intended to do anything unconstitutional or beyond its power; and, if such limitation would have been unconstitutional, we must assume, in the absence of an express provision to that effect, that it was not intended. The fact that the corporation which was created by the act of April 24, 1858, was different in territory as well as in government did not of itself prevent an action from being brought against the maker of the bonds. Before the bonds had matured the legislature passed the act of April 25, 1863, by which the inhabitants of the same territory which was embraced in the original act of March 26, 1851, were reincorporated and vested with the same property and rights which the mayor and common council of the city of Sacramento had possessed prior to the taking effect of the act of April 24, 1858. By the act of April 24, 1858, the city and county of Sacramento was made and constituted the "successor" of the corporation theretofore known as the "Mayor and Common Council of the City of Sacramento," and by the act of April 25, 1863, all the property that the city and county of Sacramento had received from the mayor and common council of the city of Sacramento as the "successor" of that municipality was transferred to and vested in the new "City of Sacramento," which thus became the legal "successor" of the corporation which had issued the bonds.

The legislature cannot, by merely changing the name of a municipal corporation, or by abridging or enlarging its territory, so destroy its identity as to impair the rights of its creditors to the enforcement of their obligations against the original corporation. It has been held that where

a public corporation has been absolutely dissolved without making any provision for its obligations, and where no successor is created, a creditor of such corporation has only the faith of the legislature upon which to rely for payment thereof. *Barkley v. Commissioners*, 93 U. S. 258. It is also an established principle that a corporation does not lose its identity, or become relieved from its liabilities, by any change in its charter, or by the substitution of a new charter in place of the old one, unless there is an express legislative declaration to that effect. This rule was applied in *Broughton v. Pensacola*, Id. 266. The city of Pensacola had issued certain bonds, and had thereafter, by virtue of certain statutes, ceased to exist under its original act of incorporation. The inhabitants of the territory within which the city had been organized subsequently established a municipal government under the provisions of the laws of that state, and the payment of these bonds was resisted upon the ground that the new corporation was not responsible for them. The court, however, held that the payment of the bonds could be enforced against the new corporation, saying: "The inhibition which preserves against the interference of a state the sacredness of contracts applies to the liabilities of municipal corporations created by its permission; and, although the repeal or modification of the charter of a corporation of that kind is not within the inhibition, yet it will not be admitted, where its legislation is susceptible of another construction, that the state has in this way sanctioned an evasion of or escape from liabilities, the creation of which it authorized. When, therefore, a new form is given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs; and, in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization." In *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. Rep. 393, the city of Mobile under its corporate name, the "Mayor, Aldermen, and Common Council of the City of Mobile," had issued certain bonds in 1859. In 1879 the legislature passed two acts, one entitled "An act to vacate and annul the charter, and dissolve the corporation of the city of Mobile, and to provide for the application of the assets thereof in discharge of the debts of said corporation," and another, entitled "An act to incorporate the port of Mobile, and to provide for the government thereof." The territory embraced in the port of Mobile was about one-half that which was formerly embraced in the city of Mobile, but included the larger portion of the in-

habitants and taxable property of the former corporation. In an action brought against the port of Mobile to recover upon the bonds that had been issued by the former municipality, the court held that the port of Mobile was the legal successor of the city of Mobile, and liable for its debts, saying: "Where the legislature of a state has given a local community, living within designated boundaries, a municipal organization, and by a subsequent act or series of acts repeals its charter and dissolves the corporation, and incorporates substantially the same people as a municipal body under a new name, for the same general purpose, and the great mass of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor in law of the former, and liable for its debts; and, if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new." See, also, *Amy v. Selma*, 77 Ala. 103; *Milner's Adm'r v. Pensacola*, 2 Woods, 632; *Hill v. City of Kahoka*, 85 Fed. Rep. 32; *Amy v. Watertown*, 180 U. S. 320, 9 Sup. Ct. Rep. 537. We are of the opinion that the holder of the bonds in question has at no time since the 1st day of July, 1874, been prevented by a "statutory prohibition" from bringing an action to recover the amount of the bonds, and also that the corporations which were created by the acts of 1858 and 1863 were respectively in law the successor of the corporation that issued the bonds, and liable to be sued thereon.

It could not have been the intention of the legislature by the act of March 22, 1864, to extend the time for refunding the indebtedness of the city beyond the time within which an action upon that indebtedness could have been commenced. At the date of that act more than 10 years remained before the maturity of the bonds in question. The bonds held by the petitioner had no fund provided for their redemption, but were dependent solely upon the faith and credit of the city. The act of 1864 gave to the holder of these bonds the privilege of exchanging them for other bonds bearing a lower rate of interest, but secured in their payment by the fund provided therein for their redemption. An option was thus extended to the holder of such bonds to make the exchange, and this option could be exercised at any time during the life of the bonds. A failure on his part to present them to the board of trustees and demand the issuance of new bonds in their place until after they had become barred by the statute of limitations, would give to the board the right, if they chose to exercise it, of refusing to issue new bonds therefor upon this ground. A municipal corporation has the legal right to avail itself of the defense of the statutes of limitations as fully as any other debtor. It is a privilege personal to the debtor, and whenever in any

legal proceeding it is invoked by the debtor the court is compelled to recognize it as a proper defense. This defense is pleaded in the present proceeding, and, as we have before shown, is sustained by the facts, and must, therefore, be held sufficient. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.; GAROUTTE, J.; PATERSON, J.

McFARLAND, J. I concur in the judgment.

BEATTY, C. J., being disqualified, took no part in the foregoing decision.

(39 Cal. 399)

FISHER V. SOUTHERN PAC. R. CO. (No. 14, 136.)

(Supreme Court of California. June 2, 1901.)

CARRIERS—MIXED TRAINS—INJURY TO PASSENGER—NEGLIGENCE—MEDICAL EXPERT—CROSS-EXAMINATION.

1. In an action against a railroad company for injuries received by a passenger on a mixed train through the alleged negligence of the trainmen in coupling the parts of the train, the court instructed, in the language of Civil Code Cal. § 2100, that "a railroad carrying passengers paying fare must use the utmost care and diligence for their safe carriage, and must provide everything necessary for that purpose," but omitted the concluding words of the section, "and must exercise to that end a reasonable degree of skill." Held, that the omission did not injure defendant, as the omitted part simply added to the requirement of diligence, skill in using it, and the instruction as given did not ignore or take from the jury the consideration of any evidence or argument rebutting the presumption of negligence created by plaintiff's evidence.

2. On the cross-examination of a medical expert the reading of statements from medical works, and asking the witness if he agrees with the authors, cannot be allowed where the statements are evidently intended as evidence to sustain the theory of the party cross-examining, and not to affect the competency of the witness or the value of his testimony.

Commissioners' decision. In bank. Appeal from superior court, Stanislaus county; WILLIAM O. MINOR, Judge.

W. H. Dudley, for appellant. D. M. Delmas, for respondent.

TEMPLE, C. Appeal from judgment and order denying defendant's motion for a new trial. Action for damages through alleged negligence of defendant, a common carrier of passengers for hire. On the 29th of August, 1889, defendant was operating a railroad between Oakdale, in the county of Stanislaus, and Stockton. On that day plaintiff purchased a ticket at the office in Oakdale, and immediately boarded the train for Stockton. The train was composed of one empty box-car, eight empty gravel-cars, two loaded box-cars, and a passenger-car. It was a regular train, principally for freight, but habitually carried passengers, and tickets were always sold at the ticket-office for this train. It is shown to have been so run for a period of four years before the injuries complained of. At this time there were some 14 passengers on the train. At a place called "Burnett's Station," where there was a gravel-pit, the train made a

stop to exchange its eight empty gravel-cars for nine loaded gravel-cars. To accomplish this, the engine, the empty box-car, and the gravel-cars separated from the other cars, ran up the main track past the switch, leaving the two loaded box-cars and the passenger-car with brakes set, there being an up-grade at this place. After getting rid of the empty cars, the engine with the empty box-car was coupled to nine loaded gravel-cars, and they were let down the grade by gravitation alone, without steam, to the part of the train which had been left on the grade with brakes set. A conductor and two brakemen were in charge of the train, but the conductor and one brakeman had ridden the empty cars into the pit. The other brakeman turned the switch to put the train back upon the main track, and then jumped upon the engine or tender, so that there were no brakemen on either part of the two portions of the train to be coupled, no conductor to superintend, and no person between the two parts to be coupled. There was what was called a "left-hand" curve; and the conductor could not see either the end of his portion of the train, or the cars to be taken on. The fireman from the left-hand side could see and gave signals to the engineer. The cars had to be let down the grade some seven or eight hundred feet, and between the engine and the space were the nine gravel-cars and the empty box-car, about three hundred feet of the train. Upon receiving the signal "one car," meaning that there was the length of one car between the parts to be coupled, the engineer, as he testified, put all the brakes on, and left nothing undone. He had all necessary appliances in good order. There was, however, a violent jar at the coupling, which threw the plaintiff from his seat, diagonally across the car, some three or four feet, hitting a stove with his left side. He fell upon his back, and was partially unconscious for a time, receiving, as he claims, very serious injury. The defendant claims that this was not a passenger train, but a freight train, with a caboose car attached, that regular passenger cars were run upon the road for which plaintiff's ticket would have been good; that it is more difficult to manage freight-cars, and the exigencies of such a train expose it to some peculiar dangers, and render the same care impracticable; and that it should not be expected that there would be the same completeness in equipment as on purely passenger trains. These views are presented as objections to an instruction given at the instance of plaintiff, as follows: "The court instructs you that the law of this state is that a railroad company carrying passengers paying fare must use the utmost care and diligence for their safe carriage, and must provide everything necessary for that purpose." The language is taken from section 2100 Civil Code, omitting the concluding words of the section: "And must exercise to that end a reasonable degree of skill." It is claimed that these words constituted an important qualification of the rule, rendering it incumbent upon the defendant to provide, not every possible, or even the

best possible, contrivance for the purpose, but only to exercise a reasonable skill to that end, and that the instruction ignored in part the theory of the defense: (1) That the jar resulted not from carelessness, but because the practical operation of this train in which plaintiff chose to ride demanded that it be managed and equipped not as a passenger but as a freight train; (2) the jar was only such as was to be expected upon a freight train; and (3) that the amount of care consistent with the operation of such a train was exercised.

I know of no principle by which the statute can be limited so as not to apply to all carriers of passengers for hire. If one insists on going by a train which does not habitually carry passengers, a different rule may prevail. Of course the different conditions attending the running of a freight train are proper matters to be taken into consideration in determining whether there has been negligence. It was proper for the jury to take into consideration the fact, if it were so, that in the coupling of loaded freight cars such violent jerks and jars are likely to occur, and might happen without negligence, and also that the practical operation of the train required that it be equipped as a freight rather than as a passenger train; but certainly the increased difficulty did not justify any remission of diligence and care. This train's regularly carrying freight and passengers rendered the company liable for the full degree of diligence enjoined by the statute. It cannot, I think, be held that the omitted clause requiring the exercise of a reasonable degree of skill in providing everything necessary for the safe carriage of passengers refers, as applied to the facts of this case, to the use of the freight train for the purpose of carrying passengers. If so, it would seem to prohibit the use of such train altogether, if it is conceded that it cannot be made as safe for that purpose as a passenger train. The qualification is not, as counsel seem to contend, that only reasonable diligence need be used, but to require, in addition to diligence, skill in providing what is necessary. Section 2101 of the Civil Code—the next section—enjoins the carrier to provide safe and fit vehicles, and declares he is not excused for default in this respect by any degree of care. Common sense teaches us that these sections must not receive a construction so absolute as to practically prohibit rail road passenger traffic, or such a useful and common convenience as a mixed or accommodation train; but to find anything down of the standard of diligence, in the omitted clause is to impart a meaning diametrically opposed to its manifest intent, which, as stated, simply adds, to the requirement of diligence, skill in the use of it. The reasonable rule would, therefore, seem to be that those who travel on mixed trains assume the extra risk necessarily incident to such trains or the traffic; the carrier using such diligence and care as the Code requires on passenger trains, so far as such care is possible and reasonably consistent with the freight business. The injury was not claimed to

have resulted from the failure to provide everything necessary. The sole issue as to negligence was in regard to the manner of coupling the two parts of the train at Burnett's Station, and the jury were, in substance, so instructed, at the instance of plaintiff. I cannot see, therefore, how the omitted clause could have helped the defendant, or that the instruction as given ignored or took from the jury the consideration of any evidence or argument rebutting the presumption of negligence created by plaintiff's evidence.

On cross-examination of Woolsey, a witness called as an expert by defendant, plaintiff's counsel was allowed, against the objection of defendant, to read statements from medical works, and to ask the witness if he agreed with the authors. This is assigned as error. Plaintiff's counsel defends the ruling here on two grounds: (1) That the witness on his direct examination testified to certain medical opinions, and supported his statements by the assertion that they conformed to the authority of medical works, and he claims that the rule is that if the witness, either in direct or cross-examination, relies in any manner upon the authority of medical works, generally or specifically, it is proper cross-examination to confront him with the works upon which he relies, to show that his understanding of them is incorrect, or to contradict him; and, (2) that it is proper cross-examination to test the competency of the witness as an expert, or the value of his opinions.

A careful examination of the evidence has convinced me that the rulings complained of cannot be defended upon either of these grounds, though the legal proposition be admitted. As to the first, it is plain that some of the extracts read have no reference to any opinions of the witness, which he sought to sustain by a reference to medical writers, either generally or specifically, except in response to a direct question by plaintiff referring to such writers. As to the second ground, it is not so plain. The value of an effective cross-examination as a means of showing the incompetency of a witness or his lack of integrity and the true value of his testimony, can hardly be overrated; and this is true in a special sense as to expert testimony, where the party may choose from the body of a profession those whose opinions are most favorable. It is quite natural, and certainly common, for one called as an expert to enhance his authority by his power of self-assertion; and there is reason to fear that these opinions are not always as impartial and indifferent as a judicial utterance should be. While it is to be regretted, if, in the proper exercise of the right of cross-examination, it shall appear that certain medical writers of repute differ from the witness, and so a party will get the benefit of unsworn testimony, still this evil, unavoidable in the nature of things, is, in my opinion, not at all commensurate with that which would deprive a party in such a case of the best touchstone known to legal science, by which to estimate the value of testimony. And if, on general principles, such ques-

tions are legitimate on cross-examination, I do not see how a party can be deprived of his right because such evil consequences may follow. All the works on medical jurisprudence which I have examined seem to sustain this position; and some cases, although they are not uniform. *Broadhead v. Wiltse*, 35 Iowa, 429; *Insurance Co. v. Ellis*, 89 Ill. 516; *Ripon v. Bittel*, 30 Wis. 614; *Pinney v. Cahill*, 48 Mich. 584, 12 N. W. Rep. 862; *State v. Wood*, 53 N. H. 484. But, since consequences are likely to follow which admittedly should be avoided if possible, such examination should be strictly limited to this one purpose for which only it can be permitted. I think no fair-minded person can closely study this record without being convinced that the evidence was not put in with any such purpose. No doubt counsel offered it under the impression that it was justified as inconsistent with opinions which the witness had claimed were sustained by medical authorities. I have shown that the claim cannot be sustained on that ground. In fact, although the witness took issue with some statements read, they cannot fairly be said to contradict his evidence in any respect. They were evidently intended as evidence for the plaintiff to sustain his theory of the case, and not to affect the competency of the witness or the value of his testimony. As it seems to me a new trial must be granted for this error, it becomes unnecessary to review the other assignments. The judgment and order should be reversed, and a new trial granted.

We concur: FITZGERALD, C.; FOGTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial granted; and the court is further of the opinion that the amount of the verdict was excessive.

DE HAVEN, J. I concur in the judgment. The court erred in permitting the attorney for the plaintiff, upon the cross-examination of the witness Dr. Woolsey, to read extracts from certain medical books, and then ask the witness whether he agreed with the same or not. *Marshall v. Brown*, 50 Mich. 148, 15 N. W. Rep. 55; *City of Bloomington v. Shrock*, 110 Ill. 22; *Rog. Exp. Test.* §§ 181, 182. It is not permissible on cross-examination to call the attention of such a witness to what is said on the subject to which he is testifying by standard works for the purpose of testing his general knowledge or competency as an expert. It has been held, however, that, when an expert asserts that his opinion agrees with a particular author, it is not improper to call his attention to what that particular author says for the purpose of contradicting him. But there was nothing in the evidence of Dr. Woolsey to justify reading to him, and in the presence of the jury, the extracts referred to, for any such purpose. I think, also, that as the evidence does not establish a case for punitive damages the sum awarded by the verdict is excessive.

89 Cal. 339

**FOX et al. v. TAY et al.** (No. 12,817.)

(Supreme Court of California. May 30, 1891.)

**EXECUTORS—LIABILITY AS TRUSTEES—LIMITATIONS—PLEADING.**

1. An executor who takes possession of assets belonging to the estate, and gives to his co-executors a note secured by mortgage for the amount, is a trustee of the fund, and the statute of limitations will not run in his favor until there is an express repudiation by him of the trust.

2. The fact that such executor was appointed in a foreign jurisdiction does not affect his relation to the estate as trustee; for though he could not by virtue of such appointment enforce the collection, in another jurisdiction, of the assets belonging to it, yet, where they come into his hands by voluntary payment, they are received in his capacity as trustee, and that relationship is not altered by his giving his own note and mortgage for the amount.

3. The co-executors appointed in a foreign jurisdiction, to whom the note and mortgage were given as trustees, can prosecute an action in that capacity to foreclose the mortgage without taking out ancillary letters of administration.

4. Under the provision of Code Civil Proc. Cal. § 462, that statements of new matter in the answer must be deemed controverted, matters in avoidance of the bar of limitations will be deemed to have been pleaded in reply to affirmative matters on the subject alleged in the answer.

Affirming 24 Pac. Rep. 855.

In bank. On rehearing.

**PER CURIAM.** After hearing in bank and further consideration of the case, we are satisfied with the conclusion reached in department 1, and with the opinion there delivered by Justice PATERSON. 24 Pac. Rep. 855. The matters upon which the plaintiffs rely to relieve them from the bar of the statute of limitations may be deemed to have been pleaded in answer to the affirmative matters alleged in the answers of the defendants. There being no replication, such affirmative matters are taken as controverted. Section 462, Code Civil Proc. The judgment and order are reversed, and the cause remanded for a new trial.

89 Cal. 245

**HAIGHT et al. v. VALLET et al.**  
(No. 13,038.)

(Supreme Court of California. May 27, 1891.)

**EJECTMENT—CONFLICTING INSTRUCTIONS.**

1. In ejectment, where the defense is that plaintiffs' ancestor conveyed the premises to defendants' grantor by a deed which plaintiffs claim was forged, it is error to instruct that a forged deed is void, and confers no rights, "except, if duly recorded, it is constructive notice of that fact."

2. In determining whether plaintiffs' ancestor executed the deed claimed to have been forged, the jury may properly consider the subsequent conduct of the ancestor, and whether he ever made any claim to the property, or its possession, paid taxes and assessments, or made any other assertion of ownership.

3. Instructions assigning several different dates from which the statute of limitations will begin to run against a party are conflicting and confusing, and constitute reversible error.

Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

*Taylor & Haight*, for appellants. *Wilson & Wilson*, (*Cope, Boyd & Fifield*, of counsel,) for respondents.

v.26p.no.14—57

**SHARPSTEIN, J.** This is an action of ejectment, and one of the defenses to the action is that the plaintiffs' ancestor conveyed the demanded premises to the grantor of the defendants. Another defense is that the action is barred by the statute of limitations. The verdict and judgment were in favor of the defendants, and the plaintiffs appeal from the judgment and order denying their motion for a new trial. The exceptions relied on here are to certain instructions given, and the refusal to give certain other instructions requested by plaintiffs to be given.

Plaintiff requested the court to instruct the jury that "a forged deed conveys no right, title, or interest; it is absolutely void, and as though never made." The court refused to give it as requested, but in lieu thereof gave the following: "A forged deed conveys no title, right, or interest; it is absolutely void, and as though never made, except, if duly recorded, it is constructive notice of that fact." The latter clause of this instruction is clearly erroneous, and is inconsistent with another part of the charge, in which the jury were instructed that "no legal effect can be produced upon the rights of the parties by recording a forged instrument."

Another instruction excepted to by plaintiffs reads as follows: "If you find from the evidence that the said Joseph M. Brown, the ancestor of plaintiffs, was not in possession of the property in question, or any part thereof, from and after the 18th day of December, 1860, or from any other period prior to the 4th day of March, 1861, to the time of his death, November, 2, 1864, and that during that time the defendants, or their grantors, or those under whom they claimed, were in the open, notorious, continuous, and exclusive possession of said property; and that defendants, and those under whom they claimed, continued such possession for the period of five years, and during all of said time were claiming to own the same adversely to all other persons, and exclusive of any other right,—then your verdict should be for the defendants, notwithstanding that the children of said Brown were minors at the time of his death."

Another instruction, which appellants claim to be in conflict with the one last above quoted, reads as follows: "The ancestor of the plaintiffs, that is, Joseph M. Brown had died on the 2d day of November, 1864, nearly two years prior to the 20th of August, 1866, so that I instruct you that the statute of limitations, with reference to the land in controversy, did not commence to run against him during his life-time. And inasmuch as the statute of limitations did not commence to run in his life-time, and did not commence to run against his children until the 20th day of August, 1866, and inasmuch as neither of the children had reached the age of majority five years prior to the commencement of this action, I instruct you, as a matter of law, that the defense of the defendants as against either of the children, and that whatever testimony has been given before you respecting the occupancy or possession of the land in controversy for the purpose of establishing an adverse



possession, must be disregarded in your determination of the rights of the plaintiffs other than the representative of Josephine D. Brown, the widow of Joseph M. Brown." There is another instruction which is clearly inconsistent with the one first above quoted. It is as follows: "As I have before stated to you, the statute of limitations could not, in any event, have run with respect to the land in controversy until the 1st day of July, 1864." Thus the jury were instructed that the statute of limitations might have commenced running in 1860, if the plaintiffs' ancestor was not then in possession of the land; and that the statute of limitations could not have run with respect to the land in controversy until the 1st day of July, 1864; and that it did not commence to run against the children of Brown until the 20th day of April, 1866. That two of these instructions contradict a third is apparent. That, taken together, they are confusing, is also apparent. In *Brown v. McAllister*, 39 Cal. 573, the court said: "Where the instructions on a material point are contradictory, it is impossible for the jury to decide which should prevail, and it is equally impossible, after the verdict, to know that the jury was not influenced by that instruction, which was erroneous, as the one or the other must necessarily be, where the two are repugnant." That it is a sufficient ground for reversing a judgment has frequently been held. *People v. Valencia*, 43 Cal. 552; *McCreery v. Everding*, 44 Cal. 246; *Chidester v. People's Ditch Co.*, 53 Cal. 57; *Bank of Stockton v. Biren*, Id. 708; *People v. Wong*, 54 Cal. 154; *Aguirre v. Alexander*, 58 Cal. 28.

Another instruction excepted to was that, in determining the question as to whether Joseph M. Brown, the ancestor of plaintiffs, executed and acknowledged the deed which purported to have been executed to said Henry P. Hulbert, the jury had a right "to take into consideration the subsequent conduct of said Joseph M. Brown during his life-time, and whether he ever after the date of said deed set up any claim to the property, or made any claim upon the parties in possession of the same, for the delivery of possession to him, or paid the taxes or street assessments on the same, or did any other act asserting ownership over the property during his life-time, after the date of said deed." We think this instruction correct. The evidence upon which it was based is not set out in the transcript, but the statement in it is that defendants introduced evidence which tended to prove "that said deed purporting to have been executed by said Joseph M. Brown to said Hulbert was the genuine deed of said Brown." We think testimony of such conduct on the part of Brown, as the court in the instruction specifies, would have a tendency to prove the genuineness of the deed which purported to be executed by him, and therefore we cannot presume that such evidence had not been introduced. We cannot presume error, and in this instance none is shown. The exception to this instruction is overruled. The instruction given in regard to expert testimony is not,

in our opinion, erroneous. The exception to that instruction is overruled. But for errors before pointed out the judgment and order denying the motion for a new trial must be reversed. Judgment and order reversed.

We concur: MCFARLAND, J.; DE HAVEN, J.

(89 Cal. 258)

SCOTT v. JACKSON. (No. 12,912.)

(Supreme Court of California. May 27, 1891.)

SALE OF PATENTS—ASSIGNMENT—EVIDENCE.

1. In an action for the price of letters patent which were sold to a rival manufacturer, and were to be assigned as soon as the patentee had effected certain settlements with other parties, but which were not assigned until nearly three years thereafter, it appeared that the patents were delivered to defendant, and held by him, and that plaintiff ceased to manufacture thereunder, and entered defendant's employ. Held sufficient to support a finding that the delay in making the formal assignment was acquiesced in by both parties.

2. Where the purchaser of patents takes and retains possession thereof, and derives the same benefit as if they had been formally assigned, and both parties act as if they had been assigned, the purchaser cannot complain that the formal assignments were tendered after one of the patents had expired.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

M. A. Wheaton, for appellant. Scrivner & Boone, for respondent.

PATERSON, J. This is an action to recover the sum of \$1,500, the contract price of several United States letters patent sold by plaintiff's assignor, Watkins, to defendant under an agreement dated July 19, 1885. The contract of sale provided that Watkins should assign, deed, and deliver to defendant all of his patents for harvesting machinery for the sum of \$1,500, one-half of which was made payable November 1, 1885, and the balance November 1, 1886. The contract provided that the assignment was to be made as soon as a settlement was made by Watkins with Rice. The court found that a settlement was made by Watkins with Rice in March, 1885; that at all times subsequent to January 19, 1885, Watkins was ready and willing to assign the patents to defendant, and that, in December, 1887,—prior to the commencement of this suit,—he tendered an assignment in writing to the defendant of all the letters patent except patent No. 97,646, which had expired on the 1st day of December, 1887. The contract was assigned by Watkins to the plaintiff herein January, 20, 1886. Judgment was entered in the court below in favor of the plaintiff for the amount claimed. The defendant moved for a new trial, which motion was denied, and he thereupon appealed from the order and from the judgment.

It is claimed by appellant that Watkins could not put Jackson in default without an offer to perform; that readiness to perform is not the same as performance; that the tender of the assignment came too late, not having been made until two years and eight months after the settlement with Rice; that at that time it was impossible

for Watkins to perform, because one of the patents had already expired, and defendant cannot be required to take less than all of the property Watkins agreed to sell. Of course Watkins could not put Jackson in default without an offer to perform in accordance with the terms of the contract, and, if there were nothing in the case to overcome the effect of the finding that Watkins did not tender an assignment of the letters patent until December, 1887, the defendant would be entitled to judgment; but the court found "that the delay in making the assignment of said patents was not caused by the neglect or refusal of said Watkins to make an assignment, but was acquiesced in by both parties to this contract;" and we cannot say that this finding is not supported by the evidence. It appears from the testimony that at the time the contract set forth in the complaint was entered into, the defendant was engaged in manufacturing and selling agricultural implements, and was the owner of letters patent for the manufacture of such implements. Watkins was also the owner of certain patents and improvements in agricultural implements, and was having his machines manufactured at the establishment of Rice, and was engaged in selling the same in competition with the defendant. Jackson claimed that Watkins was unlawfully infringing upon his patents, and litigation was threatened. The contract set forth in the complaint seems to have been entered into in compromise of the differences between the parties. Watkins agreed to sell to Jackson all of his letters patent for the sum of \$1,500, make a settlement with Rice, and collect royalties for machines sold prior to January 1, 1885, and devote his entire time in the capacity of salesman and traveling expert for defendant, for which he was to receive the sum of \$1,500 per year. Immediately after the execution of the contract, the patents were delivered by Watkins to Jackson. Watkins ceased to manufacture or sell any more of his machines, and remained in the employ of the defendant from January 19, 1885, until the early part of 1886, when he demanded a settlement under the contract. The defendant seems to have considered it important to avoid the competition caused by the manufacture and sale of Watkins' machines. There was evidence to show that such was the main consideration which induced the defendant to enter into the contract. It is true the defendant never used the patents, but the possession thereof was taken and held by him, and no doubt as thus held they were as valuable to him as they would have been if he had actually used them in the manufacture of machines. The rival patents were not only put out of the way, but defendant secured the services in his own business of Mr. Watkins, who is designated in the contract as "traveling expert in the field." The defendant purchased the Watkins machines from Rice, and paid the latter between \$5,000 and \$6,000 for them. Under the circumstances, the court below doubtless believed that the defendant had received all the benefit that he would have received if the letters

had been actually assigned at the proper time, and that defendant was estopped by his conduct from claiming that the tender of the assignment came too late.

It is claimed by the appellant that the finding of the court does not amount to a finding of a consent to delay, or waiver of an earlier assignment, but we do not so understand it. The term "acquiesce," as used here by the court, means a consent inferred from silence,—a tacit encouragement. "Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be peculiarly prejudiced by assertion of such adversary claim." *Swain v. Seamen*, 9 Wall. 254. "Acquiescence is where a person who knows that he is entitled to impeach a transaction or enforce a right neglects to do so for such a length of time that under the circumstances of the case the other party may fairly infer that he has waived or abandoned his right." *Rap. & L. Law Dict.* By accepting and retaining possession of the patents, the defendant virtually deprived Watkins of the use thereof, and indicated that he was satisfied with what Watkins had done under the contract. Although Watkins continued in his employ for a long time after the contract was made, nothing was said about an assignment, both parties having apparently considered that none was necessary; and it would be a hardship now upon Watkins and his assignee if they should be deprived of the value of the property through what was evidently a mutual mistake in regard to that matter.

Appellant's contention that the tender of the assignment was not good because one of the patents was not included in the assignment tendered is unsound. The patent omitted from the assignment was dead, the statutory term of its existence having expired. It would have been a useless thing, therefore, to have included it in the assignment. If the delay in making the assignment was not through the neglect of Watkins, but by and with the consent of the defendant, as the court has found, the defendant cannot complain that the life of the patent had expired before the tender was made. Furthermore, no objection of this kind was made at the time Watkins tendered the assignment. Section 2076, Code Civil. Proc.

Judgment and order affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.; HARRISON, J.; McFARLAND, J.

89 Cal. 423

HAUBERT v. MAUSSHARDT. (No. 13,030.)  
(*Supreme Court of California.* June 8, 1891.)

CONTRACT OF SALE—MISTAKE—NOVATION.

Plaintiff sold defendant wine at a certain price, a written contract of sale being signed in duplicate. By mutual mistake, one copy recited a less price than that agreed, and this copy was assigned by defendant to a third party, to whom, by defendant's direction, the wine was delivered. *Held* that, in the absence of evidence showing a release of defendant and an acceptance of his assignee, there was no novation of parties, even

though plaintiff may have known of the assignment, and received partial payments from the assignee.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

*Taylor & Craig*, for appellant. *W. C. Burnett* and *C. Bartlett*, for respondent.

TEMPLE, C. Defendant appeals from the judgment and an order refusing him a new trial. On the 28th of February, 1886, plaintiff sold to defendant the wine in his cellar in Sonoma valley, for 28½ cents per gallon. After the parties had come to an agreement, defendant caused the contract to be written out by a friend, who prepared two copies, supposed to be duplicates. By mistake, however, in one copy the price was put at 20½ cents per gallon. Defendant took them to plaintiff, who read one of the contracts, which chanced to be the correct one, and, finding it satisfactory, both parties executed the two supposed duplicates; defendant assuring plaintiff that they were exactly alike. The incorrect copy was not read by either. It does not appear that plaintiff had anything to do with the preparation of the writing, or whether he even desired or expected a writing to be prepared, nor that he knew that defendant had not read and compared the two. One copy, which also happened to be the correct one, was left with plaintiff; the other defendant took, and immediately assigned to one Schmidt, who agreed to receive and pay for the wine, and give defendant one-half the profits on the transaction. The defendant was not employed by Schmidt to make the purchase, but he knew Schmidt desired the wine, and purchased with the expectation of making a transfer to him. Plaintiff knew that Mausshardt was purchasing with the expectation of transferring the contract to some one, though no name was mentioned by Mausshardt as a principal. It was, in fact, somewhat in the nature of those contracts which are sometimes called "options," only Mausshardt, though not expecting to complete the purchase himself, bound himself by an absolute contract. He expected to make something by selling the contract, and plaintiff must have known this, for there was something said about a commission, and plaintiff actually gave him \$20 as compensation. The contract assigned to Schmidt was the one in which the price of the wine was stated at 20½ cents, and Schmidt denies knowing that the real price agreed upon was 28½ cents. The wine was all delivered to Schmidt in pursuance of defendant's express orders, and Schmidt paid plaintiff 20½ cents per gallon, and refused to pay more, on the ground that he had purchased at that price. The error was then discovered for the first time, and it seems plaintiff did not know until then that the contract had been assigned to Schmidt, although defendant claims that he did know of the assignment before he delivered any wine.

There are really but two points made on this appeal, although they are stated in different forms: *First*. The evidence

shows a novation,—plaintiff accepted Schmidt as principal instead of defendant. There is no evidence which tends, even slightly, to show that plaintiff ever released defendant from his obligation, or accepted Schmidt in his place. If he knew of the assignment, and afterwards shipped the wine to the assignee, and received part payment from him, it would not show a novation. These acts are all consistent with his continuing to hold defendant, and, as that course would be more advantageous to plaintiff, it is to be presumed he did so. At any rate, the contract of novation must be proven as other contracts are. *Second*. Because Haubert signed the copy which was delivered to Schmidt he should suffer the loss resulting from the mistake. The evidence shows that plaintiff signed the copy on the assurance of Mausshardt that the two were exactly alike. Had this been true, there would have been no trouble. Plaintiff did not know, so far as appears, that defendant had not read and compared the two. He had a right to presume he had, and cannot be held responsible by defendant for reposing too much confidence in his assurances. There can be no doubt as to the responsibility of Mausshardt. Had there been a formal novation, under the circumstances, the contract of novation would have been invalid, as one made under a mutual mistake. We advise that the judgment be affirmed.

We concur: FITZGERALD, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

80 Cal. 310

NEUBEAUMER *et al.* v. WOODMAN. (No. 13,866.)

(*Supreme Court of California*. May 23, 1891.)

MINING—LOCATION OF CLAIM—POSSESSION—EJECTMENT—EVIDENCE.

J. attempted to locate a mining claim by posting notices on it, but failed to mark the location on the ground so that its boundaries could be readily traced as required by Rev. St. U. S. § 2324. He and his grantees held possession and worked the mine until ejected by defendant, who attempted to locate the claim by posting a notice at each end and recording a copy thereof, but who also failed to locate its boundaries on the ground. J.'s grantee worked on the claim after the attempted location by defendant. *Held*, that a finding that plaintiffs and their grantor never abandoned the claim and were in continuous possession, and that defendant was a mere trespasser, was sustained by the evidence.

Commissioners' decision. In bank. Appeal from superior court, Tuolumne county; J. F. ROONEY Judge.

*E. A. Rogers* and *F. D. & G. W. Nicol*, for appellant. *F. W. Street*, for respondents.

FOOTE, C. Henry Neubeaumer and F. W. Street sued in ejectment for a certain piece of mining ground. The defendant denied the ownership and right of possession of plaintiffs, and set up the claim that the ground was subject to location under the laws of the United States, by any citi-

zen thereof, as vacant and unoccupied, and that in pursuance of such laws, and the local rules and regulations of the mining district in which the mineral land described in the complaint was situated, he had located the same, and that he is in possession thereof, and working it. He further denies that the plaintiffs ever had possession of the property in dispute, or that he ever ousted them therefrom or wrongfully withholds the same, or that they have suffered any damage. The court below rendered judgment in favor of the plaintiffs, from which, and an order denying a new trial, the defendant appeals.

From the facts found, it appears that the mining claim was attempted to be located on the 24th of October, 1873, by one William Jones, by posting certain notices on it, but that in making this attempt he did not mark the location of the claim so that the boundaries could be readily traced. On the 2d of July, 1877, Jones being indebted to one F. L. Tucker, he and the defendant here, S. P. Woodman, made a grant, bargain, and sale deed of this claim, called the "Tiger Mine," to Tucker, describing it. Thereafter Jones and others, for Tucker, performed labor on the mine, running tunnels into it, and crushing the quartz rock taken from it in a mill situated nearby, known as the "Tiger Mill." Afterwards, on the 13th of February, 1880, Tucker deeded the property to one William T. Jones. The latter entered into possession of the claim under that deed, and during the years from 1880 to 1886 ran four tunnels in and upon the quartz vein in the claim, and expended several thousand dollars in labor and improvements upon it. As part of the purchase price, this William T. Jones executed and delivered to Tucker on the 25th of December, 1880, a promissory note for \$1,400, with interest, which instrument was signed by him and William Jones and S. P. Woodman, the defendant. On the 23d of January, 1885, Tucker commenced an action against the three parties last mentioned to recover the amount due on that note, but he died shortly afterwards, and Henry Neuebaumer, one of the plaintiffs here, became the executor of his last will and testament, and, prosecuting the action, obtained judgment therein against the defendants therein on the 9th of July, 1885, for \$1,529.22 and costs. The mining claim here involved was sold on execution issued on that judgment, and, no redemption having been had, it was deeded by the sheriff who made the sale to the purchasers at the sale, the original plaintiffs here, Henry Neuebaumer and F. W. Street. On the day after Tucker commenced that action, William T. Jones made a conveyance of the property in dispute to his mother, E. A. Jones. This conveyance was afterwards, at the suit of the plaintiffs here, declared fraudulent and void, canceled, and annulled. Henry Neuebaumer died after this action was commenced; and, prior to the trial, Teresa Neuebaumer, his administratrix, was substituted. In addition to these facts, it was further found, in the eighth finding of fact: "That the mining claim in the complaint de-

scribed was never abandoned by the plaintiffs herein, or by their grantors, and that plaintiffs and their grantors were in continuous actual possession of the same until the 3d day of December, 1888, at which time the defendant herein, said S. P. Woodman, entered in and upon said mining claim and ejected the plaintiffs therefrom; that upon the said 3d day of December, 1888, said defendant, S. P. Woodman, made an attempted location of the mining claim in the complaint described, by posting a notice of location on the vein at each end of the claim, and by causing a copy of said notice of location to be recorded in the office of the recorder of Tuolumne mining district, in the said county of Tuolumne, on the 10th day of December, 1888, and said S. P. Woodman, the defendant herein, did no other acts in reference to the location than the posting of a notice at each end thereof; that said defendant, S. P. Woodman, did not mark the location of said claim on the grounds so that its boundaries could in any manner be traced."

The only ground of error relied on for the reversal of the judgment and order is that this finding is not supported by the evidence. The evidence shows that the defendant did not take the necessary steps to locate the mine, nor did the plaintiffs or their grantors, under section 2324 of the Revised Statutes of the United States. The point to be considered, then, is whether the plaintiffs or their grantors were in the actual possession of the claim, and had not abandoned it at the time of the ouster. By the undisputed finding, it appears that William Jones, who made the attempted location, conveyed the whole of this claim to Tucker on the 2d of July, 1877. Thereafter this Jones worked the mine for Tucker, and his possession was that of Tucker. Then it appears that on the 13th of February, 1880, Tucker conveyed the property to William T. Jones, who was the son of William Jones. William T. Jones entered into possession at once under this deed, and during the years from 1880 to 1886 remained in possession and did work on the mine, even after the action was commenced by Tucker against him in 1885. It also appears in evidence that Mrs. E. A. Jones, at the time she claimed it under her fraudulent deed from her son, William T. Jones, stated that the claim was being kept up. This continued the possession of those interested against the claim of the defendant. The plaintiffs, or those in their interest, worked on the claim in 1888, after the deed to them was made, and after the attempted location by the defendant. William T. Jones, whose interest was sold and conveyed by the sheriff under a conveyance from whom respondents claim, had been for years in possession of a large part of the claim, having entered under the deed of Tucker, who claimed the whole mine, and for whom William Jones had possession of a part thereof up to the time when the deed was made by Tucker to William T. Jones. Tucker certainly had possession after his purchase through William Jones of a part of the claim, and made a deed of the whole of it to William T. Jones,

through whom the plaintiffs claim as their immediate grantor. Tucker had possession of a part, claiming the whole, described by metes and bounds, through his deed from William Jones. Thus claiming the whole, he made a conveyance of it by metes and bounds to William T. Jones, and the last immediately entered into possession, claiming the whole. This possession was continued in the respondents. This would give them the constructive possession of the whole tract as against a mere intruder, as the court finds the defendant to be. *Dodge v. Yates*, 76 Cal. 254, 18 Pac. Rep. 323; *Atwood v. Fricot*, 17 Cal. 37; *English v. Johnson*, Id. 107. We think the evidence on the part of the plaintiffs tends to show that the defendant Woodman did not on his attempted location mark the same on the ground so that its boundaries could in any manner be traced. The finding assailed is supported by sufficient evidence, and we advise that the judgment and order be affirmed.

WE CONCUR: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(39 Cal. 437)

LONG V. SAUFLEY. (No. 13,273.)

(*Supreme Court of California*. June 8, 1891.)

TRIAL BY THE COURT—REVIEW ON APPEAL.

Where findings of fact have been waived, and the decision of the trial court is based upon conflicting evidence, the supreme court will not review an order refusing a new trial.

Department 1. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

*Stewart & Herrin*, (W. T. Baggett, of counsel,) for appellant. *W. H. Sears*, (D. H. Whittemore, of counsel,) for respondent.

PER CURIAM. The judgment in this case has been heretofore affirmed by this court. 79 Cal. 260, 21 Pac. Rep. 757. The present appeal is from an order denying a new trial. The action was brought upon the following agreement, executed by the defendant to James H. Long, the assignor of the plaintiff: "San Francisco, April 7, 1885. For value received, I hereby agree to pay to J. H. Long or order the sum of five hundred (\$500) dollars out of money collected on judgment in action of Frank vs. Kilbourn et al., No. 13,636, superior court, city and county of San Francisco, department No. 7, provided that said money shall be collected from property of defendant pointed out by the said Long. R. C. SAUFLEY." The defendant, in addition to a denial of the allegations in the complaint, alleged "for a further and separate defense to said action" that he had been induced to execute the instrument sued on by certain false and fraudulent representations made to him by said James H. Long, and that said contract was "inequitable, and wholly fraudulent and void." At the trial of the action the defendant did not deny the execution of the instrument sued on, but offered evidence for

the purpose of showing the negotiations between him and said Long prior to its execution regarding the subject-matter thereof, and that in those negotiations Long had agreed that he would point out other property from which the judgment could be made than that upon which the execution was subsequently levied. Long denied that any such agreement had been made by him, or even made the subject of conversation between him and the defendant, and it was shown by the witnesses for the defendant that the execution upon said judgment was placed in the hands of Long, and that under his instructions a levy was made upon this property, and that thereafter, without any sale, the defendant accepted \$4,000 from the judgment debtor in satisfaction of the judgment.

The court rendered judgment in favor of the plaintiff; and, as findings were waived, we must assume that the court found all the facts that were necessary to sustain its judgment. The effect of the written agreement of the defendant could not be limited or qualified by any oral testimony that his liability was contingent upon some condition not expressed therein. The matters alleged by the defendant in his separate answer constituted an affirmative defense, which it was incumbent upon him to establish by a preponderance of evidence. The testimony offered by him in support of this defense was contradicted by Long, and Long's testimony was in many respects corroborated by the testimony of the defendant's witnesses. Upon this conflict of evidence the court held that the defendant had failed to establish a defense to the action. Upon his motion for a new trial the defendant again presented the matter to the court, and in his statement expressly called attention to the fact that the evidence was sufficient to support his answer; but the court, after mature consideration, held otherwise, and denied a new trial. This court has repeatedly held that the decision of the trial court upon conflicting evidence is conclusive, and that when that court, upon a motion for a new trial, has refused to set aside such decision, this court will not reverse or even review its action. In view of this rule, it must be held that an appeal from an order denying a new trial, wherein the only ground urged for a reversal is that the court below did not properly consider the conflicting evidence, is frivolous. The order appealed from is affirmed, with \$100 damages; and the superior court is directed to allow to the respondent that amount of money as a part of the costs on appeal.

(39 Cal. 237)

PUGET SOUND LUMBER CO. V. KRUG *et al.* (No. 13,121.)

(*Supreme Court of California*. May 27, 1891.)

AGENCY OF HUSBAND—EVIDENCE—NEW TRIAL.

In an action against a wife for the price of lumber alleged to have been furnished her through her husband as agent, the evidence showed that the husband had for a number of years lived on his wife's land, using it in his own business, and for his own profit; and that the lumber was purchased by him with his wife's knowledge, and used in erecting buildings on the land for use in

his business. There was some circumstantial evidence tending to show precedent authorization of the husband to act in his wife's name in erecting the buildings, but the evidence was conflicting. Held, that an order setting aside a verdict for plaintiff and granting a new trial will not be disturbed.

Commissioners' decision. Department 2. Appeal from superior court, Napa county; R. CROUCH, Judge.

*Jordan & Bull*, for appellants. *Stanley, Stoney & Hays*, for respondents.

VANCLIEF, C. The defendants are husband and wife. This action was brought to recover from the wife the value of lumber alleged to have been purchased by her from the plaintiff through the agency of her husband. The case was tried by a jury. Verdict and judgment for \$5,044.98. On motion of defendants a new trial was granted, and this appeal is from the order granting a new trial. The grounds upon which the new trial was asked were: (1) Insufficiency of evidence; (2) errors of law; and (3) that the verdict was against law. It appears, however, from the opinion of the lower court, brought up with the transcript, that the new trial was granted on the ground of insufficiency of the evidence to prove the agency of the husband; and whether it was so is the principal question for decision.

The following facts were proved by the plaintiff or admitted by the defendants: At the time of the marriage of the defendants, in 1860, the land described in the complaint (about 340 acres) was the separate property of the wife, and has ever since remained so; and the husband and wife have ever since resided thereon; and during all that time the husband has used and cultivated the land, principally in raising grapes, from which he made wines. For the purpose of making wines from those grapes, and from other grapes purchased by him from other persons, he built upon his wife's land a large wine cellar and other permanent structures necessary for making wines, called a "winery;" also, a barn, stable, and sheds. The most expensive portion of these improvements were made within six years immediately prior to the commencement of this action, during which time, and for many years before, he carried on the business of making and selling wines in his own name, and so advertised his business throughout this state, and in several eastern cities. At different times, within five years next before the commencement of this action, he ordered lumber from the plaintiff, in his own name, to be used, and which was used, in the construction of the winery and other buildings above enumerated upon the wife's land. Plaintiff, believing that the husband was the owner of the land and improvements thereon, and also of the business of manufacturing wines thereon, delivered to him, on the land, the lumber sued for, and charged it to him individually. To save time in the examination of one of the plaintiff's witnesses, counsel for defendants admitted the following facts: "That, during all the fifteen years of the witness' acquaintance with the parties, Mrs. Krug had allowed Mr.

Krug to use her property as his own; that he had done it, and carried on business with it; that he had availed himself of the proceeds of it, and pocketed them, and never accounted to her for them, and she had never asked him to do so; and that he had carried on the business of wine-making in part with her property, (the property referred to and described in the complaint,) and with other property of his own; and that he had for all this time carried on his business of wine-making, using this piece of property described in the complaint belonging to his wife as though it was his own, and with her consent and knowledge; that he used the place as if it was his own; that he planted it and plowed it, and took the crops off and sold the crops and took the money; also, that he entered into a contract himself for the building of a stable and of a winery with her knowledge; that he entered into these contracts and concluded them, and that he paid various sums of money in the construction of these buildings; and that he was in the habit of so doing, and that she was living in a house on the property at the time. Mr. Jordan. And that these things were going on with Mrs. Krug's knowledge? Mr. Hays. Yes, sir. She saw the buildings going up." In 1885, after the lumber had been delivered and used as above stated, the husband failed in business, and was adjudged an insolvent debtor, and his assignees realized from the sale of all his property only about 5 per cent. of his debts. The debt to plaintiff for lumber was put in the schedule of his debts, and was proved against his estate by the plaintiff, after plaintiff had notice that the wife owned the land, but whether any dividend was paid thereon by the assignee to plaintiff does not appear. Of course the wife's land and the winery and other structures thereon, above mentioned, did not go to the husband's assignee in insolvency, and the husband and wife are still residing on the land, which, as improved, is worth about \$100,000, but subject to a mortgage of \$40,000 given to secure debts contracted by the husband in the business carried on by him.

The following is a part of the testimony of the husband upon being called as a witness for plaintiff: "I am one of the defendants in this action. The other defendant is my wife. I moved upon the property where we now reside, about a mile north of the post-office, at St. Helena, and described in the complaint, at the end of the year 1860. I had then about twenty-three hundred (\$2,300) dollars of my own, which I used. The first money I spent on the place was to buy out Mr. Haskins, who was a squatter or renter on the place. I paid him a thousand (\$1,000) dollars for moving off. I used the balance of the money in fencing, ditching, and whatever was needed. I had a business of my own at that time. I was then a wine-maker, and made wine in different places in Napa county, in Napa city, in 1858, with John Patchett. After my marriage I made wine on this place, and on Mr. Yount's ranch on shares. The funds I received I used in my business. I managed the prop-

erty of Mrs. Krug. I planted it and ploughed it, and reaped the income from it, and used it in my business, mingling the funds with my own, and never rendered to Mrs. Krug any account of her portion of them. She never asked me for any account. It has been my constant practice since I went in business, managing her property and my own business, to mingle the funds of myself and my wife, and continued this for thirty years. I do not know how much of my money I have used. I have sold a portion of the property of my wife. I sold I think somewhere about twenty-two or twenty-three thousand dollars' worth of her property, and used the money mostly in my business. I never rendered her any account of it. She never did ask me for any account. I have been in the habit of managing this property—her property—as though it was my own. I ceased to manage it on my own hook when I failed. I manage it to-day, but not in the style I did before. The difference is that I am doing this work for Mrs. Krug now, and the money affairs go all through her hands. We have no more wine business. The business is gone, and so I am there and work for her. She does not and never did pay me a salary. What I need I suppose she gives me,—bread and butter, and a pretty good suit of clothes." Both the husband and the wife testified that no express authority was ever given to the husband to act as agent for the wife; and there was no evidence tending to prove the expression of such authority in words, oral or written. As to whether, after the commencement of the proceeding in insolvency, the wife acknowledged her liability to plaintiff, and promised to pay the debt, or any part of it, the evidence is conflicting.

The opinion of the court in granting a new trial concludes as follows: "The evidence fails to disclose a precedent authorization to act as her agent in purchasing the lumber and materials from plaintiff, unless it can be inferred from the acts and relative situation of the parties; and, if the agency cannot be so inferred, then, if it existed at all, it must have been created by subsequent ratification. 'An agency may be created and an authority may be conferred by a precedent authorization or a subsequent ratification.' Civil Code, § 2307. The question arises here, is the evidence sufficient to warrant the jury in finding either that Charles Krug was made her agent by precedent authorization, or that there was a subsequent ratification of his acts by her? For, if there is not sufficient evidence to warrant them in so finding, the verdict should not stand; otherwise, the motion should be denied. It is not contended there was any 'precedent authorization' given to Charles Krug to act as agent for his co-defendant. In order to constitute a 'subsequent ratification' of the act by the principal it seems there must be evidence of previous knowledge on the part of the principal of all the material facts, (*McClelland v. Whiteley*, 15 Fed. Rep. 322; 2 Greenl. Ev. § 66;) and it would seem that a ratification is only effectual when the act is done by a person professedly acting as the agent of the par-

ty sought to be charged as principal, (1 Amer. & Eng. Enc. Law, 481, and authorities there cited; *McLaren v. Hall*, 26 Iowa, 305.)"

These, so far as they are conclusions of law, appear to be correct, unless the learned judge intended to be understood that the evidence on the part of the plaintiff had no substantial tendency to prove "precedent authorization" of the husband to act as the agent of the wife in erecting the fixtures above-mentioned upon her land, and in purchasing the lumber for that purpose. If he so intended, I think he was mistaken. An agency, including the agency of a husband for his wife, may be proved by circumstantial evidence, (*Whart. Ag. §§ 44, 121, and 126; Burnett v. Fisher*, 57 Cal. 152; *Westgate v. Munroe*, 100 Mass. 227; *Bickford v. Dane*, 58 N. H. 185;) and I think the circumstantial evidence on the part of the plaintiff in this case sensibly and substantially tended to prove precedent original authority of the husband from the wife to erect the fixtures above mentioned upon her land, and for that purpose to purchase the lumber sued for. But it is probable that the court based the order granting a new trial upon what it considered to be a preponderance in the weight of conflicting evidence in favor of defendants; and, since the trial courts have *criteria* by which to determine the credibility of witnesses and the comparative weight of evidence for and against the respective parties not furnished to the appellate court by a transcript of the evidence, the decisions of trial courts as to the weight of evidence, especially in granting new trials, are seldom disturbed. For the purpose of the new trial it is proper to add that, although the plaintiff (corporation) was not aware of the agency of the husband at the time it sold the lumber, and then understood that it was selling directly to him, yet, upon discovering the agency of the husband, if any there was, it had the right to resort for payment to either the agent or principal,—the husband or the wife. *Ellis v. Crawford*, 39 Cal. 523; *Thomas v. Moody*, 57 Cal. 215, *Arnold v. Spurr*, 130 Mass. 347 and 350; *Raymond v. Proprietors*, 2 Metc. (Mass.) 324; *Whart. Ag. §§ 464 and 496*. I think the order should be affirmed.

WE CONCUR: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

59 Cal. 231

PUTNAM v. DUNGAN. (No. 13,442.)

(*Supreme Court of California*. May 27, 1891.)

VOLUNTARY PAYMENT — RECOVERY — JOINT PURCHASE OF LAND.

1. Where the owner of land, on the representation of another that he has an interest therein, pays him money for a release of his claim, with the understanding that it is to be repaid if he has no interest, he may recover the money if it is ascertained that the claimant has no interest, though a person who was present with such claimant when the land was purchased has stated to the owner the facts attending the purchase.

2. The fact that several persons unite in a note to secure money for the purchase of land



does not of itself create a joint interest in all of them in the purchase that may be made.

Department 1. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

*Buck & Wheeler*, for appellant. *E. W. Wilson* and *P. F. Hart*, for respondent.

HARRISON, J. The real question involved in this action is whether the \$1,000, which the plaintiff alleges was paid by him to the defendant, and for the recovery of which the action was brought, was paid as a compromise and in settlement of differences existing between him and the defendant, or whether it was paid upon the representation and claim by the defendant that he had an interest in the purchase of certain lands in Oregon, and upon his agreement that he would repay it if it should be subsequently ascertained that he did not have any interest therein. Underlying this question, however, is the question whether the defendant did in reality have any such interest, and whether, if he did not, he knew that he had no such interest; for, if he knew that he had no interest in the land, his representation to the plaintiff that he had was false, and, if made with a view of inducing the plaintiff to pay to him \$1,000 therefor, was fraudulent. Inasmuch, moreover, as the defendant himself had been personally connected with all the acts and transactions culminating in the purchase of the land, he must be held, as a matter of law, to have known whether he had any interest in the purchase or not. Hence the first question to be determined upon the trial was whether the defendant did, in fact, have any interest in the purchase of the land referred to. In pursuance of a previous plan formed on behalf of the plaintiff, one Walker, and one Smith with the defendant and his brother, the defendant and Walker had gone to the state of Oregon from the county of Humboldt, where they all resided, for the purpose of making purchase of lands, if any could be found which would be satisfactory to them. Previous to their departure, a note for \$5,000 had been given to the Humboldt County Bank by four of the parties, for which the bank had given five \$1,000 drafts on the Bank of California, of which two were made payable to the order of Walker, and three to the order of the defendant. After reaching Oregon, a purchase was made of the Long ranch, and an agreement for its conveyance executed between the owner and Walker, the defendant signing his name as a witness to the agreement. After making this purchase, the defendant and Walker looked at some other tracts of land, but, finding none which suited them, returned to Humboldt county. On their route back a disagreement arose between Walker and the defendant respecting the purchase, Walker claiming that it was for himself, Smith, and the plaintiff, and the defendant claiming that he had an interest in it. After they had returned to Eureka they met Smith and the plaintiff, and the controversy was continued, until finally the plaintiff paid to the defendant the \$1,000 which is the subject of this controversy; the defendant claiming that it was paid as

a compromise of the difference, and for a release of his claim to the land purchased, and the plaintiff contending that it was paid upon the express agreement on the part of the defendant that he would repay it if it should afterwards be established that the defendant did not have an interest in the purchase. The cause was tried before a jury, and a verdict rendered in favor of the plaintiff for the sum claimed. The defendant has appealed directly from the judgment, bringing up the evidence which was taken at the trial in a bill of exceptions, the appeal having been taken within 60 days after the judgment. It would serve no useful purpose to recount the testimony given at the trial. Both parties to the action, as well as the other parties to the transaction, were fully examined, and testimony from disinterested witnesses, in corroboration of one or the other, was also presented. All the relations existing between the five parties to the transaction, —the conversations and preparation prior to the departure of the defendant and Walker for Oregon, the procuring of the money with which to make such purchases as they might desire, their negotiations with reference to other tracts of land, in fact everything that might serve to throw light upon the particular transaction—was placed before the jury. It is needless to say that in many respects the testimony was in direct conflict. The jury, however, had the opportunity to weigh all the evidence, and to determine the effect to be given to the testimony of each witness. They were enabled to determine the extent to which the plaintiff relied upon the statement of the defendant as an inducement to pay him the money, as well as the knowledge which he could otherwise obtain concerning the correctness of that statement. After a careful examination of all the evidence in the record, we cannot say that it is insufficient to justify the verdict. The jury were fully instructed by the court upon the questions before them. They were instructed that if this money was paid as a compromise, or in settlement of a dispute between the parties, their verdict should be for the defendant. It was left to them to determine, from all the evidence, whether the money was paid as claimed by the one party or by the other, and, where the evidence was so directly contradictory and conflicting, their verdict must be the final determination of the rights of the parties. The fact that Walker had been with the defendant at the time the purchase was made, and that the plaintiff had learned from him the facts connected with his purchase, did not of itself, make the payment to the defendant voluntary. Walker and the defendant differed radically in their version of the transaction, and in their view of the rights of the defendant in the purchase. The plaintiff was not compelled to believe that the version of either of them was correct. He had the right to further inform himself of the facts connected with the purchase, and to rely upon the statement of the defendant that these facts would show that the defendant did have an interest. If, upon such investigation, he was able to establish that the defend-

ant did not have an interest, he had a right to demand the money back in accordance with the terms upon which he had paid it. Walker himself refused to be a party to any compromise, and the contention of the defendant, that because Walker knew all the transaction he could not have been misled by any statement of the defendant, has no application to the position of the plaintiff. He did not have Walker's knowledge, and was not compelled to rely upon his statement. He had a right to make the payment to the defendant upon the condition that, if the defendant's statement was not correct, it should be refunded, and if he should be subsequently able to establish, as he must have done to the satisfaction of the jury at the trial, that the defendant did not have an interest in the land, he had the right to maintain his action. Neither did the fact that the parties united in the note to the bank for the money with which they were to make their purchases in Oregon, of itself create a joint interest in all of the parties in whatever purchase should be made. That fact was a circumstance, but not conclusive, in determining their relations. Such arrangement could as easily have been made for the accommodation of the parties in their several rights, as in their joint rights. When the plaintiff rested, the defendant asked for a nonsuit, which was denied. There was no error in this. The court would not have been justified in withdrawing from the jury the determination from the evidence then before it of the proposition upon which the defendant asked the nonsuit. We find no error in any of the instructions or rulings of the court, and, upon well-settled principles in reference to conflicting evidence, the judgment is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

89 Cal. 251

BLUMENTHAL v. GOODALL. (No. 12,638.)

(*Supreme Court of California.* May 27, 1891.)

REAL-ESTATE AGENT — REVOCATION OF AUTHORITY.

Where the owner enters into a contract authorizing a real-estate agent to sell his land on commission, within a certain time, he cannot revoke the authority, and escape liability to the agent, if he secures a purchaser before the time limited, as the result of efforts commenced before such revocation. Reversing 25 Pac. Rep. 131. McFARLAND, PATERSON, and SHARPSTEIN, JJ., dissenting.

In bank. On rehearing.

GAROUTTE, J. This cause has been heard in department and in bank, and is now before the court in bank for decision upon an order granting a rehearing. This is an action for the recovery of commissions claimed to have been earned by a real-estate agent in the sale of certain lands belonging to defendant. Judgment for defendant. Motion for new trial denied, and appeal from both judgment and order. The court found that the defendant, being the owner of the land in question, on the 13th day of July, 1887, gave to L. Oest-

reicher, a real-estate agent, an authorization in writing, of which the following is a copy: "I hereby authorize Mr. L. Oestreicher to sell blocks 899, 900, 901, 903, outside lands, for the sum of fifteen hundred dollars (\$1,500) each, will allow him one hundred dollars (\$100) as commissions for his services on each block. This contract to be in force for ten days from date hereof." Which paper was duly dated and signed by defendant. The court further finds that on the same day Oestreicher agreed with one Fulda, orally, for the sale of the blocks at the price named, but, Fulda failing to put his agreement in writing, Oestreicher afterwards, and on the same day, executed, with O. F. Von Rhein & Co., the following agreement in writing: "Received of O. F. Von Rhein & Co. the sum of three hundred dollars (\$300) on account of purchase of outside land, blocks 899, 900, 901, and 903; price agreed upon, six thousand dollars, (\$6,000.) Subject to perfect record title. Thirty days allowed for examination of title; if title does not prove perfect, deposit to be returned." On the same day Oestreicher notified the defendant in writing of what he had done with Von Rhein. That on the 14th Von Rhein applied to defendant, told him of his agreement to purchase, and asked for the abstract of title. Defendant told him that he would not allow 30 days to examine title. Von Rhein replied that he would make the examination earlier if possible, and received and receipted for the abstract, the same to be returned to the defendant, but no time for its return specified. Later in the same day defendant received from Fulda a letter notifying him that he (Fulda) had agreed with Oestreicher for the purchase of the blocks, and that he was prepared to examine the title and complete the purchase, if the title proved satisfactory, demanding of defendant to complete the sale, and offering to deposit \$500 on account thereof. That on the next day defendant served written notice upon both Oestreicher and Von Rhein & Co., reciting that Oestreicher had procured the authorization given to him, upon his representation that he had an eastern party who was about to depart, to whom he could sell those blocks if he had authority to act at once, but he had not time to hunt up other blocks for him before his departure. That instead of selling them, as he said he could, he had negotiated a sale of them to two different resident purchasers, and, in view of these complications and misstatements, he revoked the authority of Oestreicher, and declined to proceed further in the consummation of the sale of the property through him. That, on the nineteenth day of July, Von Rhein completed his examination of the title, and offered to complete the purchase, but the defendant refused to accept the money or make the deed. That demand of the commission had been made and refused, and the claim therefor had been duly assigned to plaintiff. It was also found that the authorization from defendant had not been secured through any fraud or misrepresentation on the part of Oestreicher. On these facts the court found, as a conclusion of law, that the

plaintiff was not entitled to the relief demanded, and judgment was entered for defendant.

It is a general principle of law that, as between the principal and the agent, the authority of the agent is revocable at any time, if not coupled with an interest, and this principle is recognized by section 2356 of the Civil Code. Mechem, upon the Law of Agency, (section 209,) says: "But this power to revoke is not to be confounded with the right to revoke. Much uncertainty has crept into the books and decisions from a failure to discriminate clearly between them. \* \* \* As has been seen, the relation of the agent to his principal is founded in a greater or less degree upon trust and confidence. It is essentially a personal relation. If, then, for any reason, the principal determines that he no longer desires or is able to trust and confide in the agent, it is contrary to the policy of the law to undertake to compel him to do so. \* \* \* But it by no means follows that, though possessing the power, the principal has the right to exercise it without liability, regardless of his contracts in the matter. It is entirely consistent with the existence of the power that the principal may agree that for a definite period he will not exercise it, and for the violation of such an agreement the principal is as much liable as for the breach of any other contract." In section 615 the author says: "In using the expressions rightfully and wrongfully revoked, it will be understood that the question of the principal's power to revoke is not involved, but whether by express or implied agreement, having undertaken not to exercise that power, he has, nevertheless, exercised it in violation of the agreement." Section 620 reads: " \* \* \* Thus if, after a broker employed to sell property had in good faith expended money and labor in advertising for and finding a purchaser, and was in the midst of negotiations which were evidently and plainly approaching to success, the seller should revoke the authority with the purpose of availing himself of the broker's efforts, and avoiding the payment of his commissions, it could not be claimed that the agent had no remedy. In these cases it might well be said that there was an implied contract on the part of the principal to allow the agent a reasonable time for performance, that full performance was wrongfully prevented by the principal's own acts, and that the agent had earned his commission." Section 968 uses this language: "It is entirely competent for the principal to agree that the broker shall have a certain time within which to find a purchaser, and, where he does so, he will be liable to the broker for damages, if, without the latter's fault or consent, he terminates his authority before the expiration of that period." In the case of *Lane v. Albright*, 49 Ind. 279, where the owner of the real estate sold it pending the negotiations of the agent in making a sale, and prior to the expiration of the time given by the owner to the agent, and where the agent within the time given did find a purchaser, the court says: "The appellant performed all that

he was required by the contract to do, and was prevented by the appellee from selling the land. The appellee disabled himself from carrying out the contract of sale made by the appellant." "The fact that the appellee had authorized appellant to sell his land did not deprive himself of the power of selling it, but he could not thereby avoid his liability to appellant." In *Hawley v. Smith*, 45 Ind. 183, upon full consideration the court decided that the rule is that, where the performance by one party is prevented by the act of the other, the party not in fault should recover in damages such sum as will fully compensate him for the injury which he has sustained by reason of the non-performance of the contract. To the same effect is *Story*, Ag. § 406. In the case at bar it may be conceded that the agent had not entirely carried out his contract at the time the defendant revoked his authority, but upon the 19th day of July, and within the limit of time fixed by the contract, he did produce the purchaser, with his money in his hand, demanding a deed. The court found that the plaintiff entered into this contract in good faith, and that the writing was untainted with fraud. The record discloses that the agent was most active in his efforts to find a purchaser; indeed, the real reasons of defendant's revocation of the agency appear to be that the agent was too active, as he had found two purchasers for the property instead of one. The case of *Brown v. Pfirr*, 38 Cal. 553, would seem to indicate upon a cursory examination, views hostile to the principles expressed in the authorities cited in this opinion, but, upon examination of that case, it can readily be seen that no hostility exists. The contract in that case does not expressly stipulate that it shall remain in force 30 days, and the opinion of Justice SANDERSON clearly intimates that, if there had been a provision in the contract that it should remain in force for such length of time, the defendant would not have been permitted to prevent performance, and escape without making compensation to the agent. The remaining cases cited by respondent upon this question add no merit to his contention. The defendant expressly agreed that his contract with the agent should remain in force for the period of 10 days. The act of the agent in finding a purchaser required time and labor for its completion, and within three days of the execution of the contract, and prior to its revocation, he had placed the matter in the position that success was practically certain and immediate, and it would be the height of injustice to permit the principal then to withdraw the authority and terminate the agency as against an express provision of the contract, and perchance reap the benefit of the agent's labors, without being liable to him for his commissions. This would be to make the contract an unconscionable one, and would offer a premium for fraud by enabling one of the parties to take advantage of his own wrong, and secure the labor of the other without remuneration. Let the judgment and order be reversed, and the cause remanded, with direction

to the court below to enter judgment for the plaintiff as prayed for.

We concur: BEATTY, C. J.; DE HAVEN, J.; HARRISON, J.

We dissent: MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.

(3 Wyo. 430)

TORREY v. BALDWIN, County Treasurer.  
(*Supreme Court of Wyoming*, April 27, 1891.)

INDIAN RESERVATIONS—TAXATION.

Rev. St. U. S. § 1839, provides that "nothing in this title [the territories] shall be construed to impair the rights of person or property pertaining to the Indians in any territory so long as such rights remain unextinguished by treaty, \* \* \* or to include any territory which by treaty with any Indian tribe is not, without the consent of such tribe, embraced within the territorial limits or jurisdiction of any state or territory, but all such territory shall be excepted out of the boundaries and constitute no part of any territory now or hereafter organized." The treaty of July 3, 1868, with the Shoshones, pursuant to which their reservation was established, contains no reservation or exception whereby it should be excluded and excepted out of the territory within which it was situated. Held, that the reservation was included within the territory, and that cattle thereon, belonging to a white person in no wise connected with the Indians, were subject to taxation in the county within which the reservation lay.

Reserved case from district court, Fremont county.

The plaintiff, Robert A. Torrey, brought suit on the 3d day of February, 1890, in the district court of the third judicial district of the territory of Wyoming for Fremont county against the defendant M. N. Baldwin, as county treasurer and *ex officio* collector of taxes for Fremont county. The plaintiff seeks to have certain taxes in the sum of \$1,262.62 levied and assessed against him on his live-stock, horses, and cattle ranging on the Shoshone Indian reservation within the geographical limits of the county of Fremont, declared void, and to perpetually enjoin and restrain the defendant as such officer, and his successors in office, from collecting such taxes levied and assessed against him by the board of the county commissioners of the county of Fremont for the year 1889. The petition alleges the levy and assessment of such taxes upon the live-stock of the plaintiff, consisting of horses and cattle, upon an assessed valuation of \$59,250; that said live-stock were upon the open range, and were during all of said year 1889 ranged and located within and upon said Shoshone Indian reservation, situated within the geographical limits of said Fremont county; that the reservation was established pursuant to a treaty between the United States and the eastern band of the Shoshones and the Bannock tribe of Indians, made and concluded at Ft. Bridger, in the territory of Utah, July 3, 1868, which treaty has ever since existed; that plaintiff during said year 1889 was a non-resident of Wyoming; that defendant threatened to levy upon and distrain the property of plaintiff if said tax was not paid. To this petition defendant demurred, assigning two grounds of demurrer: (1) That

the court had no jurisdiction of the subject-matter of the action; and (2) that the petition does not state facts sufficient to constitute a cause of action. Upon these pleadings and the issues thereby raised the court below, Hon. A. B. CONAWAY, now one of the justices of the supreme court, presiding, on his own motion, and under the provisions of chapter 66 of the Session Laws of Wyoming for 1888, reserved and sent for decision to this court the said cause and the questions raised by demurrer, and, as is stated in the certificate of the said district court: "Whether the county of Fremont, within the geographical boundaries of which is situated said [Shoshone] Indian reservation, had in the year 1889, any right, authority, or jurisdiction to assess for taxation and levy a tax upon the cattle and horses of the plaintiff, which were during all of that year kept and located upon the said Shoshone Indian reservation; and whether said cattle and horses of the plaintiff, as kept and located upon said reservation during that year, were subject to taxation in said county for that year; and whether said taxes, so levied and assessed upon said property, were void, wrongful, and illegal for the want of authority and jurisdiction to tax the same."

Charles N. Potter, for plaintiff. A. C. Campbell and Charley Allen, for defendant.

GROESBECK, C. J., (after stating the facts as above.) The questions involved in this proceeding were directly passed upon by the supreme court of the late territory of Wyoming when the said Shoshone Indian reservation was a part of Sweetwater county, and before the formation of the county of Fremont from a part of its territory, in the case of Moore v. Board, etc., 2 Wyo. 8, and the broad statement was then judicially announced that the territory of Wyoming was wholly excluded from the exercise of political power over this reservation, either to regulate the intercourse of its subjects with it, or to extend its municipal authority over it. The right to tax any property within the reservation was by this decision emphatically denied. We should be loth, at this late day, to re-examine this question, were it not that since the said decision was made there have been a number of decisions of the federal supreme court passing upon the questions involved, either absolutely or incidentally, which are in direct conflict with the views of the learned judge who delivered the opinion of the supreme court of the territory in the case first cited. Notwithstanding this decision and the later one of Fremont Co. v. Moore, (Wyo.) 19 Pac. Rep. 438, one of the members of that court, while sitting as a district court for Albany county, upon a cause heard and determined by him upon a change of venue from Fremont county, has since held that the county of Fremont, in its corporate capacity, had the right to tax personal property of the plaintiff in this case, the same being live-stock ranging on the Shoshone Indian reservation in Fremont county; and the fact that this matter has been sent to us for decision by another district court shows that these decisions of the terri-

torial supreme court have been boldly challenged by bench, bar, and the public. We should not lightly upset these decisions, however erroneous they may appear to us, unless it satisfactorily appears to our minds that they have not been acquiesced in and considered the settled law of this jurisdiction, so that the doctrine of *stare decisis* would apply, or because it is impossible to follow them with safety, in the light of a more elaborate discussion of the principles involved, and because they are clearly against the weight of authority and the law governing the case. The treaty with the eastern band of the Shoshones and the Bannack tribe of Indians was made and concluded at Ft. Bridger, Utah, July 8, 1868, and was afterwards ratified by the president and the senate of the United States. 15 U. S. St. 673. There is neither reservation nor exception in this treaty, as was the case in the treaty with the Shawnees and other tribes, whereby the territory embraced within the exterior lines of the reservation should be excluded and excepted out of the state or territory within which the reservation was geographically situated. It was so expressly decided in the case of *Langford v. Monteth*, 102 U. S. 145, where the error made in the case of *Harkness v. Hyde*, 98 U. S. 476, was corrected. We quote from the opinion in the former case: "This court, in *Harkness v. Hyde*, supra, relying upon an imperfect extract found in the brief of counsel, inadvertently inferred that the treaty with the Shoshones, like that with the Shawnees, contains a clause excluding the lands of the tribe from territorial or state jurisdiction. In this it seems we are laboring under a mistake. Where no such clause or language equivalent to it is found in a treaty with the Indians within the exterior limits of Idaho, the lands held by them are a part of the territory, and subject to its jurisdiction, so that process may run there, however the Indians themselves may be exempt from that jurisdiction. As there is no such treaty with the Nez Perces tribe, on whose reservation the premises in dispute are situated, and as this is a suit between white men, citizens of the United States, the justice of the peace had jurisdiction of the parties, if the subject-matter was one of which he could take cognizance." The court further decided that the reservation which was provided for in the Shoshone treaty was not excepted out of the territory of Idaho. The organic act of the territory of Wyoming, approved July 25, 1868, contains the following exception and reservation relating to the rights of Indians, and no other, viz.: "Provided, that nothing in this act shall be construed to impair the rights of person or property now pertaining to Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians." The proviso afterwards inserted in the Revised Statutes of the United States, (section 1839,) is nearly the same as that contained in the organic acts of the territories of Idaho, Dakota, and probably of other territories, organized prior to the creation of the territory of Wyoming, thus plainly indicating that the

remainder of the proviso which appears in the organic act of these older territories was studiously and for a purpose omitted in the organic act of Wyoming. Section 1839 of the Revised Statutes of the United States reads as follows: "Nothing in this title shall be construed to impair the rights of persons or property pertaining to the Indians in any territory so long as such rights remain unextinguished by treaty between the United States and such Indians, or to include any territory which by treaty with any Indian tribe is not, without the consent of such tribe, embraced within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries and constitute no part of any territory now or hereafter organized, until such tribe signifies its assent to the president to be embraced within a particular territory." The only substantial differences in the phraseology between the organic acts of the territories other than Wyoming and this section just quoted are that the words "to be included" are stricken out of the organic acts, and the word "embraced" inserted in lieu thereof in the section; and the clause: "Or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never been passed," is also stricken out, but is substantially re-enacted in section 1840, Rev. St. U. S. It will be noticed, although it is contended that the organic acts of the territories existing prior to the revision of the federal statutes of 1874 and 1878 were repealed by the revision, the supreme court of United States, long after the adoption of the revision, refers almost entirely to the organic acts themselves in construing these provisions relating to Indians, as if they were unmodified and unrepealed. We think that the error in the case of *Harkness v. Hyde*, supra, arose rather from a false construction of the proviso relating to Indian rights in the organic act of Idaho than "from an imperfect extract found in the brief of counsel," and it appears that the same error runs through the language employed by Mr. Justice MATTHEWS in the case of *Ex parte Crow Dog*, 109 U. S. 556, 8 Sup. Ct. Rep. 396. He says: "The district courts of the territory of Dakota are invested with the same jurisdiction in all cases arising under the laws of the United States as is vested in the circuit and district courts of the United States. Rev. St. §§ 1907-1910. The reservation of the Sioux Indians lying within the exterior boundaries of the territory of Dakota was defined by article 2 of the treaty concluded April 29, 1868, (15 St. 635;) and by section 1839 of the Revised Statutes it is excepted out of and constitutes no part of that territory. The object of this exception is stated to be to exclude the jurisdiction of any state or territorial government over Indians within its exterior limits, without their consent, where their rights have been reserved, and not extinguished by treaty." If the

Sioux reservation was excepted out of and constituted no part of the territory of Dakota, why was that jurisdiction over Indians alone excluded? Why was it not excluded as to white people? We do not see any such exception in the Sioux treaty, which is almost like that of the Shoshone treaty on this point. This case was, however, decided upon another and a controlling point,—that section 3146, Rev. St. U. S., excepting offenses committed by one Indian against the person and property of another Indian in the Indian country from the operation of the local law, was not repealed.

We are content with the views expressed by the court in the case of *Langford v. Monteith*, decided earlier, and the cases of *Railway Co. v. Fisher*, 116 U. S. 28, 6 Sup. Ct. Rep. 246, and *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. Rep. 1109, decided later, which are harmonious with the case of *Langford v. Monteith*. Although it was decided that the exclusive authority and jurisdiction of the United States over Indians in the Indian country was not lost in the *Crow Dog Case*, this objection was removed by the statute of March 3, 1885, which provided that Indians should be tried for many offenses arising under the territorial laws by the territorial courts in which the reservations were situated, and this act was declared valid in the case of *U. S. v. Kagama*, supra. In *Re Gonsahay-ee*, 130 U. S. 343, 9 Sup. Ct. Rep. 542. However, admitting that the disputed portion of section 1839, Rev. St. U. S., superseded and repealed the organic act of Wyoming, yet we cannot see that it has any such meaning as is sometimes attributed to it. It certainly is not free from ambiguity, but, reduced to simple language, in an intelligible form, it would read thus: "Nothing in this title ["Territories," tit. 23] shall be construed to include any territory which by treaty with any Indian tribe is excluded from the territorial limits of any state or territory; but all such territory shall be excepted out of the boundaries and constitute no part of any territory now or hereafter organized." The clause "all such territory" must mean the territory which, by treaty with the Indians, is excluded from the territorial limits or jurisdiction of any state or territory. There is no such reservation or exception in the Shoshone treaty, and this was directly and of necessity decided in the cases of *Langford v. Monteith* and *Railway Co. v. Fisher*, supra. If we adopt the construction of the federal supreme court in these cases, (and we are bound to do so,) that the Ft. Hill (Hall) reservation was a part of the territory of Idaho, notwithstanding the greater restriction imposed by its organic act, we must hold that the Shoshone reservation in Wyoming, which was provided for and designated in the same treaty, was a part of the territory of Wyoming, and consequently a portion of the county of Fremont, wherein it lies. Our attention has been called to section 863 of the Revised Statutes of Wyoming, defining the boundaries of Fremont county, wherein it is "provided that if, by reason of any treaty with the Shoshone or Arapahoe tribe of Indians, the Indian

or government title to any lands or reservation within the limits of the county shall be extinguished, the same shall form and constitute a part of the aforesaid county." We think that this proviso was inserted through an excess of caution, and in view of the decisions of the territorial courts. No territory was excluded from the county by the act organizing it; and, if the Shoshone reservation is a part of Wyoming, it certainly must be a part of Fremont county, within the exterior boundaries of which it lies. At the time, then, of levying the taxes upon the property of plaintiff in 1889, the territorial courts, as such, had both civil and criminal jurisdiction over the Shoshone Indian reservation in Fremont county, so that process could run there, and, of necessity, so that process could be enforced there.

The question is, was there any further jurisdiction of the territory, such as the taxing power over this reservation? It is undoubtedly true that when a given area is within the defined limits of a municipality it would be presumed to be within the jurisdiction of the same for all purposes, including taxation. If it be excluded or exempt for any purpose, the exemption should clearly appear. The realty cannot be taxed; the soil belongs to the government, of which the Indians have the usufruct. The property of the Indians cannot be taxed. It is true, as stated in the case of *Fremont Co. v. Moore*, supra, that "the jurisdiction to tax and the jurisdiction of the courts are not necessarily co-extensive." But, the general jurisdiction being conceded, we do not see, on principle, why the taxing power may not exist over the person and property of any person not an Indian, so long as the rights of the government or of the Indians are not impaired. We do not agree to the proposition that property on the reservation could not be distrained if it could lawfully be taxed there. There is no pretense that the plaintiff, Torrey, is a post trader, or an officer or agent of the government. It is folly to say that a tax collector could not enforce his warrant for the collection of taxes on the reservation with as much propriety as a sheriff could serve a civil writ or a criminal warrant there. The reservation does not belong to the Indians, as the title to the soil is in the government, and the Indians have but the usufruct to the land, unless they choose to select and cultivate the land in severalty and even when this is done, on the abandonment of such a purpose the land reverts to the government. It was not the purpose of congress to create an *imperium in imperio* within our limits, nor to make a foreign country of an Indian reservation. The doctrine that the Indians are separate nations, or even "dependent sovereignties," as they are named in the first *Moore Case* quoted above, has long ago been exploded. They are considered the wards of the government, as in a condition of pupillage, and as "dependent political communities." They are kept on reservations to restrain their natural propensities to roam over a large scope of country; to keep them from contact with the meaner whites, from whom they have absorbed the vices,

without the virtues, of civilization; to secure the settlers in the vicinity of the reservations, who have planted with so much care their homes in a frontier country, the peaceable occupation of their lands, improvements, and property; and to give to the Indians a "local habitation and a name," and thus to gradually overcome their hereditary lawlessness and their indisposition to labor. They are dependent upon the government for food, clothing, and shelter, for their protection from the rapacity of the stronger race, from their internal quarrels, with the encouragement to improve their condition by every incentive that can be afforded to such a people. The law on the subject of the treatment of the Indians is a curious and an interesting study. After a century of dealings with them, a new and a more sensible policy found legislative utterance, forced by the imperative logic of events, in the statute of March 3, 1871, (section 2079, Rev. St. U. S.,) which provides that no Indian tribe or nation within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the government may contract by treaty, saving all existing rights growing out of treaties then in existence. Since the enactment of this law, agreements with the Indians are no longer held as "treaties" requiring the assent of the president and the senate, but these contracts must be ratified by a solemn act of congress, in which the concurrence of the lower branch of congress, which carries the purse, must be obtained, as well as that of the upper branch, which bears the sword. The statute of March 3, 1886, as was well said by Mr. Justice MILLER, in the *Kagama Case*, quoted above, "does not interfere with the operation of state laws upon white people found there," (on an Indian reservation.) We consider the case of *Railway Co. v. Fisher*, 116 U. S. 23, 6 Sup. Ct. Rep. 246, much stronger. The railroad company obtained a cession of its right of way through the Ft. Hill (Hall) reservation, and claimed exemption from local taxation, because the reservation was excepted out of and formed no part of the territory of Idaho, and because the taxing power did not extend over the reservation. But the court held that the road and property of the company thereupon was subject to taxation for territorial and county purposes, and was only "withdrawn so far as necessary for the construction and working of the road and the use of buildings connected therewith" from the reservation, and that the reservation was not excluded from the territorial limits of Idaho. It was further said in the opinion that, if the railroad company constructed and operated a railroad through this reservation, it could not be perceived that any just rights of the Indians were impaired by taxing the road and the property used in operating it. It seems, therefore, that the only jurisdiction of the territory that was excluded from this reservation was such only as might impair the rights of the Indians. Hence, with the supreme court of the United States, we do not see that any just rights of the Indians could be impaired by tax-

ing the property of the plaintiff. If the plaintiff ranged his cattle and other livestock on the reservation, without the consent of the Indians, he is in the attitude of a trespasser or wrong-doer justifying his immunity from taxation by his own wrongful and unlawful act. If his livestock were ranging there with the consent of the Indians, he would come within the rule laid down in the case of *Railway Co. v. Fisher*. Even under a contract with the Indians, he might be compelled to remove his property from the reservation, as were those who leased lands from the Cherokees, and who were expelled by the proclamation of the president of July 23, 1885. 24 U. S. St. at Large, 1. If his livestock, which appear to have been depasturing on the reservation solely for his pecuniary benefit and gain, are exempt from taxation while there, there is nothing in the way to prevent others subject to taxation, whose property has its *situs* in Fremont county, from moving their personal effects and chattels across the line into the reservation during the assessment period, and, when that time has expired, returning with it. In such a case the reservation becomes a rendezvous for those who seek to escape taxation,—an asylum for those who would evade the just burdens of government. Taxation is an incident of civilization, and he who would avoid it must expatriate himself, and transfer his property where government is unknown. Much stress is laid upon the clause of the Shoshone treaty which provides that "the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians," etc. This clause was discussed and construed in the case last mentioned, (*Railway Co. v. Fisher*), and the conclusion reached was "that the authority of the territory may rightfully extend to all matters not interfering" with the protection of the Indians. It is strange that the plaintiff sets up his own wrong in this matter—his own trespass, his own unlawful presence on the reservation—as a reason why others should not go there to interfere with him. It is contended that the plaintiff can receive no direct benefits from the taxation of his property on the reservation, because schools cannot be maintained there, nor roads laid out, nor bridges built at the expense of the county, and for the reason that the taxes collected there cannot be there distributed and expended in common to and with other portions of the county. This is too narrow a view to take of taxation. "The state levies taxes for the support of its government and for all public needs, that it may be able to carry into effect its mandates, and to perform its manifold functions; and the citizen pays from his property his portion, that he may secure thereby the enjoyment of the benefits flowing to him and his neighbors from organized society. No



government can be so administered, even by the most conscientious rulers, that there may not be apparently unjust and inequitable consequences in particular cases." Cooley, Tax'n, pp. 1-3. There are many instances of this arising from the operation of our revenue laws. The childless man must pay for the education of the children of others, the thrifty citizen must contribute to the support of those who have become indigent through their unthrift, the upright must be taxed for the support of the vicious criminal, the sane must care for the insane. The general school tax in each county in Wyoming is collected from the taxable property of the whole county, whether settled or unsettled, but it can only be expended in the settled portions thereof, which are divided into school-districts, and one may be compelled to pay for the expense of building a bridge or of maintaining a public highway where he may never travel the one or cross the other. Yet the plaintiff may sue and be sued in the local courts; and he now seeks their aid to secure him exemption from taxation when he is not willing to contribute for their support, although his liability for costs is but a small fraction of the salaries of officials, and the costs of maintaining the courts. He could have even an Indian punished for the larceny of his stock, in the local courts, and he could recover in the same tribunals property wrongfully detained from him by another on the reservation. His position is no worse, but the same, as the Utah & Northern Railway Company in the case last quoted, where the corporation could not expect to receive all the benefits, in common with others, of the moneys received and derived from territorial and county taxes, as no roads could possibly be laid out or maintained, nor bridges built, nor schools established on its right of way, yet it was held that the company was liable to be taxed. The case of *Bridge Co. v. City of Louisville*, 81 Ky. 189, depends upon a different principle, as there the power of the state to tax the bridge was upheld, while the right of the city to tax was denied, as, although the bridge was within the corporate limits, yet it was without the taxable limit. This principle, in the case of the extension of the limits of a municipal corporation over suburban and farming property, not laid off into lots, has been frequently announced by the courts of Michigan and other states. In this connection we think the decisions in Wisconsin collected in the case of *Lumber Co. v. Brown*, 40 N. W. Rep. 482, are more in point. In *re Phoenix, etc., R. Co.*, (Ariz.) 26 Pac. Rep. 310.

We answer the questions reserved and sent to us as follows: The county of Fremont had in the year 1889 full right, power, and authority to assess for taxation and levy a tax upon the cattle and horses of the plaintiff which were during all that year kept and located upon the Shoshone Indian reservation, which lies within the geographical limits of said county, and the cattle and horses of the said plaintiff as kept and located upon said reservation during said year were subject to taxation in said county for said

year, and the said taxes so levied and assessed upon said property were not void, wrongful, or illegal for the want of jurisdiction to tax the same. The district court of judicial district No. 3, sitting for the county of Fremont, is directed to sustain the demurrer of the defendant to the petition of plaintiff, and to proceed with the cause, and to make such disposition thereof as shall be consistent with this opinion.

CONAWAY and MERRELL, JJ., concur.

(3 Wyo. 441)

WHEATON *et al.* v. RAMPACKER.

(Supreme Court of Wyoming. April 27, 1891.)

REVIEW—RECORD—ACTION ON CONTRACT—EVIDENCE.

1. The statement in a bill of exceptions that "the said testimony was all the testimony offered by either party" does not show that all the "evidence" is therein contained so as to allow a review thereof.

2. On the back of a certificate for stock owned by plaintiff, defendants indorsed an agreement to pay plaintiff therefor a certain amount after three years on the surrender of the certificate. Held that, in an action thereon, it was not necessary to allege a consideration for the promise, but that it was sufficient that plaintiff accepted it, and notified defendants thereof in a reasonable time, and before the offer had been withdrawn.

3. In the absence of evidence as to the circumstances, the judgment for plaintiff cannot be disturbed on the ground that a tender of the stock, made within a year after the expiration of the three years, was not made within a reasonable time.

Appeal from district court, Albany county.

*Brown & Arnold*, for appellants. *I. P. Caldwell* and *Lacey & Van Devanter*, for appellee.

GROESBECK, C. J. Rampacker, the defendant in error, brought suit in the district court of Albany county against Wheaton and Trabing, the plaintiffs in error, on a certain indorsement upon a certificate for five shares of the capital stock of the Big Laramie Land, Cattle & Improvement Company, of the par value of \$500, which he (Rampacker) owned on the 22d day of May, 1884. This indorsement on the certificate is as follows: "Chicago, May 22, '84. We agree to pay A. Rampacker the par value of this stock, with interest at 10 per cent. per annum from date, after three years, upon the surrender of this certificate. [Signed] GEO. D. WHEATON, TRABING BROS." The firm or copartnership of Trabing Bros. was, at said date, composed of Augustus Trabing, one of the plaintiffs in error, and Charles Trabing, who has since died. The petition alleged these facts, and that on the 16th day of May, 1888, and at divers other times prior to that date, and after the expiration of said three years, Rampacker offered to surrender the said certificate of stock to said Wheaton and Trabing, and demanded payment therefor, which was refused. Augustus Trabing, who appears to be the only defendant served and appearing in the court below, demurred to the petition on the ground that it does

not state facts sufficient to constitute a cause of action. The demurrer was overruled, an exception was taken, and Trabling answered, admitting that Rampacker was the owner of the said certificate on May 22, 1884, admitting the execution of the said indorsement thereon by him for Trabling Bros., but denying that there was ever any consideration to support the agreement indorsed upon said certificate, although this was not alleged in the petition, denying that Rampacker ever promised to return said stock or to surrender the same to said Wheaton and Trabling, although this was not alleged in the petition; and denying, further, the offer to surrender said stock by Rampacker, and denying that he demanded payment therefor from any defendant in the case, in accordance with the conditions written upon the back of said certificate. A trial was had, and the court found for Rampacker, the plaintiff therein, and rendered judgment in his favor against Augustus Trabling for the sum of \$746.65 and costs. A motion for a new trial was made and overruled, and proceedings in error were brought to this court.

1. We cannot review the evidence in the record, presented, as it is claimed, before the trial court, as it has become the settled rule of this court, to which we must adhere, that the bill of exceptions must contain all the evidence admitted in the trial court, where the same is sought to be reviewed here. The statement in the bill of exceptions before us is that "the said testimony was all the testimony offered by either party on the trial of this cause." It was held in the case of *Trust Co. v. Holliday*, (Wyo.) 24 Pac. Rep. 193, that the word "testimony" is not synonymous with the word "evidence," and that such a bill of exceptions as the one before us, containing a like recital, would not be considered by the court. The learned counsel for the plaintiffs in error, recognizing the force of this rule, contented himself with urging two objections to the judgment of the district court: (1) The court erred in overruling the demurrer to the petition; and (2) the petition does not state facts sufficient to support the judgment.

2. These objections rest upon the single proposition, which was argued at length, that the petition does not allege any consideration for the offer to purchase or take the stock in question. This is true. The agreement was strictly unilateral, as it was not signed by Rampacker, and there is nothing to show that he agreed to accept the proposition or offer of the plaintiffs in error at the time when the indorsement on the certificate was made. This offer, however, became good, if accepted, and, if the promisors were notified of the acceptance within a reasonable time, unless the agreement had been revoked or withdrawn, or when from the lapse of time, it would be presumed to have been revoked or withdrawn. The promise indorsed on the certificate of stock is in the nature of a continuing offer or proposition. Whatever consideration for the promise existed at the time of the execution of the agreement, or whether any consideration

ever existed between the date of the promise and that of the tender of the stock, cannot be considered, as no consideration is set up in the pleadings. The offer to purchase, so far as it appears, was primarily without consideration, and it might have been withdrawn or revoked at any time prior to the tender of the stock. It was then accepted and acted upon by Rampacker, and it was then no longer a *nudum pactum*, but became a valid and binding agreement. The offer must be regarded as continuing, until accepted, rejected, or withdrawn. So long as it continues, it is at the disposal of the party to whom it is made. Wade, Notice, § 384, and cases there cited.

It is urged that the offer to purchase or pay for the stock was not accepted within a reasonable time, and that the defendant in error forfeited his rights under the agreement by his laches, but we think that this contention is not well founded. By its terms the offer was held open "until after three years," and the defendant in error could not have surrendered or performed his part of the contract, if he chose to accept the agreement, before the expiration of that time. The allegation in the petition is that the tender was made on or about May 16, 1888, nearly one year after the three years had expired, and "at divers other times prior to that date, and after the expiration of said three years." Inasmuch as there is no allegation in the answer that the acceptance and tender were not made within a reasonable time, and the ground for reversal is not urged on this point, we are unable to determine whether or not the tender and offer to surrender the certificate were made in a reasonable time. The averments of the petition, as to the offer to surrender the stock, are flatly denied in the answer, and, in the absence of any evidence on this point, we must presume that the trial court decided that the surrender or offer to surrender the stock must have been made within a reasonable time, as it had all the evidence before it, and could settle that question by the facts and circumstances of the case and the situation of the parties. If, however, we strain the rule, and look at the evidence which the bill of exceptions contains, we find that Trabling was informed by Rampacker's attorney, some time in 1887, that Rampacker accepted the offer; and that all that Trabling said, at that time, was that it was a matter in which the estate of his brother was interested, together with the Trabling Commercial Company, and that he was unable to do anything about the matter until these affairs were settled. This shows that Trabling did not disaffirm the contract, or insist upon its withdrawal. It appears, also, that on the date alleged, May 16, 1888, the stock was tendered, and payment therefor refused. Whether or not this is all the evidence in the trial court we cannot say, but, admitting that it was, we think it established the fact that the agreement was accepted and acted upon within a reasonable time. The defendant in error had undoubtedly the right to elect to surrender, or offer to surrender, the stock, and sue for the con-

tract price, as he has done. The judgment is affirmed.

CONAWAY and MERRELL, JJ., concur.

*Ex parte BERGMAN.*

(Supreme Court of Wyoming. Nov. 25, 1890.)

HABEAS CORPUS—CONTEMPT—ABOLITION OF TERRITORIAL PROBATE COURT.

1. Under Rev. St. Wyo. § 1269, which provides that the court may refuse to issue the writ of *habeas corpus* if, from the showing of the petitioner, he is not entitled to any relief, the writ will not issue in the first instance as of course, but the petitioner must make out a *prima facie* case for its issuance.

2. The fact that an order to show cause why defendant should not be punished for contempt was not styled in the name of the state, as required by Const. Wyo. art. 5, § 15, does not render the order of commitment void, where defendant voluntarily submitted to the order to show cause, which was personally served on him, and appeared both in person and by counsel, without raising the question of jurisdiction.

3. Const. Wyo. art. 5, § 10, confers on the district court, among other things, exclusive original jurisdiction "in all matters of probate;" and article 21, § 17, provides that all records of the territorial probate court shall pass into the possession of the district court, and that the latter court shall have jurisdiction to determine all causes which the probate court would have heard if the constitution had not been adopted. *Held*, that the territorial probate court and the office of probate judge were abolished on the adoption of the constitution, notwithstanding the fact that the territorial probate judge was *ex officio* county treasurer, and that Const. Wyo. art. 21, § 19, continued in office all county officers until the expiration of the terms for which they were elected, and until their successors were qualified, as the two offices of probate judge and county treasurer, though held by the same person, are separate and distinct.

4. Since the district court is constructively in possession of the records of the territorial probate court, the territorial probate judge holds them subject to its order; and, on his refusal to produce them when called for, he may be punished for contempt.

5. The fact that the district court may compel the production of the records of the territorial probate court by *mandamus* does not deprive it of the more summary proceedings by contempt against the probate judge.

6. Since the probate judge may purge himself of the contempt by the production of the records, the order of the district court that he be imprisoned until he does produce them is not void, as imposing a term of imprisonment without limit; nor is such order affected by Sess. Laws Wyo. 1890, p. 144, § 121, which fixes a definite punishment for witnesses who refuse to be sworn or answer questions, and which expressly provides that "this section shall not prevent summary proceedings for contempt."

7. In the absence of direct statutory provisions, the fact that the person in contempt may be proceeded against by indictment does not take away the power of the court to commit for contempt.

8. Where the record of the district court shows that a rule to show cause was personally served on the probate judge; that the latter, with full knowledge of the charge against him, appeared both in person and by counsel, and submitted his case on the evidence; that, on hearing the order to produce the records of the probate court, he declined to make further answer; and that he retained them after repeated requests to turn them over,—an objection to the order of commitment, on the ground that the probate judge was held in contempt in matters which had not occurred when the order was made, and that he

had no hearing or opportunity to be heard, is not well taken.

9. The record in the contempt proceeding imports absolute verity, and cannot be questioned on *habeas corpus* to release the prisoner.

Application for writ of *habeas corpus*.

Walter R. Stoll and A. C. Campbell, for petitioner. Willis Van Devanter and John M. Davidson, amici curiæ.

GROESBECK, C. J. The petition for the writ of *habeas corpus* recites that Isaac Bergman, the petitioner, is a citizen of the United States of America, and of this state, and is restrained of his liberty by John A. Martin, as sheriff and jailer of the county of Laramie, at the jail of said county; that the pretense of such restraint, according to the best information of the petitioner, is by an order of commitment of the district court of the first judicial district, sitting within and for the county of Laramie, a copy of which order is attached to the petition; that the restraint and imprisonment of the petitioner is illegal, in this: (1) That the said district court was without jurisdiction in the premises; (2) that the said commitment was made in an alleged proceeding for contempt, which alleged contempt consisted in not obeying what is called a "request" or "order," which is attached to the petition, and in not obeying what is called a "further order," also attached to the petition; (3) that the said order of commitment was illegal, in this: that it is without limit; (4) that the said order of commitment is illegal, in this: that the said petitioner was held in contempt in matters which had not occurred at the time the said last-mentioned order was made returnable, and in which the petitioner had no hearing, and no opportunity to be heard. The petition closes with the usual averments that the illegality of the imprisonment of the petitioner has not been adjudged upon a prior proceeding of the same character, and that the application for the writ has not been made to, and refused by, any court or judge. The orders referred to are sufficiently set out in the answer and return of the said sheriff to the writ, and the substance of such answer and return is given in this opinion.

This court has been invested with original jurisdiction in *habeas corpus* by the constitution of this state. Section 3, art. 5, of the constitution of Wyoming. The supreme court of the territory of Wyoming also exercised this original jurisdiction, under the organic act of the territory and the acts of congress relating to *habeas corpus*. The proceedings and practice in *habeas corpus* set forth in chapter 1 of title 17 of the Revised Statutes of Wyoming appear to be applicable herein, and the petition and answer are drawn thereunder. Under the provisions of this statute, the writ does not issue, as of course, upon the application. Sec. 1269, Rev. St., provides that "if, from the showing of the petitioner, the plaintiff would not be entitled to any relief, the court or judge may refuse the writ." And section 1272 directs that, "if the writ is disallowed, the court or judge shall cause the

reasons for said disallowance to be appended to the petition, and returned to the person applying for the writ." This is the rule under the common law, and is the practice uniformly followed by courts and judges upon application for the writ, unless the statute of the jurisdiction points out another method. The writ can only issue to one "entitled to it," and it should not be granted without inquiry. To allow the writ, without determining that the petitioner had made a *prima facie* case, would make it a mere ministerial act; and a clerk of a court or other ministerial officer might issue it as in case of *mesne* process, and as an ordinary writ. The right to the writ "is a right in a larger and more liberal sense,—a right to be delivered from all unlawful imprisonment." Until early in the present century, in England, the opinion prevailed that the court was bound in the first instance to issue the writ of *habeas corpus*, as, of course, without exercising its discretion, as to the grounds upon which the writ issued or moved. But it clearly appears that all the leading later decisions, both English and American, establish the rule that probable cause must first be shown to obtain the writ, whether it is granted at common law or under the statute; and this rule has been followed without interruption, in this country, in both federal and state courts, and is upheld, as a prominent author well terms it, "in a multitude of cases." Church, *Hab. Corp.* § 92, and the cases there cited.

Our examination of the petition, after a long and exhaustive argument, in which the sufficiency of the allegations of the petition were not raised, or even alluded to, except as to the legal effect thereof, shows the petition defective in many particulars. The allegation that the court is without jurisdiction does not state wherein either as to the person or the subject-matter of the contempt proceedings, and in fact the whole petition is lacking in sufficiency and perspicuity of statement. In order, however, to decide the question raised in the fourth allegation of the petition, we reluctantly granted the writ, as it appears impossible to determine, from the order or *mittimus* attached to the petition, that the hearing was had, and we prefer to err on the side of liberty, and to "spell out" vague and indefinite allegations, and to order a hearing, in order that the whole record of the committing court may be reviewed, and that the important public questions raised in the argument of counsel may receive a careful and thorough consideration at our hands.

The answer and return of the sheriff of Laramie county avers that he has now, and since the 17th of November, 1890, has had, the petitioner in his custody under and by virtue of certain orders and process of the district court of Laramie county, certified copies of which are appended to the answer and return. These papers were submitted in evidence, and constitute the record and proceedings of said court in this matter. The record discloses that the petitioner, Isaac Bergman, was probate judge of Laramie county on the 10th day of July, A. D. 1890, when the con-

stitution of this state went into effect; that, as such judge and court, he had actual possession of the records, papers, and proceedings of the late probate court of Laramie county on that day, and has continued in such possession since that date; that the district court of said county, claiming that, by operation of the constitution, the same were transferred in contemplation of law into the custody and possession of said court, on November 11, 1890, when Bergman was in said district court, required him, in open court, to deliver the records, papers, and proceedings of the late probate court of Laramie county to said district court, or show cause why he should not do so; that thereafter the court made an order requiring the sheriff of Laramie county to request and demand of said Bergman the said records, papers, and proceedings, finding that the same were in Bergman's possession, and requiring him to turn over the same to the sheriff; that such order was served by the sheriff, who made said request, to which Bergman made no response, and did not turn over any books, papers, records, or proceedings to the sheriff; that thereafter the district court, finding these facts, and that Bergman was still in the actual possession of the probate records, and had been since July 10, 1890, in the actual possession thereof, and had failed to turn over the same to the court, or its clerk or appointed officer, entered its order, and directed the service of a copy thereof on said Bergman, requiring him to appear on November 17, 1890, at an hour specified therein in said district court, and to there show cause why he should not be punished for his contempt of court in refusing to comply with its said order to turn over said probate records; that said rule to show cause was served on Bergman; that he appeared in person and by counsel on said 17th of November, in pursuance of the rule to show cause why he should not turn over said probate papers and records, and, being so present, did not state any cause in answer to the rule, but submitted the cause on the evidence before the court, and on the said rule; that the court determined and found that Bergman was in possession of the said records, books, and papers, and had been since the date aforesaid; that Bergman had failed and refused to deliver up the same; that, in the presence of Bergman, the court further found that it was entitled to the possession thereof, and that the same were the records of said court, and of right belonged to its custody; that the court then informed Bergman of its findings and decision, and again, in open court, requested Bergman to permit the court to take possession of said records, etc., and inquired of him whether or not he would permit the court to take possession thereof, whereto Bergman replied that he had heard the ruling of the court, and declined to make any other or further answer; that the second time, and directly thereafter, the court made the same request of Bergman, whereto Bergman made the same reply as at first; that the court then asked Bergman when he would permit the court to take possession of said records,

or when he would deliver the same to the court or its officers, whereto Bergman answered that he could not say, and declined to make any further answer; that thereupon the court found Bergman willfully and contumaciously in contempt, and ordered and adjudged that he be committed to the common jail of Laramie county, until such time as he shall deliver or cause to be delivered to the court the said records, papers, and proceedings; and, further, that Bergman be in open court committed to the custody of the sheriff of said county of Laramie, to be confined in the jail thereof until he should make such delivery, or cause the same to be made. In this proceeding we cannot pass upon any of the alleged irregularities of the district court in the contempt proceedings. In this hearing, we can only consider the questions of jurisdiction of the subject-matter, and of the person of the defendant, and whether or not the judgment of the court is valid. It is unnecessary to quote authorities in support of this position, as they appear to be wholly in harmony with this view.

1. It is contended that the rule or order to show cause is a "process" of the court, and, as section 15 of article 5 of the constitution of this state provides that "the style of all process shall be 'The state of Wyoming,'" that the rule or order not being so styled was void. In the case of *Wilson v. Territory*, 1 Wyo. 155, the only reference in the opinion on this point is this brief sentence: "We further believe that the plaintiff in error did not waive any of his rights in these proceedings, by appearance or otherwise." But, in that case, the court below was held to be without jurisdiction, because it had issued an attachment for contempt against Wilson for the purpose of showing cause why he should not be punished for contempt, without any evidence, by affidavit or otherwise, showing that a contempt of the court had been committed. Here the committing court had an affidavit and other evidence before it, and the proceedings are not similar. In the *Wilson Case*, the court acquired, or attempted to acquire, jurisdiction by its attachment; but in this case the district court for Laramie county acquired jurisdiction by the personal service of its order or rule, and by the voluntary submission of Bergman, who appeared, as the record discloses, both in person and by counsel, and the question of jurisdiction was not raised, and the validity of the rule or order to show cause was not questioned. The case cited by counsel for the petitioner establishes the rule. *Dix v. Palmer*, 5 How. Pr. 234. Whenever the defendant appears in a civil cause, he admits himself to be regularly in court, and hence all defects in the summons and its service, and even the total omission of any summons at all, becomes immaterial. This rule in civil causes, where the process has been irregular or defective, we apprehend would apply to criminal or quasi criminal cases; and, when a defendant appears and pleads to an indictment, he would not probably be heard to complain that the bench-warrant upon which he was arrested was not styled, or did not

bear teste, in the name of the sovereignty.

2. We can hear, under the allegation of want of jurisdiction, objections to the power of the court to issue the several orders to turn over the papers and records of the late probate court of Laramie county, and its authority to punish for contempt of such orders. There can be no doubt that the probate court in each county, created by the organic act and the laws of the late territory of Wyoming, was abolished by the constitution of Wyoming, and that it was divested of its jurisdiction, with which the district court of the same county was completely invested. Section 1 of article 5 of the constitution vests the judicial power of the state in the senate sitting as a court of impeachment, in a supreme court, district courts, justices of the peace, courts of arbitration, and such courts as the legislature may, by general law, establish for incorporated cities and towns. Nowhere in the constitution are probate courts recognized as separate tribunals or courts. Section 10 of article 5 confers original jurisdiction on the district courts of the state of all causes, both at law and in equity, and in all criminal cases, of all matters in probate and insolvency, and of such special cases and proceedings as are not otherwise provided for, and said courts are also given therein original jurisdiction in all cases and proceedings, in which jurisdiction shall not have been by law vested exclusively in some other courts. Section 17 of article 21 of the constitution provides that, "when this constitution shall go into effect, records and papers and proceedings of the probate court in each county, and all causes and matters of administration and other matters pending therein, shall pass into the jurisdiction and possession of the district court of the same county; and the said district court shall proceed to final decree or judgment, order, or other determination, in the said several matters and causes, as the said probate court might have done if this constitution had not been adopted." It would appear, from a reading of these sections of our supreme law, that the district courts have been made courts of boundless original jurisdiction; and it certainly is clear that such courts have, since the adoption of the constitution, been clothed with exclusive original jurisdiction in probate matters, and that the probate courts of the territory were, by the constitution, when it was warmed into being by the admission act of congress, stripped of all jurisdiction, and instantly abolished. In addition to the sections of the constitution itself, conferring, in the plainest and most unmistakable terms, exclusive original jurisdiction in probate matters upon the district courts of the state, the schedule to the constitution directly provides that these courts shall have jurisdiction of the papers, records, and proceedings of the probate courts; and not only that, but shall succeed to the jurisdiction of the probate courts, and hear, try, and determine all matters and causes which the probate court would have heard if the constitution had not been adopted. It is urged that the meaning of said section 17 is

modified by, or is in conflict with, the provisions of section 19 of the same article of the constitution, which provides that "all county and precinct officers who may be in office at the time of the adoption of this constitution shall hold their respective offices for the full time for which they have been elected, and until such time as their successors may be elected and qualified, as may be provided by law, and the official bonds of all such officers shall continue in full force and effect as though this constitution had not been adopted;" and that this clause should be construed in such manner as to continue the office of probate judge, who was, by the territorial law, *ex officio* county treasurer, until the expiration of the term of office for which he had been elected. We think that, when the constitution took effect, there was no such office as probate judge, and the clause, "who may be in office," could not apply to one whose office and court was abolished by the constitution. The constitution nowhere recognized such an office, and the jurisdiction of the probate courts was transferred by that instrument to the district courts. Even if these sections were in conflict, the familiar rule of construction must be applied, and one part of the constitution must not be allowed to defeat another, if, by any reasonable construction, the two can be made to stand together. Cooley, Const. Lim. pp. 68, 70.

The clause in section 19 of the schedule (article 21) of the constitution, "who may be in office at the time of the adoption of the constitution," must mean such officers as are permitted to hold their respective offices by the terms of the constitution, and not such as are ousted by its provisions. Any other rule of construction would defeat the plain intent and meaning of the constitution. Under the territorial statutes, although the offices of probate judge and county treasurer were combined, and the probate judge was styled *ex officio* county treasurer, the intent and meaning of the various statutes applicable to these offices is to consider them as two separate and distinct offices, the duties of each to be performed by one and the same person. It was so held in the case of *Territory v. Ritter*, 1 Wyo. 818, and the following cases were cited in the opinion of the court, to the effect that to make a person an *ex officio* officer, by virtue of his holding another office, does not merge the two offices into one. *People v. Edwards*, 9 Cal. 286; *People v. Love*, 25 Cal. 520; *Lathrop v. Brittain*, 30 Cal. 680; *People v. Ross*, 38 Cal. 76. The statute of 1888, found in section 1083 of the Revised Statutes, provides that the offices of probate judge and county treasurer shall appear on the ballots as one office only, and the legislative intent is clear that the two distinct and separate offices should be held by one person, and the elector could vote for but one person to hold the two offices. This statute was in force at the time of the election of the petitioner, and subsequent amendatory legislation, as found in the recent election laws, has combined the two offices as "probate judge and county treasurer." As Mr. Justice BLAIR stated in his opinion in the case of

*Territory v. Ritter*, supra: "The correctness of this view, as to the intent of the legislature, is not lessened, but, on the contrary, greatly strengthened, by the fact that the duties of the office of probate judge, and that of county treasurer, have no connection with each other; each is clothed with different and distinct powers; each to perform separate and distinct duties,—the functions of the former being wholly judicial, the latter purely ministerial." The abolition of probate courts and the office of probate judge does not interfere, therefore, with the right of the petitioner to hold the office of county treasurer, he being in that office, which was and is separate and distinct from the office of probate judge, at the time of the adoption of the constitution, and being expressly recognized by that instrument, and not being abolished or interfered with thereby.

3. The district court being constructively in the possession of the records, papers, and proceedings of the late probate court of Laramie county, the petitioner holds them subject to the order of the court, and as a custodian thereof. He has no right to them in any other capacity. Until they are turned over to the district court, which is entitled to the jurisdiction and possession of them, his possession is but the possession of that court, and he becomes directly subject to the orders of that court, while the records remain in his possession, in regard to the same. He stands in the attitude of a custodian of the records of a court, and he must produce them when called upon. On refusal to do so, he may be punished for contempt. A court of general jurisdiction must have the inherent power to control its own records, upon which its existence depends, and which have been lodged in its jurisdiction and possession. It would be impossible for such a court to exercise its probate jurisdiction, lately exercised by its predecessor in probate matters, without access at all times to the records of the late probate court. Without actual possession thereof, the court would be thwarted at every step. It could not adjudicate upon pending cases, nor could it know judicially that such cases were in existence, or the *status* thereof, without a consultation of the records of the late probate court for its county. We cannot imagine a more chaotic state of affairs than the spectacle presented of a superior court, having a jurisdiction and unable to exercise it, with litigants clamoring for relief and action, and no means for affording them relief, with its records in the hands of one who refuses to surrender them, and with no power to compel, by summary proceedings, their production, or to punish the contemnor, in case of a refusal. Such a condition of affairs would be extraordinary. The rights of infant heirs, the tender care of insane and incompetent wards, would be set at naught, and no means provided to conserve an estate, to prevent its spoliation, or to protect those ever under the watchful and jealous eye of a chancellor. Unless such a court has control of its records, and power to secure actual posses-

sion when it has constructive possession thereof, by drastic measures, its jurisdiction cannot be exercised or enforced, and the very object for which it was created would be absolutely defeated by the whim or caprice of one who has actual possession of its records.

4. While *mandamus* may lie to reach the one withholding the records of probate matters, the court is not compelled to wait the slow motions of some litigant in its probate branch who desires relief. The court, being entitled to these records and papers, and undoubtedly competent to reduce them to its own possession, may make and enforce its orders therefor by coercive measures.

5. The statutes of this state recognize the distinction between punitive and coercive contempts. Section 2602 of the Revised Statutes provides that a witness refusing to be sworn to answer a question, or to subscribe to a deposition when lawfully ordered, may be imprisoned in the county jail, "there to remain" until he submits to be sworn, testifies, or gives his deposition. Section 121 of the crimes act (Sess. Laws 1890, p. 144) provides that "whoever, having been duly served with a subpoena or citation, duly issued, refuses or willfully fails to obey the same, or secludes himself, or leaves the place of his residence to avoid being served with a subpoena issued, or that he has reason to believe will be issued for him, in any cause pending in any court, or in any matter before any legal authority, or, being present before any court or legal authority, and called upon to give testimony, refuses to take an oath or affirmation, or, being sworn or affirmed, refuses to answer any question required by such court or authority to be answered, shall be fined not more than five hundred dollars, nor less than ten dollars, to which may be added imprisonment in the county jail not more than ninety days; but this section shall not prevent summary proceedings for contempt." This section does not apply to the enforcement of an order of the court like the one under consideration, and it strictly and expressly provides that the section shall not prevent summary proceedings for contempt. An indictment setting forth the facts in this case could not be drawn under this section. There is absolutely nothing in our statute that regulates the proceedings in contempt cases, except those quoted above. One of the methods of punishment for civil and criminal contempts, disclosed by an examination of the authorities, is imprisonment to compel compliance by a party or witness with the requirements of an order or decree of court, (Rap. Contempt, § 130;) and so in 2 Bish. Crim. Law (7th Ed.) § 271, it is said: "When the proceeding is to enforce an order or to do a particular thing, the only escape for the defendant from perpetual imprisonment is, usually, to comply." In *Williamson's Case*, 26 Pa. St. 9, BLACK, J., eloquently says: "Some complaint was made in the argument about the sentence being for an indefinite time. If this were erroneous, it would not avail here, since we have as little power to revise the judgment for that

reason as for any other. But it is not illegal, nor contrary to the usual rule in such cases. It means commitment until the party shall make proper submission. *Regina v. Paty*, 2 Ld. Raym. 1108; *Yates' Case*, 4 Johns. 375. The law will not bargain with anybody to let its courts be defied, for a specified term of imprisonment. There are many who would gladly purchase the honors of martyrdom in a popular cause at almost any given price, while others are deterred by a mere show of punishment. Each is detained until he finds himself willing to conform. This is merciful to the submissive, and not too severe upon the refractory. The petitioner, therefore, carries the key of his prison in his own pocket. He can come out when he will, by making terms with the court that sent him there. But, if he chooses to struggle for a triumph,—if nothing will content him but a clean victory or a clean defeat,—he cannot expect us to aid him. Our duties are of a widely different kind. They consist in discouraging, as much as in us lies, all such contests with the legal authorities of the country." To the same effect is the opinion of KENT, C. J., in the *Yates Case*, quoted with approval in the *Pennsylvania case*, *supra*, where the question to be decided was the sufficiency of the return "that the prisoner was committed until the further order of the court." In *Re Allen*, 13 Blatchf. 275, it is held: "When the contempt consists of a violation of the order of court, and is a contempt not committed in its presence, and the statute does not prescribe the form of the order of commitment, the defendant may be imprisoned until he be discharged by order of the court, or until the further order of the court;" citing and accepting the doctrine laid down by KENT, C. J., in the *Yates Case*. In *Ex parte Sweeney*, (Nev.) 1 Pac. Rep. 379, although, under the statutes of Nevada, no court or judge can impose a greater fine than \$500, or imprisonment for more than five days, upon any person adjudged guilty of a contempt, it was decided by the supreme court of that state that a party may be committed to jail until the fine was paid at a certain rate per day, fixed by the statute; and the court in its opinion quotes approvingly a decision in *Brown v. People*, 19 Ill. 614, where the court held that a justice of the peace might imprison a party in contempt, refusing to pay his fine, until the same was paid, although the statute allowed no one to be imprisoned by a justice of the peace for contempt. Judge BARTOL, of the Maryland court of appeals, (*Ex parte Maulsby*, 13 Md. 642,) released a petitioner on *habeas corpus*, where the commitment read, "until he purge the contempt by appearing before the grand jury," etc. It appearing to the judge that the grand jury had been discharged, so that it would be impossible for the contemnor to obey the court's order, although the learned judge was careful to say that the court had power to commit until the party answered or testified or produced papers before the grand jury, and that, in such case, "the commitment is a compulsory process to compel the party to obey the mandate of



the court." He further stated, although he discharged the petitioner, that "the term of imprisonment fixed by the warrant is ended by the operation of law, not because the court has not the power to commit for contempt for a period extending beyond the term of court, but in this case it has not done so." There are some cases which seem to hold a contrary doctrine, notably the case of *Whittem v. State*, 36 Ind. 196, on appeal proceedings, where the court held the evidence insufficient to constitute a contempt of court, and in glowing terms condemned the practice of courts committing until the further order of the court. In the case of *Leach*, 51 Vt. 630, from which was evidently drawn the exact language stated in the fourth allegation of illegal restraint set forth in the petition in this case, the court held that a probate court could not imprison an executor for the non-performance of orders requiring the payment of money to the widow of a decedent, when the orders were not all due, and on the ground that it made the jailer a judge to determine the length of imprisonment, and because the commitment was, in effect, an imprisonment for debt, which was abhorrent to the law of Vermont; but the judge says, in order to place his meaning beyond question: "Where a witness is contumacious, and refuses to obey the order of the probate court in giving evidence or other specific requirements, it would, no doubt, be competent, as a means of compelling obedience to the order of court, for the court to order imprisonment so long as contumacy should continue. *Goff's Case*, 3 Maule & S. 208. But, in such a case, the court ordering the imprisonment judges of the time when the contumacy ends; and whether it would be competent for a court to order an imprisonment, without limit on the face of the order, beyond the term of court inflicting the punishment, need not be discussed here." In *Shanks' Case*, 15 Abb. Pr. (N. S.) 43, the statute controlling the matter provided that imprisonment for contempt should not exceed 30 days.

6. The further objection is made that there can be no commitment for contempt, where the contemnor may be proceeded against by an indictment, and the following cases are quoted in support of this view: *Baldwin v. State*, 11 Ohio St. 681, and *State v. Blackwell*, 10 S. C. 37. These are strong cases, but we think that the court in each case relied upon the peculiar statute of the jurisdiction. We have no statute at all that would reach this case, that we have been able to discover, with the assistance of the learned counsel, that provides any punishment in cases of contempt like the one under consideration. The great weight of authority, in the absence of direct statutory provision, is in the other direction. 1 Bish. Crim. Law, § 1067, and 2 Bish. Crim. Law, § 264, and the cases there cited. The only criminal statute providing punishment for contempt, and fixing a definite penalty, is section 121 of the crimes act, quoted above, and this expressly disclaims any attempt to curtail the power of the courts in this direction; hence authorities cited where

statutory provisions regulate proceedings in contempt cases can have no weight with us. The common law prevails here, and is strengthened by our statutes, which run in the same line and in the same direction.

7. It might be held that the contempt committed in the case before us was not a constructive contempt, but one committed *in facie curiæ*, and the following cases would seem to sustain such a view: *Ex parte Robinson*, (Cal.) 12 Pac. Rep. 794; *Territory v. Murray*, (Sup. Ct. Mont.) 15 Pac. Rep. 145; *Neel v. State*, 50 Amer. Dec. 200. It appears from the record that the affidavit of the clerk of the district court was filed before the rule to show cause was issued, and that in open court, and by the orders of the court served upon him, the petitioner had full knowledge of the charge against him. He appeared in the trial court in person and by counsel, submitted his case upon the evidence, says he has heard the order of the court, and declined to make any further answer. Can this be deemed anything more than a refusal to comply with the order of the court, made in his presence? And is not the retaining of the records, papers, and proceedings, after repeated requests to deliver them, and in the light of this full record, which must stand unimpeached in this case, and which speaks with no uncertain sound, a contempt committed in the presence of the court? Further speculation, however, is useless. We must, on this inquiry, hold that the record of the district court of Laramie county before us imports absolute verity, and cannot be questioned in this proceeding; that such court had jurisdiction of the person and subject-matter of the contempt proceedings before it; that it had full power and authority to make and enforce the orders it made to secure actual possession of the records, papers, and proceedings of its predecessor in probate matters, the late probate court of Laramie county; that its commitment was and is neither void nor erroneous; and that, in other words, and in the terse and expressive language of the statute, the court acted "within its legitimate province, and in a lawful manner," and we are not permitted, by that provision of the *habeas corpus* act, to question the correctness of its action. The record before us presents nothing to show that the district court acted arbitrarily, harsh, or insolent towards the petitioner; but, on the contrary, it breathes a spirit of courtesy, conciliation, and moderation. It made "requests" when it might have made "demands," and it is clear that it exercised coercion with extreme reluctance. We have pushed this inquiry to the very verge of our powers, recognizing the admitted high character of the petitioner. We believe that his conduct has been owing to a misconception of his rights and duties, rather than to a desire to thwart or obstruct the administration of justice. Certainly, no one can know better than he, from his admitted long service in a responsible judicial position, the imperative necessity of maintaining intact the dignity of the courts and the majesty of the law. We acknowledge ourselves indebted to the

learned counsel for the petitioner, and to the gentlemen who, as *amici curiæ*, have aided us by their experience, knowledge, and research in this matter. The petitioner will be remanded to the custody of the sheriff of Laraine county

CONAWAY, J., concurs. MERRELL, J., not having qualified, did not sit in this case.

(7 Utah, 319)

NEEDHAM *et al.* v. SALT LAKE CITY *et al.*  
(Supreme Court of Utah. June 4, 1891.)

ADMINISTRATOR'S SALE OF LANDS — PETITION—  
COMMENCEMENT OF ACTION—APPEAL—TIME OF  
TAKING.

1. Under Comp. Laws Utah 1876, pp. 265-269, providing that lands of decedents may be sold to pay debts when the personalty is insufficient, a petition for sale which merely asks a sale "in order to settle up the business of the estate, to pay certain debts and demands due and owing by said estate," without alleging that the personalty is insufficient, does not confer jurisdiction upon the court, and an order of sale based thereon is void.

2. Under 2 Comp. Laws Utah, §§ 8155, 8203, providing that the filing of the complaint is the commencement of the action, and that summons may issue within a year, or defendants may appear within that time without summons, where no summons was issued, and defendants appeared and defended more than a year after the filing of the complaint, but did not object that no summons was issued, the action will be deemed to have been commenced from the filing of the complaint.

3. 3 Comp. Laws Utah, § 3635, provides that no exception to a decision on the ground that it is not supported by the evidence can be reviewed on appeal unless the appeal is taken within 60 days after rendition of the judgment. *Held*, that on appeal from an order overruling a motion for new trial, based upon the ground that the evidence did not support the judgment, the supreme court can review the sufficiency of the evidence, although the appeal was taken more than 60 days after judgment.

4. Where there is a notice of motion for new trial, and an order overruling it, but no motion appears in the record, objection that there is no such motion cannot first be raised in the supreme court.

Appeal from district court third district; T. J. ANDERSON, Justice.

Arthur Brown, for appellants. C. F. Lousbourov, for respondents.

BLACKBURN, J. This suit is brought to quiet title, and, before proceeding to decide the case, we wish to say that the abstract is so imperfect that the work of the court was vastly increased, because it was compelled to read the whole record to understand the case. Attorneys ought to take more pains in preparing their abstract. A preliminary question is, when was this suit commenced? The complaint was filed November 13, 1888; amended complaint, January 16, 1889; answer of defendants, December, 1889. No summons was issued in the case; the defendants answered voluntarily. The statute of the territory expressly provides that the filing of the complaint is the commencement of the action, (2 Comp. Laws Utah, § 8155;) that a summons may issue within a year, and the defendants may within that time appear without summons, and defend the action, (section 8203.) The defendants did

appear, and defended the action without making any point by their answer, or any other way, that a summons was not issued within a year. The suit was continued on the docket as commenced. We think, therefore, the date of the commencement of this action is November 13, 1888. 2 Comp. Laws Utah, p. 237.

Another preliminary question is, what can the appellate court review in this case? The contention of the respondents is that the question as to whether the evidence justifies the judgment cannot be reviewed because the appeal was not taken within 60 days from the rendition of the judgment. The appeal was not taken within 60 days from the rendition of the judgment; but the appeal was taken both from the judgment and from the order overruling the motion for a new trial, and only a few days from the date of the order. The notice of motion for a new trial states that the motion is made upon the ground, *inter alia*, that the evidence does not support the judgment. We think the appellate court can review anything the court below might rightfully pass upon, on the hearing of a motion for a new trial, in an appeal from the order overruling the motion. Therefore we think the whole case is subject to review by this court. *McLaughlin v. Doherty*, 54 Cal. 519, 520; 2 Comp. Laws Utah, § 3635.

The defendants contend that the appeal from the order overruling the motion for a new trial cannot be considered, because there is no such motion in the record. There is a notice of such motion and such an order, and it is too late to take advantage of the want of the formal motion for the first time in this court, and the practice in this territory is to allow the notice of the motion for a new trial to take the place of the formal motion.

This suit is brought to quiet title to the quarter section of land described in the complaint, by the heirs of Jonathan Needham, deceased. The defendants filed an answer denying the allegations of the complaint, and a cross-complaint alleging they are the owners of a portion of the land of said quarter section, and deraign their title through a deed from the administrators of the estate of said decedent to the city of Salt Lake. They also set up adverse possession for more than seven years. The decedent settled upon the land, and made final proof and paid for the land in his life-time, and after his death a patent for the land was issued to him. This gives the heirs a title in fee, unless the title passed out of them by the sale and deed made by the administrators; but plaintiffs claim that the proceedings in the probate court in the applications of one of the administrators are absolutely void. The first question is, is this contention by the appellants well taken? These proceedings were had in 1875, under the law as it then existed. It provided that the lands of decedents may be sold to pay debts and claims against the estate when the personal property is not sufficient to pay the same, but it did not provide the mode of procedure; it only gave the probate court jurisdiction to order the sale of the land on the application of the admin-

<sup>1</sup>Petition for rehearing pending.

istrators. Comp. Laws Utah 1876, pp. 265-269. In this case application was made to the probate court, by only one of the administrators, (there being two,) on August 23, 1875; the order of sale, August 27, 1875; sale, August 28, 1875; and confirmation of sale, September 3, 1875. No notice of the application or of the sale or of the confirmation was given. The statute does not provide that any notice of these proceedings shall be given, but is silent on the subject. The contention of the appellants is that these probate proceedings are *coram non jure*, and void for want of notice. In the view we take of this case, it is not necessary to pass upon that question. But it seems to us, when a special proceeding is provided for by statute, and the manner of performing it is not specified, it ought to be according to the course of the common law, and the rule at common law is that every person interested in any adjudication shall have an opportunity to be heard, and to have notice so that he may be heard. Yet many authorities hold that in the class of cases under discussion notice to heirs is not necessary. On that question we pass no opinion. Another contention of the appellants is, the petition to the probate court to have this land sold did not state facts sufficient to give the court jurisdiction of the subject-matter. We think this contention is well taken. Two prerequisites to authorize the probate court to order the administrators to sell the lands of decedents are: (1) There must be debts or charges against the estate unpaid; and (2) that the personal property of the decedent is insufficient to pay these debts and charges. "The rule is that a statutory remedy or proceeding is confined to the very case provided for and extends to no other. A party seeking the benefit of such a statute must bring himself strictly within not only the spirit, but also its letter. He can take nothing by intendment." *Suth. St. Const.* § 234 et seq. The meaning of this is that this statute under discussion is *stricti juris*, and must be strictly followed. The petition in this case does not allege that there exist debts or charges against the state unpaid; nor does it allege that there is no personal property to pay such debts or charges, if any existed. The logical conclusion, therefore, is, and from which there is no escape, that the court had nothing before it to give it jurisdiction. We think this view is supported by all the authorities. *Gregory v. McPherson*, 13 Cal. 577; *In re Spriggs' Estate*, 20 Cal. 125. In the case of *Grignon v. Astor*, 2 How. 319, cited by respondents, the court, through BALDWIN, J., says: "No other requisites are necessary to the jurisdiction of the county court than the death of Grignon, the insufficiency of his personal estate to pay his debts, and a representation thereof to the county court where he dwelt or his real estate was situated, and making these facts appear to the court." In this case these jurisdictional facts were not made to appear to the court. Therefore it had no jurisdiction to act in the premises. *Ror. Jud. Sales*, says, (section 317:) "When jurisdiction has fully attached

by petition," etc.,—making it clear that the court has jurisdiction only by petition, and the facts justifying the sale are jurisdictional, and must appear by petition. In *Comstock v. Crawford*, 3 Wall. 405, the court says, through FIERD, J.: "As thus seen, the representation of the insufficiency of the personal property of the deceased to pay his just debts was the only act required to call into exercise the power [the jurisdiction] of the court,—clearly showing that the representation of that fact was necessary to authorize the court to take jurisdiction of the case."

In the petition in the probate court under discussion there is no allegation, nor any pretense of an allegation, that the personal property of Needham, deceased, was insufficient to pay the debts due from said estate, and legal charges against it; nor is there any allegation of any debts or charges against the estate. There is a recital as follows: "This petition respectfully represents that in order to settle up the business of the estate of said deceased, to pay certain debts and demands due and owing by said estate," etc. It requires quite a stretch of the imagination to say that that statement is an allegation that legal debts and legal charges exist unpaid against the estate. Again, the order of sale shows affirmatively that the real estate was not sold to pay debts and charges against the estate; but only that "it will be for the best interest of the said estate and the heirs of the said deceased to sell the land described in said petition." This shows clearly that the question of indebtedness and charges against the estate, and that the personal property was insufficient to discharge the same,—the only fact he had jurisdiction to act upon,—was not taken into account by him. These proceedings therefore are *coram non jure*, and absolutely void. The deed from the administrators of Needham's estate passed no title to Salt Lake City, the grantee, and, that deed being in the chain of title through which these respondents claim, they had notice of its invalidity, and are not innocent purchasers without notice, and can take nothing by it.

Another contention of respondents is that they and their grantors have had adverse possession of the said lots 4, 5, and 6,—the portion of said quarter they claim to own,—for more than seven years prior to the commencement of the suit. The court below found that fact for the respondents, but surely on the ground that this suit was not commenced November 13, 1888, for we do not think the evidence supports that view if the case was commenced at that time. We have already said in this opinion that the filing of the complaint in this case—November 13, 1888—was the commencement of this suit; the effect of which is that adverse possession, in order to avail the defendants, must be for more than seven years prior to that date. The evidence on that subject is that the city, the grantee of the administrators, took no possession, only to lay off a portion of the land into lots and blocks, and it does not appear when they did that. The son of Henry Arnold, the grantee of the city, testifies his father

bought these lots in the spring of 1881; that his father took possession of these lots about six months after he bought them; but specifies the possession he took as follows: "Some time in the fall of 1881 he plowed lot four, and in the spring of 1882 he again plowed lot four, and fenced in the lots, and sowed them in grass seed; and that he continued in actual occupancy of these lots until he sold them to the respondents in 1888." This is the substance of all the evidence in reference to the possession of these lots or any of them. The presumption of law is, and it is so provided by the statute of this territory, that the parties having the legal title to land are in possession, until the evidence shows a preponderance that it is held adversely to the owner. It is also a rule of law that the party alleging adverse possession must prove it. 2 Comp. Laws Utah 1888, pp. 221-229. It is clear, therefore, if suit was commenced 13th November, 1888, from the evidence that there has not been adverse possession of lots 5 or 6 by these respondents and their grantees for seven years prior to the commencement of this suit, and as to these lots they can take nothing by virtue of their adverse possession. As to lot 4 the case is different. The plowing of it in the fall of 1881 was taking adverse possession, and, if that plowing was done before November 13, 1881, the respondents are entitled to maintain their right to it by their claim of adverse possession. But it is wholly uncertain from the testimony whether the plowing done on that lot was before or after the 13th of November, 1881, and upon that question we will not pass, as in another trial of this case the parties may be able to make it appear whether the plowing was done before or after November 13th. On the whole record, therefore, we think the judgment ought to be reversed, and the cause remanded for further proceedings in accordance with this opinion. Judgment reversed.

**MINER, J.** I concur in the result.

(7 Utah, 327)

**CORINNE MILL, CANAL & STOCK CO. V. JOHNSON.**

(Supreme Court of Utah. June 5, 1891.)

**RAILROAD LAND GRANTS—EJECTMENT—EVIDENCE.**

Act Cong. July 1, 1863, and July 2, 1864, (13 U. S. St. at Large, p. 489, and 18 U. S. St. at Large, p. 856,) grant to the Central Pacific Railroad Company all odd-numbered sections of land for 10 miles on each side of its right of way except those sold by the United States, or to which a pre-emption or homestead right had attached at the time of the location of the road, and further declares that the company shall within two years designate the route of its road, and file a map thereof with the department of the interior. Held that, in ejectment by one deriving title from the railroad company for lands thus granted to which no patent has been issued, where defendant is in actual possession, plaintiff must prove compliance with the requirements of the act, and that the land in controversy is not within its exceptions.

Appeal from district court, first district; H. P. HENDERSON, Justice.

*Bennett, Marshall & Bradley*, for appellant. *Thomas Maloney*, for respondent.

**ANDERSON, J.** This is an action by the plaintiff to recover possession of the following described real estate situated in Box Elder county, to-wit: Section 5, township 11 N., of range 3 W.; sections 17, 19, 21, and 23, in township 12 N., of range 3 W.; the W.  $\frac{1}{4}$  of section 33, and the S. W.  $\frac{1}{4}$  of section 15, in township 12 N., of range 3 W., Salt Lake meridian. The complaint alleges that plaintiff was, on the 8th day of June, 1883, the owner, and in possession, and entitled to the possession of said real estate, and that on said day the defendant unlawfully and wrongfully took possession of the whole thereof, and has ever since unlawfully withheld the possession of the same from the plaintiff. The plaintiff alleges that it has been damaged by the withholding of the possession of said real estate by defendant in the sum of \$5,000, and that the value of the rents and profits thereof is \$1,000. The plaintiff prays judgment for the possession of the land in question, for \$5,000 damages, and for \$1,000 for rents and profits. The defendant, by his answer, denied all of the allegations of the plaintiff's complaint, except that of possession by defendant of the premises in controversy, and pleaded that he and those under whom he claimed had held adverse possession of the land for more than 15 years next preceding the commencement of the action. As a further answer, and by way of cross-complaint, the defendant alleged that in April, 1878, one E. A. Stahn went upon the premises in controversy, and made valuable improvements thereon, under a contract with the Central Pacific Railroad Company for the purchase thereof, and that Stahn afterwards sold his improvements to the defendant, and that plaintiff obtained its title from said railroad company, with notice of and subject to defendant's right, and prayed for a specific performance of this contract against plaintiff, or that he have judgment for the value of his improvements. The cross-complaint was afterwards, and before trial, dismissed by defendant, and no evidence was offered in its support. The cause was tried before a jury, and there was a verdict and judgment for defendant, and the plaintiff brings this appeal.

The plaintiff's proof of title consisted of an article of agreement between it and the Central Pacific Railroad Company, dated June 6, 1883, whereby the railroad company agreed to sell and convey to plaintiff the lands in controversy, together with a large amount of other lands, upon certain terms as to price, time of payment, etc.; and upon compliance by plaintiff with the terms of the sale the railroad company was to convey all the lands described in the agreement, to which it had acquired or might acquire title from the United States. The contract by its terms provided that plaintiff should have possession and right of possession of the lands agreed to be sold. The plaintiff also showed the organization of the Central Pacific Railroad Company of California, and its consolidation with the West-

ern Pacific Railroad Company on the 22d day of June, 1870, under the name of the Central Pacific Railroad Company; also the amalgamation or consolidation of the Central Pacific Railroad Company with the California & Oregon Railroad Company, the San Francisco, Oakland & Alameda Company, and the San Joaquin Valley Railroad Company, on the 20th day of August, 1870. Plaintiff also offered in evidence an order from the commissioner of the general land-office dated October 16, 1873, together with a map of the line of the Central Pacific Railroad Company, as definitely located, withdrawing the lands in controversy from entry, the same being within the 20-mile limit of the Central Pacific Railroad Company. The lands in controversy are odd-numbered sections and parts of odd-numbered sections, and it was not disputed at the trial in the court below, nor was it in the argument in this court, that the land lies within the 20-mile limit of the line of the Central Pacific Railroad as it was constructed and is now operated. It was not shown by the plaintiff that any patent for these lands had ever been issued by the United States to the Central Pacific Railroad Company nor to the plaintiff. It was not shown that the lands were not such as were included in the reservations and exceptions contained in the act of congress of July 1, 1862, and the various acts amendatory thereof, granting each odd-numbered section within 20 miles of the line of said road, as definitely located, to the Central Pacific Railroad Company, nor was it shown when the map showing the definite location of said railroad was filed in the office of the secretary of the interior, nor when the railroad was completed. The court instructed the jury that "the plaintiff has undertaken to show here that it has derived title from the government to the land, but as a matter of law, gentlemen, I charge you that the plaintiff has failed in that. The proof which he has submitted here of the ownership of these lands on the part of the Central Pacific Railroad Company by grants of congress is defective,—so defective that it does not show title whatever. The acts of congress that have been put in here were taken from the consideration of the jury, it being my opinion that certain requisites have not been shown,—certain things have not been shown as complying with that statute in order to perfect the title under the grants of congress. What they are, it is unnecessary for me here to state." This instruction was excepted to, and constitutes the principal assignment of error, as it substantially took the case away from the jury, and virtually instructed them to return a verdict for the defendant.

The evidence shows the defendant was in the peaceable possession of the lands in controversy at and before the commencement of this action, and hence, unless the plaintiff could show that it owned the premises, the defendant had the right, as against the plaintiff, to remain in possession. The plaintiff claimed to derive its title through the Central Pacific Railroad Company by its contract of purchase with said company. Without stopping

to inquire whether this action, which is substantially the same as ejectment at common law, could be maintained upon a contract of purchase where the legal title had not yet vested in the plaintiff, we proceed to inquire whether the party from which it had a contract of purchase had title to the lands in controversy, for the plaintiff could have no greater or better title than the party from which it claimed to have purchased. The evidence failed to show a patent from the government to anyone. The plaintiff relied upon the act of congress of July 1, 1862, (12 U. S. St. at Large, p. 489,) and the act of July 2, 1864, (13 U. S. St. at Large, p. 356,) amendatory thereof, to establish the grant of these lands to the Central Pacific Railroad Company of California, and through the several consolidations of that company with other companies to the Central Pacific Railroad Company, through and under which it claimed title. If all the odd-numbered sections within 20 miles of the line of the Central Pacific Railroad as constructed and operated had been granted to it by the acts of congress referred to, it would have included the lands in controversy, and the evidence would have been sufficient upon proving the railroad company had complied with the requirements of the statute. But by the terms of the act of July 1, 1862, certain portions of such sections were excepted and reserved from the operation of the grant. Section 3 of the first-mentioned act contains the following language, to-wit: "That there be and is hereby granted to the said company \* \* \* every alternate section of public land designated by odd numbers to the amount of five alternate sections per mile [changed to 10 by section 4, Act 1864] on each side of said railroad on the line thereof, and within ten [changed to 20, section 4, Act 1864] miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have been attached at the time the line of said railroad is definitely fixed: provided, that all mineral lands shall be excepted from the operation of this act. \* \* \* And all such lands so granted by this section which shall not be sold or disposed of by said company within three years after the entire road shall have been completed shall be subject to settlement and pre-emption, like other land, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company." The act further provided that the railroad company should within two years after the passage of the act designate the route of its road as near as may be, and file a map of the same with the department of the interior. It will thus be seen that congress did not grant the whole of each odd-numbered section within the prescribed limits, but only such odd-numbered sections or parts of sections as were not mineral, and as had not been sold, reserved, or otherwise disposed of, or were not within any government reservation, or to which a pre-emption or homestead claim had not attached. Now, it is obvious that if the lands in dispute were in-

cluded in any of the exceptions or reservations mentioned in these statutes, they did not pass by the grant, and never became the property of the railroad company nor of plaintiff. In the case of *McGrath v. Tallent*, 26 Pac. Rep. 574, (decided at the April session, 1891,) this court held that in an action of ejectment by one holding by deed from the Union Pacific Railroad Company of lands granted to it by the acts of congress referred to, and where no patent had been issued, that it was necessary for the plaintiff to prove a compliance with the statute by the railroad company, and that the lands in dispute were not included in any of the reservations or exceptions mentioned in the statutes, in order to maintain the action. See, also, *Tarpey v. Salt Co.*, 5 Utah, 494, 17 Pac. Rep. 631. In this case, no evidence having been offered that the railroad ever obtained a patent for the lands in dispute, nor that it filed its map showing its line as definitely located within the time provided by the law, nor any proof as to the time when said railroad was completed, nor that the lands were not within any of the exceptions or reservations provided in the statute, we think plaintiff failed to show its title, and that there was no error in the instruction given by the court to the jury.

The trial court submitted to the jury the issue of the statute of limitations raised in defendant's answer, and this is assigned as error, upon the ground that there was no evidence tending to support this issue. We have examined the evidence contained in the record, and, while it does not purport to contain all the evidence in the case, yet from the evidence set out in the printed transcript we think no error was committed in this respect, and the judgment of the district court is affirmed.

**ZANE, C. J., and BLACKBURN and MINER, J.J., concur.**

(7 Utah, 335)

**ECCLES et al. v. UNION PAC. RY. CO.**

(*Supreme Court of Utah*. June 6, 1891.)

**RELEASE OF CLAIM—MISTAKE—EVIDENCE.**

Plaintiff, having been injured in a railroad accident, signed a release 11 days after of all claims now sued for. Nineteen days later she was prematurely confined. She claimed that she thought she was only releasing claims for injuries to another child and for her husband's loss of time. It appears that the release was read to her before signing, and that she hesitated about settling, fearing a miscarriage, but signed under the advice of her husband and his father. No fact as to her condition was misstated by defendant, nor was any fraud practiced upon her. *Held*, that a verdict for plaintiff was unsupported by the evidence.

Appeal from district court, first district; **JAMES A. MINER**, Justice.

*P. L. Williams and Waldemar Van Cott*, for appellant. *C. B. Pach and T. D. Johnson*, for respondents.

**ANDERSON, J.** The plaintiffs and their infant son, *Stewart Eccles*, were passengers on a train on the defendant's road, and were injured by an accident to the train on the 30th day of January, 1890, alleged

to have been caused by the negligence of the defendant, and this action is to recover damages for the injuries sustained. The defendant pleaded a settlement and release, and this was the defense relied on at the trial in the court below. Plaintiffs obtained a verdict and judgment, and the defendant brings this appeal.

The ground relied on for reversal is that the verdict of the jury is not supported by the evidence. At the time of the accident, *Jeannette Eccles*, who is the wife of her co-plaintiff, *Samuel H. Eccles*, was advanced about seven months in pregnancy. The settlement was made and the release executed on the 11th day of February, 1890, and on the 1st day of March following *Jeannette Eccles* gave premature birth to an eight-months child. Plaintiffs claim that they settled with the defendant under a mistaken belief, induced by the statement of *Dr. Perkins*, a physician in the employ of the defendant, as to the extent of the injuries to *Jeannette Eccles*; that she feared a miscarriage, and was not willing to settle, until it should be known there was no danger of such a result, but that, upon the assurance of *Dr. Perkins* that there was no danger of that kind to be apprehended, she was induced to settle, and that she did not understand the release to include her entire claim for damages in case her injuries should cause her to give premature birth to her child. The release by its terms includes all claims and demands of the plaintiffs for the injuries sued for in this action, and there is no claim of fraud in procuring its execution by plaintiff, but it is sought to be avoided, on the ground of mistake, as to the extent of the injuries to *Jeannette Eccles* at the time of its execution. There is no dispute in the evidence as to the material facts, and the sole question for our determination is whether the verdict is supported by the evidence. The accident occurred between *Aspen, Wyo.*, and *Ogden, Utah*, on the evening of January 30, 1890, and the train reached *Ogden* about 4 o'clock A. M. of January 31st. *Jeannette Eccles* testified that she saw *Dr. Perkins*, the defendant's physician, when she arrived at *Ogden*, and that he told her to "go home and lay still," and that he would call later in the day; that about noon he called, and found her sitting up, when he said, "Oh, I see there is nothing wrong with you at all; if there had been anything wrong with you, it would have happened before this; if you were hurt, your child would have been born at once, or else to-day;" that about 20 hours had intervened from the time of the accident until the doctor called, and that she never saw him afterwards. One *E. J. Fisher* was the claim agent of the defendant company, with whom the settlement was made. The plaintiff *Jeannette Eccles* testified as follows: "My husband went to see *Mr. Fisher* to settle. *Mr. Fisher* sent for him. My husband went three or four times to see *Mr. Fisher*, and when he returned home he told me about it. I told my husband I thought he had better wait awhile, and see how I got along before he settled. The night before I signed the release my husband told me about the

definite agreement he had made with Mr. Fisher regarding the settlement. I heard about the definite agreement going to be made before that, and the next day Mr. Fisher came with the release. My father-in-law, William Eccles, my husband, my mother-in-law, Mrs. Sarah Eccles, and a young man by the name of Wall, were in the room besides myself. \* \* \* When Mr. Fisher came in he said he had come to settle with us, and wanted to know what I thought about it. I told h'm 'I didn't want to settle; that I had rather wait to see how I got long. And he said: 'I am satisfied you are all right, by Dr. Perkins' statement. He is a well-learned man, and he would not say there was not anything wrong with you, if there was, and you might as well sign the release, for you won't get any more. You are all right, and you might as well sign it, and have it done with.' I insisted on waiting, but he said that Dr. Perkins said there was nothing wrong with me, or it would have happened before. I do not think of much else that was said while he was there." She further testified that she "did not read the release, but it was read aloud by Mr. Fisher;" that she listened to it as much as she could, but was suffering with nervous headache at the time; that the night before she signed the release her husband had told her the amount he had settled for, and that the persons who insisted on her signing the release were her husband and her father-in-law; and that the relations between herself and husband were pleasant. She also testified that Dr. Allen, a regular practicing physician of Ogden, had attended her from the time of the injury until the release was signed, and had made an examination of her person to see how seriously she was injured, and that he visited her the day before she signed the release; and that her mother-in-law, who was the mother of a large family, and experienced in nursing, was her nurse. She further testified that she thought she was settling only for the injury to her child, Stewart, and for her husband's loss of time. Samuel H. Eccles, the husband and one of the plaintiffs, testified that, when Fisher came to his house to settle, he signed; but that his wife declined to sign the release, and said she "didn't know what might happen yet, and she would sooner wait awhile;" that Fisher was there about an hour, and that Fisher and he and his father told her she might as well sign. He also testified that Fisher read the release aloud before any one signed; that he "understood the agreement before signing it, just as it is;" that he did nothing more than advise his wife to sign the release, and that no one did more than that, and that his father also advised her to sign it.

We think the foregoing testimony of the plaintiffs, together with more of a similar character, clearly establishes that, in making the settlement and executing the release, the possibility that Mrs. Eccles might give premature birth to her child was taken into the account, and was understood by both parties to be covered by the release. Dr. Perkins' statement, made in less than 24 hours after the injury,

could not have been understood by her, 11 days after the accident, as the statement of an absolute fact on which she should rely in settling, but merely as the expression of an opinion as to the probable results of her injuries. Besides that, she had a physician of her own in constant attendance, with whom she could, and doubtless did, consult as to the probable effect of her injuries. No fraud is claimed to have been practiced by the defendant in making the settlement. The husband, who executed the release at the same time, understood the release according to its terms, and advised Mrs. Eccles, as did the other members of the family, to sign it. It does not appear that any element of damages was omitted from consideration, nor that any fact was misstated by defendant in order to procure her signature, nor that any fact was misunderstood by her, or that undue influence was exercised to induce her to settle. She was advised, through her husband, before she talked with Fisher, of the state of the negotiations for settlements and of the amount and of the terms of settlement; but hesitated about settling for the sole reason that, notwithstanding Dr. Perkins' statement as to the probabilities of a miscarriage, she feared such a result might happen; but, notwithstanding such doubts, she settled, and signed the release, and we think she is bound by it, and the verdict of the jury was wholly wanting in evidence to support it. The cause is therefore reversed and remanded, and a new trial ordered.

ZANE, C. J., and BLACKBURN, J., concur.

(7 Utah, 340)

#### JONES v. MOMMOTT.

(Supreme Court of Utah. June 9, 1891.)

##### EJECTMENT—SUFFICIENCY OF COMPLAINT.

Comp. Laws Utah 1888, §§ 3126, 3219, provide but one form of civil action, and that the complaint must contain a statement of the facts constituting a cause of action in ordinary and concise language. Section 3133 provides, in actions to recover real property, the right of possession is presumed to accompany ownership, and the possession is presumed subordinate to the legal title. *Held*, that a complaint in ejectment, alleging that "plaintiff is, and at all times therein mentioned was, the owner of, and seised in fee of, \* \* \* and that the defendant is in possession thereof, and unlawfully withholds the same from the plaintiff, to her damage," is sufficient.

Appeal from district court, first district; BLACKBURN, Justice.

*Thurman & King and Sam'l L. Page*, for appellant. *M. M. Kellogg*, for respondent.

MINER, J. The complaint in this case was filed August 19, 1890, and alleges "that the plaintiff is, and at all times therein mentioned was, the owner of and seised in fee of lot 4, block 7, plat K, Payson City survey of building lots in Utah county, Utah territory, etc.; that the defendant is in possession thereof, and unlawfully withholds the same from the plaintiff, to her damage in seventy-five dollars," etc. The defendant denied each



allegation in the complaint. The case proceeded to a trial before a jury, whereupon the defendant's attorney interposed an objection to any evidence whatever being introduced under the complaint, on the ground that the allegations in the complaint were insufficient to admit of any evidence being introduced thereunder; the defendant contending that plaintiff must allege in her complaint that, at some time prior to the commencement of the action, the plaintiff was the owner of the premises, and either in possession of, or entitled to the possession of, said premises; and that the defendant either wrongfully entered into said possession, and ousted plaintiff, and still holds said possession wrongfully, or that the defendant entered into the possession of the premises lawfully, but now holds the possession wrongfully; and claim that this position is sustained in *Payne v. Treadwell*, 5 Cal. 310; *Gladwin v. Stebbins*, 2 Cal. 105. The court sustained the objection, and gave plaintiff permission to amend his complaint, which he declined to do; and thereupon, on motion of defendant's attorney, the court directed a verdict for the defendant. To this ruling, decision, and judgment thereon the plaintiff alleges error. In this territory, "there is but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs." Comp. Laws 1888, § 3126. And in such actions the complaint must contain "a statement of the facts constituting the cause of action in ordinary and concise language." Id. § 3219. Consequently all technical allegations and fictions peculiar to the old form of an action of ejectment are unnecessary. The ultimate facts, as they exist, should be alleged in ordinary and concise language; and only such facts need be alleged as are necessary to be proved, except to negative a positive performance of the obligation on which the action is based, or to negative an inference from an act which is in itself indifferent and connected therewith. While possession does not always accompany the legal title, (Id. § 2621,) yet, in actions to recover real property, the right of possession in this territory is presumed to accompany the ownership within the time required by law, and the possession is presumed subordinate to the legal title. Id. § 3133. It is sufficient, therefore, in a complaint in ejectment, for the plaintiff to aver, in respect to the title, that, at the time of the commencement of the action, he was the owner of and seised in fee or for life, or for years, according to the fact, of the premises described in the complaint, and the right to the possession follows as a conclusion of law from the seizure, and need not be specifically alleged; and it should further appear from the complaint that the defendant is in possession of the premises claimed by the plaintiff, and withholds the possession thereof from the plaintiff, and, if the defendant's holding rests upon an existing right, he should show such right affirmatively in his defense. The withholding of the possession from one who is seised of the premises is manifestly adverse to his rights, and t

wrongful and unlawful, and it is because of the presumption that the plaintiff can rest his case at the trial, in the first instance, upon proof of *seisin*, and the possession by the defendant. "When these facts are established in an action of ejectment, the law implies a right of present possession in the plaintiff, and a holding adverse to that right in the defendant." In a case where the plaintiff has been in possession of premises which he seeks to recover by action, against one who has ousted him therefrom, it is then sufficient for him to allege such possession, and the entry, ouster, and continual withholding by the defendant. Such allegations are proper where they can be truthfully made, and agree with the facts of the case, but they are not essential or necessary, under our practice. This doctrine is sustained by the courts of New York and California. *Ensign v. Sherman*, 14 How. Pr. 439; *Walter v. Lockwood*, 23 Barb. 228; *Sanders v. Leavy*, 16 How. Pr. 308; *Payne v. Treadwell*, 16 Cal. 242-244. The doctrine of this last case, opinion by FIELD, C. J., is approved by a large list of California decisions, among others the following: *McCarthy v. Yale*, 39 Cal. 586; *Haight v. Green*, 19 Cal. 117; *Ferrer v. Insurance Co.*, 47 Cal. 431; *Keller v. Ruiz de Ocana*, 48 Cal. 638; *Brown v. Kentfield*, 50 Cal. 132; *Kligger v. Stevens*, 60 Cal. 422; *Rego v. Van Pelt*, 65 Cal. 256, 3 Pac. Rep. 867; and expressly overrules *Gladwin v. Stebbins*, 2 Cal. 105; *Payne v. Treadwell*, 5 Cal. 310; *Gregory v. Haynes*, 13 Cal. 592,—cited and relied upon by the defendant. It follows, from the views herein expressed, that the complaint in this case was sufficient, and plaintiff should be allowed to introduce his proof under it. The verdict and judgment of the court below is set aside, and a new trial ordered, with costs to abide the result.

ZANE, C. J., concurs.

(7 Utah, 346)

JOHNSON v. RIO GRANDE W. RY. CO.

(Supreme Court of Utah. June 9, 1891.)

RAILROAD COMPANIES — KILLING STOCK — NEGLIGENCE — EVIDENCE.

1. In an action against a railroad company for killing a mare it appeared that there was no fence between plaintiff's pasture and the track; that the mare had crossed the track to feed, and was surrounded by a fence on the west, a cattle-guard on the south, and the track on the east between it and the pasture, when the train came along at an unusual speed. The mare was struck while attempting to recross the track. No whistle was blown, nor bell rung, nor speed slackened. The engineer could have seen her for over a mile. The engineer testified that he did not slacken speed, nor blow his whistle, until he got within 250 feet, although he saw her when over a quarter of a mile from the place of accident. *Held*, that the question of defendant's negligence was for the jury.

2. Where the value of the mare was not disputed, and plaintiff and another witness testified that she was worth \$150, a verdict in that sum was warranted, although plaintiff gave as a reason for his valuation that he had been offered that sum for her.

3. The testimony of two witnesses as to whether the engineer could have done anything else to avoid the disaster, where the engineer tes-

tified that he did all he could to stop the train, is inadmissible.

Appeal from district court, first district :  
J. W. BLACKBURN, Justice.

*Bennett, Marshall & Bradley*, for appellant.  
*Thurman & King*, for respondent.

MINER, J. This action was brought to recover damages on account of the killing of a mare belonging to the plaintiff, July 6, 1889, by a train of cars on the railroad of the defendant, the mare being at the time on the railroad track of the defendant, which adjoined the pasture of the plaintiff, there being no fence between the pasture and the defendant's right of way. At the time of the killing of the mare, she, with other horses, had crossed from the pasture to the opposite side of the track, and was there feeding between the track and a wire fence, a little to the west, and a cattle-guard being a short distance to the south of them, when the south-bound train of defendant came along. The track was straight for a mile each way from the place, and the train, being late, was being run at from 30 to 35 miles an hour,—a higher rate of speed than usual. No attempt was made to stop the train or to slacken speed. As the train neared the place where the horses stood near the track, the horses started across the track when the train was 100 yards away, and the mare in question, being the hindmost one, was caught by the train and killed; the cause of the plaintiff being that she was killed by the negligence of the defendant's servants engaged in running the train. It is alleged as error that the evidence fails to show that the defendant was guilty of negligence. The evidence on this subject was conflicting. It was shown on the part of plaintiff that the mare was knocked 32 steps when hit by the cars, and that no whistle was blown, nor bell rung, and that the horses were close to the track, and that the engineer could have seen them for a mile or two miles before reaching them, and that the unusual speed of the train was not slackened until after the mare was struck, and that the horses were surrounded by a fence on the west, a cattle-guard on the south, and the track on the east. The engineer himself testified that he did not slacken speed nor blow his whistle until he got within 250 feet of them, although he saw them 1,500 or 2,000 feet,—something more than a quarter of a mile,—before reaching them. We think there was sufficient evidence to go to the jury on the question of defendant's negligence.

There was some proof in the case on both sides concerning the plaintiff's negligence, but the jury have by their verdict found this issue against the defendant, and we cannot say that their finding of fact in this respect was not sustained by the evidence, and the motion for a nonsuit was properly denied.

We think the evidence of the plaintiff and of the witness Clinger that the mare was worth \$150 sufficient to warrant the verdict of the jury in that respect. The value was not disputed, and Clinger was shown to be the owner of horses. Even if plaintiff's evidence on that subject was

stricken out, there remained enough to enable the jury to ascertain the value. That the plaintiff gave a fallacious reason for his opinion as to the value does not render his judgment as to value wholly worthless. It may still stand for what it is worth; and, no evidence of value being produced by the defendant, there was no injury done to defendant by allowing his answer that he got at the value because he had been offered that for the mare, and refused it, to stand. It is not necessary to be an expert horse dealer to have some judgment as to the value of a horse.

The questions put to the witnesses Ryan and Stapleton as to whether the engineer could have done anything else to avoid the disaster was correctly excluded. That question was for the jury to determine on consideration of all the facts. Besides, the record shows that the witness was allowed to state that he did all he could to slow the train after he saw the horses crossing the track. We think the case was fairly submitted to the jury on the questions of law involved. Some omissions from and expressions in the charge excepted to, if taken separately from the balance of the charge, might perhaps be open to some criticisms, but we are satisfied that the entire charge, taken together, fairly submitted the case to the jury, and that such of the defendant's requests as it was entitled to were fairly covered by the instructions given. We find no error in the record sufficiently prejudicial to the defendant to justify the granting of a new trial, and the judgment is affirmed, with costs.

ZANE, C. J., concurs.

(7 Utah, 244)

COOK v. CRANDALL, et al.

(Supreme Court of Utah. June 9, 1891.)

MUNICIPAL CORPORATIONS—TAXATION—FARM LANDS.

A city had done some work on a street as far out as a certain farm, which was inside the corporate limits, and about a mile from the platted portion of the city, and had removed nuisances therefrom, and police protection had been afforded in the immediate vicinity on sundry occasions. *Held*, that the farm was within the range of municipal improvements and benefits, and subject to taxation.

Appeal from district court, first district :  
J. W. BLACKBURN, Justice.

Action by Martha Cook against M. E. Crandall and another to recover the value of a wagon seized for taxes. Plaintiff appeals.

*Sutherland & Judd*, for appellant. *Thurman & King*, for respondents.

ZANE, C. J. The appellant brought this action to recover the value of a wagon seized by the defendant Crandall, as collector of Springville, to pay taxes alleged to be duly assessed and due that municipality. The plaintiff insisted that her farm upon which the taxes were assessed is situated outside of the town as indicated by its improvements, and beyond the range of its municipal benefits, and that the tax for which the seizure was made was for that reason unauthorized. The case

was submitted to a jury, who returned a verdict against the defendants for \$100, which the court set aside upon motion. To this order the plaintiff excepted, and appealed to this court. The facts of the case are that the plaintiff was the owner of a farm consisting of 56 acres, within the corporate limits of Springville, and situated about one mile south of the platted portion of the town; that there are streets south of these platted lands, one of which extends to plaintiff's farm, and bounds it on the north and east; that some work has been done on this street as far south as plaintiff's premises; that about 75 families reside on lots and small farms outside of this platted ground on the side plaintiff's place is situated; that a portion of them are between it and the platted part; that the marshal of Springville some times goes out as far as plaintiff's premises to drive stock from the streets, and at other times to remove dead animals; that the police of Springville have attended public gatherings near plaintiff's place, and made arrests for disorderly conduct. From this evidence we must infer that plaintiff's premises, and persons on them and in that vicinity, receive some of the benefits of the expenditures of the money arising from municipal taxes; that the plaintiff's premises are within the range of the municipal benefits of Springville. In the case of *Territory v. Daniels*, (Utah,) 22 Pac. Rep. 159, this court said: "Upon principle and authority, we are of the opinion: *First*, that municipal taxation should be limited to the range of municipal benefits; *second*, that lands and their occupants, without the range of municipal benefits, should not be taxed to aid those within; *third*, that a law authorizing the assessment of taxes for municipal purposes, upon lands or their occupants located beyond the range of municipal benefits, is not a rightful subject of legislation; *fourth*, that taxation for city purposes should be within the bounds indicated by its buildings, or its streets and alleys, or other public improvements, and contiguous or adjacent districts so situated, as to authorize a reasonable expectation that they will be benefited by the improvements of the city, or protected by its police; that no outside district should be included when it is apparent and palpable that the benefits of the city to it will only be such as will be received by other districts not included, such as will be common to all neighboring communities." The case in hand is not within the rules as above laid down. We are of the opinion that the plaintiff's property was subject to the municipal tax, and that the seizure complained of was legal. The judgment appealed from is affirmed.

MINER, J. I concur.

(7 Utah, 352)

PEOPLE *ex rel.* YOUNG *et al.* v. COHN *et al.*

(Supreme Court of Utah. June 13, 1891.)

QUO WARRANTO—TITLE TO OFFICE—JOINDER OF PARTIES.

Comp. Laws Utah 1888, § 3584, provides that when several persons claim to be entitled to

the same office one action may be brought against all such persons in order to try their respective rights thereto. Section 1761 provides that in cities of the first class three councilmen shall be elected from each ward at the same time, and their terms of office shall commence and end at the same time. *Held*, that three councilmen so elected may properly join in an action against three persons who have usurped their offices.

Appeal from district court, third district; C. S. ZANE, Chief Justice.

P. L. Williams, for appellants. Le Grand Young and F. S. Richards, for relators.

MINER, J. The people of the territory of Utah, by Walter Murphy, prosecuting attorney of Salt Lake county, on relation of Richard W. Young, William J. Tuddenham, and John Fewson Smith, filed complaint in the third district court, alleging, among other things, that Salt Lake City is a city of the first class, divided into five municipal wards; that on the 10th day of February, 1890, there was an election held in said city for the purpose of electing a mayor and 15 councilmen,—three from each municipal ward, as provided by law,—to serve in said city as the city council thereof for the ensuing two years; and that at such election, said relators, being qualified, were then candidates for such office of councilmen in the Fourth municipal ward of Salt Lake City, and they each received of the legal qualified votes of said ward at such election 482 votes, and that no other persons were voted for in said ward by said electors for said office save the defendants, and that they received only 305 votes each for said office; that said relators were then and there each duly elected to such office of councilmen; that they had accepted said offices, and are ready, willing, and have offered to enter upon the discharge of the duty thereof; that said defendants have usurped and intruded into, and are now unlawfully usurping, intruding, and holding, said offices, to the injury of the people and to the damage of relators, and ask to be adjudged the rightful holders of said office, etc. To which complaint the defendants filed their demurrer on the grounds: (1) Said amended complaint does not state facts sufficient to constitute a cause of action. (2) Misjoinder of parties plaintiff, in that each of the relators, Young, Smith, and Tuddenham, claims to be entitled to an office which is separate and distinct from the office or franchise claimed by each of his co-relators, and they are not authorized by statute to be joined in an action to establish their titles to separate and distinct offices. (3) Misjoinder of parties defendant in said action, in that it appears that each of the said defendants, Cohn, Noble, and Hall, has usurped and intruded into and is holding an office separate and distinct from the office which it is alleged each of his co-defendants is usurping and holding. (4) Several causes of action have been improperly united in said complaint, to-wit: A cause of action by said Young to determine his right to the office of councilmen, with causes of action by Tuddenham and Smith, to determine their

separate rights to separate offices of councilmen of Salt Lake City. The court overruled the demurrer. The appellants failing to answer, judgment was entered in favor of the relators and against the appellants as prayed, and on this ruling and judgment the appellants appeal. This action is brought by the prosecuting attorney, under sections 3529, 3530, Comp. Laws 1888, to determine the rights of the relators to such office. By section 1761, Id., three councilmen were to be elected from this ward at the same time, each to hold the office for two years. The term commences and ends at the same time. Under the admission in the pleadings the appellants were not elected by a majority of the votes of the ward, but have unlawfully usurped the office, and now hold it against the rights of the people and of the relators, who were each duly elected at such election. The contention by the appellants' counsel, that neither of the relators were elected to fill either one of the particular offices held by any one of the appellants, shows that, if suit was brought by one of the relators for the position usurped by one of the appellants, great difficulty would be found in ascertaining what particular office or place should be assigned to the claimant, and this contention argues strongly in favor of the judgment asked by the relators, and that it was a proper judgment in their favor. "When several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons in order to try their respective rights to such office or franchise." Comp. Laws 1888, § 3534. The joinder of defendants under this statute was intended to protect the rights of the people, and to prevent a multiplicity of actions to determine the same question based upon one and the same, or substantially the same, right, and relating to the same kind or character of office, and where the action and defense would necessarily be the same, or involve substantially the same rights. This is an action wherein the people must necessarily be plaintiffs, and it is difficult to see in what other mode this particular action could be commenced and maintained so as to do substantial justice to all and injustice to none. The relators were all elected at the same time for the same office or franchise. Neither were elected to fill any particular place now held by any particular one of the appellants, and there could not for that reason be any separate judgment for either relator as against either one of the appellants. There is a joint common usurpation of the office by all the appellants to which the relators have a joint common interest or right by virtue of their election. The action was therefore properly brought by the people in behalf of the three relators against the three appellants to determine which set of these persons claiming title were entitled to hold the franchise and represent the fourth precinct in the city council. *People v. Murray*, 8 Hun, 577, 5 Hun, 42; *People v. Woodbury*, 14 Cal. 43; *People v. Page*, (Utah,) 23 Pac. Rep. 761. The demurrer should be overruled. The order and judgment of the third district court is affirmed, with costs of both courts.

BLACKBURN, J., concurs. ANDERSON, J., did not sit in this case.

PEOPLE ex rel. ATTORNEY GENERAL v.  
RICHMOND et al.

(Supreme Court of Colorado. May 29, 1891.)

CONSTITUTIONAL LAW—COURT OF APPEALS—JURISDICTION—AUTHORITY OF SUPREME COURT—RIGHT OF APPEAL—POWERS OF LEGISLATURE.

1. The unconstitutionality of a statute must be established beyond a reasonable doubt. It is not enough to show that the act is obnoxious to some unexpressed intent or spirit supposed to pervade the constitution.

2. The constitution operates upon the legislature purely as a limitation; that body possesses plenary authority, except as expressly or by clear implication denied in the constitution.

3. Section 1, art. 6, of the constitution, as amended, recognizes the legislative right to create a court of review. But no such court can be clothed with final jurisdiction co-ordinate with the supreme court.

4. The court of appeals created by the act under consideration is subject to the superintending control and guided by the decisions of the supreme court. In all cases that might, under any circumstances, go in the first instance to the supreme court, the judgment of the court of appeals is still subject to review by the superior tribunal.

5. The court of appeals will probably voluntarily yield its judgment, in case of difference of opinion upon the same legal propositions, to that of the higher tribunal. If that court, however, should insist upon a contrary view as to the same question in the same case, an appropriate remedy will be found to enforce the law as declared by the supreme court.

6. The supremacy of the supreme court appears in the paramount force and authority of its adjudications, not in the extent of its jurisdiction or the amount of its business.

7. The constitution confers and defines the jurisdiction of the supreme court, but does not inhibit the legislature from regulating to some extent the quantity of its business by reasonably contracting or enlarging the limits of such jurisdiction. The constitutional policy is not to specify absolutely the extent and boundaries of the jurisdiction of all courts, but to allow a large legislative discretion in connection therewith.

8. The citizen has no natural or inalienable right to a hearing in the supreme court. If this right exists, it must be deduced from a constitutional guaranty.

9. Section 6 of the bill of rights simply confers upon each individual the right to an intelligent, impartial, and speedy judicial hearing and determination of his grievances. It does not authorize him to invoke the jurisdiction, in a given case, of all the courts of the state.

10. Appeals to the supreme court remain creatures of statute, and, in the absence thereof, do not exist.

11. Writs of error from the supreme court may be forbidden by statute, unless preserved by the constitution. But that instrument only saves this proceeding, so far as ordinary appellate purposes are concerned, in connection with the judgments of county courts.

12. The writ of error is an original writ; it may be included in the original writs authorized by section 3, art. 6, of the constitution. But the writs designated in that section are confined to original jurisdiction, and cannot be used in aid of ordinary appellate authority.

13. The legislature may say, within reason, at what particular stage or in what particular court a specified kind of ordinary litigation shall end.

14. Section 2, art. 6, of the constitution, grants appellate jurisdiction to the supreme court, but

does not lodge in that tribunal all jurisdiction of the kind, or jurisdiction over all litigation. That court is essentially a court of review. Its superintending control, original jurisdiction, and duty of answering executive and legislative questions are secondary functions.

15. The superintending control given by section 2, art. 6, aforesaid, refers primarily to courts, not to parties or cases. It was not designed for ordinary appellate jurisdiction, but to keep subordinate courts within bounds, and to insure the harmonious working of the judicial system.

16. When a constitution confers jurisdiction over a particular subject upon one court and not upon another, the jurisdiction thus conferred is exclusive. But this principle is inapplicable in the present case.

17. Section 28, art. 6, of the constitution, was not expected to insure uniformity in judicial decisions. Its purpose was to require that laws pertaining to the organization, jurisdiction, etc., of courts, also that the legal force and effect of judicial judgments, should be uniform.

18. Section 6 of the bill of rights provides for the administration of justice without delay; and, under the circumstances, the act creating the court of appeals is, in effect, a legislative attempt to obey this mandate.

19. A legislative attempt to interfere with the existence or supremacy of the supreme court, to change the nature of its jurisdiction and duties, or to entirely take away its utility, would be declared void. But the supreme court will not indulge the judicial presumption that the legislature may be guilty of such revolutionary conduct.

*(Syllabus by the Court.)*

Original proceeding by information in the nature of *quo warranto*.

The eighth general assembly adopted an act creating a court of appeals. The essential features of this act are as follows: The court is made a court of record, with appellate jurisdiction only, and is authorized to issue the necessary writs and other processes in aid of such jurisdiction. Its judges, three in number, are to possess the same qualifications, and to receive the same salary, as the judges of the supreme court. It is provided with a clerk and bailiff, and its decisions are to be reported as are those of the supreme court, but in separate volumes. The act forbids the suitor a review, except upon error to county courts, by the supreme court in civil cases, where the amount of the final judgment is \$2,500 or less, and where the controversy does not relate to a franchise or freehold, or require the construction of a provision of the constitution of the state or of the United States. In all such cases, however, determined in trial courts of record, an appeal lies to, or a writ of error from, the court of appeals, the judgment of that court being final. But the appellate jurisdiction of the court of appeals is also extended to all other civil cases, and to all criminal cases not capital. Its decisions, however, in the cases, civil and criminal, last mentioned, are made reviewable in the supreme court by appeal and by writ of error. Respondents, having been duly commissioned judges of the court of appeals, appointed the necessary officers, organized the court, and entered upon the discharge of the judicial duties pertaining thereto. The present proceeding was instituted for the purpose of testing the constitutionality of the act. It is submitted on a general demurrer to the return or answer of respondents

pleading the statute, and their appointment thereunder.

*L. S. Dixon, Wells, Macon & Furman, and Atty. Gen. Maupin, for the People. Willard Teller, D. V. Burns, Caldwell Yeaman, and W. S. Decker, for respondents. Robinson & Love, amici curiæ.*

HELM, C. J., (after stating the facts as above.) No illegality or defect in the manner of respondents' selection for the office in question is asserted, nor is any personal disqualification relied on; therefore our investigation is necessarily confined to the objections so ably argued, touching the constitutionality of the court itself. Authorities need not be cited in support of the proposition that he who asserts the unconstitutionality of a statute must establish, beyond a reasonable doubt, the conflict or inconsistency which renders it void. It is not enough for him to vaguely insist that the act questioned is obnoxious to some unexpressed intent or spirit supposed to pervade the constitution. He must point out the specific provision or provisions of that instrument transgressed. Another elementary rule to be borne in mind, throughout the following discussion, is that the constitution operates upon the law-making branch of the government purely as a limitation; and that the legislature possesses plenary authority in the enactment of laws, except as such authority is expressly or by clear implication therein denied.

Section 1, art. 6, of the constitution, declares that "the judicial power of the state, as to matters of law and equity, except as in this constitution otherwise provided, shall be vested in a supreme court, district courts, county courts, justices of the peace, and such other courts as may be provided by law." This section clearly recognizes two kinds of courts, viz.: *First*, those established by and expressly enumerated in the constitution itself; and, *second*, such other courts as the legislature may at its pleasure, from time to time, create. It will be observed that the character and jurisdiction of the statutory courts to be thus created are not specified. The provision contains no command or inhibition touching these subjects. For aught that appears therein, the legislative will is omnipotent in the exercise of the power mentioned. When the constitution was first adopted, the clause in question read, "and such other courts as may be created by law for cities and incorporated towns;" but, by constitutional amendment in 1885, the phrase, "for cities and incorporated towns," was expunged. This change was evidently made with the deliberate purpose of removing the single limitation upon legislative discretion theretofore existing. There is nothing in the language now employed to justify the inference that additional trial courts alone may be provided by law. The legislature, in our judgment, is by this section affirmatively invested with authority to create an intermediate court of review; and we find no express constitutional limitation of the jurisdiction, territorially or otherwise, that may

in the legislative wisdom be conferred upon a court of this kind. If, therefore, the act before us is unconstitutional, it is because constitutional provisions, touching other courts or subjects, inhibit, by implication, the jurisdiction, in whole or in part, conferred upon the court of appeals. Such is the position taken by relator and the learned counsel who appear with him on behalf of the people. It is asserted that a part, at least, of the authority given the court of appeals undermines the constitutional supremacy and jurisdiction of the supreme court, and is therefore as fully prohibited by the constitution as if express inhibiting words were found therein. If this contention be correct, it is either because a constitutional right of the citizen is denied, or because some constitutional provision relating to the supreme court or its jurisdiction is invaded. There can be no doubt about the supremacy of the supreme court. This court is placed by the constitution at the head of the judicial system of the state. From its judgments there is no appeal to any other state tribunal, and its determinations are binding upon the rest of the state judiciary. The legislature cannot interfere with its existence or supremacy, nor can that body alter the nature of its jurisdiction and duties; and it follows, of course, that, without change in the fundamental law, the legislature cannot create a court of co-ordinate final jurisdiction. In *re* Court of Appeals, 9 Colo. 623, 21 Pac. Rep. 471; In *re* Court of Appeals, 15 Colo. 578, 26 Pac. Rep. 214. Every tribunal established by statute, whether clothed with original or appellate powers, must, like the trial courts expressly named in the constitution, be inferior to the supreme court, subject to its "superintending control," and guided by its decisions upon questions determined in the exercise of its appellate authority. The opinion above cited from 9 Colo., and 21 Pac. Rep., seems to be misapprehended, and such misapprehension justifies an explanatory word in passing. The legislative act at that time under consideration provided for a court which, without consent of parties, should have final co-ordinate jurisdiction with this court in cases then upon its docket. That opinion does not declare that all appellate power is lodged in the supreme court, nor does it undertake to define the boundaries of the jurisdiction of this court in that regard. Its clear import is that in such cases as are, by virtue of the constitution and laws consistent therewith, retained within the reviewing authority of this tribunal, the judgment of no other court can be final; and, upon intelligent comparison, it will be found that no inconsistency exists between that opinion and the opinion referred to in 15 Colo., and 26 Pac. Rep., or the views hereinafter expressed.

But the present statute does not undertake to create a tribunal superior to, or co-ordinate with, the supreme court. The court of appeals is given no original jurisdiction whatever, and no independent superintending control over other courts; neither is it authorized to answer executive and legislative questions. Its decla-

tions in all civil actions relating to franchises or freeholds, or where a constitutional question, state or federal, is involved, or where the amount of the judgment in the trial court exceeds \$2,500, may be reviewed by the supreme court. Nor are any of its judgments final in causes from the 55 county courts, regardless of the subject-matter or amount in controversy, in the sense that a review of such judgments may not be had in this tribunal; and, while some ambiguity exists in relation thereto, we are of the opinion that the statute contemplates a reconsideration by this court of its conclusions in criminal causes when demanded by the convicted party. Every case that, within the purview of the constitution and statute, might, under any circumstances, come in the first instance to this court for review, may still be brought here for final adjudication. In this connection it is important to remember that a material distinction exists between the supremacy of the supreme court and certain features of its jurisdiction. As has been well said, the supremacy of such a court "is to be found, not in the extent of its jurisdiction, or the amount of its business, but in the paramount force and authority of its adjudications,—a force acting directly in controlling, without being controlled by, other tribunals; an authority operating indirectly from the respect and deference due to the highest tribunal known to the constitution and the laws." *Sharpe v. Robertson*, 5 Grat. 518. While the constitution confers and defines the jurisdiction of the supreme court, it does not, as we shall presently see, forbid the legislature from regulating to some extent the quantity of its business by reasonably contracting or enlarging the limits of the exercise of such jurisdiction, as the exigencies of the public welfare may require. An extensive legislative power to regulate the exercise of judicial authority is an imperative necessity. A constitutional provision, unalterably defining and fixing in all respects such jurisdiction, would be a serious misfortune. The constitutional policy seems to have been, not to specify absolutely the extent and boundaries of the jurisdiction of all the courts, but to allow a large legislative discretion, so that the varying demands and the ever changing necessities of the people may from time to time be adequately provided for.

With these general observations, we proceed to consider the remaining constitutional provisions to which our attention has been specifically invited. If, as relator contends, every suitor is entitled to be heard by the supreme court in every case, it follows, of course, that the judgment of no other court can be final; and therefore the act, in so far as in certain cases it confers final jurisdiction upon the court of appeals, is void. But the citizen has no natural or inalienable right to a hearing, in the supreme court. If the right to such a hearing exists, it must be deduced from some constitutional guaranty. The constitution will, however, be searched in vain for any provision that expressly or by fair implication contains this guaranty. The declarations in section 6 of the

bill of rights, "that courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property, or character, and that right and justice shall be administered without sale, denial, or delay," simply bestow upon each individual the right to an intelligent, impartial, and speedy judicial hearing and determination of his grievances. They were not intended to confer the privilege of having each controversy tried by every court of the state; nor was it the purpose of this provision to declare, irrespective of legislative direction, that the litigant should be permitted to invoke the jurisdiction of any particular court or number of courts. Such a construction of the language employed would often in practice be injurious to the suitor himself, as well as detrimental to the public welfare. The provision is, as already observed, satisfied when the suitor has an opportunity to secure a speedy and impartial judicial settlement of his controversy; and this is especially true when, as under the present act, such settlement includes a hearing in both an original and an appellate tribunal.

The foregoing conclusion is not affected by any constitutional declaration concerning the manner of invoking the appellate jurisdiction of the supreme court. The litigant cannot, as a matter of right, assert that he will come to this tribunal by appeal, for such appeals remain creatures of statute, and, in the absence thereof, do not exist. He cannot claim a vested right to bring his case to this court by writ of error; for, while this writ is in most cases a writ of right at the common law, it may by statute, unless the constitution forbids, be limited or abolished altogether. *Haines v. People*, 97 Ill. 161; *Willoughby v. George*, 4 Colo. 22; *Stebbins v. Anthony*, 5 Colo. 273; *Webster v. Gaff*, 6 Colo. 475. But, save as to judgments of county courts, the writ of error has received no express constitutional recognition for ordinary appellate purposes. The declaration in section 23, art. 6, that writs of error shall lie to review all final judgments of the county court, does not, as we construe it, forbid a legislative enactment authorizing writs of error to the judgments of other inferior courts of record. But it is conclusive of the proposition that the constitutional purpose was to leave the existence and use of this writ, with the exception mentioned, subject to legislative control. The provision, in effect, declares that, though the legislature may abolish the writ of error, to review the final judgments of other courts, the right to have those of the county court considered in this tribunal shall be inviolate. Were it important to account for the distinction thus made, ample reason exists in the fact that the estates of deceased persons and the interests of minor heirs, often involving adjudications and final judgments, are committed so largely to the custody of county courts; also in the further fact that the judges of such courts are not required to be learned in the law, many of them not even being licensed practitioners. It is true, as counsel for the people contend, that the writ

of error is an original writ; and it may possibly be true, as they also assert, that it is fairly included within the "other original and remedial writs" referred to by section 3, art. 6, of the constitution, which the supreme court is authorized to issue. But, as we have already held, the jurisdiction conferred by said section 3 is original, in contradistinction to the appellate authority given by the preceding section. The original writs mentioned are not to be used in connection with or in aid of ordinary appellate jurisdiction, but for the purpose of instituting original causes or proceedings. *Wheeler v. Irrigation Co.*, 9 Colo. 248, 11 Pac. Rep. 108.

Neither of the foregoing constitutional provisions, aside from the exception mentioned, fairly inhibits the legislature from saying, within reason, at what particular stage or in what particular court a specified kind of ordinary litigation shall end. It would seem that when the suitor has had the full, fair, and impartial judicial hearing guaranteed by section 6 of the bill of rights, the constitutional duty of the state is performed, and he ought not to complain. But our attention is further invited to section 2, art. 6, of that instrument: "The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, and shall have a general superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law." It is insisted that this section lodges final appellate jurisdiction over all cases in the supreme court, and therefore that the legislative attempt to confer such jurisdiction upon the court of appeals in any class of cases is necessarily a nullity. We answer that, in the first place, since the constitution authorizes the legislature to create "other courts," such power necessarily carries with it authority to give the courts created a share in the trial of controversies that would otherwise be disposed of by the tribunals expressly named. Moreover, the very words of section 1, above quoted, lodge "the judicial power of the state" in the courts that may afterwards be provided by law, as well as in those enumerated by name. Secondly, we reply that, while section 2 clothes the supreme court with appellate jurisdiction, such jurisdiction is not exclusive. True, the intent is clear to make this court essentially a court of review. The word "only," coupled with the other words employed, plainly indicates a purpose to render its primary and principal powers appellate. Its superintending control over other courts, and its limited original jurisdiction, together with its anomalous duty of answering executive and legislative questions, while functions of great importance and value, must be regarded as secondary. It would be idle, however, to argue that the supreme court absorbs all appellate jurisdiction; and it would be scarcely less idle to say that section 2 gives it a monopoly for purposes of review. We are not at liberty to transpose the adverb, and make the constitution read, "The supreme court 'only' shall have appellate jurisdiction



while the language as it is written, "shall have appellate jurisdiction only," falls far short of declaring that it shall have such jurisdiction in all cases. This expression operates both as a grant and a limitation. It confers appellate authority, and at the same time forbids the exercise of original jurisdiction, save in the excepted cases. It specifies the kind, not the quantum, of jurisdiction, and is not inconsistent with the lodgment of power in some other court to review finally enumerated classes of cases. Care was taken to provide that the appellate authority of the court shall be co-extensive with the territorial boundaries of the state, and, had it been the intention to extend and forever continue its final appellate power over all litigation, such intention would have been expressed. The constitution declares that district courts "shall have original jurisdiction of all causes, both at law and in equity;" but, while every suitor is thus authorized to bring his suit in that court, no one ever supposed that this declaration operates to prevent vesting original jurisdiction of civil causes also in trial courts, which the legislature may see fit to create. If the claim of counsel for respondents be correct, (a matter we do not determine,) that the last clause of section 2, viz., "under such regulations and limitations as may be prescribed by law," applies to the appellate jurisdiction of the court, this feature of the provision reinforces the above conclusion; for, while the expression relates principally to procedure, the word "limitations" is comprehensive enough to include a legislative declaration as to the character or amount of a judgment that can be thus reviewed. It is hardly necessary to add that the "superintending control" given by the constitutional provision now under consideration refers primarily to courts, not to parties or cases. Its purpose is to keep the courts themselves "within bounds," and to insure the harmonious working of our judicial system. It was not designed to secure the review of judgments in connection with ordinary appellate jurisdiction, and, in so far as the rights of suitors in particular causes may be affected, the effect is incidental purely. To say that the "superintending control" was intended to include ordinary appellate power is to render the preceding clauses superfluous, in so far as they constitute a grant of such power.

The foregoing views are not inconsistent with the principle also relied on by relator, that, when a constitution confers jurisdiction over a particular subject-matter upon one court, and not upon another, the jurisdiction thus conferred is exclusive. That principle is simply inapplicable. The provision before us grants general appellate supervision; it specifies no "particular subject-matter." Section 28, art. 6, of the constitution, declares that "all laws relating to courts shall be general and of uniform operation throughout the state; and the organization, jurisdiction, powers, proceedings, and practice of all the courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments, and

decrees of such courts severally, shall be uniform." The court of appeals created by this statute cannot be regarded as belonging to the same class or grade with any of the trial courts, while, as we have seen, it is inferior to the supreme court. There being no other court of a like class or grade, and its powers being exercised uniformly throughout the state, there is no disobedience of the constitutional command relating to judicial uniformity. It may be that, as counsel suppose, the views entertained by the court of appeals in cases within its final supervision will sometimes differ from those promulgated, under like circumstances, by the supreme court. But it is believed that, in such instances, the court of appeals will voluntarily yield its judgment to that of the higher tribunal. Something must always be trusted to the disposition of judges to act for the general harmony and good as well as to their honesty and legal discrimination. Should direct contrariety of opinion arise in the same case, however, as counsel seem to fear, an appropriate remedy will undoubtedly be found to enforce the law as declared by the supreme court, and thus vindicate both the interest of the suitor and the supremacy of this tribunal. But these thoughts are not pertinent to the specific question in hand; for, however much uniformity of judicial decision may be desired, section 28 was not expected to insure such uniformity. This provision deals with legislation. It is the laws pertaining to the organization, jurisdiction, etc., of courts, also the legal force and effect of the judgments, not the judgments themselves, that are to be uniform.

We have now briefly considered all of the constitutional provisions upon which reliance is placed by relator and his learned counsel. We discover in the legislative act challenged no such inconsistency therewith as would justify us in holding it unconstitutional. Some of its features will doubtless prove objectionable in actual practice. But it is largely an experiment. Experience may demonstrate its entire inutility; that it will suggest improvements, is a matter of course. Aside from the rule of construction that forbids courts from holding statutes void so long as a reasonable doubt of their validity remains, this, or a similar measure, is supported by direct constitutional sanction, as well as by potent considerations of public and private justice. Section 6 of the bill of rights, already mentioned, not only guarantees to the citizen a remedy for every legal injury suffered, but also provides that such remedy shall be enjoyed without delay. It is an open secret that the reviewing branch of our judicial machinery has for years been unable to give this provision full force and effect. Upon the organization of this tribunal, it received a bequest of more than 100 causes from the territorial court of last resort. The state's diversity of industries, and its marvelous growth in population and wealth, have caused a vast and unanticipated increase in the volume of judicial business. As one of the natural results, nearly 8,000 cases have reached this court

for review. And when the novel and perplexing character of a large part of this litigation is considered, it is certainly not a matter of surprise that the court, despite diligent and earnest endeavor, has failed to keep pace with the rapid accumulations upon its docket. The annoyance and delay incident to this condition of affairs have amounted in many instances to a denial of justice. The gravity of the situation appealed strongly for some sort of legislative relief, if such relief were possible; and, while incongruities in judicial organization and action are to be deplored, we find no excuse for relaxing any rule of construction in order to declare the statute before us void. There is no evidence whatever in the act itself, or in the circumstances attending its adoption, of a legislative intent to detract from the dignity or standing of the supreme court. We cannot favor the supposition that the legislature may in the future, directly or indirectly, undertake to deprive this tribunal of its jurisdiction, appellate or original. When that body attempts, if it ever should, to interfere with the existence or supremacy of this court, or to change the nature of its jurisdiction and duties, or to render it an "idle and empty pageant," the court will undoubtedly decline to recognize such usurpation of authority and illegal action; but, until that time arrives, the discourtesy towards another branch of the government will not be committed, of indulging the presumption that a willful effort may be made to thus impair the judicial system and lessen its usefulness. The supreme court might, by disregarding rules of construction, declare all acts of a particular general assembly void, and thus nullify its entire work; but it is highly unreasonable to surmise that this tribunal will ever be guilty of such revolutionary conduct. To suppose that either department of government will make the most vicious and illegal use possible of the powers conferred, is to suppose a proceeding subversive of the government itself. The numerous authorities cited by counsel have been carefully examined, but to attempt a critical analysis thereof would unnecessarily prolong this opinion. It is not pretended that our views are in strict harmony with all of the able decisions referred to. They are, however, in the main not unsupported by authority, and we submit them in confidence, believing that, besides promoting the public good, they will be found well sustained by firmly established legal principles. The demurrer to respondents' return or answer will be overruled.

(16 Colo. 335)

**COWAN v. COWAN.**

(*Supreme Court of Colorado. May 29, 1891.*)

**BILL OF EXCEPTIONS—ORDER MADE AT THE TIME OF FINAL JUDGMENT—NEW TRIAL—EVIDENCE—DEPOSITIONS—DIVORCE—ALIMONY.**

1. When the trial is had at one term, and the final judgment is not entered until a subsequent term, an order fixing the time within which a bill of exceptions may be filed, made at the time of the entry of judgment, is sufficient authority for including in the record the prior proceedings.

2. The rulings upon the admission and re-

jection of testimony made at the trial, if excepted to at the time, may be reviewed upon appeal, although no formal exception to the overruling of the motion for a new trial was taken.

3. It is not error to refuse to admit evidence upon matters expressly admitted by the pleadings.

4. Under our practice, only such objections, exceptions, and motions in respect to depositions will be considered as are made before trial.

5. When adultery is charged, it is not error to refuse evidence of the good reputation for chastity of the person with whom the adultery is alleged to have been committed, when the general reputation of such person has not been put in issue, she being neither a party to nor a witness in the case.

6. A wife suing for divorce, if without sufficient separate estate, may properly be allowed reasonable attorney's fees to be paid from the husband's estate, varying in amount with reference to the value of the services and the financial condition of the parties, but, where the husband's estate is small, this fact must be given due weight in fixing the amount that may properly be allowed for such purpose out of his estate.

(*Syllabus by the Court.*)

**Appeal from superior court of Denver.**

Action for divorce, alimony, and custody of minor children. Appellee, Laura Cowan, as plaintiff below, rested her application for divorce, etc., upon two distinct charges against the defendant Edwin R. Cowan, viz., adultery and extreme cruelty. The trial of these issues resulted in a general verdict in favor of appellee. This verdict was rendered upon the 2d day of January, 1889. A motion for a new trial was filed and denied upon January 21, 1889. An appeal to this court prayed and allowed the same day. No further action appears to have been taken in the case at that term of court. At the next term, on March 14, 1889, the cause was called for hearing upon the question of alimony and custody of the children, and, upon the 15th day of the month of April following, the final decree was rendered. By this decree the bonds of matrimony between the parties were dissolved. Appellee was given the custody of the children, the issue of said marriage, the same being Cora H., Ethel M., and Augusta, aged, respectively, about 13, 9, and 6 years at the time of the trial. Permanent alimony was awarded the plaintiff in the sum of \$15,000, and counsel fees in the sum of \$1,800, and said amounts were made a lien upon certain property belonging to appellant.

*H. E. Luthe and Wells, McNeal & Taylor*, for appellant. *Benedict & Phelps*, for appellee.

HAYT, J., (*after stating the facts as above.*) Objection is made to any consideration of the matters brought here by the bill of exceptions upon our review of the trial of the divorce issues. This objection is based upon the fact that the bill was neither presented at the term at which these issues were tried, nor was any order extending the time within which the same might be presented made at that term. Neither were necessary. An order fixing the time within which a bill of exceptions might be presented was made at the time the final decree was entered, and this is all the statute requires. *Stocking v. Morey*, 14 Colo. 317, 23 Pac. Rep. 343. And it is not necessary, under the present provis-

ions of the Civil Code, to preserve a formal exception to the overruling of a motion for a new trial, in order that this court may consider the exceptions reserved to the rulings of the court upon the admission and rejection of testimony at the trial. Civil Code 1887, § 387. A number of assignments of error are based upon the admission and rejection of evidence at the trial. These in most instances relate to matters that could have had but slight effect upon the substantial merits of the controversy between the parties. They will, however, be briefly noticed.

1. When plaintiff was upon the stand, she was asked, upon cross-examination, as to how the house occupied by her was furnished, etc. This question is claimed to be material, under the allegation of the plaintiff that the defendant at one time deserted plaintiff, leaving her with three children to provide for, without making adequate provision for their support. It is said that, if the house was well furnished, it might perhaps have been shown that the plaintiff could have in part supported herself and children from the rent of rooms. It is sufficient answer to this contention to say that, when she attempted so to do, her husband objected, and turned the roomers away. Further than this, it is expressly admitted by the pleadings that the house was well furnished at the time to which this inquiry was directed; hence the evidence was unnecessary. When the question of alimony was under consideration at a subsequent term, the witness answered fully in regard to the value and character of such furnishings, and we do not think the previous rejection of the testimony was error.

2. The next objection urged is based upon the rulings of the court at the trial in reference to a portion of the deposition of the witness Mrs. Ennis. This objection was made too late, and must be deemed to have been waived under section 353 of the Civil Code, which provides that "all objections, exceptions, and motions in respect to depositions shall be made and disposed of before the trial: provided, that objections to the competency, relevancy, or materiality of the testimony therein may be reserved and ruled on during the trial." Section 353, Code 1887.

3, 4. The third exception argued here relates to the ruling of the court sustaining an objection to the following question propounded to the defendant while upon the stand: "Why do you think the children were in danger?" It is claimed that this question was pertinent and proper, as explaining defendant's conduct towards his wife upon an occasion, when she swears she was forcibly thrust down-stairs by him. Both parties were fully examined upon all the facts and circumstances, in connection with that episode, and each allowed to detail at length, before the jury, his or her version of the matter; and, although an objection was sustained to this particular question, the witness answered the same in connection with his answer to the next interrogatory, thus curing the harm, if any, that might have otherwise resulted from sustaining the objection. The testimony of the defendant,

as to his motive for calling upon the servant upon a certain occasion, which is the fourth point urged against the conduct of the trial below, was properly excluded.

5. The fifth relates to the motive of the plaintiff in bringing this suit. We think this was also properly excluded. The attempt being to prove by the witness Pond that the plaintiff had made statements showing that she had a bitter hatred towards the defendant, it is sufficient to say that such evidence was entirely unnecessary. During the plaintiff's long examination in chief, as well as upon cross-examination, she made no attempt to conceal the fact that she entertained the feelings towards the defendant attributed to her. Almost every answer is an admission that she did entertain such hatred. Further evidence upon this point was entirely unnecessary.

The defendant was charged with having committed adultery with one —, and counsel for appellant complained because the court refused to allow them to inquire into the general reputation of said person for chastity. The argument is that, when the general reputation for chastity of one is in evidence, it is competent to show such person's good reputation. This rule has no application, under the circumstances of this case. The general reputation of the party with whom the adultery is alleged to have been committed was not in issue. She was neither a party to nor a witness in this case. The testimony was properly refused.

The case appears to have been fairly submitted to the jury, under proper instructions. The evidence, although quite conflicting, is sufficient to sustain the verdict, and we see no reason for disturbing the decree of the trial court dissolving the bonds of matrimony between the parties. No error is urged to that part of the decree relating to the custody of the children.

Appellant claims the amount decreed appellee as permanent alimony, and for counsel fees, etc., to be grossly excessive. In view of his financial condition, we think there is some merit in this claim. The only property belonging to the defendant, as shown by the evidence, consists of four lots on the corner of Twenty-First and Stout streets, in the city of Denver, with a dwelling-house thereon. The market value of this property at the time of the trial was variously estimated by the witnesses at from twenty to thirty thousand dollars. Taking the testimony altogether, and it may be said to fix the value of the property at \$25,000, less the sum of \$1,200, due for taxes thereon. It is in evidence that the defendant had received several thousand dollars from the sale of property during the former years immediately preceding the trial. Such property was incumbered, however, and the amounts received therefrom by defendant were not more than sufficient to pay his living expenses up to the time of the trial and the amounts awarded the plaintiff for temporary alimony. It is also shown that, five or six years previous to the trial, while he was a member of the firm of Cowan & Co., the firm had deposits in bank at differ-

ent times to their credit in amounts ranging from ten to thirteen thousand dollars. The latter testimony, in view of the remoteness of the time and uncertainty of the liabilities, etc., is of no weight. The defendant upon the trial testified that the Stout-Street property constituted his sole and only asset, and that he was then indebted to various parties in amounts aggregating something over \$6,000. That he is afflicted with spinal *schlerosis*, a malady that in a great measure incapacitates him for business, is established. Under these circumstances, we are of the opinion that the plaintiff should not have been allowed out of the defendant's estate for counsel fees and permanent alimony more than the sum of \$14,000. As fixed by the decree, the aggregate of these items is \$16,800. A wife suing for divorce, if without sufficient separate estate, may properly be allowed reasonable attorney's fees to be paid from the husband's estate, varying in amount with reference to the value of the services and the ability of the defendant to pay; but where the estate, as here, is not large, this fact must be given due weight in fixing the amount that may properly be allowed her for this and other purposes, out of his estate. If divorce applicants desire an array of eminent counsel, it is their privilege to provide themselves therewith at their own expense, but the amount to be allowed the wife for counsel fees from the husband's estate must be governed to some extent by the situation in life of the parties and the husband's ability to pay. We shall not disturb the allowance in this case as an independent item, as appellee seems to desire same should not be interfered with; but, in the opinion of the court, \$14,000 is the limit that should have been allowed for all purposes. Leaving the attorney's fees unchanged, this would leave the wife as permanent alimony the sum of \$12,200. This is all we think she is entitled to, under the circumstances of this case, and the decree should be modified accordingly. The decree is reversed as to the amount allowed for permanent alimony, with direction to the court below to modify the same in this respect in accordance with the views herein expressed.

ELLIOTT, J., did not participate in this decision.

(16 Colo. 347)

PEOPLE *ex rel.* ROSENFELD V. GRAHAM,  
District Judge.

(Supreme Court of Colorado. May 29, 1891.)

ENTRY OF JUDGMENT — CONDITIONS — MANDAMUS.

1. A court has no right to require as a condition precedent to the entry of final judgment that a part of said judgment be first paid.

2. The writ of *mandamus* cannot be used to control judicial discretion, but it may properly be invoked to command a subordinate court to proceed to judgment.

(Syllabus by the Court.)

Petition for *mandamus*.

Wells, McNeal & Taylor, for petitioner.  
L. C. Rockwell, for respondent.

HAYT, J. This is an original application for a writ of *mandamus* to be directed to

the respondent, commanding him as one of the judges of the second judicial district to enter a decree in a case pending in said court. It is not necessary to determine any question of fact upon this application. It appears that some time in the month of August, 1889, an action was commenced in the district court of Arapahoe county by petitioner as plaintiff against Katie J. Rosenfeld as defendant. The action was for the purpose of dissolving the bonds of matrimony existing between plaintiff and defendant. The defendant, Katie J., appeared in said cause, and answered the complaint, denying all the material averments thereof. Shortly after the institution of the action an order was made by the district court requiring the plaintiff to pay defendant a certain sum per month as temporary alimony, and an allowance for counsel fee was also made. Afterwards the case was called for trial before respondent and a jury. Both parties to that suit were present in person and by attorney, and a trial was regularly had, resulting in the jury finding the issues for the plaintiff. Thereafter a motion was made to set aside said verdict and for a new trial, which motion was by said judge overruled, and, the case coming on further to be heard, the judge rendered a decision to the effect that the plaintiff in said suit was entitled to a decree dissolving the bonds of matrimony between the plaintiff and defendant, and "that the defendant should be awarded the sum of \$5,000 as permanent alimony." Plaintiff had previously been required to pay for the use of the defendant the sum of \$500 as counsel fees, and also alimony *pendente lite*; first at \$75 and then at \$100 per month. It affirmatively appears that all these sums had been paid prior to the time the case was reached for judgment. Respondent, after outlining his decree, refused to enter the same unless \$1,000 of the \$5,000 awarded the defendant should be first paid, and afterwards prepared a written decree, inserting said condition therein, but refusing to sign the same until the condition should be complied with. The sole question raised upon this application relates to the right of the district court to require as a condition precedent to the entry of any judgment the payment of the said sum of \$1,000. From the written opinion of the judge, filed at the time, it appears that said condition was attached for the reason that the judge was of the opinion that the money would not be otherwise paid. We do not think the court had any authority to attach such condition. The case had already proceeded to a stage at which it became the duty of the court to enter a final decree, from which an appeal could be taken. An appeal can be taken only from a final judgment, and courts cannot be permitted to withhold such judgment, and refuse to pronounce the same, unless a part of the proposed judgment be first paid, for this, in effect, would be to make the right of an appeal depend upon a compliance with conditions not authorized. The conditions upon which an appeal may be taken are prescribed by statute, and additional burdens cannot be imposed by

a court as conditions precedent to its exercise. *People v. Quinn*, 12 Colo. 473, 21 Pac. Rep. 488. At an earlier period in the case the court refused to proceed until its order in reference to alimony *pendente lite* had been fully complied with. Its right to impose such condition is undisputed, the plaintiff being able to comply. But, as we have seen, at the time the cause was ripe for a final decree all former orders of the court had been fully complied with. It will be time enough to enforce the provisions of the proposed final decree when in fact it becomes the decree of the court. The district court by its conduct is placed in the attitude of refusing to proceed to judgment in the cause. While the writ of *mandamus* cannot be used to control judicial discretion, it may properly be invoked to command a subordinate court to proceed to judgment, as is prayed in this case. Let the peremptory writ issue.

**AN KLE et al. v. MOLEAN et al.**

(*Supreme Court of Idaho*. April Term, 1891.)

Appeal from district court, second district.

*James W. Poe* and *James W. Reid*, for appellants. *James H. Forney* and *Albert Allen*, for respondents.

MORGAN, J. The transcript in this case fails to show that any judgment was ever entered, but merely an order for a judgment. Therefore the opinion in the case of *Durant v. Comegys*, 26 Pac. Rep. 755, (decided at this term,) applies to, and will govern, this case. Appeal dismissed, without prejudice to another appeal, costs of appeal awarded to respondents.

SULLIVAN, C. J., and HUSTON, J., concur.

(40 Kan. 612)

**STATE v. HENTHORN.**

(*Supreme Court of Kansas*. June 6, 1891.)

**CONTEMPT—ORDER OF ARREST.**

It is error to issue an attachment, warrant, or order of arrest for an alleged constructive contempt, without an affidavit or information, containing a statement of the facts constituting the alleged contempt, having first been filed with the court.

(*Syllabus by Strang, C.*)

Commissioners' decision. Appeal from district court, Cowley county; *M. G. TROUP*, Judge.

*Peckham & Henderson*, for appellant. *J. N. Ives*, Atty. Gen., and *C. T. Atkinson*, for the State.

STRANG, C. This is an appeal from a proceeding for contempt. On the 7th day of January, 1890, there was pending, in the district court of Cowley county, a certain case in which *Barbara Croco* and *John Croco* were plaintiffs and the *Winfield National Bank* was defendant. This case had been tried, and a judgment thereon had been rendered, but it was pending on a motion for a new trial. There was another case pending in said court at that time in which the state of Kansas was plaintiff and *C. Perry* defendant, said

cause being a contempt proceeding instituted by said court against said *Perry*, charging him with contempt for writing, and publishing in the papers of said city, a certain card, which it was alleged was calculated to impede and obstruct the business of the court, and to impeach the integrity of said court, and the judge thereof. On said 7th day of January, 1890, said card was published in the *Daily Telegram*, with comments thereon, as follows: "Arrested for contempt. Dr. C. Perry was arrested to-day on a bench-warrant, and arraigned on a charge of contempt of court. Dr. Perry's crime (and it must be a crime, else he would not be so charged and arraigned) consists in the following card, published in the daily newspapers: 'A card. In relation of the case of *Croco v. The Winfield National Bank*, I am not a little surprised that the daily papers should so industriously lay before a public, ignorant of the facts, the allegation of the plaintiff, and at the same time should so entirely ignore the testimony on the part of the defendant. However, this is only in the line of the action of the judge, who evidently believed the allegation of the plaintiff, and gave no credence to the testimony on the part of the defendant, which testimony (so far as the writer's knowledge of the facts of the case) was nevertheless absolutely true. I make only this comment,—that, if the judge believed what he is reported to have asserted, it is his bounden duty to direct the county attorney to file a criminal action against Messrs. McDonald, E. T. and G. H. Schuler, and myself, C. PERRY.' At this time, the result of the case is not known. Moral. Don't express your contempt of a court. Think all you please, but say nothing and saw wood. Probably the court will dismiss the charge. We fail to see wherein any contempt was expressed. Later. The court gave Dr. Perry until next Monday to make a showing in defense of his rights as an American citizen." On the next day, January 8, 1890, without any affidavit, complaint, or information first having been filed therein the district court of said county being in session, a warrant was issued by said court, or the judge thereof for the arrest of the defendant *J. W. Henthorn*, together with *H. Vincent* and *L. Vincent*, on a charge of contempt of court; the contempt consisting in the publishing of the card of *C. Perry*, quoted above, and comments thereon by the editor of the *Telegram*. The defendant, *Henthorn*, was arrested and brought before the court. Afterwards he filed his answer to the charge contained in the warrant, admitting the publication of the article, and averring that he was the sole editor of the *Daily Telegram*. The answer, which was verified by the oath of the defendant, also averred that the article was not published for the purpose of prejudicing the public against the said court, nor the judge thereof, nor was it published willfully and with intent to influence, or in any way to impede or obstruct, the administration of justice therein. There was no evidence heard in the matter. The court, however, found the defendant guilty on

the admission in the answer, and fined him \$100 and costs, and ordered him committed to the county jail until the costs were paid. From such judgment the defendant appeals, and demands his discharge at the hands of this court.

"A contempt of court is either direct or constructive. A direct contempt is an open insult, in the face of the court, to the person of the judges while presiding, or a resistance to its powers in their presence. A constructive contempt is an act done, not in the presence of the court, but at a distance, which tends to belittle, degrade, or to obstruct, interrupt, prevent, or embarrass the administration of justice." When the contempt sought to be punished is committed *in facie curiæ*, the punishment is summary, and generally immediately follows its commission. In such case no preliminary process or evidence is necessary, except what is gathered by the sense of seeing and hearing. The court takes judicial notice of the offense, and punishes without a hearing of any kind, except in some cases to give the guilty parties an opportunity to apologize, upon which the court may discharge, or it may receive the apology in mitigation of the offense in fixing the punishment. But where the contempt is constructive,—that is, where the contempt is not committed *in facie curiæ*, but where the act or omission which constitutes the contempt occurs away from the court, beyond its power of observation,—a proceeding in contempt must be instituted to bring the matter before the court. There were a number of methods whereby such proceedings were commenced under the English practice, several of which obtained more or less countenance in this country under the common-law practice. But at this time, in this country, the common and more approved methods of instituting a proceeding for contempt are—*First*, when an attachment or warrant or order of arrest for contempt issues in the first instance; or, *secondly*, when a rule to show cause why an attachment for contempt shall not issue, or why the alleged contemner shall not be punished for contempt. Under either of these methods, the defendant is entitled to a hearing. And a careful examination of the authorities satisfies us that, in all cases of constructive contempt, whether the process of arrest issues in the first instance, or a rule to show cause is served, a preliminary affidavit or information must be filed in the court before the process can issue. This is necessary to bring the matter to the attention of the court, since the court cannot take judicial notice of an offense committed out of court, and beyond its power of observation. There are a few cases in the books where the courts have taken notice of constructive contempts, and issued process, without any affidavit or information having been filed to bring the subject-matter of the contempt to the attention of the court. But such cases are very rare in this country, and the practice nearly or quite obsolete. The great weight of authority is certainly opposed to such practice. Courts should never be required to go about looking for

contempts of their authority. To do so is sufficient to lower their dignity, and bring them into contempt.

The case of *Wilson v. Territory*, 1 Wyo. 156, is exactly in point with this case. In that case Wilson was arrested on an order of arrest issued by the court without an affidavit or information having been filed therein. He was charged with constructive contempt for writing and securing the publication in the Omaha Herald of an article reflecting upon the first district court of Wyoming, and upon the judge of said court. He answered, no other evidence was introduced, and the accused was found guilty, and fined. He appealed to the supreme court of that territory. That court used the following language in expressing its opinion in the case: "Without entering upon the question of contempt in this case, \* \* \* we are of the opinion that an error was committed by the district court, at the very commencement of the proceedings, which renders it necessary to set aside the judgment thereof. This consisted in issuing the process of attachment without any valid evidence whatever before the court upon which to found such a proceeding." In *Re Daves*, 81 N. C. 72, the court holds "that a rule to show cause why a party should not be attached for contempt, in disregarding the order of the court, should not be granted on mere motion, but should be based on the affidavit of the party to the attachment or other satisfactory evidence." In the case of *Ex parte Wright*, 65 Ind. 508, the court says: "The grounds of a constructive contempt should be stated by affidavit, by the return of some officer, or in some way made known to the court *prima facie*, by witnesses or otherwise, so that they may be made a part of the record; and this should be done before a rule or writ is granted against the alleged offender." In *State v. Blackwell*, 10 S. C. 35, it is said: "It is a fatal objection to a rule to show cause why a party should not be attached for contempt for an offense not committed in the presence of the court that it was issued without affidavit." In the case of *Young v. Cannon*, 2 Utah, 561, the court says: "In all proceedings for contempt which are not committed in the presence of the court, in order to give the court jurisdiction, it is necessary that an affidavit be filed, stating the facts constituting the contempt. When the alleged contempt is not committed in the presence of the court, an affidavit of the facts constituting the contempt must be presented, in order to set the power of the court in motion." *Batchelder v. Moore*, 42 Cal. 412. "Proceedings for contempt, not committed in the presence of the court, are instituted by filing an information under oath stating the facts constituting the alleged contempt. An attachment or order to show cause will then be issued, and the party accused brought before the court. As the proceeding is solely to protect public justice from obstruction the accused is not entitled to a trial by jury." *Gandy v. State*, 18 Neb. 445, 14 N. W. Rep. 143. See, also, *Bond v. Bond*, 69 N. C. 97; *Worland v. State*, 32 Ind. 50; *McConnell v. State*, 46

Ind. 298; Rugg v. Spencer, 59 Barb. 897; State v. Mott, 4 Jones, (N. C.) 449. This case must be reversed upon the ground that the court had no jurisdiction of the defendant, because no affidavit or information was filed in the court as a basis for the warrant of arrest upon which the defendant was taken into court and tried. The judgment of the district court is reversed, and the defendant discharged, with costs. All the justices concurring.

(46 Kan. 618)

## STATE v. VINCENT.

(Supreme Court of Kansas. June 6, 1891.)

## CONTEMPT—ORDER OF ARREST—INFORMATION.

1. It is error to issue an attachment, warrant, or order of arrest for a constructive contempt, without an affidavit or information, containing a statement of the facts constituting the alleged contempt, having first been filed in the court whence the process issues.

2. The answer in this case examined, and held that, under the circumstances of this case, the defendant should have been discharged on his answer.

(Syllabus by Strang, C.)

Commissioners' decision. Appeal from district court, Cowley county; M. G. TROUP, Judge.

Peckham & Henderson, for appellant. J. N. Ives, Atty. Gen., and C. T. Atkinson, for the State.

STRANG, C. This is an action for contempt, growing out of the same publication that was alleged to constitute contempt in the case of State v. Henthorn, 26 Pac. Rep. 937, (just decided.) In this case, as in that, the defendant was arrested and brought into court on a warrant or order issued by the district court of Cowley county, without any affidavit or information of any kind, containing a statement of the facts constituting the alleged contempt, having first been filed in said court. This case must therefore be reversed upon the strength of that case. It is also the opinion of this court that this defendant should have been held to have purged himself by his answer, and discharged. His answer, which was verified by his oath, showed that J. W. Henthorn was the sole editor of the Winfield Telegram, the paper in which the article constituting the alleged contempt was published, at the time of its publication, and that this defendant had nothing to do with the publication of the article complained of, and had no knowledge of said article, or its publication, until the order of arrest in this case, which contained a copy thereof, was served on him. There was no evidence before the court tending to show that such answer was not true. On the other hand, the verified answer of J. W. Henthorn, who was arrested at the same time with this defendant, and on the same process, also stated that Henthorn was the sole editor of the paper in which the article complained of appeared, and that he was solely responsible for its publication. Under these circumstances, we think this defendant should have been discharged. "In this instance, Gilbert Murdock has, in the most complete positive manner, denied all the charges made

against himself, and the other two persons, who stand accused, sustain his answer by their assertion that they did not act as his agents, or with his knowledge; hence it is clear that he must be discharged, with his costs." Murdock's Case, 2 Bland, 487. It is recommended that the judgment of the district court be reversed, and defendant discharged, with costs.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 620)

## STATE v. VINCENT.

(Supreme Court of Kansas. June 6, 1891.)

Appeal from district court, Cowley county; M. G. TROUP, Judge.

Peckham & Henderson, for appellant. J. N. Ives, Atty. Gen., and C. T. Atkinson, for the State.

PER CURIAM. Upon the authority of the case of State v. Vincent, 26 Pac. Rep. 939, (just decided,) which case is in all respects like this one, the judgment of the district court will be reversed, and the defendant discharged, with costs. All the justices concurring.

(46 Kan. 620)

## WINFIELD NAT. BANK v. CROCO et al.

(Supreme Court of Kansas. June 6, 1891.)

## CANCELLATION OF MORTGAGE—FRAUD—DURESS—NEW TRIAL—PREJUDICE OF COURT.

1. If a creditor obtains the signatures of a man and his wife to a mortgage to secure a debt upon which the man is surety, by representations that the instrument is not a mortgage, but simply a paper to protect the man from arrest and imprisonment for an offense committed, and it appears that they are old people, whose eye-sight is so impaired that they cannot read the writing in the mortgage presented to them for signing, such mortgage will, in a proper proceeding promptly begun, be declared invalid, and will be canceled.

2. If the creditor operated upon the fears of the husband by threats of arrest and imprisonment believed by him to be imminent, and thus overcomes his will, and through fear and undue influence compels him to sign the mortgage, the signature is not binding; and, if the wife is induced to execute the mortgage from fear excited by threats made to her by the creditor of an illegal criminal prosecution against her husband, the instrument thus obtained will not be binding upon her.

3. The testimony in the case examined, and held to be sufficient to sustain the finding of the court that the mortgage in controversy is invalid.

4. The mere expression of the opinions of witnesses that the court entertained bias and prejudice for and against some of the parties in the action, without a statement of the facts and grounds upon which such opinions were founded, cannot be regarded as testimony, and is entitled to no consideration in an application for a new trial.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. TROUP, Judge.

Peckham & Peckham, for plaintiff in error. S. E. Fink and McDermott & Johnson, for defendants in error.

JOHNSTON, J. This was an action brought in the district court of Cowley county by Barbara Croco and John Croco to cancel and set aside a mortgage executed by them to the Winfield National Bank on February 20, 1889. It was alleged that



the property mortgaged was the homestead of Barbara Croco and John Croco, situated in Winfield, and a farm near to Winfield, and that both the homestead and the farm were owned by Barbara Croco. The plaintiffs below averred that the signatures to the mortgage were obtained by fraudulent representations, duress, intimidation, and threats of injury. They averred that the pretended mortgage was procured without any consideration, and without any knowledge on their part of its contents, but, on the contrary, that the bank and its agents, with the intent to defraud them, falsely represented that the instrument was not a mortgage, but was a paper necessary to be executed to keep John Croco from being criminally prosecuted and imprisoned. They alleged that they were unable to read, and did not read or hear the instrument read, and were not aware of its contents at the time of signing the same. They further say that the acknowledgment of the mortgage was taken by G. H. Schuler, a stockholder and officer of the bank, but that he did not inform them, or either of them, that the instrument was a mortgage, or that he was attempting to take their acknowledgment to a mortgage. The bank denied all the averments of fraudulent representations and duress alleged in the petition, and stated that the mortgage was procured from the Crocos in the ordinary course of business and for a valid consideration, to secure the payment of a promissory note, executed by P. C. Croco and John Croco, for the sum of \$5,405. The case was submitted to the court upon conflicting testimony, and the claims of the plaintiffs below were sustained, it being held that they did not voluntarily or legally execute or acknowledge the mortgage, and that it was without consideration, and void. It is not disputed that the instrument sought to be canceled in this proceeding was signed by John Croco and Barbara Croco on February 20, 1889. The name of John Croco was signed to it in a back room of the bank, in the presence of the officers, and the name of Barbara Croco was attached to it at her home, in the absence of her husband, and when no one was present but G. H. Schuler, an officer of the bank. It further appears, without question, that Barbara Croco was the owner of the property described in the mortgage, and that she was in no way indebted to the bank. Peter C. Croco, a son, was largely indebted to the bank, and his father, John Croco, had signed, as surety, with him, a note of \$5,405, held by the bank. When the mortgage was signed by John and Barbara Croco, Peter was insolvent, and the officers of the bank, learning of his financial condition, were actively endeavoring to obtain security for his indebtedness to the bank. The record does not disclose the ages of John and Barbara Croco, but they are spoken of as old people, and the testimony is that the eyesight of each was greatly impaired.

The testimony of John Croco with reference to the signing of the mortgage, in substance, is that on the morning of February 20, 1889, he started to the railway depot to take the train for the town of

Floral, to visit his daughter; that, while waiting for the train at the depot, J. N. McDonald, the vice-president of the bank, came in, and invited him to return to the bank, but Croco declined. McDonald insisted that he must go to the bank, as there was urgent business, and, picking up Croco's valise, he started towards the bank with it, and, finally, Croco reluctantly accompanied him. He was taken to a back room in the bank building, where McDonald sat down and commenced writing. Shortly afterwards, George H. and Everett Schuler came into the room, and the paper upon which McDonald had been writing was presented to Croco for signature. Croco inquired what the nature of the paper was, stating that he had not his glasses, and was unable to read what was upon the paper. He was told that it was for the purpose of keeping the United States officers from arresting him upon the charge of obtaining money under false pretenses; that money had been obtained from the bank upon the note signed by him; that it was a United States bank, and that they must telegraph the United States officers at Washington by noon that day if the paper was not signed, and that they would telegraph to the marshal or some other officer at Kansas City, who would proceed to Winfield and arrest him. George H. Schuler sat down and wrote a dispatch, which he held up in Croco's face, saying that there was a dispatch that would go to Washington if he did not sign that paper, and that the officers there would telegraph, and cause him to be arrested and taken to Leavenworth. Everett Schuler made a similar statement and argument, and McDonald pushed the paper over to him, and said if he would sign it now that he would be all right. Croco said he repeatedly asked what the paper was, and to have it read, and at each time was told that it was simply to protect him from prosecution and arrest. He states that he declined to sign, and that he arose, and started for the door, telling them that he would go and see his lawyer, and, if his lawyer said it was right to sign the paper, he would do so, when George H. and Everett Schuler jumped to their feet, and sharply said that he could not go, but must sign the paper. Dr. Perry, another director of the bank, came in, and joined with the others in an effort to obtain his signature to the paper. He had been a friendly neighbor of Croco's, and he talked pleasantly to him, and advised him to sign it, and avoid trouble; and that, if he did not, the officers at Washington would be notified at once. He was repeatedly told that if he did not sign it before 12 o'clock the telegram would be sent, and about 15 minutes before 12 he signed the paper. He said that he was at no time informed that it was a mortgage, and was told that it was not intended to affect his or his wife's property. After he had written his name, George H. Schuler tore up the dispatch, and when they started from the room they found that the doors of the same were locked. After leaving the bank, he stated to Schuler that he was going to the office of his lawyer to consult him.

When he started up stairs to the law-office he sat his valise down, and Schuler informed him that he would not go up. Croco found the office door locked, and started for the residence of his lawyer, but when he came down stairs he found that Schuler had gone, and taken the valise with him. Soon afterwards he reached home, and found that George H. Schuler had been there and obtained the signature of his wife. Barbara Croco testified to the effect that about noon of the day on which the mortgage was signed she was at home alone, lying in bed, having been sick for some time; that she heard some one rapping at the back door of her house, and on going to the door saw a stranger, who proved to be George H. Schuler, standing there; that he spoke to her, and stated that he had brought Mr. Croco's satchel home, when she inquired what had happened to her husband; and she says that it occurred to her that he had been injured or killed. He walked into the room, and presented a paper to her to sign, and when she inquired the nature and purpose of the paper she was told that Peter Croco had made an assignment; that the bank had telegraphed to Washington, and the officers would come to-morrow and arrest her husband. She states that he told her that the paper presented was simply to protect Mr. Croco from the officers and from arrest. She told him that she could not read the writing, and asked him what it was, when he replied again that it was simply to protect them; that Mr. Croco had signed it, and that, if she refused, Mr. Croco would be arrested on the next day. After a good deal of talk of a similar character, and that, if her husband was arrested, he would be handled roughly, she states that she became alarmed, and anxious for the safety of her husband, and signed the paper. Between five and ten minutes after her signature was attached, her husband returned home. She states that Schuler never intimated that the paper was a mortgage upon her property, nor inquired if she acknowledged the execution of the same as a mortgage, and that in fact she did not know that it was a mortgage until the following day. The mortgage was taken to the office of the register of deeds at once for record. An employe in the register's office testified that he heard a conversation between McDonald and another employe in the register's office with respect to the signing of the mortgage, and, while he did not remember the exact language used by McDonald, it was to the effect that they took Croco into the bank, and made him sign the mortgage; that one of the Schuler boys went down to the house, and got old lady Croco to sign it; and that he thinks he used the term "bull-dozed" in speaking of the manner in which they had obtained the mortgage.

The bank assails the finding and judgment upon the ground that they are not sustained by sufficient evidence, but if we accept the testimony of the Crocos to be true, as we must, there can be no question that it abundantly supports the finding of fraud and invalidity. Taking their tes-

timony to be true, it is inevitable that their signatures were obtained by a gross deception, and a species of duress. It should be stated that the officers of the bank emphatically deny that there were any misrepresentations or any threats made to induce either Croco or his wife to execute the mortgage. They state that Croco went to the bank without any compulsion; that the mortgage was drawn up in his presence, and its nature explained to him; that they reminded him of his representations as to the property and solvency of himself and his son, made before that time as a basis for credit, and urged him to make good those assurances by tangible security. In the argument it is said: "The old man was unable to withstand these proper appeals to his moral sense, and thus gave the securities, not very freely we admit, but with thorough knowledge of what he was doing, and not under such circumstances as to entitle him to any relief in a court of equity." Some things in the testimony of Croco would sustain the theory of the bank and indicate that he may have known the character of the paper he was signing. For instance, he admits that when the mortgage was in course of preparation McDonald inquired the name of Croco's wife, and also made inquiry in regard to the extent and description of Peter Croco's land. On the other hand, some circumstances are shown by the testimony of the bank which tend to sustain the claim that there was both fraud and duress in procuring the signatures to the mortgage. It is admitted that the old man was taken into a rear room of the bank, and that great pressure was required to obtain his signature, and that for more than two hours the four officers of the bank in turns labored with him to induce him to sign the paper. It is admitted that a telegraphic dispatch was written in his presence about 12 o'clock, the hour mentioned by Croco, and a statement was made to him that if the matter was not satisfactorily arranged the telegram would be sent; but it is claimed that it was a telegram to Schuler's father. It is also admitted that some of them may have told Croco that the transaction would be reported to the United States officers at Washington. Then the action of Schuler in hurrying to the home of Croco, and obtaining the signature of Mrs. Croco, when he knew that Mr. Croco was absent, and endeavoring to find and consult his lawyer in regard to the matter, tends to support the theory of the Crocos. All these circumstances, and others which we are not possessed of, were before the trial court, and enabled it to determine whether the mortgage was fairly and voluntarily executed, or whether the signatures to the same were obtained by fraud, fear, and compulsion. Whether the weight of the evidence supports the finding that was made is not a question in this court now. If there is competent evidence to sustain the same, that is decisive with us. *Well v. Eckard*, 37 Kan. 696, 15 Pac. Rep. 922; *Goodrich v. Magers*, 39 Kan. 746, 18 Pac. Rep. 896. It is true there were more wit-

nesses testified in behalf of the theory and claim of the bank than for that advanced by the Crocos, but the trial court was not obliged to believe their evidence unless it convinced and satisfied its reason and judgment; and the presence of the witnesses and the circumstances surrounding the transaction and occurring at the trial no doubt threw considerable light upon the matter, and enabled the court to reach a decision upon testimony which was so contradictory and conflicting. If the officers of the bank purposely deceived the old people, who could not read the instrument presented for their signatures, in regard to its character, as the Crocos have testified, then the mortgage was invalid, and the decree of cancellation is correct. *Bird v. Logan*, 35 Kan. 228, 10 Pac. Rep. 564; *Warden v. Reser*, 38 Kan. 36, 16 Pac. Rep. 80. If they operated upon the fears of John Croco by threats of illegal arrest and imprisonment, believed by him to be imminent, as he has testified and thus overcame his will, and through fear and by undue influence compelled him to sign the mortgage, the signature is not binding. "If the wife was induced to execute the mortgage from fear excited by threats made to her by the plaintiffs of an illegal criminal prosecution against her husband, the instrument thus obtained would not be binding upon her." *Green v. Scranage*, 19 Iowa, 461, 466; *Foley v. Greene*, 14 R. I. 618; *Harris v. Carmody*, 131 Mass. 51; *Schultz v. Culbertson*, 46 Wis. 313, 1 N. W. Rep. 19. Barbara Croco was the exclusive owner of the property described in the mortgage, and, unless it is binding on her, it cannot be sustained. She did not sign the note upon which her husband was surety, and was not indebted to the bank in any amount. The note sought to be secured was made December 24, 1888, and did not mature until 90 days thereafter. The mortgage was signed by Barbara Croco and her husband more than 30 days before the maturity of the note to secure an indebtedness for which she was in no way liable. It is conceded that the note was not then due, that no extension of time was asked or obtained, and no present consideration passed from the bank to her or any one else at the time of the execution and delivery of the mortgage. It is therefore difficult to discover any consideration that would support the execution of the mortgage by Barbara Croco. Looking at the whole testimony, however, there is no difficulty in saying that there is sufficient to sustain the finding and judgment rendered by the court. The plaintiff in error contends that a new trial should have been granted because of bias and prejudice entertained by the trial court against the officers of the bank. On the motion for a new trial three affidavits in behalf of the bank were presented by McDonald, Schuler, and Perry, and in behalf of the Crocos oral testimony was given by one witness, and a statement with reference to the charge of bias and the conduct of the trial was made by the court, and the testimony produced falls far short of sustaining the charge. The statements of the affiants are largely expressions of opinion that the

court was prejudiced against the officers of the bank, and that his conduct during the trial indicated such prejudice, without reciting the facts and circumstances upon which such opinions and statements were based. The mere expression of the opinions of these witnesses, without a statement of the facts or grounds upon which such opinions were based, cannot be regarded as testimony, and is entitled to no consideration. It is stated as a fact that the court allowed great latitude in the cross-examination of the officers of the bank, but allowed no latitude whatever on the cross-examination of John and Barbara Croco. We find that the record does not sustain this claim. It is also stated that the judge in rendering judgment remarked that if he believed the testimony of the Crocos, some of the officers of the bank were criminally liable, and should be proceeded against for a criminal offense; but this is qualified to some extent by the oral testimony and statement of the judge. But, even if the statements imputed to the court in rendering its judgment are accepted, it does not indicate that the court entertained any prejudice at the commencement or during the course of the trial, nor yet at the time the statement was made. If the judge believed the testimony of the Crocos, and that the charge made against the officers of the bank was true, it is quite natural that some strong and severe language should be used; but we find nothing in what was said when the judgment was given, or in the conduct of the judge during the trial, which convinces us that the judge had any bias or prejudice for or against any of the parties to the action. Judgment affirmed. All the justices concurring.

(46 Kan. 629)

#### WINFIELD NAT. BANK V. CROCO, (two cases.)

(Supreme Court of Kansas. June 6, 1891.)

#### FRAUDULENT CONVEYANCE—PREFERENCES—FUTURE DEBTS.

1. A debtor in failing circumstances may prefer one creditor to another, although that creditor may be his wife, and he may in good faith transfer his property at a fair price to her in payment of her *bona fide* claim.

2. A conveyance of land by an insolvent debtor to his attorney to pay for services to be rendered for him and for other persons with whom he has business relations, for two years in the future, and with the provision that any fees allowed to the attorney by the courts in such further litigation should be returned to the debtor, constitutes a fraud against existing creditors, and furnishes grounds for the issuance of an attachment.

#### (Syllabus by the Court.)

Error from district court, Cowley county; *M. G. TROUP, Judge.*

*S. D. Pryor and Peckham & Peckham*, for plaintiff in error. *S. E. Fink and McDermott & Johnson*, for defendant in error.

JOHNSTON, J. Two actions were brought in the district court of Cowley county by the Winfield National Bank against Peter C. Croco. The first was brought upon a promissory note for \$5,405, which was not then due; and the second was upon prom-

issory notes which were past due, amounting to \$3,731.91. Orders of attachment were obtained by the bank upon the grounds that the defendant was about to convert a part of his property into money for the purpose of placing it beyond the reach of his creditors, and had assigned and disposed of his property, or a part thereof, with the fraudulent intent to hinder, delay, and defraud his creditors. Afterwards the defendant moved to discharge the order of attachment in each case, for the reason that the grounds alleged in the affidavit made to obtain the attachment were untrue. The motions were heard together and upon the same evidence, before the judge at chambers, and the attachments were discharged. Without waiting for the final disposition of the cases the plaintiff comes here, asking a review and reversal of the orders discharging the attachments. The question tried by the judge at chambers was the good faith and honesty of certain transfers of property made by Peter C. Croco about February 1, 1889, and while he was in a failing condition. In the early part of 1889 defendant became financially embarrassed, and transferred land and other property to his wife, of the estimated value of \$6,100. He conveyed property to S. E. Fink his attorney worth about \$500, and soon afterwards made an assignment of the remainder of his property for the benefit of all his creditors. In 1881 his wife obtained from her father in Ohio \$2,000 in cash, and \$2,000 in promissory notes, which were subsequently collected; and the testimony is that she loaned this money to her husband at the interest rate of 10 per cent. per annum. Later on, and some time about April, 1888, she received the additional sum of \$500 from her father, which was also loaned to her husband on the same terms. At the time of the transfer, his indebtedness to her amounted to more than \$7,000, and the testimony offered by defendant in error shows that the property transferred to his wife in payment of this indebtedness was worth less than \$7,000. She, however, accepted the property as full payment, and is claiming no interest in the estate conveyed by the general assignment. Upon testimony somewhat conflicting, it has been found that the transfer was made in good faith, to pay a *bona fide* debt, and hence as to this transfer there is little left for us to determine. A reading of the evidence satisfies us that it was amply sufficient to sustain the finding of the judge. No good purpose would be served by reciting or analyzing it. It is enough to say that the defendant showed quite clearly the receipt of the money by Mrs. Croco from her father, the loaning of the same to the defendant, and his promise to repay the amount and a stipulated rate of interest; and that all this was done while he was in a sound financial condition. It is true that the transfer was made to her while he was insolvent, and that he had consulted an attorney to ascertain whether he could prefer his wife to other creditors; and, further, that he was contemplating a general assignment when the transfer was made to

his wife. But these things do not affect the validity of a transfer made in good faith to pay a *bona fide* debt. It is well settled that a debtor in failing circumstances may prefer one creditor to another, although that creditor should be his wife, and he may in good faith transfer his property at a fair price to her in payment of her *bona fide* claim. *Monroe v. May*, 9 Kan. 473; *Tootle v. Coldwell*, 80 Kan. 125, 1 Pac. Rep. 329; *Bailey v. Manufacturing Co.*, 32 Kan. 73, 3 Pac. Rep. 756; *Kennedy v. Powell*, 34 Kan. 22, 7 Pac. Rep. 606; *Chapman v. Summerfield*, 86 Kan. 610, 14 Pac. Rep. 235; *De Ford v. Nye*, 40 Kan. 665, 20 Pac. Rep. 481. A decision upholding the validity of the transfer to the wife, however, does not settle that there were no grounds for the issuance of the attachment, nor that the conveyance of property to Croco's attorney is valid. About the time that the transfer was made to his wife, and just before the general assignment, he conveyed about 165 acres of unimproved land, worth about \$500, to S. E. Fink, his attorney, not for services that had been rendered, but largely for services to be rendered in the future. It was made, not only for services in behalf of Croco himself, but also for services to Croco's wife, his father, his mother, as well as for the administrator of the estate of a deceased brother. The conveyance was made in pursuance of a written contract entered into on the same day, which is as follows: "Contract between P. C. Croco and Rachel A. Croco, his wife, John Croco and Barbara Croco, his wife, and P. C. Croco, as administrator of the estate of Melangethron Croco, deceased, and S. E. Fink. It is this day agreed by and between the parties hereto that the said S. E. Fink shall transact all legal business for all the parties named for the period of two years from and after the 31st day of January, 1889, that may be done in any of the courts of Cowley county, Kansas; and in the event of suits begun within the two years, and not ended, that the said Fink shall continue to transact the necessary business pertaining thereto until all business for said estate by way of settlement is finally settled; and all allowances made as counsel fees are to be transferred to said administrator and to become his property. For and in consideration for such services rendered and to be rendered under this contract P. C. Croco and wife agree to pay the same, and the said Fink agrees to accept, as pay, the following described piece of real estate: Being lots 2 and 3, and south-east quarter of N. W.  $\frac{1}{4}$  and west five acres of south half of N. E.  $\frac{1}{4}$  and N. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  section eighteen, (18) Tp. 34, range 7 east of 6th P. M., containing 156 $\frac{1}{2}$  acres more or less, all in the county of Cowley and state of Kansas; that the said lands so deeded by these parties is because of all the anticipated legal aid needed by the said John Croco and wife, arises and probably will arise out of the complications growing out of his indorsing and security given to the said Peter C. Croco by going upon his paper. It is further understood and agreed that, should there by any expenses attending the transaction

of the business for the parties hereto, the same shall be paid by the party employing and not the employed. In witness whereof we hereto set our hands the day herein written. S. E. FINK. PETER C. CROCO. RACHEL A. CROCO. JOHN CROCO. BARBARA CROCO. PETER C. CROCO, Adm'r." While Croco could have paid his attorney with money or land for any pre-existing *bona fide* indebtedness, he cannot, while in an insolvent condition, take any portion of the property which fairly belongs to his creditors to pay the debts or obligations of other people. By this contract he undertook to pay the expenses, not only of his own litigation, for the period of two years in advance, but for all legal business that might be transacted for Rachel A. Croco, John Croco, Barbara Croco, and the administrator of the estate of Melangthron Croco, in any of the courts of Cowley county. The agreement also contemplated that the attorney should obtain allowances as counsel fees from the probate court in the settlement of the estate of the deceased brother, and that these allowances were to be paid over to Peter C. Croco and to become his property. Whatever may have been the intention of Croco, this agreement and the carrying out of the same amounted to a withdrawal of that which justly belonged to his *bona fide* creditors, and operated to delay and defraud his creditors in the collection of their debts. While in an insolvent condition he created a new debt for something to be obtained two years in the future, and tried to pay it with property which should have been devoted to the payment of debts then existing. He goes further, and tries to provide and pay legal counsel for his relatives an equal length of time in the future, when his entire estate was insufficient to meet his own existing obligations. The validity of the transfer to Fink, therefore, cannot be sustained, and the making of the same furnished grounds for the issuance of an attachment. While the property conveyed to the wife could not be taken on the attachment issued, the land attempted to be transferred to Fink was subject to a levy, and there may have been other property that might properly have been seized under the order that was discharged. While the judge was warranted in discharging and releasing some of the property which had been seized, his finding that the attachment should not have issued, and the absolute discharge of the attachment that was issued, was error, for which there must be a reversal of the order made by the judge at chambers in each of the cases. That will be our judgment. All the justices concurring.

(45 Kan. 738)

## FULLER v. CROCO.

(Supreme Court of Kansas. June 6, 1891.)

Error from district court, Cowley county; M. J. THOMP, Judge.

Peckham &amp; Peckham, for plaintiff in error. S. E. Fink and McDermott &amp; Johnson, for defendant in error.

PER CURIAM. This is a proceeding brought to reverse an order discharging an attachment. The

grounds for attachment, the evidence submitted on the motion to discharge the same, and the questions raised for determination are substantially the same as in *Bank v. Croco*, 26 Pac. Rep. 942, and on the authority of that case the order of the district judge discharging the attachment must be reversed.

(46 Kan. 634)

## KANSAS FARMERS' MUT. FIRE INS. CO. v. AMICK.

NAILL et al. v. KANSAS FARMERS' MUT. FIRE INS. CO.

(Supreme Court of Kansas. June 6, 1891.)

## MUTUAL FIRE INSURANCE — ASSESSMENTS — SEPARATE CLASSES.

1. Under the provisions of chapter III, *Sess. Laws 1875*, (chapter 60a, *Comp. Laws 1879*), the business of each class of a mutual fire insurance company must be conducted separately and independently of the other, and in no case shall an assessment be made by the company or association upon the premium notes of one class to pay the losses or expenses of the other.

2. A general judgment, rendered upon a policy of insurance on property of the second class only, issued on November 7, 1883, by a mutual fire insurance company, under the provisions of chapter III, *Sess. Laws 1875*, (chapter 60a, *Comp. Laws 1879*), cannot be collected from the property expressly devoted by the statute to the payment of losses by the company on property of the first class.

VALENTINE, J., dissenting.

(Syllabus by the Court.)

Error from district court, Franklin county; A. W. BENSON, Judge.

Error from district court, Dickinson county; M. B. NICHOLSON, Judge.

For former report in *Kansas Farmers' Mut. Fire Ins. Co. v. Amick*, see 14 Pac. Rep. 454.

*Stambaugh, Hurd & Dewey*, for plaintiff in error *Kansas Farmers' Mut. Fire Ins. Co.* F. A. Waddle, for defendant in error *Amick*. F. A. Waddle and Huron & Davis, for plaintiffs in error *Naill et al.* *Stambaugh, Hurd & Dewey*, for defendant in error *Kansas Farmers' Mut. Fire Ins. Co.*

HORTON, C. J. We do not think that the general execution in this case, or any of the proceedings under the execution, or under the receivership, can compel or result in any assessment upon the premium notes of the first class to pay the losses or expenses of the second class; nor can any of the premium notes executed by persons insured in the first class be sold, applied, or used in any way to pay the losses or expenses on the judgment upon the policy in this case, which belongs to the second class; nor can the collections or assets from the premium notes of the first class be applied or used to pay this judgment, or any part thereof. In our opinion, all the funds, guaranty or otherwise, notes, or other assets of the insurance company, which are expressly devoted by the statute for the payment or protection of any insurance of any property insured by the company in the first class, cannot be levied upon, applied, or used in any way, directly or indirectly, to pay any judgment rendered upon a policy insuring property of the second class. Section 83, c. 50a, *Comp. Laws 1879*, relating to mutual fire insurance companies, which was in force at the time of the issuance

of the policy to Lydia A. Amick of the 7th of November, 1883, provides, among other things: "That any number of persons, not less than five, may associate themselves together for the purpose of mutual protection against loss or damage by fire or lightning or tornado, under the provisions of this act, which property to be insured shall be classified as follows. *First*, to include all dwelling-houses, barns, sheds, out-buildings, and cribs, and their contents, farm implements, hay, grain, wool, and other products, live-stock, wagons, carriages, harness, household goods, wearing apparel, provisions, musical instruments, and libraries, being upon farms or farm property, or in dwellings, or in accompanying outbuildings that constitute detached risks in villages, and belonging to the members, *second*, to include all risks on buildings used for merchandising and manufacturing, and the goods, wares, machinery, and implements contained therein, and all other property not included in the first class. The business of each class shall be conducted separately and independently of the other, and in no case shall an assessment be made by the company or association upon the premium notes of one class to pay the losses or expenses of the other; and any company or association doing business under this act may elect to confine their business to either the first or second class, or to embrace both; and, whenever any change is made in the character of their business, under this act, it shall be done by resolution of the directors, which shall be filed, with the by-laws, in the office of the secretary of state." See, also, paragraphs 3417, 3418, Gen. St. 1889. See, also, sections 86, 89, 90, 93, c. 50a, Comp. Laws 1879, and pars. 3421, 3425, 3426, 3428, Gen. St. 1889. When the insurance company issued its policy to Lydia A. Amick, and when she accepted the same, all parties acted with full knowledge of the provisions of chapter III, Sess. Laws 1875, (chapter 50a, Comp. Laws, 1879.) Lydia A. Amick at that time had notice that, by insuring in the Farmers' Mutual Fire Insurance Company, she became a member and stockholder thereof, and she also knew at that time, or she was bound to know, that the business of each class of the insurance company was conducted separately and independently of the other. She took her policy in the second class, not in the first class. When she brought her action in the district court, her petition showed that she had insurance in the second class of the company, not in the first class. Therefore her judgment rendered upon the policy issued on property of the second class, and not of the first class, cannot be collected from premium notes, assets, or other funds exempted by the statute from being applied to losses of the second class. The premium notes, assets, or other funds, exclusively devoted by the statute for the protection of insurance of the first class, cannot be used or applied to pay losses upon insurance of the second class. Therefore, while the judgment in this case is a general judgment, it cannot be enforced against property which is expressly exempted by the statute. Of course, if any

property, assets, or funds belonging to the second class at the date of the policy issued to Lydia A. Amick, or at the date of the fire, or at any other time, has been improperly or wrongfully transferred by the officers of the insurance company from the second class to the first class to evade the payment of any judgment, debt, or other claim, such transfer will not prevent the collection of the judgment from such property, assets, or funds. Again, if the officers of the insurance company have concealed or secreted any of the property, assets, or funds of the second class in the business of the first class, such property will also be subject to the payment of this judgment. Further, if the officers of the insurance company have covered up, by reorganization or any other change any of the property, assets or funds which belong, or ought to belong, to the second class, or which in any possible way can be used, under the provisions of the statute, to pay the losses of the second class, such property is also subject to the payment of this general judgment. In case No. 5,491 the judgment of the district court will be affirmed, but the receiver will not be permitted to take possession of, disturb, or control any of the property expressly exempted by the statute. Case No. 7,017 will be modified, but the injunction will continue, excepting as to property not exempt in accordance with the views herein expressed.

JOHNSTON, J., concurring.

VALENTINE, J., (*dissenting*.) In my opinion the judgments heretofore rendered in these two cases are perfectly right. The original judgment involved in this controversy was rendered by the district court of Franklin county on October 7, 1885. It was and is a general judgment against the insurance company in its entirety, and with reference to all its parts, authorizing a general execution to be issued against its property generally. It is just such a judgment as would be rendered against the company for its office rent, or for the purchase price or cost of erecting a building in which to do business, or for lights or fuel or stationery or advertisements in a newspaper, or other printed matter, etc. It is not a special judgment against the company with reference to some portion of its business, as its first-class business, or its second-class business, or with reference to any particular property. Nor is it to be enforced in some particular manner different from the enforcement of judgments in general. It is a general judgment in all its aspects. It authorizes a general execution to be issued, and, under it, the clerk could not issue any other kind of execution; and, when the execution is issued and placed in the hands of the sheriff, he could not transform it into a special execution. He could not say, in case he could not find some particular kind or class of property to levy on, that he would not levy upon any property at all. Under it he would have the right to levy upon any kind of property belonging to the company subject to execution. It makes no difference now

whether the judgment should originally have been rendered in some other form or in some other manner or not. It was originally rendered, as it now exists. It was rendered on October 7, 1885,—more than five and a half years ago. Afterwards, and on July 9, 1887 (nearly four years ago) it was affirmed by the supreme court, (14 Pac. Rep. 454,) and it still remains just as it was originally rendered, without the slightest change or modification; and certainly the clerk of the district court could not modify it in effect by issuing a special execution upon it, and he has not attempted to do so; and the sheriff could not, in effect, modify it by refusing to levy upon any property at all, unless he could find property of a particular kind or class upon which to levy, and he has not attempted to do so; nor could the judge of a district court, other than the one in which the judgment was rendered nor the court itself, nor any court, not even the supreme court, at this time, and upon this present showing, change or modify the judgment, or in effect reverse it or vacate it. The insurance company claims, in effect, that, on account of its own transformations and changes in business, the judgment cannot be enforced at all. It claims that the judgment as rendered may be virtually ignored as a general judgment, and then it claims that the judgment cannot be enforced against the company with reference to its first-class business, because the original policy was a second-class business policy; and that it cannot be enforced against it with reference to its second-class business, for the reason that that kind of business has been blotted out of existence, extinguished, annihilated, and that it has no assets belonging to such defunct business, and that no execution can be enforced against such business, for the reason that no execution can be enforced against a nonentity. It must be remembered, however, that the judgment does not of itself authorize any kind of process except an ordinary general execution. Under this judgment, an execution, confined to its second-class business or property only, could not be issued; but, if it could, it would be worthless, for such business was annihilated years ago, and no longer has any existence, and all the assets belonging thereto have in some manner been placed beyond the reach of executions. Possibly, by this kind of legerdemain and jugglery, the company may defeat all general judgments rendered against it, and avoid all its liabilities thereon; but it should not be allowed to do so. If it can, then a judgment, general in its terms, can no longer be considered as importing absolute verity, or as being the end of litigation, and the doctrine of *res adjudicata* should be obliterated from the law. A thing settled by a judgment would not be settled at all, and all respect for judgments should certainly cease, for judgments could no longer be considered as having any binding force or obligation as against any one. It is said that since our last decision in this controversy, and while this motion for a rehearing has been pending in this court, the company has undergone another trans-

formation by a reorganization of its corporate existence. Perhaps I should add a few words with regard to exemptions. Of course, a special execution, running against only particular property, could not be levied upon any other property, whether the same be called exempt property or not. But this is immaterial in this case, for no special execution could be issued in the present case, but only a general execution. It is also true that a general execution, running against all property subject to execution, could not be levied upon property exempt from a general execution. But neither has this anything to do with the present case, for, so far as insurance companies are concerned, there are no exemptions, constitutional, statutory, or otherwise, as against a general execution. It cannot well be claimed that any constitutional provision, or any statute, or any legal principle, may anywhere be found exempting any property of any insurance company from any general execution running against all the property of the insurance company subject to execution. I know of no exemption laws in favor of insurance companies exempting any of their property from general judgments and general executions. In my opinion, it makes no difference whether Mrs. Amick's petition in the case in which the original judgment was rendered shows that her insurance policy belonged to a second-class insurance business or not, or whether Mrs. Amick had any knowledge upon this subject or not; but, in fact, neither the petition nor the record in that case shows anything concerning these matters, except as follows: The record shows what property was insured and what property was injured or destroyed by fire; and the insurance policy was attached to the petition, and made a part thereof; and at one place upon its face, and at another place upon its back, the following isolated letters and figures, occupying in the aggregate less than one and one-half inches in length, and less than one-sixth of an inch in width, are found, to-wit: "Class No. 2." No allegation is anywhere to be found in the record of the case in which the original judgment was rendered stating that the insurance company did a second-class business, or more than one kind of business, or that Mrs. Amick had any knowledge concerning these matters; and the letters and figures, "Class No. 2," standing alone upon the insurance policy, as they do, do not indicate very much. The petition was an ordinary petition upon an insurance policy, asking for a general judgment for money, and a general judgment for money was rendered, and, in my opinion, it should now be treated as a general judgment.

(45 Kan. 745)

AXMAN V. DUEKER *et al.*

(Supreme Court of Kansas. June 6, 1891.)

SERVICE ON GARNISHEE—COLLATERAL ATTACK.

Where the record in garnishment proceedings showed that the garnishee was served with a copy of the writ of attachment and a written notice not to pay any money or turn over any property in his hands to the defendant until so ordered by the court, and the sufficiency of such



service was challenged by the defendant, and was by the district court held sufficient to require the garnishee to answer, and such garnishee did answer, under the order of the court, held, that such service was not void, and cannot be attacked in a collateral proceeding. Explaining 25 Pac. Rep. 582.

(*Syllabus by the Court.*)

On rehearing.

PER CURIAM. It is urged upon the motion for a rehearing in this case that the court failed to decide whether or not the service of process upon the defendant William J. Dueker in the case of C. F. Ziegler v. L. C. Pfaffenberger was sufficient to give the court jurisdiction over the property claimed to have been attached or garnished. The district court found in the case of Axman v. Dueker that Ziegler had a lien for \$565.05, by virtue of the attachment and garnishment proceedings instituted in the case of Ziegler v. Pfaffenberger, upon the note sued on. It would seem from the record that a trial was had before the court, and the plaintiff in error in this case was given a judgment for the balance due on the note executed by Dueker to Pfaffenberger, after deducting the amount of Ziegler's lien, acquired by virtue of the attachment and garnishment proceedings. We stated that there was sufficient in the record, in our opinion, to give the court jurisdiction. This is as far as we think we are called upon to go in this case. Had the question of the sufficiency of the service, raised in the original case of Ziegler v. Pfaffenberger, been brought to this court by proceedings in error, we might have held otherwise. But the garnishee was ordered by the district court to appear and answer, after the sufficiency of the proceedings had been questioned by the original defendant. The garnishee answered without objection, and thus waived all defects to the process, unless they were of such a character as to render the proceedings absolutely void. The judgment in that case still stands unchallenged. 8 Amer & Eng. Enc. Law, 1118. The return of the sheriff stated that he received the order of attachment on the 12th day of May, 1887, and served the same by delivering a true and certified copy to William Dueker, with a written notice not to pay any money or turn over any property to the defendant Pfaffenberger until so ordered by the court. There may be a question as to whether this return would stand a contest by the garnishee, but we do not think it is void, and hence cannot be attacked in a collateral proceeding. We are aware that the decisions are conflicting. Some states have held that the appearance and answer of a garnishee waives any objection that might have been taken to the notice. Upon this proposition, see *Miller v. O'Bannon*, 4 Lea, 398; *Carter v. Koshland*, 12 Or. 493, 8 Pac. Rep. 556; *Lupton v. Moore*, 101 Pa. St. 318; *Pulliam v. Aler*, 15 Gr. 54; *Railroad Co. v. Taylor*, 81 Ind. 25; *Truitt v. Griffin*, 61 Ill. 27; *Reynolds v. Collins*, 78 Ala. 94; and *Hinkley v. Water-Power Co.*, 9 Minn. 56, (Gil. 44.) While we do not care to go to the extent that some of the authorities do upon the question of a volun-

tary appearance by the garnishee, still we think that the record in the case of Ziegler v. Pfaffenberger showed that the service was not void. The district court held that it was sufficient, and required the garnishee to answer, and we are of the opinion that the service upon the garnishee cannot be attacked in this case. It is further urged that the opinion stated that the defendant in this case made a special appearance for the purpose of contesting the jurisdiction of the court over the subject-matter of the action, when in fact no such appearance was made by either the defendant or plaintiff. The language of the opinion is not subject to the interpretation placed upon it by counsel. The opinion stated that the defendant made a special appearance in this case, referring to the case of Ziegler v. Pfaffenberger, and not to the case at bar. The motion for a rehearing will be overruled.

HORTON, C. J. All of the papers, pleadings, and notices in the case of Ziegler v. Pfaffenberger are not before us, or at least the record does not show they are. All presumptions are in favor of the rulings and judgment of the district court, and therefore I cannot say, upon the record as presented, that the court had no jurisdiction over the garnishee from the date of the service of the notice. Again, it does not seem to me that Mr. R. Axman purchased the note in controversy in good faith. He is a colorable owner only, not the actual holder. For these reasons I concur in the foregoing order denying a rehearing.

VALENTINE, J. With very great doubts I concur in overruling the motion for a rehearing, and in affirming the judgment of the court below.

JOHNSTON, J. I concur in the result.

(46 Kan. 581)

CHICAGO, K. & W. R. CO. v. O'CONNELL.

(*Supreme Court of Kansas. June 6, 1891.*)

PERSONAL INJURIES — EXEMPLARY DAMAGES.

In an action to recover damages for personal injuries, where there is no testimony showing that the negligence complained of is so gross as to amount to wantonness, and no willful or malicious acts are proven, it is error for the trial court to instruct the jury that "they are at liberty to award what are termed 'exemplary' or 'punitive' damages; that is, damages which are given, not on account of any special merit in plaintiff's case justifying the same, but as a warning and lesson to the defendant, to teach it greater respect and care for the rights and safety of others." The case of *Railroad Co. v. Kier*, 41 Kan. 671, 21 Pac. Rep. 770, cited and followed.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Chase county; FRANK DOSTER, Judge.

Geo. R. Peck, A. A. Hird, and C. N. Sterry, for plaintiff in error. Madden Bros., for defendant in error.

SIMPSON, C. The defendant in error brought an action in the district court of Chase county, Kan., against the plaintiff in error, to recover a judgment for a person-

al injury to himself, resulting, as he claimed, through the negligence of plaintiff in error. A trial was had to a jury, and a verdict of \$700 returned in favor of defendant in error for that amount, and costs, and this proceeding is to reverse that judgment. That portion of plaintiff's petition which sets out the negligence claimed, and concerning which evidence was offered at the trial, reads as follows: "That on or about the 13th day of March, A. D. 1888, the said defendant was engaged in the digging and constructing of a tank-well for its business near its line of road, and also near to its round-house between Strong City and Cottonwood Falls, in Chase county, Kan.; that the said plaintiff was in the employ of the said defendant railroad company as a laborer, among others, at said time, digging in said well, and filling dirt in boxes to be elevated out of said well; that said defendant had the furnishing, and it was its duty to furnish, all the appliances, machinery, structures, and conveniences in and about the digging, construction, and operation of said well; that over the top of said well there was erected a scaffolding attached to piles driven in the ground; that, between the four cross-timbers or beams that constituted the frame of said scaffolding, there was a square opening through which the boxes for elevating dirt out of said well ascended and descended; that on the top of the frame of said scaffolding there were two upright shafts or pieces of timber secured at the bottom of said frame, and immediately over the top of said well; that on the top of said pieces there was a cross-piece of timber, to which, about midway, was attached a pulley, through which said pulley and another one, attached to one of the upright shafts or pieces of timber above mentioned, the rope that elevated and lowered said dirt boxes passing into a windlass that was operated by a steam-engine that was stationed near said well for that purpose, and that said engine was operated by an engineer by the name of Scott Sharper; that, as fast as the dirt was taken out of said well by the operation of said appliances, it was deposited in a dirt-car that was run immediately over the top of the well to receive said dirt, and said dirt was conveyed away from said well in said dirt-car, and upon a track built for that purpose, and upon which said car ran; that it was necessary for the reasonable safety and proper security of the plaintiff herein, who was working in said well, that said square opening, immediately over the top of said well, be kept free and unimpeded, so that the rope should be, to the extent thereof, free and untrammelled in its operation; that said defendant, by its agents and servants, acting under power and authority from the defendant, did, in the doing of said things, carelessly and negligently, and without reasonable care and prudence in the premises, place three heavy planks or boards, loosely and insecurely fastened, and unsuitable and unfitted and improperly prepared for that purpose, upon the top of said well, upon the cross-beams aforesaid, thereby narrowing said square opening so that the rope could

easily come in contact with said heavy planks or boards; after having been so placed over the top of said well, were, by, said defendant, its agents and servants aforesaid, carelessly, negligently altered and changed, and the inside plank was changed, by cutting the same with an axe, so that a narrow and insufficient portion thereof only extended onto the frame on either end, and thereby rendering it less secure and more dangerous, hazardous, and perilous; and said defendant, by its agents and servants aforesaid, did negligently and carelessly suffer the said planks or boards to remain unsecured, and out of repair, and each and all of said boards or planks so carelessly and negligently placed and altered as aforesaid, and suffered to remain as aforesaid, were each and all extrahazardous and dangerous to the life and limb of persons working in said well,—all of which was well known, at all times, to said defendant, and its agents and servants aforesaid; that while the plaintiff herein was engaged in working in said well, and while a box was being elevated out of said well by means of the appliances aforesaid, said rope came in contact with said planks or boards situated and placed as aforesaid, and, without any warning or signal to plaintiff by said defendant, or any of its servants or agents, and by the force or violence of the contact, hurled one of said heavy planks or boards from its place down into the well, and upon the said plaintiff, which plank crushed, wounded, and maimed the hand of said plaintiff, breaking and dislocating the bones thereof; that the placing of the planks or boards hereinbefore mentioned, and the alteration of the same so as to render them less secure and more dangerous, and the allowing of the same to remain in the condition they were in at the time of the injury to plaintiff, were unknown to the plaintiff, but was known by the said defendant, its agents and servants, as aforesaid; and said defendant, its agents and servants as aforesaid, knew that the position of the plaintiff in said well was extra dangerous and hazardous to his life and limbs, by reason of said rope coming in contact with said plank, or either of them, and throwing the same upon said plaintiff in said well, and the same could have been known by the said defendant, its agents and servants, as aforesaid, by the exercise of reasonable and ordinary care in the premises; that the plaintiff's work in digging in said well and filling the boxes with dirt as aforesaid, was an extrahazardous and dangerous position, and required great diligence and care on the part of said defendant to guard against injury; that the placing of said planks as aforesaid, and the altering of the same as aforesaid, and the allowing the same to be out of repair as aforesaid, and the carelessness and negligence of defendant's engineer as aforesaid, and his incompetency, caused and produced plaintiff's injuries as aforesaid." To this petition the defendant below filed an answer containing a general denial, and the defense of contributory negligence, and upon the issues so made up the case was tried.

The defendant prepared certain special findings of fact in said cause to submit to the jury for them to answer; that, among the others, the following occurred: "How much, if anything, do you allow plaintiff as exemplary or punitive damages? How much do you allow plaintiff for compensatory damages? What amount, if any, do you allow plaintiff for medical and surgical care,—medical attendance? And thereupon, when said defendant was about to submit said questions, and the court had approved of their submission, the attorneys for plaintiff and defendant agreed in open court to submit said cause to the jury without argument, upon consideration that said special questions should be withdrawn, which condition was made by plaintiff's attorney; which agreement was made in open court, and carried into effect by defendant's withdrawing said questions; and thereupon said cause was submitted without argument to the jury. Thereupon the jury retired to consider of their verdict, and that afterwards, and on the 23d day of June, 1888, the jury returned into court their verdict, which is in words and figures following, to-wit: 'We, the jury impaneled and sworn in the above-entitled case, do upon our oaths find for the plaintiff, and assess the amount of his damages at \$700.'"

The material facts are that prior to the 13th day of March, 1888, the plaintiff in error dug a large well at its round-house between Strong City and Cottonwood Falls, and it also started a second one. This second well had been started in this way: A test well 6 feet square, and curbed with boards, had been sunk to a depth of 30 feet; that is, a well 30 feet in diameter, having this test well in its center, was started by digging down to a depth of from 8 to 10 feet, leaving this test well in the center. When the large well was sunk to a depth of from 8 to 10 feet, curbing was put around the inside, and then 4 piles, each 40 feet in length, were driven down, so that they formed a square that was 12 feet each way,—that is, from each pile to the other there was a distance of 12 feet, measured in any direction,—and in the center of this square was the test well. The tops of these piles, when sunk as far as they were to be sunk, were a little above the level of the ground; and, upon the tops being leveled and squared, a crib or frame-work of timbers was placed thereon, 12 feet square, except that the 2 timbers running east and west on each side extended to the ground. This crib was built up by timbers crossing each way on top of the first heavy timbers to a distance in height of some 3 or 4 feet. On the top of this crib were placed two upright timbers about 12 feet high, braced on each side to keep them upright, and another timber was placed upon the top of these 2 upright timbers, making a cross-beam. In the center of which was fastened a pulley. This pulley was directly over the center of the large well. A track was laid from the railroad track on the outside, and the same gauge as it, north, up onto this crib, so that the same ran from the south to north of the center of the well a few

feet. An engine located some 80 feet to the west of the well contained a drum for the purpose of winding up a rope running from it to a pulley at the foot of one of the upright posts, and from such pulley to the pulley over the center of the well, on the beam across these upright posts, from whence it hung down with an iron hook over the exact center of the large well. There were 3 dirt boxes, 3 feet square and 3 feet deep, which were made with movable bottoms, and chains running from the corners to a common center, into which the hook of this rope was fastened. The scheme was this: To lower these three dirt boxes, and, as fast as one would be filled, the hook at the end of the rope running over the pulley on the derrick would be fastened to the chains attached to the box, and, upon a signal from the men who attended to loading the box and fastening the hook to it, the engine in the engine-house would cause the drum to revolve, winding the rope up upon it, and thus causing it to hoist the box to the top of the opening on top of this crib, and up high enough to run a dirt wagon or buggy on this railroad track under it, when the bottom of the box would be unfastened, and the dirt would drop out of it into the wagon, which would then be run down the track, on the crib, off onto the railroad track. The opening through which the dirt boxes were hoisted was 4 feet 8 inches wide, and considerably longer north and south, making a hole probably 4 feet 8 inches east and west, and from 5 to 6 feet north and south. The top of this crib, outside of the hole, was planked over. On the north end of this railway track, which came from the railroad up onto this crib, were 3 planks, about a foot wide, 2 inches thick, and from 6 to 7 feet long. These 3 planks were nailed across the top of the scantling that held the track, for two purposes,—one to stop the dirt wagon or buggy from going any further north when it was run up empty, to receive the dirt from the dirt boxes; and the other to prevent the dirt falling out of this dirt wagon from falling back into the well, this dirt wagon being open on the north end.

The day before the injury occurred, upon completion of the crib and track, the rubbish and stuff of that kind had been hauled up out of the well in these dirt boxes, and on the morning of the injury they had commenced to raise the dirt out of the well in the manner described, and had, prior to the time of the injury, hoisted up from three to five boxes. The foreman in charge of the work, believing that these planks spoken about, on the north end of the railroad track, prevented the dirt wagon or buggy from running far enough to the north, took an axe, and either chopped out a piece on each track in the first plank so that the dirt wagon could go further to the north, or else split off a part of the first or south plank, to accomplish the same purpose. These planks were fastened to the scantling on which the track was laid by from five to seven spikes in each end. It was claimed by the plaintiff below that the foreman split off so much of the first or south plank as to leave the remainder held by one

spike in each end. Immediately prior to the accident, and after this plank had been cut, the plaintiff below and two other employees had taken an empty dirt box, and placed it on the north-west side of the well, outside of the square made by the pilings, within about two feet from the outside embankment, and had there filled it. This box, when it was carried to the place where it was filled, was carried by plaintiff and his comrades, and had the rope hitched to it. When it was placed, the rope ran, from its connection with the box, on a slant, so that it bound on this plank that had been cut. This dirt box when filled weighed about 1,200 pounds. When this dirt box was filled the plaintiff gave the signal to hoist away, and took hold of the box to steady it. As the engine started and the rope straightened out it threw this plank that had been chopped into, up into the air, so that it fell on the north side of the crib, into the well, striking the plaintiff on his hand, breaking two or three of the bones; and this was the injury complained of.

On the part of the plaintiff below it was claimed that it was negligence for the foreman to have chopped into this plank so as to have left it fastened with any less spikes than it originally had to hold it in its position, and that such negligence was the direct cause of plaintiff's injury. On the other hand, the defendant claimed that plaintiff's injury was solely and entirely caused by his own negligence, or the negligence of his co-employees combined, in this: That it was never intended, in putting these planks down, that the rope which hoisted the bucket should ever bind upon or come in contact with these planks in hoisting the bucket; and the men were particularly warned and cautioned not to set the bucket so far to one side as to have the rope bind upon any of the timbers. If the rope hung straight down, it is an undisputed fact that it would be from 3 to 3½ feet from it to this plank. If the dirt boxes were set anywhere inside of the square made by the piling, between the piling and the curbing of the test well, the rope, when hitched to the dirt box, would not bind or rub upon this plank or any of the timbers. It was not expected or understood that the rope would catch on to these planks, and they were not put there for any purpose of that kind. Plaintiff's injury was such that, under ordinary circumstances, he would be expected to have recovered from such injury in the course of about three months. There was some conflict in the evidence as to the warning of the foreman to the men not to set the bucket so far at the side as to make the rope bind upon the timbers, but the preponderance on that question was with the plaintiff in error. There was no evidence as to the value of the attendance of a physician, or as to his charges, or as to the liability of the defendant in error for his services. Prior to the accident, the defendant was receiving about \$1.55 per day for his labor. The accident occurred on the 13th day of March, 1888, and the cause was tried on the 22d day of June, 1888. All three of the surgeons examined, one of whom was in attendance on the injured

man, testified that the injury was not permanent. Without commenting at length on the facts, we are of the opinion that the case was not properly presented to the jury by the instructions, and that there was material error committed by the trial court in refusing certain instructions asked for by the plaintiff in error. No instruction was given respecting the burden of proof, and one that fairly stated that the burden was on the plaintiff to prove the negligence alleged was refused. One contention of the plaintiff in error at the trial was that the employees, embracing the defendant in error, were several times warned of the danger there might be if they set the bucket so far back that the rope would bind upon the timber, and, as we have said, there was conflicting evidence about it.

The defendant in error requested the court to give an instruction, numbered 6 in the record, that reads as follows: "The jury are instructed that if the plaintiff disregarded any warnings or cautions given to him, either by the foreman in charge or by a co-laborer, and that the disregard of such warning and caution in any way contributed to the injury complained of, that then in such case the plaintiff cannot recover." This was refused, and no notice taken of such fact by any instruction given, except that the court did instruct the jury that "an employee is bound to obey the orders of the person placed in authority over him, and, if he disobeys, and an injury results to him, he cannot recover for such injury." There is nothing in the record that any orders had been disobeyed. There is evidence that a caution or warning had been given repeatedly to the men, in the presence and hearing of the defendant in error, about the danger attending an improper location of the dirt bucket. This warning could not be tortured into an order, and the defendant in error's failure to heed it into a disobedience. This question was not so presented by the instructions that the jury could comprehend its import. The instructions did not notice that the defendant in error was charged with contributory negligence, and that there was some evidence tending to prove the same. No definition of "contributory negligence" was given or rule stated to guide the jury on the only defense made by the plaintiff in error. A special instruction was requested by the defendant in error which fairly embodied the law applicable to the state of facts as set forth in the record, and it would have been better, perhaps, to have also given the instruction asked. There are other instructions given that are subject to grave criticism, and others offered and refused that ought to be given, but they are unimportant when compared to this instruction. The jury were told by the trial court in these words: "If you believe from the evidence that the negligence of the defendant was of a gross and reckless character, and defendant's conduct lacking in all elements of caution and regard for the safety of the plaintiff, you are at liberty to award what are termed 'exemplary' or 'punitive' damages; that is, damages which are given

not on account of any special merit in plaintiff's case justifying the same, but as a warning and lesson to the defendant, to teach it greater respect and care for the rights and safety of others." Now, we have searched this record in vain to find the utterance of a single witness, or the recitation of any one particular fact, which could, by fair construction or just inference, be considered as tending to establish wanton negligence, or gross or reckless conduct, upon the part of the servants and employees of the railroad company. There is absolutely no testimony to warrant such an instruction. For this alone, if there were no other reasons, this case must be reversed, and a new trial ordered. *Railroad Co. v. Kier*, 41 Kan. 671, 21 Pac. Rep. 770; *Railroad Co. v. Cutter*, 19 Kan. 83; *City of Parsons v. Lindsay*, 26 Kan. 426; *Railroad Co. v. Peavey*, 29 Kan. 163. It is recommended that the judgment be reversed, and the cause remanded, with instructions to grant a new trial.

PER CURIAM. It is so ordered, all the justices concurring.

(46 Kan. 524)

SHERMAN CENTER TOWN CO. v. FLETCHER.

(*Supreme Court of Kansas*. June 6, 1891.)

CONTRACTS OF CORPORATION—ESTOPPEL.

A corporation which has enjoyed the benefits of a contract cannot claim that it was *ultra vires* and void.

Error from district court, Sherman county; LOUIS K. PRATT, Judge.

*Hardy & Stirling*, for plaintiff in error. *J. W. Lewis*, for defendant in error.

PER CURIAM. This was an action brought in the district court of Sherman county by John C. Fletcher against the Sherman Center Town Company, upon a certain contract for the recovery of \$200; and the plaintiff recovering that amount in the district court with interest and costs, the Sherman Center Town Company then, as plaintiff in error, brought the case to this court for review. Every material question involved in this case, we think, has already in effect been decided by this court in the following cases, to-wit: *Town Co. v. Morris*, 43 Kan. 282, 23 Pac. Rep. 569; *Town Co. v. Swigart*, 43 Kan. 292, 23 Pac. Rep. 569; *Town Co. v. Russell*, 26 Pac. Rep. 715, (decided by this court on April 11, 1891.) Upon the authority of the foregoing cases the judgment of the court below will be affirmed. All the justices concurring.

(46 Kan. 571)

CAREY et al. v. REEVES et al.

(*Supreme Court of Kansas*. June 6, 1891.)

BOUNDARIES OF STATE—SERVICE BY PUBLICATION—FORECLOSURE OF MORTGAGE.

1. On the 17th day of January, 1861, the region of country known as "Pike's Peak" was within the territory of Kansas.

2. Where an affidavit for constructive service by publication, filed on January 17, 1861, showed upon its face that the defendant resided within the region of country known as "Pike's Peak" at the time that the action was commenced and the affidavit filed, it was not sufficient to

give the district court jurisdiction, constructive or otherwise, over the defendant, upon the ground that he was a non-resident of the territory of Kansas. Under the provisions of the Code of Civil Procedure of 1859 a plaintiff could not upon such an affidavit proceed to make service by publication, and the district court had no jurisdiction to foreclose a mortgage in such a case where the only service of summons was by publication upon such an insufficient affidavit, and no personal or other appearance was made by the defendant. Comp. Laws 1862, c. 26, tit. 4, 5, and especially sections 52, 78, 79. See, also, tit. 11, § 883, of the same chapter.

(*Syllabus by the Court*.)

Error from superior court, Shawnee county; W. C. WEBB, Judge.

Carey and Bray commenced on October 26, 1883, this action to quiet title to a quarter section of land in Shawnee county. They alleged ownership and actual possession. The claim of title of each side is set out in the special findings as follows:

Conclusions of fact: "First. That April 26, 1859, one James McCamman duly entered and paid for at the United States land-office, according to law, the south-east quarter of section 15, township 18 south, of range 15 east, in Shawnee county, Kansas, and that the proper officer executed and delivered to said McCamman a duplicate receipt for said land in the manner provided by law, at the time and place aforesaid. Second. That afterwards, on April 26, 1859, the said James McCamman executed and delivered to one Reuben H. Farnham his certain mortgage in writing for the purpose of securing the payment of \$223.20 when the same should become due and payable, according to the terms of a certain promissory note in writing, executed by McCamman to said Farnham, which mortgage described the following land, to-wit, the south-east quarter of section 15, township 15, range 15 east. Third. That afterwards, on January 17, 1861, the said Reuben H. Farnham filed his petition as plaintiff in the clerk's office of the district court of Shawnee county against the said James McCamman as defendant for the purpose of reforming said mortgage according to the facts, and to foreclose said mortgage upon the land now in controversy in this action, and prayed for that said premises might be sold for the payment of the principal and interest of said note. Fourth. That afterwards, on 17th day of January, 1861, the said Reuben H. Farnham, by Wilson Shannon, his attorney, for the purpose of securing service of summons by publication in said action to foreclose said mortgage, filed in the office of the clerk of the district court the following affidavit, and none other. 'Reuben H. Farnham vs. James McCamman. Territory of Kansas, Shawnee county. District court sitting in said county, second judicial district. Wilson Shannon, being duly sworn, deposeth and saith that he is the attorney of record for the above-named plaintiff in the above-entitled cause; that the said plaintiff is a resident of the state of New York, and is now absent from his territory; that the said plaintiff, on the — day of January, A. D. 1861, filed in said court a petition against the said James McCamman, defendant, praying that certain lands sit-

uate in said county may be decreed to be sold to satisfy a mortgage given by the said defendant to the said plaintiff to secure the payment of a certain sum of money therein named; and that the said defendant has removed from the said county of Shawnee, and now resides in that region of country known as "Pikes Peak," and that service of a summons cannot be made on the said defendant within this territory, and that the plaintiff wishes to obtain a service on said defendant by publication; and further this affiant saith not. [Signed] WILSON SHANNON. Sworn to and subscribed before me, this 14th day of January, A. D. 1861. M. G. FARNHAM, Notary Public. [Seal.] Filed January 17, 1861. L. McARTHUR, Clerk. By H. McARTHUR, D. C.' *Fifth.* That afterwards, to-wit, October 9, 1861, the said Reuben H. Farnham, plaintiff in said action, filed the following notice of publication and proof of publication in said action in the clerk's office of said court, which notice of publication is in words and figures following: 'Notice. James McCamman, late of the county of Shawnee and territory of Kansas, will take notice that Reuben H. Farnham did on the 17th day of January, A. D. 1861, file his petition in the district court sitting in and for the county of Shawnee, in the second judicial district and territory of Kansas, against the said James McCamman, defendant, setting forth that the said James McCamman gave a mortgage to said plaintiff on the south-east quarter of section No. 15, of township No. 13, of range No. 15 of the lands subject to entry in the Pawnee land district, Kansas territory; that by the mutual mistake of the parties said land was described in said mortgage as being in township No. 15, instead of township No. 13. The object of said mortgage was to secure the payment of \$180, according to a certain note referred to in said mortgage. Said petition prays that said mortgage may be reformed, and said mistake corrected, and that said defendant may pay said sum of money, with the accruing interest which is now claimed to be due, or that said premises may be sold to pay the same. And the said James McCamman is notified that he is required to appear and answer said petition on or before the 4th day of March, A. D. 1861, or the same will be taken as confessed. REUBEN H. FARNHAM. By WILSON SHANNON, His Attorney. Attest: L. McARTHUR, Clerk. By H. McARTHUR, D. C.' And which proof of publication of the foregoing notice is in words and figures following: 'State of Kansas, county of Shawnee: J. F. Cummings, being duly sworn, upon oath says that the notice hereto annexed was published for seven weeks in the Topeka Tribune, a newspaper published and printed in the city of Topeka, county of Shawnee, the first publication being made on the 19th of January, 1861; the 2d, January 26th, 1861; the 3d, February 2d, 1861; the 4th, February 9th, 1861; the 5th, February 16th, 1861; the 6th, February 23d, 1861; the 7th, April 2d, 1861, and further saith not. [Signed] J. F. CUMMINGS. Subscribed in my presence, and sworn to before me, this 9th day of October, A. D. 1861. JAMES

FLETCHER, Clerk. By H. McARTHUR, D. C. Printer's fees, \$10. Filed October 9, 1861. JAMES FLETCHER, Clerk. By McARTHUR, D. C.' *Sixth.* That January 17, 1861, and for some time previous thereto, the said James McCamman, defendant in the action commenced by said Reuben H. Farnham for the purpose of foreclosing said mortgage, resided in the town of Denver, then situated in Arapahoe county, in the territory of Kansas, and there continued to reside until after the 29th day of January, 1861, when Kansas became a state, and said town of Denver was, by law, excluded from said boundaries. *Seventh.* That afterwards, on October 9, 1861, at the regular term of said district court begun and held in said Shawnee county, the said action of said Reuben H. Farnham against James McCamman for the foreclosure of said mortgage came regularly on for trial, and on the consideration of said court there was found to be due to said plaintiff, Reuben H. Farnham, from said defendant, James McCamman, the sum of \$390.20; and that all the allegations in said plaintiff's petition were true as therein stated, and a decree was entered reforming said mortgage, and for the sale of the south-east quarter of section 15, township 13, range 15, in Shawnee county, as will more fully appear by a copy of said judgment and decree attached to and made a part of plaintiff's petition in this action. *Eighth.* That afterwards an order of sale in pursuance to said decree was issued by the clerk of said court to the sheriff of said county, and the said sheriff of Shawnee county returned said order of sale, showing by his said return indorsed thereon that said sheriff sold said real estate according to law, August 5, 1863, to said Reuben H. Farnham, and said return indorsed on said order of sale having been afterwards examined by said court, and the court being satisfied on examination of said proceedings that said sheriff had made said sale in all things in conformity to law, the court confirmed said sale, and ordered said sheriff to make and deliver a sheriff's deed for said premises to the said purchaser, as will more fully appear by examination of the order of the court confirming said sheriff's sale, attached to and made a part of plaintiff's petition in this action. *Ninth.* That afterwards, to-wit, the said sheriff executed and delivered to said Reuben H. Farnham a sheriff's deed for said premises, and which deed is in form and substance in due form of law, and said sheriff's deed was recorded in the office of the register of deeds of Shawnee county, on —, 186—. *Tenth.* That afterwards, to-wit, \* \* \*, the said Reuben H. Farnham conveyed said premises to \* \* \* by a deed of conveyance, and the defendant holds title to said premises through a regular claim of title from Reuben H. Farnham, who held the same by virtue of said sheriff's deed, unless the plaintiff's title is superior to defendant's title. *Eleventh.* That no summons was served on said James McCamman in said action by the sheriff or other officer or person, except the service of summons by publication referred to in conclu-

sion of fact No. 5, and no other affidavit was made by the plaintiff, Reuben H. Farnham, or any one in his behalf, or for him, for the purpose of procuring service of summons by publication, except the affidavit of Wilson Shannon, copied in conclusion of fact No. 4. *Twelfth.* That no other affidavit or proof of publication of said service of summons by publication was filed in said action except the affidavit of J. F. Cummings, copied in conclusion of fact No. 5. *Thirteenth.* That the said James McCamman, defendant in said action, did not appear to said action in person or by attorney, nor did the said James McCamman know that said action had been commenced in the Shawnee district court by Reuben H. Farnham for the purpose of foreclosing said mortgage for more than ten or fifteen years after said property had been sold by the sheriff under said decree to Reuben H. Farnham, and during all said time, from January 17, 1861, until after the conveyance to Cornelius Bray, as stated in the next finding, ten or fifteen years thereafter, said McCamman had no knowledge of the pendency of said action in said court, or that said premises had been sold by the sheriff and purchased by Farnham. *Fourteenth.* That August 16, 1881, the said James McCamman sold and conveyed said premises, by a deed of conveyance, to the plaintiff C. Bray. *Fifteenth.* That said C. Bray sold and conveyed the undivided one-half of said premises, by a deed of conveyance, to the plaintiff Geo. W. Cary, and the said Geo. W. Cary and C. Bray are the owners in fee of the title from said James McCamman, the grantee of the government of the United States, for said premises, unless the sheriff's sale made in pursuance of the judgment made by the consideration of the court in the action of the said Reuben H. Farnham against James McCamman divested the said James McCamman of the title to said premises heretofore described. *Sixteenth.* That at the date of the commencement of this action the plaintiffs were in the actual possession of said premises as alleged in their petition. *Seventeenth.* That prior to the time the plaintiff went into the possession of the premises described in plaintiff's petition the said premises were vacant and unoccupied land. *Eighteenth.* That the defendants have paid all the taxes on said premises for the last twelve years. *Nineteenth.* That the patent issued by the government of the United States to James McCamman for the south-east quarter of section 15, township 13 south, of range 15 east, was dated June 1, 1860. *Twentieth.* That neither the said James McCamman, nor the said Reuben H. Farnham, nor any subsequent grantee taking under said sheriff's deed, nor either of the defendants, has at any time been a resident of the state of Kansas since the date of its admission as a state."

The following are the legal conclusions: "The questions of law in this action are: *First.* Was the affidavit of Wilson Shannon, filed in the clerk's office of the district court January 17, 1861, described in conclusion of fact No. 4, in the action commenced by Reuben H. Farnham against

said James McCamman, for the purpose of reforming and foreclosing the mortgage hereinbefore described, sufficient in law to authorize service by publication in said action against the defendant, James McCamman, under section 79, Code of Procedure 1859, (Compiled Laws of 1862, c. 26?) *Second.* Was the affidavit of J. T. Cummings, publisher of the newspaper, sufficient in law to show that the publication notice was made 'six consecutive weeks?' as required by law in such actions? *Third.* If both these propositions are found in the affirmative, then the plaintiffs must fall in this action. If either of these propositions are solved in the negative, then the court did not have jurisdiction to decree a sale of the land in controversy described in plaintiffs' petition, and the plaintiffs are entitled to recover in this action. *Fourth.* That the issue of law is against the plaintiffs and in favor of the defendants." To the conclusions of law in favor of the defendants and against the plaintiffs the plaintiffs excepted, and bring the case here. *G. C. Clemens*, for plaintiffs in error. *H. H. Harris*, for defendants in error.

HORTON, C. J., (after stating the facts as above.) The United States issued a patent to the land in controversy to James McCamman on the 1st day of June, 1860, and the findings are to the effect that the plaintiffs are the owners by conveyances from McCamman, unless the judgment of October 9, 1861, of Reuben H. Farnham against James McCamman and the sale of the land thereunder divested McCamman of his title. When this case was here before, (Carey v. Reeves, 32 Kan. 718, 5 Pac. Rep. 22,) Mr. Justice VALENTINE, speaking for the court, said: "When this affidavit [for publication service] was filed, is not shown. It is alleged that the action was commenced on January 17, 1861, and the affidavit shows that the petition was filed 'on the — day of January, 1861;' but there is nothing to show when the affidavit was in fact filed. If it was filed prior to January 29, 1861, the region of country known as 'Pike's Peak,' or a portion thereof, was in Kansas; but if the affidavit was filed after January 29, 1861, then such region was not in Kansas, and no part thereof was in Kansas. \* \* \* We suppose that when the plaintiffs in this action say that the foreclosure action was commenced on January 17, 1861, they mean that the petition was filed on that day. But when the service was made is not shown; nor is it shown when the judgment was rendered. It may have been in 1861, or in 1862, or in some subsequent year. We cannot say that the court below erred in deciding against the plaintiffs in this particular." At the last trial it was shown, and the court expressly found, that the affidavit for publication was filed on the 17th day of January, 1861. This was while Kansas existed as a territory and before its admission as a state into the Union. It was also shown, and expressly found at the last trial, that on January 17, 1861, and for some time previous thereto, James McCamman resided in Denver, and within the territory of Kansas, and continued to reside there aft-



er the 29th of January, 1861, when Kansas was admitted as a state. The former decision of this court in this case at its July term, 1884, (32 Kan. 718, 5 Pac. Rep. 22,) is not decisive or controlling, because the facts now presented in the record are materially different from those which we considered at the time the former opinion was handed down. The affidavit for publication stated that the defendant, James McCamman, "has removed from the said county of Shawnee, and now resides in that region of country known as 'Pike's Peak,' and that service of summons cannot be made on him within this territory." At the time that Kansas was organized as a territory its western boundary extended "to the eastern boundary of the territory of Utah, on the summit of the Rocky mountains." We must take judicial notice of where "the region of country known as 'Pike's Peak'" existed on the 17th of January, 1861. *State v. Telsse*, 30 Kan. 478, 2 Pac. Rep. 650; *State v. Baldwin*, 36 Kan. 1, 12 Pac. Rep. 318; *Railroad Co. v. Burge*, 40 Kan. 736, 21 Pac. Rep. 589. Lippincott's Pronouncing Gazetteer of the World, (published in 1856,) referring to Kansas, said: "It is a territory of the United States of America, formed by an act of congress passed May, 1854, lying between 37° and 40° N. lat., and between about 94° 30' and 107° W. lon. About 100 miles of the W. portion lies between 38° and 40° N. lat. It is bounded on the N. by Nebraska Territory; E., by the states of Missouri and Arkansas; S., by Indian Territory and New Mexico; and W., by New Mexico and Utah. This territory is about 630 miles in length from E. to W., and 208 in its widest, and 139 in its W. part, including an area of nearly 114,798 square miles. The Rocky mountains separate it from Utah, and the Missouri river forms a small part of the N. E. boundary." The *New American Cyclopædia* (volume 10, p. 103, published in 1860) described Kansas as follows: "It is a territory of the United States, lying between lat. 37° and 40° N. and long. 94° 40' and 106° 50' W., bounded N. by the territory of Nebraska, E. by the state of Missouri, S. by the Indian Territory and New Mexico, and W. by New Mexico and Utah. With the exception of the N. E. corner of the territory, where the boundary line follows the irregular course of the Missouri river, its shape is that of a parallelogram as far W. as long. 103°. The boundary then follows this meridian N. to lat. 38°, and runs W. along that parallel to long. 106° 50'; thence N. to about lat. 39° 20', E. to long. 105° 40', and finally N. again until it meets the Nebraska frontier. Length, E. and W., 550 M.; breadth, E. of long. 103°, 208 M.; W. of that line, 139 M.; area, 114,798 Sq. M." The *Encyclopædia Britannica*, (volume 23, p. 4796,) in describing the Rocky mountains, says: "Gray's peak (14,341 feet) is the highest point in this range, (the front, or Colorado range,) but, although on the continental divide, it is too far west to be visible from the plains. This divide, which separates the Atlantic water from those of the Pacific, follows the front range as far as Gray's peak, where it is deflected westward for

20 miles to the Sawatch range, which it follows for about 75 miles. In this deflection the divide passes between Middle and South parks, the lowest pass in this part being that called the 'Tennessee,' (10,418 feet,) which leads from the head of the Arkansas to the Grand River branch of the Colorado. The Sawatch range is one of the highest and best marked chains in the Rocky mountains. It lies west of the head of the Arkansas; and its dominating peaks, along the whole range, exceed 14,000 feet. The most northerly of these, the Mountain of the Holy Cross, (14,176 feet,) was so named on account of the existence on its eastern flank of a large snow-field lying in two ravines which intersect each other at right angles, in the form of a cross, and which in summer is conspicuously visible from a great distance. The highest point is Mount Harvard, (14,375 feet,) and the passes range from 12,000 to 13,000 feet. The continental divide follows the Sawatch range to its southern end, in lat. 38° 20', and then runs in a south-westerly direction for about 75 miles, over a high region without any distinctly marked range. Here it turns, and, running south-easterly, follows the crest of the San Juan range, which at many points rises above 13,000 feet." Not only as a matter of fact is the summit of the Rocky mountains (the western boundary of the territory of Kansas) a long distance west of Pike's Peak, but it was so generally mentioned in the gazetteers, geographies, and encyclopædias in general use in 1861. Therefore "the region of country known as 'Pike's Peak'" on the 17th of January, 1861, and until Kansas was admitted into the Union, on January 29, 1861, was within the territory of Kansas, and generally known to be within the territory of Kansas. The affidavit for service by publication showed upon its face that James McCamman had removed from the county of Shawnee and resided "in the region of country known as 'Pike's Peak.'" That region was within, not without, the territory of Kansas at the date of the filing of this affidavit; therefore McCamman was not a non-resident of the territory of Kansas at the time the service by publication was made; therefore such publication was void,—that is, it was invalid as a constructive service, because the affidavit for publication affirmatively showed that the defendant resided within the territory of Kansas, and it was not stated that he had departed from the territory or the county of his residence with the intent to delay or defraud his creditors, or to avoid the service of a summons, or to keep himself concealed. It has already been decided by this court that it cannot be shown in a collateral attack that the affidavit for publication is untrue. *Ogden v. Walters*, 12 Kan. 282; *Rowe v. Palmer*, 29 Kan. 337; *Carey v. Reeves*, 32 Kan. 718, 5 Pac. Rep. 22, but that is not this case. In this case the affidavit is insufficient upon its face. It does not state facts to authorize any publication service; therefore no personal or constructive service was ever had upon McCamman prior to the rendition of the judgment against him on the 9th day of October, 1861. *Comp. Laws*,

c. 26, tit. 4, 5, §§ 52, 78, 79. See, also, title 11, § 385, same chapter. Upon the findings of fact the judgment must be reversed, and the cause remanded with direction to the district court to render judgment for the plaintiffs and against the defendants. This direction will not prevent the defendants from recovering any taxes paid by them, if any have been paid, while the land has been in controversy in any of the courts of this state. *Seas. Laws 1876, c. 34, § 149, par. 7004, Gen. St. 1889; Wood v. Gruble, 31 Kan. 69, 1 Pac. Rep. 277. All the justices concurring.*

(46 Kan. 550)

ROSS v. HIXON.

(Supreme Court of Kansas. June 6, 1891.)

MALICIOUS PROSECUTION—PROBABLE CAUSE.

The finding of an examining magistrate that "an offense had been committed, and that there was probable cause to believe the defendant guilty thereof," is only *prima facie* evidence of probable cause, in an action for malicious prosecution brought by such defendant against the prosecuting witness.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Bourbon county; C. O. FRENCH, Judge.

*Hulett & Fletcher* and *Cory & Hulbert*, for plaintiff in error. *Hill & Chenault*, for defendant in error.

SIMPSON, C. On the 17th day of January, 1887, Hixon filed an affidavit before a justice of the peace in Bourbon county, charging Ross with having mixed certain poison with a quantity of flour, with the intent and for the purpose of causing the death of certain persons. Upon said complaint a warrant was issued, and Ross was arrested. A preliminary trial was had on the 4th of February before the justice who issued the warrant. At the preliminary examination 12 witnesses were examined for the state, and 7 for the defendant. After the hearing of all the evidence, the justice bound Ross to appear at the district court and answer the charge. He failed to give bond, and was committed to jail. The finding of the justice was as follows: "After hearing the evidence, I find that said offense has been committed, and that there is probable cause to believe the defendant guilty thereof." Ross was in jail from the 17th day of January, 1887, until May 2, 1887. On the latter date, the district court of Bourbon county being in session, the county attorney filed a statement showing cause for non-prosecution, and Ross was discharged. On the 8th day of August, 1887, he commenced this action for malicious prosecution against James Hixon, the prosecuting witness. Trial was had at the May term, 1888. The plaintiff in error offered evidence showing the proceedings before the justice of the peace on the criminal charge, and tending to prove every material allegation in such an action. When the plaintiff rested, the defendant Hixon introduced a large number of witnesses, when he was interrupted by the court. The trial was stopped, and a verdict was ordered for the defendant. The jury re-

turned a verdict for the defendant, and a motion for a new trial was overruled. The record itself discloses no reason for the ruling of the court, but counsel agreed that the reason assigned by the trial court was that the examining magistrate had made a finding of probable cause, and that such finding was conclusive upon that question. It is further claimed by counsel for the defendant in error that the trial court made the further statement: "That, as the petition does not charge fraud or undue means in obtaining the finding of probable cause by the magistrate, the same cannot be attacked." The sole question discussed in the oral argument of counsel for defendant in error, and the briefs on both sides, is as to the weight to be given to the finding of the examining magistrate as to whether it is *prima facie* or conclusive on the question of probable cause, and whether or not, in either case, the finding must be attacked for fraud or undue means by proper allegations in the petition.

1. In the case of *Sweeney v. Perney*, 40 Kan. 102, 19 Pac. Rep. 328, this court incidentally noticed the conflict in authorities as to whether or not proof of arrest, commitment and indictment is *prima facie* proof of probable cause; and the case of *Ricord v. Railroad Co.*, 15 Nev. 167, was cited on one side, and that of *Womack v. Circle*, 29 Grat. 192, on the other. The question in this case is closely allied to this controversy, but authorities cannot be found on both sides of this question. In the case of *Bauer v. Clay*, 8 Kan. 585, Justice VALENTINE, says: "The proof showing that the justice ordered that Clay should be bound over for his appearance at court, or, in default of bail, that he should be committed to the county jail, is only *prima facie*, and not conclusive, evidence of probable cause." The cases of *Ash v. Marlow*, 20 Ohio, 119, and *Ewing v. Sanford*, 19 Ala. 605, are cited in support. The force of this decision is sought to be destroyed by counsel for defendant in error by an assertion that it is *dictum*. It is sometimes difficult to draw the line between what is authoritative and what is not in a judicial opinion. The report of the case does not give either the pleadings, the assignment of errors, or the briefs, but it is evident that the question was necessarily involved in the rulings of the trial court; and this court thought it necessary to give this as one of the reasons for affirmance of the judgment below, because, if counsel for defendant in error are now right in their contention, Clay had no cause of action, and the case was decided wrongfully in both the trial and the appellate courts. However the rule may be in cases in which the magistrates have jurisdiction to hear and pass judgment, we are satisfied that the case of *Bauer v. Clay* states the true rule in cases in which the magistrates have only power to bind over. This rule is upheld by the cases of *Ash v. Marlow*, 20 Ohio, 119; *Ewing v. Sanford*, 19 Ala. 605; *Raleigh v. Cook*, 60 Tex. 438; *Ricord v. Railroad Co.*, 15 Nev. 167; *Hale v. Boylen*, 22 W. Va. 234; *Bacon v. Towne*, 4 Cush. 217; *Spalding v. Lowe*, 56 Mich. 366, 23 N. W. Rep. 46; *Ganea v.*

Railroad Co., 51 Cal. 140; Diemer v. Herber, 75 Cal. 287, 17 Pac. Rep. 205. These are all express adjudications on that particular question. In one of these cases, decided in 1885, being that of Spalding v. Lowe, 56 Mich. 366, 23 N. W. Rep. 46, the defendant requested the trial court to instruct the jury as follows: "It appears from the proofs in this case that an examination was had upon the charge made against Spalding, and that the justice upon such examination determined that this offense charged against Spalding had been committed, and that there was probable cause to believe said Spalding guilty thereof. This was a judicial determination the justice was authorized to make, and unless such action and determination of the justice was corrupt or collusive, or was wrongfully procured by the defendant herein, it is final as to the question of probable cause, and your verdict should be for the defendant." The trial court refused to so instruct the jury, and this refusal was assigned as error in the supreme court, but that court say, (page 372, 56 Mich., and page 49, 23 N. W. Rep.): "No authority has been produced in support of it, and we think none exists." We have been unable to find a reported case in which the rule is held as claimed by counsel for defendant in error. There are cases that so hold when the magistrate has power to render a judgment of conviction. How much weight as proof of probable cause shall be attributed to the judgment of a court in an original action, when subsequently reversed for error, is elaborately discussed by the supreme court of the United States in the case of Crescent City Live-Stock Co. v. Butchers' Union, etc., Co., 120 U. S. 141, 7 Sup. Ct. Rep. 472,—a case much relied on by counsel for defendant in error. To our mind, however, the distinction between that case and the one at bar is plain and distinct. If the magistrate in Bourbon county had possessed the statutory power to hear the evidence and determine the guilt or innocence of the defendant, and to punish by fine and imprisonment if guilt was found, then his finding and judgment would come within the rule established by that case to be the law of the land. The question in this case is how much weight, as proof of probable cause, shall be attributed to the finding of an examining magistrate that "an offense had been committed, and that there is probable cause" to believe the defendant guilty thereof, when the defendant is subsequently discharged, the prosecution against him confessedly ended, and he has instituted a suit for malicious prosecution against the complaining witness. In the one case there is a solemn judgment rendered by a court having full and complete jurisdiction both of the parties and subject-matter, binding on all until reversed on appeal or error. In the other case there is a finding, in effect, that sufficient facts have been developed that justifies a magistrate in sending the parties before a court competent to ultimately deal with the question of guilt or innocence. Again, while a conviction is generally conclusive of probable cause, yet it may be over-

come by a showing that it was procured by fraud, undue means, or the false testimony of the prosecution. Womack v. Circle, 29 Grat. 192; Olson v. Neal, 63 Iowa, 214, 18 N. W. Rep. 863; Cloon v. Gerry, 13 Gray, 201; Whitney v. Peckham, 15 Mass. 243; Peck v. Chouteau, 91 Mo. 138, 3 S. W. Rep. 577; Bowman v. Brown, 52 Iowa, 437, 3 N. W. Rep. 609; Palmer v. Avery, 41 Barb. 290; Richey v. McBean, 17 Ill. 63; Payson v. Caswell, 22 Me. 212; Herman v. Brookerhoff, 8 Watts, 240; Jones v. Kirksey, 10 Ala. 839. In such a case the petition in the action for malicious prosecution must directly attack the judgment of conviction, or it will be suicidal. It is therefore unimportant whether the words used by the court in Bauer v. Clay are *dicta* or authoritative in that case, as they express the law as universally held by all courts of last resort that have spoken on this subject. It follows that the other suggestion of counsel, that the finding of the magistrate must be directly attacked in the petition for fraud or undue means, is without force; because, as that finding is only *prima facie*, all that is necessary for the plaintiff to do to win is to overthrow it by a preponderance of evidence. It can be fairly said that there was evidence submitted at the trial by the plaintiff in error, other than the transcript of the proceedings before the examining magistrate, bearing upon the question of probable cause, which the court below permitted to go to the jury, from which they might have found that the *prima facie* case made by the magistrate's finding was overcome. It is recommended that the judgment of the district court of Bourbon county be reversed, and the cause remanded, with instructions to grant a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 501)

REED v. STATE *ex rel.* HERTLEIN.

(Supreme Court of Kansas. June 6, 1891.)

BASTARDY—CREDIBILITY OF WITNESSES.

An instruction, in a bastardy case, which informs the jury that the interests of the mother of the child and the defendant in the case are not equal; that the mother is a mere witness for the state in a proceeding to compel the father of the child to contribute to its support, while the defendant has a direct pecuniary interest in the result of the proceeding; and also states that "the defendant, being liable to be charged with such support, is directly interested in the result, while the mother has no such interest,"—does not correctly state the interests of the mother and reputed father of the child in the result of such proceeding, and is therefore erroneous.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Finney county; A. J. AB-BOTT, Judge.

G. L. Miller and A. J. Hoskinson, for plaintiff in error. H. F. Mason, for defendant in error.

STRANG, C. This was an action for bastardy, tried in the district court of Finney county on September 4, 1888, before the

court and a jury, resulting in a verdict and a judgment that the defendant, Guilford J. Reed, was the father of the bastard child of Barbara Hertlein. There are a large number of errors assigned, but as this court is of the opinion that the judgment of the district court must be reversed, because of error in the instructions of the trial court, the other errors, the cause for many of which will not exist in connection with another trial of the case, need not now be considered. The instruction complained of reads as follows: "You are instructed that, under the law, the interests of the mother of the child and of the defendant in this suit are not equal. The mother is a mere witness for the state in a proceeding to compel the father of her child to contribute to its support, and so save the public from the expense of sustaining it, while the defendant has a direct pecuniary interest in the result of the proceeding. The defendant, being liable to be charged with such support, is directly interested in the result, while the mother has no such interest. These facts may be considered by the jury in weighing their testimony." This instruction is faulty in several respects. It states that the mother has no pecuniary interest in the support of her child. This statement could only have been made by the trial court upon the assumption that the mother of a bastard child is in no way responsible, under the law, for the support of such child. This is not the law. Under the law, the mother of an illegitimate child is all the while known, and is at all times, at least during its infancy, liable for its support, while the father of such child is unknown until ascertained by judicial proceedings, unless he acknowledges its paternity; and therefore he is liable only when the paternity of the child is acknowledged by him, or it is established by judicial inquiry; and, when the paternity of the child is established by the judgment of the court, the law does not relieve the mother from liability for the support of her child, but compels the father, thus ascertained, to contribute his share to the support of such child. The mother must still do her part towards caring for and supporting her child. And, again, so far as the judicial inquiry is concerned, the mother, who, under the law, must alone support her illegitimate child, unless its paternity is ascertained by such inquiry, has an interest in the result of the proceeding, to the full extent of the contribution the court requires the accused, if found to be the father of her child, to make towards its support; and that is the measure also of the pecuniary interest the accused has in the inquiry. It follows, therefore, that the pecuniary interest of the mother of the illegitimate child in this case, and that of the reputed father, were not so unlike upon the trial as the district court seemed to think when the above instruction was given. The court says, in the instruction given: "The mother is a mere witness in a proceeding to compel the father of her child to contribute to its support." This instruction is also faulty in this: that it comes too near telling the jury that the

accused is the father of the child. The instruction does not say, to compel the reputed father of her child, or the alleged father of her child, to contribute to its support, but it says, "to compel the father of her child to so contribute." Some qualifying word should have accompanied the word "father" in this part of the instruction. This instruction does not correctly state the rule in relation to the interests of the mother of an illegitimate child and the reputed father thereof, in an inquiry to ascertain whether the accused is the father of such child, and it is faulty in the other respect, as pointed out, and it is therefore erroneous. We also think the error prejudicial to the substantial rights of the plaintiff in error. It is therefore recommended that the judgment of the district court be reversed, and the cause remanded for a new trial.

**PER CURIAM.** It is so ordered; all the justices concurring.

(46 Kan. 491)

**STEWART et al. v. SCULLY.**

(Supreme Court of Kansas. June 6, 1891.)

**SETTING ASIDE DEFAULT—TERMS.**

Where a defendant applies to have a judgment which was rendered without other service than by publication opened up, and that he be permitted to make a defense, he may, in the discretion of the court, be required to pay all costs before his application will be granted; but a formal offer, by answer or otherwise, to pay costs is not a prerequisite to the hearing or granting of the application.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. REED, Judge.

*Hallowell, Hume & Gordon*, for plaintiffs in error. *J. V. Dougherty*, for defendant in error.

**JOHNSTON, J.** This is a proceeding to reverse a ruling of the district court of Sedgwick county opening up a judgment rendered May 12, 1887, quieting title to two lots in the city of Wichita. The judgment was rendered without other service than by publication, and the defendant made an application, under section 77 of the Code, to have the judgment opened, and to be let in to defend, and he supported his application by an affidavit setting forth the nature of his title to the lots; that at all times during the pendency of the action he was a resident of Washington Territory, and absent from Kansas, and that he had no actual notice of the commencement or pendency of the action; and, further, that he had paid the taxes assessed on the property ever since he had acquired title thereto. He also presented a full answer to the petition of the plaintiffs, denying every allegation therein except that of possession by plaintiffs, alleging that he was the exclusive owner of the legal and equitable estate in the property in controversy, and entitled to its immediate possession. Due notice of the application and the hearing thereon was given on February 28, 1888. An order was made vacating and opening up the judgment, and permitting the defendant to file his answer to the plaintiff's petition. Subse-

quently the cause came on for final trial, and judgment was given dismissing the plaintiffs' action to quiet title, and adjudging that Martin Scully was the owner and entitled to the immediate possession of the real estate. The only objection to the regularity of the proceedings in opening up the judgment is that the defendant failed to proffer payment of costs in the answer which he filed. The objection cannot be sustained. Neither the proffer nor the payment of costs is indispensable to the opening up of a judgment under the provisions of section 77 of the Civil Code. Notice of the application, proof by affidavit to the satisfaction of the court that there was no actual notice of the action and time to appear to make a defense, and presentation of a full defense to the petition, are prerequisites, but costs are not to be paid unless the court hearing the application requires payment. *Satterlee v. Grubb*, 38 Kan. 234, 16 Pac. Rep. 475, is cited as sustaining the claim of the plaintiffs; but, while the language of the opinion may give some reason for the claim, it was not intended to hold that the offer to pay costs was a prerequisite to the hearing and determination of the application. We cannot add to the statutory requirement, which only requires the applicant to "pay all costs if the court require them to be paid." Even if a formal offer to pay costs was necessary, it would be immaterial in the present case; for it is conceded that the court may in its discretion open the judgment, and permit the defendant to come in and make a defense without the payment of costs; and, this having been done, the matter of a preliminary offer is now of little consequence. The court hears such an application after notice upon the affidavit of the applicant and any counter-affidavits that may be filed, and, if it appears that the judgment was rendered without other service than by publication in a newspaper, and that the answer or defense presented is a sufficient one, determines that it shall be opened, and also whether, under the circumstances, the applicant should be required to pay costs as a condition of granting the relief asked. The court does not and cannot well determine whether the payment of costs should be required as a condition precedent to the opening of a judgment until the hearing of the application is had and the facts in the case are developed. If it was shown that the applicant had no notice whatever of the commencement or pendency of the action, and had a good defense thereto, and that he had promptly and without delay presented his application to the court upon learning of the rendition of the judgment, there would be little reason for the court to require the payment of costs. On the other hand, if it should appear that he had delayed in presenting the application after learning of the judgment, or if it was doubtful whether or not he had a sufficient defense, the court might then be justified in requiring the payment of costs. An offer to pay costs, however, need not be made until it has been determined that payment will be required. If payment is required, the defendant cannot proceed

until it is made; but, if no such condition is imposed, then an offer is useless. Under the Code, the payment of costs before the opening of a judgment rests in the discretion of the court, and, in the exercise of that discretion, the court in the present case has not required the payment of costs as a prerequisite to the opening of the judgment; and hence the objection of the plaintiffs must be overruled. Judgment affirmed. All the justices concurring.

(46 Kan. 509)

EDWARDS V. VAN PATTEN.

(Supreme Court of Kansas. June 6, 1891.)

LEASE—IMPROVEMENTS BY TENANT — VALUATION.

Where a landlord agrees with his tenant to purchase from him at the expiration of his lease, which is to run about two years, at its value or worth at that time, an addition or fixture to the leased house, to be attached by the tenant, the value or worth of the addition or fixture is not to be estimated from the cost thereof, and its depreciation from use or lapse of time after its erection.

(Syllabus by the Court.)

Error from district court, Finney county; A. J. ABBOTT, Judge.

*W. R. Hopkins and A. J. Hoskinson*, for plaintiff in error. *Morgan, Lawrance & Mason*, for defendant in error.

HORTON, C. J. On the 8th day of April, 1885, J. S. Edwards leased to A. S. Van Patten a house in Garden City, in this state, for the term of two years. It was subsequently agreed in writing between these parties that Van Patten should put up a small addition on the south side of the house, the addition to be 12x28 feet. At the expiration of the lease, Edwards was to purchase from Van Patten the building or addition at what it might be worth at that time. In accordance with the written agreement, Van Patten constructed the addition, and, at the expiration of his lease, demanded payment therefor, claiming that it was worth \$300. Edwards offered \$100, but refused to pay any more. Then Van Patten brought his action against Edwards to recover the value of the building or addition on the 8th day of April, 1887, the date of the expiration of the lease. Trial before the court, with a jury. The jury returned a verdict in favor of Van Patten for \$170. Edwards excepted, and brings the case here. Upon the trial, Van Patten was permitted to prove the cost of the building or addition, which was erected in the summer of 1885. The cost was \$330. During the examination of the witnesses, the district judge said: "Under this contract, the theory of the court is that it ought to be proven what it cost to construct this building, and then the reasonable deterioration of the value, whether from use or abuse. It does not seem to the court proper that general deterioration or increase in value of real estate in Garden City would be proper estimate (of value or worth) in this case." The court also instructed the jury that, "in determining such value, you have a right to consider the proper cost thereof, and the depreciation in value consequent upon use and lapse of time after it was completed." All of this is

complained of. The question of fact for the jury to pass upon was what the building or addition was worth on the 8th day of April, 1887. Witnesses who were acquainted with such buildings, and knew their market value, could have testified thereto; but it was erroneous to introduce evidence showing the actual cost of this particular building or addition in the summer of 1885. Edwards was to pay the value or worth of the building or addition on the 8th day of April, 1887, not the original cost of the building, less deterioration from use or abuse. If witnesses, who were acquainted with the cost of such buildings in Garden City, had testified to the general cost of putting up such an addition, this might have been some evidence which the jury could have properly considered in arriving at the value or worth of the addition on the 8th of April, 1887; but the cost of this particular building in 1885 was not the true or fair basis of its value or worth on the 8th day of April, 1887. The judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

(46 Kan. 580)

HERNDON v. KANSAS, N. & D. RY. CO.

(Supreme Court of Kansas. June 6, 1891.)

EMINENT DOMAIN—OBSTRUCTION OF STREET—COMPENSATION.

The rule announced in *Railway Co. v. Mahler*, 45 Kan. —, 20 Pac. Rep. 22, in regard to the right of an abutting lot-owner to recover damages for the obstruction of a street by the location of a railroad thereon in front of his premises, followed.

(Syllabus by the Court.)

Error from district court, Linn county; C. O. FRENCH, Judge.

W. W. Padgett and John H. Crain, for plaintiff in error. E. F. Ware, for defendant in error.

JOHNSTON, J. The plaintiff owns a home on Mulberry street, in Blue Mound, and the defendant, with the permission of the city, built its line of railroad along the street, and in front of the plaintiff's home. She brought this action against the railway company to recover \$450 as damages for the alleged obstruction of the street, claiming that the company had built a main and side track in such a way as to take up the whole of the street, and leaving the plaintiff no means of egress or ingress from and to her home, except through the alley in the rear thereof. It appears, however, that the railroad tracks were laid upon the street in pursuance of an ordinance enacted by the city, and in compliance with its terms. Instead of occupying the entire street, it appears that the street is 80 feet wide, and that exclusive of that portion reserved for sidewalks it is 70 feet wide. It is also shown that the nearest railroad track is 34 feet from the street line of the plaintiff's property, which affords abundant room for ingress and egress to and from her premises. The road is built in a workman-like manner, and, although there is some contention that the laying of a side track was without any authority from the city, an examination of the ordi-

nance granting the right of way over the street discloses that there is authority for both a main and side track. The case, therefore, falls within the rule stated in *Railway Co. v. Mahler*, 45 Kan. —, 26 Pac. Rep. 22, and other authorities there cited, that, "to entitle an abutting lot-owner to recover damages for locating a line of railroad, under the authority of the city council, in one of the streets of a city, there must be a practical obstruction of the street in front of his premises, so as to virtually deprive him of ingress to and egress from his property." Following these decisions, we must give a judgment of affirmance. All the justices concurring.

(46 Kan. 553)

HARDESTY v. BALL.

(Supreme Court of Kansas. June 6, 1891.)

SECURITY FOR COSTS—POVERTY AFFIDAVIT.

Where a plaintiff, in 1883, commenced an action in the district court of the county of his residence, and gave a bond for costs under section 1, c. 121, Sess. Laws 1875, (section 581, Civil Code; Gen. St. 1889,) and subsequently, while continuing to be such a resident, filed a poverty affidavit, and also deposited \$15, in lieu of all security for costs, he cannot be required, upon the motion of the defendant, under the provisions of section 581 of the Civil Code, to give additional security.

(Syllabus by the Court.)

Error from district court, Lincoln county; S. O. HINDS, Judge.

Garver & Bond, for plaintiff in error. A. H. Ellis, for defendant in error.

HORTON, C. J. On the 5th day of December, 1883, David Hardesty commenced his action against Volney Ball in the district court of Lincoln county to recover damages alleged to have been sustained by reason of the erection of a mill-dam by Ball below the mill and dam of Hardesty, thereby backing the water upon the latter's mill. Hardesty resided in Lincoln county, and filed a bond for costs. He has continued to reside in that county. The action was tried at the March term of the court for 1884, and resulted in a disagreement of the jury. Another trial was had in October, 1884, with like result. At the March term, 1885, the action was again tried before the court with a jury, resulting in a verdict and judgment in favor of Hardesty, which verdict, on motion of the defendant, was set aside, and a new trial granted. A fourth trial was had in October, 1885, in which a verdict was again returned in favor of Hardesty, and judgment rendered in his favor. This judgment was reversed by this court, and the case remanded for a new trial. *Ball v. Hardesty*, 38 Kan. 540, 16 Pac. Rep. 808. On the return of the case to the district court, the defendant on May 14, 1888, made a motion to require the plaintiff to give additional security for costs. The costs then amounted to \$1,200. Upon the hearing of this motion, the court made an order requiring the plaintiff to give additional security for costs in the sum of \$1,000 within a time named, and, upon his failure so to do, directed the case to be dismissed. Previous to the making of this order, and before the hearing of the

motion, Hardesty made a deposit of \$15 as security for costs with the clerk of the court, and also filed his affidavit that he was unable to give further security. After the making of the order, Hardesty attempted compliance by filing an additional bond for costs with several persons as sureties, who qualified to the requisite amount, one of them being A. G. Hardesty, a son of the plaintiff, and who was a practicing attorney in that county. At the next term of court the defendant moved to dismiss the case, claiming that the sureties on the bond were insufficient, and objecting to A. G. Hardesty as a surety, because he was a practicing attorney. Upon the hearing of this motion, the plaintiff again presented his affidavit, and also testified orally, that he was unable to further comply with the order of the court; but the court held the security insufficient, and dismissed the case, taxing all the costs to the plaintiff. To all these rulings exceptions were taken. The provisions of the Code which we are required to consider in this matter are as follows: "Sec. 581. In any civil action hereafter brought in any district court of this state, before the clerk shall issue summons, there shall be filed in his office, by or on behalf of the plaintiff or plaintiffs, a bond, to be approved by the clerk, conditioned that the plaintiff or plaintiffs will pay all costs that may accrue in said action in case he or they shall be adjudged to pay them, or, in case the same cannot be collected from the defendant or defendants, if judgment be obtained against him, her, or them, that the plaintiff or plaintiffs will pay the costs made by such plaintiff or plaintiffs: provided, that in any case where the plaintiff or plaintiffs, having a just cause of action against the defendant or defendants, by reason of his, her, or their poverty, is or are unable to give such security for costs, on affidavit of the plaintiff or plaintiffs made before the clerk that such is the fact, no bond shall be required: provided, further, that, in case of non-resident plaintiff or plaintiffs, such plaintiff or plaintiffs may deposit with the clerk of the district court such sum or sums as, in the opinion of said clerk, will be sufficient to cover all costs in case such non-resident plaintiff or plaintiffs become liable to pay the same, and, in the case of resident plaintiff or plaintiffs, such plaintiff or plaintiffs may deposit the sum of fifteen dollars, which sum shall be in lieu of all security for costs as herein and otherwise provided. Sec. 582. The affidavit provided for in the preceding section shall be in the form following, and attached to the petition, viz.: State of Kansas, ——— county, ———. In the district court of said county. I (or we) do solemnly swear that the cause of action set forth in the petition hereto prefixed is just, and I (or we) do further swear that, by reason of my (or our) poverty, I (or we) am (or are) unable to give security for costs. Sec. 583. Any person or persons willfully swearing falsely in making the affidavit aforesaid, shall, on conviction, be adjudged guilty of perjury, and punished as the law prescribed. Sec. 584. In an action in

which security for costs has been given, the defendant may, at any time before judgment, after reasonable notice to the plaintiff, move the court for additional security on the part of the plaintiff; and if, on such motion, the court be satisfied that the surety has removed from this state, or is not sufficient, the action may be dismissed, unless, in a reasonable time, to be fixed by the court, sufficient security be given by the plaintiff." Section 581 of the Civil Code was passed by the legislature on March 1, 1875, but it took effect on the 15th day of May, 1875. Section 584 was in force a long time prior to the adoption of said section 581. It appears in the General Statutes of 1868, in chapter 80, p. 746, and took effect October 31, 1868. Section 584 must be construed in connection with section 581. Prior to 1875, a resident of the county in which an action was brought was in no case required to give security for costs. *Carr v. Osterhout*, 32 Kan. 277, 4 Pac. Rep. 318. Section 584 of the Civil Code, prior to 1875, had application only to actions brought by non-residents of the county where the action was commenced, or actions where the plaintiff became a non-resident after the action was commenced. Section 581 has not so broadened or extended its provisions as to include resident plaintiffs who have filed a poverty affidavit or deposited \$15 for costs. When the motion was filed on the 14th of May, 1888, to require Hardesty to give additional security for costs, section 581 was in full force. At that time this action could have been commenced by Hardesty without any security for costs, by his filing a poverty affidavit provided for by section 581 of the Civil Code, or by his depositing \$15 in lieu of all security for costs. *Carr v. Osterhout*, supra. If a poverty affidavit, or a deposit of \$15 in lieu of all costs, by a plaintiff, was sufficient at the commencement of the action, it ought to be sufficient, at any subsequent stage of the proceedings, to keep the action in the court. When the motion was made on the 14th day of May, 1888, to require him to give additional security for costs, he filed both his poverty affidavit, and also deposited \$15 in lieu of all security for costs. Within the terms of said sections 581-583, Civil Code, the district court ought not to have dismissed the action. He had fully complied with the provisions of said section 581. Said section 584 has application to non-residents, but not to residents who have filed a poverty affidavit or deposited \$15 for costs. Therefore it had no application to Hardesty, the plaintiff in this action, and the case must be reinstated for trial. With this conclusion, it is unnecessary to pass upon the validity of paragraph 476 of the General Statutes of 1889, prescribing the qualifications of sureties on official bonds. After his poverty affidavit was filed, and the deposit of \$15 for costs, Hardesty ought not to have been required to file any additional bond for costs. The judgment of the district court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. All the justices concurring.



89 Cal. 471

*Ex parte* HALSTEAD. (No. 20,809.)

(Supreme Court of California. June 16, 1891.)

POLICE COURTS—FAILURE TO PAY FINE—POWER TO IMPRISON.

1. St. Cal. 1885, p. 213, (Act March 18, 1885,) establishing police courts in cities of the second class, and vesting in them jurisdiction over certain public offenses, applies to the city of Los Angeles, although the precise time at which it became a city of the class does not appear.

2. Pen. Code Cal. § 1446, providing for imprisonment in default of payment of a fine, does not conflict with the act of March 18, 1885, establishing police courts, and a person convicted in such courts may be committed to the city jail in default of such payment.

In bank. Application for writ of *habeas corpus*.

J. A. Donnell and C. T. Howland, for petitioner. Jas. McLachlan, Dist. Atty., for respondent.

PATERSON, J. The petitioner was convicted of the crime of petit larceny in the police court of the city of Los Angeles, and as a penalty therefor the court imposed a fine of \$150, and, in default of payment thereof, ordered that he be imprisoned in the city jail of the city of Los Angeles one day for each and every dollar of said fine remaining unpaid. It is claimed by his counsel that there was no police court in the city of Los Angeles on the day of the arrest, conviction, and commitment of the petitioner, and that, if such court existed, there was no authority to commit the petitioner to the city jail. The judgment against the petitioner was entered on the 5th day of February, 1891. At that time, and long prior thereto, the city of Los Angeles was a city having over 30,000 inhabitants. It was intimated by the court at the oral argument that the census was complete, so far as the classification of cities is concerned, as soon as the returns were filed in the office of the superintendent of censuses at Washington. It is unnecessary, however, for us in this case to determine the precise time at which the city of Los Angeles passed into the class of cities having more than 30,000, and less than 100,000 inhabitants. It certainly changed long prior to the arrest, conviction, and commitment of the petitioner. We held in *People v. Henshaw*, 76 Cal. 436, 18 Pac. Rep. 413, that the act of March 18, 1885, popularly known as the "Whitney Act," is not obnoxious to section 11 of article 1 of the constitution, providing that "all laws of a general nature shall have a uniform operation;" that the act is not local or special legislation; that the legislature has the power to classify municipal corporations according to population; and that it has power to pass general laws affecting municipal corporations, without reference to the question whether such corporations were formed before or after the adoption of the constitution of 1879. It follows, therefore, that the city of Los Angeles, so far as its police courts are concerned, is now governed by the provisions of the Whitney act. That act confers upon the police court exclusive jurisdiction of certain public offenses, including petit larceny.

The only question which remains to be

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considered is whether the police court has power to imprison in the city jail as a means of collecting a fine. Section 1446 of the Penal Code provides that "a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for every dollar of the fine." There is nothing in the Code which prescribes the place of imprisonment for non-payment of a fine. The Whitney act does provide that, "in all cases of imprisonment of persons convicted in said police court of any offense committed in the city, the persons so to be imprisoned, or by ordinance required to labor, shall be imprisoned in the city jail, or, if required to labor, shall labor in the city." There is, therefore, no conflict between the provisions of the Code and those of the act referred to, and we think there can be no doubt of the power of the police court to direct imprisonment in the city jail. The suggestion that persons imprisoned in the city jail may be required to labor, which may impose a hardship different from that suffered by persons outside of cities, cannot be considered in this proceeding. The judgment itself does not direct that the petitioner be required to labor, and, if it did, the judgment as to the imprisonment would not be void. In *Ex parte Fil K1*, 80 Cal. 201, 22 Pac. Rep. 146, we held that a person convicted for contempt would be discharged from hard labor on the streets upon writ of *habeas corpus*, but would not be discharged from imprisonment by reason of being put at such labor. The petitioner is remanded to the custody of the chief of police of the city of Los Angeles.

We concur: BEATTY, C. J.; HARRISON, J.; SHARPSTEIN, J.; MCFARLAND, J.

*In re* MORTUO. (No. 20,813.)

(Supreme Court of California. June 17, 1891.)

In bank. Application for writ of *habeas corpus*. Willis & Appel and H. W. Hutton, for petitioner. Jas. McLachlan, Dist. Atty., for the People.

PER CURIAM. Upon the authority of *Ex parte Halstead*, (Cal.) 26 Pac. Rep. 961, (No. 20,809,) the writ in the above-entitled matter is discharged, and the prisoner remanded.

89 Cal. 467

CITY OF EUREKA v. DIAZ *et al.* (No. 13,243.)

(Supreme Court of California. June 16, 1891.)

INTOXICATING LIQUORS—ILLEGAL SALE—ACTION ON LICENSE BOND.

Under an ordinance licensing saloons and forbidding any business therein "between 11 o'clock P. M. and 5 o'clock A. M. of each and every day," no recovery can be had on a bond conditioned for the lawful conduct of the business, under a complaint charging the saloon-keeper with selling liquors between 11 o'clock P. M. and 5 o'clock A. M. of the "following" day.

Department 1. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

Horace L. Smith and S. M. Buck, for appellants. J. N. Gillett, for respondent.

**PATERSON, J.** The mayor and common council of the city of Eureka passed an ordinance which provided that it should be unlawful for any person to carry on within the limits of the city any saloon, bar-room, or dram-shop without having first obtained a license therefor, and having given a good and sufficient bond in the sum of \$1,000, with two sureties, approved by a majority of the members of the common council, conditioned that such saloon during the term of the license should be conducted in a lawful, quiet, and orderly manner. The ordinance provided that it should be unlawful to keep such place open, or to sell or give away any intoxicating drinks therein, "between the hours of 11 o'clock P. M. and 5 o'clock A. M. of each and every day." The complaint herein charges that the defendant Diaz, contrary to the provisions of the ordinance, on the 16th day of March kept his place of business open from 11 P. M. until 5 A. M. of the following day, and sold spirituous and fermented liquors, beer, and wine. The defendants Huk and Lundblad were sureties in the bond given by Diaz. Plaintiff had judgment for the sum of \$1,000. Defendants moved for a new trial. The motion was denied, and an appeal was taken from the order and from the judgment.

The demurrer to the complaint should have been sustained. The provision of the ordinance upon which the plaintiff relies is not ambiguous or uncertain. It may be that it does not express what the mayor and common council intended to express, but the court cannot make or amend ordinances. It is a cardinal rule in the construction of statutes that the intent of the legislator should be followed, but this is subject to the imperative and paramount rule that the court cannot depart from the meaning of language which is free from ambiguity, although the consequence would be to defeat the object of the act. In *Rex v. Barham*, 8 Barn. & C. 99, the court said: "Our decision may in this particular case operate to defeat the object of the act; but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose to have been the intention of the legislature." In *Smith v. State*, 66 Md. 217, 7 Atl. Rep. 49, the court said: "Even when a court is convinced that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity. As was said by Lord DENMAN, in *Green v. Wood*, 7 Q. B. 185: 'Those who used the words thought they had effected the purpose intended. But we, looking at the words as judges, are no more justified in introducing that meaning than we should be if we added any other provision. We can do no more than give such a meaning as the words authorize.' The supreme court of Ohio, in *Woodbury v. Berry*, 18 Ohio St. 462, emphatically say: 'It is our legitimate function to interpret legislation, but not to supply its omissions.' The business of the interpreter is, of course, to seek for the intention of

the legislature, but that intention is not to be ascertained at the expense of the true meaning of the words. The question is not what the legislature meant, but what its language means. "The court knows nothing of the intention of an act, except from the words in which it is expressed; \* \* \* the meaning of the law being the law itself. \* \* \* Every departure from the clear language of a statute is in effect an assumption of legislative powers by the court." End. Interp. St. §§ 5-8. If the words "each and every day" were eliminated from the provision of the ordinance above referred to, we should hold that the period of time named in the prohibitory clause is that between the hour of 11 P. M. one day, and the hour of 5 A. M. of the next day, but we have no more right to eliminate those words from the ordinance than we have to enlarge its terms. There is but one period in every day between the hours of 11 P. M. and 5 A. M. It is the same period whether you designate it as the period between 11 P. M. and 5 A. M., or between 5 A. M. and 11 P. M. of each and every day. The term "day" has a well-known signification. It is defined by the Code to be "the period of time between any midnight and the midnight following." Pol. Code, § 3259. And this is the interpretation which has always been put upon the word in the construction of prohibitory statutes. *Pulling v. People*, 8 Barb. 385; *Kane v. Com.*, 89 Pa. St. 522; *Haines v. State*, 7 Tex. App. 33. The judgment and order are reversed, and the cause is remanded with directions to sustain the demurrer to the complaint.

We concur: **HARRISON, J.; GAROUTTE, J.**

88 Cal. 593

**MARSH v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO.** (No. 14,300.)

(*Supreme Court of California.* April 13, 1891.)

**WRIT OF REVIEW—PLEADING.**

A writ of review will not be granted to consider an order removing an assignee under an assignment for the benefit of creditors where the petition does not show that the order was made without notice to the assignee, and there are no direct allegations that the petition for removal did not charge that the assignee had violated or was unfit to execute his duties.

In bank. Petition for writ of review.  
*Carroll Cook* and *J. E. Foulds*, for petitioner.

**PER CURIAM.** The petition herein is insufficient to authorize the issuance of the writ asked for. The petition does not show that the order of the superior court removing B. T. Whiteside from the position of assignee or trustee under the deed of assignment executed for the benefit of the creditors of the insolvent firm of Blum, Eppstein & Co., was made without notice to Whiteside. The averment that the petition filed in the superior court, asking for the removal of said Whiteside, contained "no allegations of any legal cause why said Whiteside should be removed," is but the statement of a conclusion of law, and is not equivalent to a direct alle-

gation that said petition did not charge that said Whiteside had violated or was unfit to execute the duties of trustee under said deed of assignment. Application for writ denied.

89 Cal. 129

ELLIS v. WOODBURN. (No. 13,532.)

(Supreme Court of California. May 18, 1891.)

ATTORNEYS — CONTINGENT FEES — ACTION FOR PLEADING AND EVIDENCE.

In an action for attorney's fees, where it is alleged in one count of the complaint that the services were reasonably worth \$1,500, of which \$500 had been paid, and in another count that they were rendered for the agreed price of \$500, and the further sum of \$1,000 in case of success, and the answer denies the reasonable worth, and alleges that the agreement was for \$500 and no more, evidence as to what would be a reasonable contingent fee in such case is irrelevant. Affirming 24 Pac. Rep. 893. BEATTY, C. J., dissenting.

In bank. Appeal from superior court, El Dorado county; GEORGE E. WILLIAMS, Judge.

*Blanchard & Swisler*, for appellant. *Ben Morgan, A. C. Ellis, George H. Ingham*, and *Roger Johnson*, for respondent.

DE HAVEN, J. This is an action by the plaintiff, who is an attorney at law, to recover from defendant the sum of \$1,000, alleged to be due on account of professional services rendered by plaintiff to defendant. The plaintiff recovered judgment for the sum demanded, and the defendant appeals from such judgment and an order refusing him a new trial. The complaint is in two counts, the first of which states, in substance, that defendant retained plaintiff as his attorney, and that as such attorney, and upon his said retainer, he rendered services in defending a case in the superior court of El Dorado county, in which the Lake Valley Railroad Company was plaintiff, and this defendant and the El Dorado Wood & Flume Company were defendants, "and in counseling and advising therein, and conducting negotiations to a settlement thereof;" and that said services so rendered were reasonably worth the sum of \$1,500, of which \$500 have been paid. The second count alleges that plaintiff was employed by defendant as his attorney in the action referred to in the first count, "to defend him against said action, and, if possible, to prevent a condemnation of his land as aforesaid, and to negotiate a sale of his said land, or the timber growing thereon, to said company, and in case said Lake Valley Railroad Company should procure such judgment of condemnation, and construct such railroad, then, in case said railroad company should fail or neglect to operate and carry on such railroad in accordance with the laws of the state of California, to commence proceedings to procure a forfeiture of its right to operate and carry on such railroad" for the agreed price of \$500, and "the further sum of one thousand dollars, if he should succeed in procuring such judgment of condemnation, or in procuring a sale of defendant's said lands or the timber thereon, or in procuring a forfeiture of the right of said railroad company to operate said railroad in case the same should be

constructed and not operated in accordance with law." The answer of the defendant, as we construe it, denies that the services of plaintiff, as alleged in the first cause of action, were reasonably worth any greater sum than \$500; and, as to the second cause of action, denies that he ever agreed to pay plaintiff \$1,000, or any other sum, on either of the contingencies therein alleged; and alleges that he (defendant) "entered into an express contract with plaintiff, whereby plaintiff agreed to render his services as an attorney at law in defending defendant against said action set forth in said complaint, and in all matters connected with said action, and, if possible, to negotiate the settlement thereof by sale of defendant's timber for the sum of five hundred dollars, and no more," and that the same had been paid. The issues thus presented for trial were: (1) If the services of plaintiff were rendered under an express contract, were the terms of such contract as alleged by plaintiff, or did the answer of defendant correctly state the contract? (2) If the evidence was not sufficient to enable the jury to say that there was an express contract, and what were its terms, then the question would arise as to the reasonable worth of the services actually rendered by plaintiff.

Upon the trial the court admitted the testimony of attorneys as to what would be a fair compensation to plaintiff for the services rendered by him, the witnesses testifying upon the hypothesis that he had contracted to perform them under an express contract for a retainer of five hundred dollars cash, "and the remainder of his fee contingent upon success, in case of compromise." This evidence was objected to by appellant as irrelevant and incompetent. The first cause of action alleged in the complaint is upon an implied contract to pay the reasonable worth of the services rendered, and the evidence objected to was clearly irrelevant as to this, because the law never implies, from the rendition of service, a promise to pay what is known to the legal profession as a "contingent fee." Such a promise, if it exist at all, is the creation of an express contract, and if it should be conceded that it is competent for parties to contract for such a fee, leaving the amount to be fixed by evidence as to what would be a "reasonable contingent fee," no such contract is alleged in the first cause of action, and as to that there was no issue to which such evidence could apply.

2. Was the testimony relevant to any issue made by the pleadings as to the express contract between the parties? The answer to this will depend upon whether such evidence has any tendency to prove the contract alleged by plaintiff or disprove the one set up by the defendant; and we cannot see how proof of this kind could afford the least aid in determining whether the contention of plaintiff or that of defendant is right in regard to the terms of the contract made by them. If there had been a dispute as to the amount of a contingent fee to be paid, then such evidence would have been relevant, if competent at all, as having a bearing upon

the probabilities of the case. Testimony as to value or usual price has been frequently admitted in aid of proof of an express contract, where the only fact in dispute was as to the sum agreed to be paid for services rendered thereunder or for property sold. The principle upon which the evidence is admitted in such a case is that proof of reasonable value or usual price has some tendency to show the probable price actually agreed on, that being the fact in dispute. Thus, in *Swain v. Cheney*, 41 N. H. 234, the court, in passing upon this point, says: "That there was a contract was admitted, and it would seem that there was no controversy about the terms of it, except as to the agreed price for drawing the lumber between the top of the hill and the depot; and while the plaintiff testified positively, as it would seem, that this agreed price was one dollar and fifty cents per thousand, the defendant probably testified just as positively that the agreed price was but one dollar per thousand. Here, then, there was a single point in dispute for the jury to settle; and, as the evidence was conflicting, the jury must find the fact to be either one way or the other, according to the preponderance of the evidence; and, if the direct testimony was evenly balanced, then they must consider the probabilities of the case, and weigh them, and thus come to a conclusion. And it seems to us that the evidence offered tended to show what was the common price for conveying that precise kind of lumber over the same road, and at the same time would, we think, be competent as tending to show whether it was more probable that the price agreed to be paid was one dollar or one dollar and fifty cents per thousand." In the present case there was no controversy as to what would have been a reasonable contingent fee, but whether there was any agreement at all to pay such a fee, and it is manifest that proof of what would be a reasonable contingent fee can have no legitimate tendency to show that there was, in fact, an express contract for that kind of fee. The opinion evidence should have related to the case stated in the first cause of action, or to the particular contract alleged by the defendant. Evidence tending to show that the fee claimed by the defendant as that agreed upon was not the usual or reasonable fee for such services would have been admissible, as bearing upon the probability whether plaintiff would have made such a contract. But the evidence we have been considering was entirely irrelevant to any issue involved in the case, and, as the verdict is general, so that it is impossible to say that the jury disregarded it, and based their verdict upon the other evidence, the judgment must be reversed. This case was heretofore determined in bank, and the same conclusion reached. 24 Pac. Rep. 893. For the reasons here given the judgment and order are reversed.

We concur: PATERSON, J.; HARRISON, J.; SHARPSTEIN, J.; GAROUTTE, J.

McFARLAND, J. I concur in the judgment; but, in my opinion, no evidence of

the reasonableness of a contingent fee is admissible under any circumstances.

I dissent: BEATTY, C. J.

30 Cal. 439

WHEATLAND MILL CO. v. PIRRIE, (two cases, No. 13,343.)

(Supreme Court of California. June 15, 1891.)

TRIAL BY THE COURT — REQUESTED FINDINGS OF LAW—REPLEVIN—COSTS.

1. After a trial has practically ended, and the court has orally announced its decision, but has not filed its findings, it cannot be required to pass upon propositions submitted to it as proposed findings of law.

2. Acts Cal. 1865-6, p. 66, § 6, providing that the prevailing party shall be allowed 5 per cent. costs on the amount recovered in litigated cases, not to exceed \$100, does not apply to an alternative judgment in replevin for the return of property or for its value.

Commissioners' decision. Department

1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Mastick, Belcher & Mastick, for appellant. Cope, Boyd & Fifield and Lloyd & Wood, for respondent.

FOOTE, C. This is an action of claim and delivery for a quantity of flour by the Wheatland Mill Company against William Pirrie. Judgment was rendered for the defendant for the return of the flour which the plaintiff had received, or the value thereof, and interest. From that judgment and an order refusing a new trial the plaintiffs have appealed. The defendant appeals from an order retaxing costs, by which the sum of \$100, claimed as percentage, under section 6 of the act of the legislature, to be found in statutes 1865-6, at page 66, in relation to fees in the city and county of San Francisco, was struck from his memorandum of costs. The appellant contends that the trial court committed error "in denying their request that it would pass upon certain propositions of law presented by plaintiff, and give the same as applicable to the case, and in refusing to pass upon said propositions, and to rule that the same were correct, and applicable to the case." The cause came on to be tried, the court sitting without a jury, on the 20th day of March 1888, and on that day, upon the evidence produced, was considered and heard by the court; and it was then submitted for decision on briefs to be filed by respective counsel, which was done. On the 4th day of May following, the court announced its decision orally for the defendant. Upon the 16th day of the same month, before the written findings were filed, the propositions of law, which are nothing more than instructions to the court, by the court, put in such a form that such tribunal could answer "Yes" or "No," and thus put itself on record as to its views of the proposition of law therein involved, were presented to the court, and it refused to consider them, making two indorsements thereon on the 21st day of May, 1888,—one indorsement refusing to pass upon or give them as applicable to the case, the other treating them as proposed

findings,—and refusing the request to sign and settle the same, because the court had upon that day signed and filed findings of fact in accordance with its decision.

We fail to perceive any good ground upon which it ought to be contended that the practice as here suggested should be held to prevail in any court. If rulings are needed as to the admission or exclusion of evidence involving the determination of questions of law or rulings upon a motion for a nonsuit, or upon any motion or matter which may arise during the progress of the trial, and which are authorized by law to be determined by the court, when counsel on both sides may be present, and can state their views, such rulings can be had before the cause is submitted to the court for final decision. But upon what sound reason a court to whom a cause, upon the law and facts, after hearing, has been submitted for decision, and the trial has practically ended, can then be compelled to instruct itself, as a jury, and at the same time prematurely commit itself as a court to propositions of law in advance of its decision which is made, by its findings of fact and conclusions of law, we do not perceive. There is no statutory provision which prescribes any such course of action, and we can see nothing whatever to recommend it. None of the cases cited by appellant are, we think, in point. If the propositions are to be considered as findings presented to the court, then it was a species of dictation to which the court was not compelled to submit. The question in all such cases is whether the written findings made by the court are sufficient, and the presence or absence of a request to make findings is utterly immaterial; and there is nothing here to show that the findings made were insufficient. *Pereira v. Smith*, 79 Cal. 233, 21 Pac. Rep. 739.

The further point is made that the findings of the court as to the ownership of the property for the possession of which the action was brought are not sustained by the evidence. We do not concur in this view of the matter, and think the evidence was sufficient. It does not seem to be questioned by either party here, but that the statute under which this percentage may be recovered is still in force, as decided in *Whitaker v. Haynes*, 49 Cal. 596. That statute is in effect that "the prevailing party shall be allowed five per cent. on the amount recovered," etc., "in litigated cases," not to exceed \$100 on any one judgment. The test here is what is the meaning to be given to the words "amount recovered," as to the judgment under consideration. It is in the alternative, under section 667 of the Code of Civil Procedure, for the return of the property mentioned in the complaint, or, in case a return thereof cannot be had, for the sum of \$1,387.50 and interest, making in the aggregate, \$2,386.85, with interest on that amount at 7 per cent. from rendition of judgment, and costs, on which amount, to the extent of \$100, the percentage was claimed. The "amount" recovered is not the primary and absolute result of the judgment. It may never be recovered, because the whole property or a part there-

of may be returned, in which event there would be a percentage given for an amount which was not recovered at all, and in this case it does not appear whether the property, or any part of it, would be returned or not. Hence we do not think that the statute in question includes such a judgment as the one in hand. It follows that the judgment and order refusing a new trial, and the order retaxing costs, should be affirmed, and we so advise.

We concur: TEMPLE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order refusing a new trial, and the order retaxing costs, are affirmed.

(3 Cal. Unrep. 415)

PEOPLE v. BRUGGY. (No. 20,706.)

(*Supreme Court of California*. June 16, 1891.)

REHEARING—NEW QUESTIONS—DEATH SENTENCE.

On appeal from a sentence of death, the supreme court will consider questions raised for the first time in a petition for rehearing.

On rehearing. For former report, see 26 Pac. Rep. 756.

PER CURIAM. In this case we are entirely satisfied with the correctness of the decision heretofore rendered upon all the points discussed in the opinion of the court. But in their petition for a rehearing counsel for the defendant present an altogether new point, as to which we have grave doubts. In civil cases we have invariably refused to grant a rehearing for the purpose of considering a suggestion of error made for the first time in the petition for rehearing, but we feel constrained to relax this rule in a criminal case in which the defendant is appealing from a judgment of death. Rehearing granted.

(30 Cal. 440)

PORTER v. JENNINGS, Sheriff, et al. (No. 13,469.)

(*Supreme Court of California*. June 10, 1891.)

INJUNCTION—SALE OF LANDS ON EXECUTION—DISSOLUTION ON ANSWER.

1. In an action to restrain the sale of land under execution against plaintiff's grantor the court should continue the restraining order pending final determination, and it is an abuse of discretion to dissolve it upon the filing of an answer denying the allegations of the bill.

2. While denials upon information and belief, authorized by Code Civil Proc. Cal. § 437, are sufficient to raise an issue, they are not such denials as will justify the dissolution of a temporary injunction on the ground that the bill is fully denied by the answer.

Department 1. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

A. S. Kittredge, for appellant. T. H. Laine and Z. N. Goldsby, for respondents.

GAROUTTE, J. This is an action for a perpetual injunction to restrain Jennings, the sheriff of Santa Cruz county, from selling the land of plaintiff, under an execution issued on a judgment in favor of defendant Cummings against one William N. Cummings. The complaint was full

and complete. The answer denied plaintiff's ownership, specifically averring that the deed from the execution debtor, Cummings, to one Ketchum was in fact a mortgage, and that the deed from Ketchum to plaintiff conveyed no title. Upon the filing of the complaint, an order was made on defendants to show cause why an injunction should not be granted to stay proceedings pending the final determination of the suit, and a temporary restraining order was issued. The matter was heard upon the complaint and answer, and upon a decree of the court made in the case of *Cummings v. Cummings*, which does not appear to be material. The restraining order was set aside by the court, which was, in effect, a refusal to grant the injunction. *Hicks v. Michael*, 15 Cal. 109. From this order denying the application for an injunction *pendente lite* plaintiff appeals.

The rule is so well established in this state that an order granting or dissolving an injunction is a matter of discretion with the lower court, which this court will not review, except where an abuse of that discretion is urged, that a citation of authority upon the question is useless labor. Applying this well-established principle to the case under examination, can the action of the trial court be sustained? The plaintiff claims to be the owner of a tract of land, purchased in good faith, for a valuable consideration, in the actual possession thereof, and now seeks to prevent a sale under execution against the original grantor. It is settled law in this state that injunction is the proper remedy in this character of action, and that a dissolution of the restraining order does not follow as a matter of course upon the filing of the answer denying the equities of the complaint. Conceding that the denials in the answer of defendants are complete and unobjectionable, still it would seem in the exercise of a sound discretion the lower court should have held the sale in abeyance until the final disposition of the case upon its merits. "Especially will this discretion be exercised where fraud is the *gravamen* of the bill, or when it is apparent to the court that a dissolution of the injunction would result in greater injury and hardship than its continuance to the hearing, or where it is apparent that by a dissolution complainant would lose all the benefit which would otherwise accrue to him should he finally succeed in his cause. \* \* \* So, where the case, as presented by the bill, is one which seems to require investigation, and the effect of dissolving the injunction would be to place the property, which is the subject of controversy, beyond the control of the court in which the action is pending, and would be equivalent to a complete denial of the relief sought by the bill, the injunction will not be dissolved." Sections 1508, 1509, High, Inj. "If the continuance of the injunction, even admitting defendant's answer to be true, cannot prejudice or imperil his rights, and on the other hand its dissolution might seriously impair the rights of complainant, the motion to dissolve upon the coming in of the answer should not be al-

lowed." Section 1511, Id. "It is also held that where the injunction is not merely ancillary to some other or principal relief sought by the action, but is itself the principal relief desired, and its dissolution would be equivalent to a dismissal of the action, if a reasonable doubt exists in the mind of the court whether the bill is sufficiently negatived by the answer, it is proper to refuse a dissolution, and continue the injunction to the hearing." Section 1512, Id. "Thus, in the case of an injunction against a sheriff's sale of real property under an execution, while a serious question is pending and undetermined as to whether the land is really subject to sale in satisfaction of the judgment, a motion to dissolve will not be granted, but the injunction will be continued to the hearing." Section 1543, Id. It must be conceded that, if plaintiff prove the allegations of his complaint at the trial, he will be entitled to a judgment of perpetual injunction, but then his judgment is a nullity; the calamity has befallen him; the horse has already been stolen; the sale has already been made; the relief has come too late; the cloud upon his title is an accomplished fact. The judgment of the trial court in denying the injunction deprived plaintiff of all benefit of the right to which the law declares he is entitled. It is virtually dismissing the action because defendants deny plaintiff's right. It is practically rendering judgment for defendants because they deny the allegations of the complaint. In this case defendants could not have been prejudiced, nor their rights imperiled, by the granting of the injunction. The execution had been levied; the lien, if any, was secure; no injury, aside from delay, (which a bond would fully satisfy,) could result to defendants. "To dissolve the injunction, and permit the plaintiff's farm to be sold, under this judgment at sheriff's sale, to the highest bidder, while a serious question is pending here whether it can be sold at all under the judgment, would be indiscreet." *Van Mater v. Holmes*, 6 N. J. Eq. 593.

In the case of *Hicks v. Compton*, 13 Cal. 210, the court used the following language: "The rights of the defendants are protected by a bond, and no injury can result to them from a continuance of the injunction. The plaintiff has no security whatever, and the dissolution of the injunction leaves him at the mercy of the defendants. The granting and continuing of injunctions of this nature are to some extent matters of discretion, and this discretion should always be exercised in favor of the party most liable to be injured." In the case of *Hunt v. Steese*, 75 Cal. 624, 17 Pac. Rep. 920, where the trial court refused an injunction *pendente lite* to restrain waste in an action of ejectment, this court said: "In all cases of this kind, an injunction should be granted pending the determination of the issue as to ownership, unless it appears that the plaintiff's title is bad, or, at least, that there is no reasonable ground for the assertion of title by the plaintiff." And again: "Not only should there be an answer to the merits, but it should be made reasonably certain by the pleadings and the affidavits that the at-

tack upon the patent will be ultimately successful, or the injunction should be granted." And thereupon this court directed the lower court to issue the injunction. To sustain respondents in this appeal would deprive appellant of all benefit which would accrue to him should he finally succeed in his cause, and would be a complete denial of the relief sought by the complainant. The injunction prayed for is not merely ancillary to other relief; it is itself the principal relief desired, and its denial is equivalent to dismissal of the action. Upon the authorities heretofore quoted, and upon principles of sound reason and justice, we think an injunction should have issued pending the final judgment in the cause.

Certain allegations of the complaint are denied upon information and belief. While denials in this form are authorized by section 437 of the Code of Civil Procedure as matters of pleading, and are sufficient to raise an issue, yet they are not such denials as will serve as the basis of a motion to dissolve an injunction on the ground that the equities of the bill are fully denied by the answer. Judge STORV says: "Such negation affords no presumption against the plaintiff's claim, but merely establishes that the defendant has no personal knowledge to aid it or disprove it." *Poor v. Carleton*, 3 Sum. 77, 78; High, Inj. § 1514. The order refusing to grant the injunction should be reversed, and the trial court directed to issue the injunction asked for by plaintiff, pending the final determination of the cause upon its merits.

We concur: PATERSON, J.; HARRISON, J.

(89 Cal. 464)

RESPINI v. PORTA. (No. 13,252.)

(*Supreme Court of California*. June 16, 1891.)

LANDLORD AND TENANT—ABANDONMENT OF PREMISES—DAMAGES.

1. Under Civil Code Cal. § 8300, providing that for breach of contract the measure of damages is that amount which will compensate the party for all detriment proximately caused thereby, a landlord whose premises are abandoned by his tenant, and who thereupon leases the same to another, can recover as damages only the difference between the amount he should have received under the first lease and that which he actually did receive under the second.

2. Civil Code Cal. § 8302, providing that the detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the obligation, does not apply to an action by a landlord to recover damages for the abandonment of the leased premises by the tenant.

Department 1. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Joseph H. Skirm, for appellant. Z. N. Goldsby, for respondent.

PATERSON, J. On November 1, 1884, the plaintiff leased certain real and personal property to the defendant for the term of five years at an annual rental of \$2,400, payable quarterly in advance. The defendant entered into possession of the lands, and held the same, and paid the rent regularly for one year. On November 2, 1885, plaintiff demanded payment of

the rent due for the first quarter of the second year, but the defendant replied that he had no more money, could not pay the rent, and was going to leave the place and give up everything. Plaintiff answered that he had not come to take possession of the property, but to ask for his rent, but if the defendant was going to abandon the property he would take possession of the same to protect it. The defendant thereupon surrendered possession of the property to the plaintiff. A few days after the 2d day of November, 1885, the plaintiff leased the property to one Filippini at a rental of \$2,000 per year, and the latter has ever since held possession and paid rent at that rate. This action was brought by the plaintiff to recover the sum of \$600, being the amount claimed to be due him from defendant on November 1, 1885, together with interest thereon at the rate of 7 per cent. per annum from that date. The court below held that the defendant was entitled to a credit of \$500, the amount the plaintiff had received from Filippini.

It was properly held by the court below that the abandonment of the premises to the plaintiff, and the taking possession by him against his wish, and the subsequent letting of the property to another tenant, was not a surrender and termination of the lease under the circumstances. A landlord, upon a wrongful abandonment by his tenant, may, if he choose, decline to meddle with the property at all, and at the end of the term sue for the rent. He is not, however, driven to this course, and run the risk of damage to his property, or the insolvency of his tenant. In this case the plaintiff pursued the right course in letting the property to Filippini, and we presume that he procured the highest rent that could be obtained. But we cannot support him in his contention that because the defendant, against his (plaintiff's) wishes, and without right, abandoned the property, he is entitled to recover the full amount provided for by the terms of the lease to defendant. Our Code provides that "for the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom." Section 3300, Civil Code.

We think plaintiff's rights are measured by the provisions of this section, and not by section 3302, *Id.* In cases of this kind the landlord is not entitled to recover for rent of the premises after the abandonment of them by the defendant, but has compensation for the injury, and his measure of damage is the difference between the rent he was to receive and the rent actually received from the subsequent tenant, provided there has been good faith in the subsequent letting. *Gear*, Landl. & Ten. §§ 128, 176; *Ledoux v. Jones*, 20 La. Ann. 540; *Bloomer v. Merrill*, 29 How. Pr. 259; *Randall v. Thompson*, 1 Tex. Civil Cas. Ct. App. 1102; *Auer v. Pennsylvania*, 99 Pa. St. 370; *Field*, Dam.



§ 523. Appellant contends that, as nearly two years had passed between the time of the abandonment by the defendant and the trial of this action, the court below ought to have allowed the plaintiff about \$800, that being the amount of damage up to that time through the defendant's breach of his obligation as lessee. The complaint, however, was filed on November 28, 1885, and no claim was made therein for anything beyond the amount of the first installment. Under the pleadings the court could not allow for any subsequent installments. Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

80 Cal. 456

WALKER v. EMERSON *et al.* (No. 13,408.)  
(*Supreme Court of California.* June 10, 1891.)

INJUNCTION—WATER-RIGHTS—EASEMENTS.

A land-owner may have an injunction against a stranger, who, under claim or right, is taking water from his canal by means of a ditch across his land, even though the amount of water taken is inappreciable, since its continued use would ripen into an easement in the land.

Department 2. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

A. H. Griffith and A. C. Hartley, for appellants. W. S. Tinning and W. S. Wells, for respondent.

McFARLAND, J. This action was brought to enjoin defendants from depositing dirt upon plaintiff's land, and from diverting water from plaintiff's canal, on his said land, and for damages. Judgment was rendered for plaintiff, enjoining defendants as prayed for, and defendants appeal from the judgment and from an order denying a new trial. We think that the evidence supports the findings.

Plaintiff owns a tract of land through which there is an artificial water-way or canal, about 7 feet deep and 40 feet wide, which is wholly owned and controlled by plaintiff, and was originally constructed mainly for purposes of navigation. It receives its waters—or most of them—from a slough connected with the San Joaquin river, and is filled and emptied by the flow and ebb of the tides of the Pacific ocean, although the water which flows into it is river water and fresh. The appellants divert water from said canal by means of a ditch which they dug through and over plaintiff's land, and connected with the canal by a box. They seem to take the position that when the canal is filled by the influence of the tides, the amount of water in it is inexhaustible, and incapable of being diminished; that, therefore, the amount diverted by them can do respondent no damage; and that, therefore, an injunction will not lie. If there is any such principle with respect to water-rights, it certainly could be applied only to a case where a party, without intruding upon the possessions of others, and without committing any direct trespass upon another's land, took water from a stream at a point where he had a right to approach it, to the alleged damage of persons claiming water-rights at other points on the stream. But there is clearly no

principle by which a mere intruder can go upon the land of another, and take water from an artificial ditch thereon. Such an act is an injury to the right, and, if threatened to be continued, should be enjoined, whatever opinion persons other than the owner may have about the extent of the damage that may result. "The right to an injunction, therefore, in such a case, does not depend upon the extent of the damage, measured by the money standard; the maxim *de minimis* does not apply." *Learned v. Castle*, 78 Cal. 461, 18 Pac. Rep. 872, and 21 Pac. Rep. 11, and cases there cited. It is true that the court finds in one place that plaintiff was not actually damaged by the taking of the water that had occurred; which means, we suppose, that the court could not make any money estimate of such damage; but the court also finds that "if said defendants are not restrained and enjoined from using said water, and conducting the same through said ditch, said use thereof by defendant will ripen into an easement on the part of the defendants, and prevent the unrestricted use of said canal by plaintiff, and cause plaintiff great and irreparable injury." The question of damages is irrelevant. The threatened act of appellants "disturbs the plaintiff's possession, and, if permitted to continue, will ripen into an easement. That of itself is sufficient to entitle him to an injunction." *Richards v. Dower*, 64 Cal. 64. The threatened filling up of plaintiff's land with dirt, thus destroying his fruit-trees, etc., is of the same character as the digging of the ditch and the diversion of the water; and upon the same principle such acts were properly enjoined. We see no error in the rulings of the court below. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; SHARPESTEIN, J.

80 Cal. 263

HIHN v. MANGENBERG. (No. 13,355.)

(*Supreme Court of California.* May 28, 1891.)

EJECTMENT — SUFFICIENCY OF COMPLAINT — DESCRIPTION OF LANDS.

1. In ejectment, a complaint alleging that plaintiff is seised in fee of the realty, and defendant is in possession, and against plaintiff's will detains and withholds the possession thereof, is sufficient on demurrer.

2. Where, in ejectment, the land is described as being in S. township, S. C. county, California, and bounded on the north-east by Bay avenue, on the S. E. by the land of M. E. Land, and on the S. W. and N. W. by S. creek, the description is sufficient on special demurrer.

Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Z. N. Goldsby, for appellant. Charles B. Youlger, for respondent.

GAROUTTE, J. This is an action of ejectment. The complaint was attacked by a general demurrer, and also by a special demurrer, as to the sufficiency of the description of the land involved in the litigation. The demurrer was overruled, and an answer filed by defendant, denying the allegations of the complaint, and setting up a lease by plaintiff to G. Mangenberg, the husband of defendant, and alleging

that she was the surviving widow of said deceased lessee, and that no administration has been had upon his estate. This is an appeal by the defendant from the judgment and order denying her motion for a new trial. The demurrer was properly overruled. The complaint alleges that the plaintiff is seised in fee of the realty; that the defendant is in possession, and against plaintiff's will detains and withholds the possession thereof. After a careful review of the law upon this question, this court, in *Payne v. Treadwell*, 16 Cal. 243, held such a complaint sufficient. To the same effect is *Rego v. Van Pelt*, 65 Cal. 254, 3 Pac. Rep. 867.

The demurrer to the complaint, as to the insufficiency of the description of the realty, was not well taken. The land was described as being in Soquel township, Santa Cruz county, state of California, and bounded on the north-east by Bay avenue, on the south-east by the land of M. E. Land, and on the south-west and north-west by Soquel creek. We cannot hold, from this description in the complaint, that it is impossible for the proper officer to identify the land in the field. *Carpenter v. Grant*, 21 Cal. 140; *Lawrence v. Davidson*, 44 Cal. 180. The lease from plaintiff to appellant's husband did not give her any greater right than the lessee would have had if he had lived. The lease was for a fixed period of five years, which expired December 31, 1884. Had the lessee been living at the expiration of this period, his tenancy surely would then have been at an end. *Canning v. Fibush*, 77 Cal. 196, 19 Pac. Rep. 376. The fact that the lessee died before the expiration of the lease could not prolong the term, and plaintiff had no interest or right in the property after the expiration of the lease. We have carefully examined appellant's exceptions upon the admission of certain evidence, and find no error in the rulings of the lower court. Let the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

89 Cal. 271

MCCORD & BRADFIELD FURNITURE CO. v. WOLLPERT et al. (No. 13,281.)

(Supreme Court of California. May 28, 1891.)

PRINCIPAL AND AGENT—SCOPE OF AGENCY—LIABILITY TO THIRD PERSON.

A manufacturer wrote to a customer that for the next year he had 14 new patterns of furniture, and that "our Mr. W. will call on you early in January, and talk to you about handling the line next year." The agent called, and defendants claim to have bought old patterns of goods, which were not delivered. *Held*, the letter only gave authority to sell the new patterns, and the customer could not recover for a failure to deliver old patterns of furniture.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

*John H. Dickinson*, for appellant. *Olney, Chickering & Thomas*, for respondents.

FOOTE, C. The plaintiff brought this action against the defendants for the recovery of \$881.67, alleged to be due it for

goods sold and delivered to the defendants, who set up a counter-claim to an amount greater than that sued for by the plaintiff. The court found in favor of the plaintiff to the extent of its demand, and also for the defendants to the extent of \$1,658, and rendered judgment in favor of the latter for the difference between the value of the goods sold and delivered and the amount allowed on the counter-claim. This appeal is from that judgment and an order denying a new trial.

The first point made by the appellant is that the court erred in finding, upon the evidence, that the plaintiff ever agreed to sell the defendants the goods which the former failed and refused to deliver the latter; the argument in this connection being that the proof showed that the alleged sale was made by an agent of the plaintiff of goods that were to be manufactured, which agent was one selling furniture on commission, and that it was not within the scope of his authority directly or ostensibly to make such a sale binding on the plaintiff. The evidence as to the scope of the agent's authority was to this effect: That the plaintiff, the McCord & Bradfield Furniture Company, a corporation, was doing business at Grand Rapids, Mich.; that Frank Wenderoth, its alleged agent, was a member of the firm of Wenderoth Bros. in the city of Chicago, whose business was that of merchants to sell furniture on commission; that he had for several years been coming twice a year to San Francisco, selling the goods of the plaintiff and of other manufacturers to the defendants; that through him the latter had made purchases of goods at various times from plaintiff. This being the ordinary course of business between the parties, the defendants on the 10th of December, 1886, received a letter from the plaintiff, to the effect that for the next year the latter had 14 new patterns of furniture, which it would be ready to submit to the inspection of the former, by the end of the month, concluding with this sentence: "Our Mr. Frank Wenderoth will call on you early in January, and talk to you about handling the line for next year." After the reception of this letter by the defendants, Wenderoth called upon them, and exhibited photographs of the furniture of the new patterns referred to in that communication, and also of certain old patterns. The defendants claim that he (Wenderoth) made a contract for the plaintiff to sell some furniture of the old patterns. Wenderoth testified that he only agreed to try to induce the plaintiff to make and furnish "the old patterns which the defendants had contracted to sell to a third party in California at a profit." The plaintiff refused to fill the order because it had none of the old pattern furniture in stock, and would not manufacture it to fill the order, as it would not pay it to do so, and it had ceased to manufacture such goods. One of the defendants testified that Wenderoth was the general agent of plaintiff, authorized to make all contracts for the sale of its goods west of the Missouri river, and assigned as a reason for this knowledge that they never

knew of or heard of any one else selling its goods. So far as the defendants' knowledge as to the scope of Wenderoth's agency was derived from the plaintiff, it was from the letter above adverted to, and a similar one, written some years before this transaction, and the bills sent for goods by the plaintiff had written on them that they were sold by Frank Wenderoth or Wenderoth Bros. So far as the direct authority goes which Wenderoth had from the letter introduced in evidence, and from the one which had been previously written, it seems that his authority to sell only extended to the new patterns of furniture which were in process of manufacture, were already manufactured, or were offered to be manufactured by these letters, which were written mainly for the purpose of notifying the defendants that the agent would be on hand, as he had been in previous years, and would endeavor to sell the new styles of furniture.

Upon the matter of the ostensible agency, to be deduced from what had occurred in former years, it does not appear that the course of business was other than that the agent sold the goods of the manufacturing company, presumably those that it was willing to manufacture, or that it was manufacturing, or that it had on hand. There is nothing to show positively that it would or would not have authorized the sale of old-style goods, which it had ceased to manufacture. The only instance where, according to the testimony of one of the defendants, the agent had undertaken to sell goods that were no longer manufactured, and not in stock, was the present instance. The agent had in at least one instance before this sold goods under a letter similar to the one in evidence, that is, containing authority to sell new pattern goods; and he had in previous years also sold whatever his principal had to sell; but it is not shown that he ever, in any of those years, undertook or did sell goods which had ceased to be manufactured by his principal. We do not see that his ostensible authority, independent of the letters, went any further than to sell goods that his principal had on hand, or was willing to manufacture, or was manufacturing. One who acts in one year for the sale of goods manufactured for sale for that year cannot be said from that circumstance to be the agent to sell the same goods for the next year, unless they are continued to be manufactured or are in stock, and the principal wishes to sell them. The very sending of an agent out to sell carries with it the idea that he is expected by the principal to sell to his advantage, and, this being so, it would seem to be going a long distance out of the way to say that, because he is expressly authorized to sell manufactured goods, he is also authorized to sell those that have ceased to be manufactured, and could not be except at a loss. We do not think that the evidence shows either direct or ostensible authority in the agent to sell goods that his employer had ceased to manufacture, and did not carry in stock, and could not manufacture except at a loss. An agent au-

thorized to sell the property of his principal when manufactured has no authority to sell before it is manufactured. *Merriam v. De Turk*, 66 Cal. 549, 6 Pac. Rep. 421. By parity of reasoning, an agent who is shown to have authority to sell new pattern goods to be manufactured (and, so far as this evidence shows, the agent had no further authority than to do this, and to sell what his principal had already manufactured, or was willing to manufacture) cannot be said to have authority to sell what is not being manufactured, and will not be by his principal, because to manufacture it would result in a loss, which is not the prevalent idea in any business. We do not think that under such circumstances a reasonable man would believe that a principal would carry out any such contract, or had apparently intended to authorize his agent to make it. It becomes unnecessary to notice any other point made by the appellant, and we advise that the judgment and order be reversed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

89 Cal. 397

STUART V. ADAMS *et al.* (No. 13,184.)

(*Supreme Court of California*. June 1, 1891.)

WHAT CONSTITUTES MINING PARTNERSHIP—LIABILITY OF PARTNERS—AUTHORITY OF SUPERINTENDENT.

1. Civil Code Cal. § 2442, providing that every general partner is jointly liable to third persons for firm debts, applies to members of a mining partnership.

2. A mine superintendent has the right to expend partnership funds for necessary supplies for the mine without express authority.

3. A contract by which a stranger agrees to work the mine, pay one-half the expense, and receive one-half the product as compensation, does not constitute him a partner, under Civil Code Cal. § 2511, providing that a mining partnership exists where several persons owning a claim actually engage in working it.

Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

*Nagle & Nagle*, for appellants. *Hutchinson & Campbell* and *Alfred Dixon*, for respondent.

GAROUTTE, J. This is an action to recover \$2,795.18 upon contracts for labor, and for money advanced. The defendants are mining copartners doing business under the firm name of the Alabama Bar Mining & Canal Company. Plaintiff performed labor for them at their mine, and a portion of the time acted in the capacity of superintendent. In this action he recovered a joint judgment for \$2,311.16. This is an appeal from the judgment and order denying defendants' motion for a new trial.

Appellants insist that, as members of a mining partnership, they are only liable, *pro rata*, for the liabilities of the partnership according to their respective interests as part owners in the mine. No authority directly bearing upon this question has

been presented for our consideration by counsel upon either side. In those states where mining partnerships are common we find many cases where judgments have been rendered against all the defendants (mining copartners) for the full amount recovered, and no question raised as to their validity upon that ground, and such has been the practice in this state. *Jones v. Clark*, 42 Cal. 181; *Taylor v. Castle*, Id. 367; *Skillman v. Lachman*, 23 Cal. 198; *McConnell v. Denver*, 35 Cal. 365. In *McConnell v. Denver*, supra, page 372, where the trial court rendered a joint judgment against some of the defendants, this court said: "Upon the findings the judgment should have been against Latham, as well as the other defendants. If he was a member when the contract sued on was made, and the contract was executed by a party duly authorized, he must, of course, be bound by it as well as the other members." While the language may tend towards the position of respondent, yet the court's attention does not appear to have been directed in that particular line. It is passing strange, if defendants' position is correct, that they have been allowed to quietly rest so long; yet its novelty does not deprive it of careful consideration by the court. "Mining partnerships, where there are no partnership articles, are governed by the law of ordinary partnerships, except so far as the general usage of persons engaged in similar pursuits, or the established practice of the particular company, has established a different rule. The only difference generally existing, as established by the decisions of this court, is such as legitimately flows from the fact that in such copartnerships there is no *delectus personarum*." *Jones v. Clark*, 42 Cal. 193. "Every general partner is liable to third persons for the obligations of the partnership, jointly with his copartners." Section 2442, Civil Code. We do not believe that the fact that in mining partnership there is no *delectus personarum* takes them out of the rule laid down in the foregoing section of the Civil Code. In all the cases we have examined which attempt to enumerate the differences existing between general partnerships and mining partnerships arising from the fact that in the latter there is no choice of partners, as already stated, we find none to assert that one of the distinctive features is that mining copartners are only liable to creditors for a *pro rata* amount of the indebtedness. There is no good reason in saying that "my partner is not one of my choice, and therefore can only bind me for a *pro rata* of the indebtedness." The proportion of the indebtedness for which he shall be bound to a third party has no relation whatever to the fact that his associate in business is not one of his choice, and does not legitimately flow from the absence of *delectus personarum*. A member of a mining partnership is bound or not bound by the acts of a copartner, who is forced upon him according as the copartner acts with or without authority, and, if he is bound at all, it would seem that he is bound to the full extent of the liability. Section 2513 of the Civil Code, which provides that a member of a mining

partnership shares in the profits and losses thereof in the proportion to his interest, etc., seems to reiterate the law of ordinary business partnerships. It does not add to the weight of appellants' contention; for it must be construed as referring to the relations of the partners as to each other, and has no reference to the liabilities of the partnership to third parties. Section 2514 of the Civil Code reads: "Each member of a mining partnership has a lien upon the partnership property for the debts due the creditors thereof, and for money advanced by him for its use." Section 2520, Id.: "The decision of the members owning a majority of the shares or interests in a mining partnership binds it in the conduct of its business." It is difficult to see why each partner should have a lien upon the partnership property for the debts due the creditors, if such partner be not liable to those creditors for the debts. It is apparent this lien is given for the purpose of enabling him to collect from his copartners their proportion of the indebtedness which he has been compelled to pay in full. By reason of the foregoing views, and from the additional fact that if the legislature, in framing the provisions of the Civil Code defining and governing mining partnerships, had intended to place such a great innovation upon the universal law of ordinary partnerships, to-wit, that a partner is only liable to creditors for his proportion of their claims, according to his interest, it would have so declared in explicit terms, we conclude that appellants' contention has no merit.

Plaintiff, as superintendent of the mine, had the right to expend for the partnership moneys in the purchase of articles that were necessary for the conduct of the mine in the usual manner, without express authority. "The company being a mining partnership, managed by a superintendent, it follows that the superintendent could not bind the partnership, except upon such contracts as are usual and necessary in the ordinary prosecution of the work. He could purchase the supplies and materials necessary for the usual working of the mine upon credit." *Jones v. Clark*, 42 Cal. 180.

Plaintiff contracted with defendants to work the mine, pay one-half the expenses thereof, and receive one-half the product of the mine for his labor. This contract does not constitute a mining partnership between plaintiff and defendants. "A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it, and extracting the mineral therefrom, actually engage in working the same." Section 2511, Civil Code. " \* \* \* The relation arises from the ownership of shares or interests in the mine, and working the same for the purpose of extracting the minerals therefrom." Section 2512, Id. In the construction of a contract very similar to the one under discussion, this court said in *Hudepohl v. Water Co.*, 80 Cal. 558, 22 Pac. Rep. 389: "Such a contract does not create the relation of landlord and tenant, but fixes a rule of compensation for services rendered. It is in all essential features

a contract for labor to be performed and to be paid for by a share of the profits realized from such labor." Appellant insists that the evidence does not show that the defendant Adams had any authority to employ plaintiff under the verbal contract of May, 1884. It would serve no good purpose to enter into a detailed statement of the evidence upon this question as disclosed by the record. There was certainly ample evidence to justify the court in denying the motion for a nonsuit, and allowing the jury to pass upon this question of fact. The instructions appear to contain a very full and fair statement of the law of the case. Let the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

89 Cal. 316

BROCK v. LUNING. (No. 13,327.)

(*Supreme Court of California*. May 28, 1891.)

MUNICIPAL CORPORATIONS — LOCAL IMPROVEMENTS  
— CONTRACTS — ASSESSMENTS.

1. The time specified by the board of supervisors for the completion of certain street work in the published proposals for bids, and the award of the contract, was 25 days, but the contract made by the superintendent of streets and contractor gave 30 days. *Held*, the contract was void, and assessments to pay for work done thereunder could not be enforced.

2. Where the action of the superintendent of streets was void, the assessment could not become valid by failure of defendant to appeal from the board of supervisors, as allowed by Act Cal. 1872, § 12.

Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

J. M. Wood, (*J. C. Bates*, of counsel,) for appellant. *Langhorne & Miller*, for respondent.

PER CURIAM. This appeal is from a judgment in favor of the defendant, and is brought up on the judgment roll alone. The action was instituted to foreclose a street assessment made by the superintendent of streets of the city and county of San Francisco. The court below found that the contract entered into by that officer and the person to whom the street work was awarded by the board of supervisors of that city and county was void, because the time within which it specified the work was to be done was a different time than that authorized by the board in the notice inviting sealed proposals by bidders to do the work, and in the award of the contract; and that the assessment based upon such void contract was also void, and not to be enforced. It seems from the findings that the time specified in the published proposal to bidders and in the award of the contract was 25 days from the signing of the contract, but the contract actually made and entered into by the superintendent of streets, and the contractor to whom the assessment was issued, was that the work should be completed in 30 days from the signing of the contract.

The appellant contends that the difference in time between the contract authorized to be entered into and that actually entered into was a mere irregularity, and

did not affect the validity of the assessment, the board of supervisors having once acquired jurisdiction to do the work; and that the defendant could have appealed to the board of supervisors under section 13 of the street act of 1872, and that, not having done so, the assessment was valid, and should have been enforced. He further claims that, even if the contract was void as to 5 days of the time specified therein in which it was agreed to be done, yet it was good as to 25 days, and, if the work was done in that time, the assessment was properly made. It has been held in many cases that neither the board of supervisors nor the superintendent of streets possesses the power to grant extensions of time for the performance of work under a street contract after the expiration of the time limited in the contract, and that an order granting such extension is void. *Raisch v. City and County of San Francisco*, 80 Cal. 4, 23 Pac. Rep. 22; *Beveridge v. Livingstone*, 54 Cal. 54; *Fanning v. Schammel*, 68 Cal. 428, 9 Pac. Rep. 427; *Dougherty v. Coffin*, 69 Cal. 454, 10 Pac. Rep. 672. "The statute itself makes time of the essence of contracts for street work." *Raisch v. City and County of San Francisco*, 80 Cal. 5, 22 Pac. Rep. 22. The extension of time after that contracted for has expired is forbidden, because of the fact that the contract entered into by the superintendent of streets, as the mere ministerial act of an agent to do a certain thing under the statute, must follow the letter of authority, which is the resolution of award made by the board of supervisors. If the time mentioned in the award as that within which the work to be contracted for must be finished, and which is then put into the contract and becomes of the essence of it, cannot be extended after it has expired, can it not be said that by parity of reason the ministerial agent cannot go outside, in the inception of his ministerial act, of his letter of authority, and extend the time in making the contract, thus making the time, which is of the essence of the contract, different from that in the award, which is the very source of his authority? If he can thus diverge from the letter of his authority to the extent of 5 days, he can do so for 5,000; and so the very object of the law, that is, that the board of supervisors shall be the power to fix the time within which street work is to be done, is done away with, and the discretion of the superintendent of streets, not contemplated by the street act, is substituted.

If it should be argued that the notice to bidders to make proposals, and the putting in of a bid, and the award of the contract, shall be said to authorize the contractor to do the work in the time mentioned in the award, without entering into the written contract with the superintendent of streets, or giving the bonds required by law, then it would appear that these last conditions necessary to be done, as prescribed in the law of 1872, pp. 808, 809, are superfluous, and need not be regarded. This view cannot be maintained. Time is of the essence of the contract, and it must be the time set out in the award, and the proceedings upon which such an assess-

ment as here involved are based, being *in invitum*, must be strictly pursued, in strict compliance with the law under which they are taken. *Ralsch v. City and County of San Francisco*, 80 Cal. 5, 22 Pac. Rep. 22. The award by the board of supervisors of the contract here was the measure of the superintendent's power as to time, which was to be of the essence of the contract. If the contract, by him a purely ministerial act, did not follow the award, it was not the contract which he was authorized to make, and it was therefore invalid. *Dougherty v. Hitchcock*, 35 Cal. 524. As the action of the superintendent of streets was void, it could not become valid by the failure of the property owner to appeal, under section 12 of the law of 1872, to the board of supervisors. He could not appeal unless "aggrieved." Such owner was not aggrieved, for the contract made was void, and affected his rights no more than would a void judgment. "The failure of the contractor to appeal did not operate (1) to create a grievance on the part of the defendants, or (2) to estop them from complaining of it." *Burke v. Turvey*, 54 Cal. 486. The judgment is affirmed.

(2 Wash. St. 381)

COX v. DAWSON.

(Supreme Court of Washington. May 28, 1891.)

ATTACHMENT—CLAIM NOT DUE—ALLEGATIONS OF FRAUD MUST BE PROVED.

Under *Sees. Laws Wash.* 1886, § 3, providing for an attachment upon causes of action not due, where the defendant has made a fraudulent disposition of his property, the allegation as to such disposition is material, and must be proved, in order to justify the bringing of the action before the claim is due.

Appeal from district court, Walla Walla county.

Action in attachment by Dawson against Cox. The eleventh and twelfth counts of the complaint alleged that defendant executed to plaintiff's assignor certain notes, which were not due, but that nothing but time was wanting to fix an absolute indebtedness thereon, and that defendant had disposed of his property with intent to defraud his creditors. The answer denied that defendant had so disposed of his property. No evidence was offered in support of this allegation of fraud, and the court rendered judgment for the amount of the notes. Defendant appeals.

*Brents & Clark* and *A. E. Isham*, for appellant. *Cox, Teal & Minor* and *B. L. & J. L. Sharpstein*, for appellee.

STILES, J. We find no material error in the record, under any of the points urged, excepting the seventh. The fifteenth paragraph of the answer raised no issue; so that all of the amounts claimed stood confessed. The admission of the letter and the statement of indebtedness, if erroneous, was not materially so, as the assignments to Dawson were otherwise sufficiently proven. But the court erred in submitting the eleventh and twelfth causes of action to the jury. The appellee, as owner and holder of two promissory notes which were not yet due, sought to include them in his suit against Cox upon his oth-

er ten causes, and to secure them by his attachment, in pursuance of section 8 of the act of February 3, 1886. He alleged fraudulent disposition of property in his complaint, and also in his affidavit for the attachment; but upon the trial he offered no proof of this allegation, and treated it as no longer material. The court took the same view, and rendered judgment for the amount of these notes, although the answer fully denies the fraud. The act referred to does not confer upon a creditor any new right of action, when it permits an attachment to secure an undue claim. Its effect is to make it the law of all contracts for future payment that, in case of conduct on the part of the debtor, such as would tend to fraudulently jeopardize the safety of the debt, the creditor may commence his suit forthwith, and have an attachment as security *pendente lite*. By the first section of the act, attachments are issued only at the time of the commencement of the action, or afterwards. An action is commenced by the filing of a complaint and the issuance of a summons. *Acts*, 1888, p. 24. In such cases, therefore, the attachment must be preceded by the filing of the complaint. But, unless the complaint shows the reason for its premature filing, it would be obnoxious to demurrer for want of facts. Therefore the allegations in the affidavit for the attachment are necessary to the complaint also, and they continue to be material allegations at every stage of the case. They must be proved like any other fact to authorize judgment, as, unless they were true at the time the action was commenced, there was no jurisdiction for the premature suit and attachment, and the proceeding must fail. The judgment will be modified by deducting the amount of the six-months note of Honeyman, DeHart & Co., (\$450,) with interest thereon from October 24th, 1889, to May 3, 1890; and by the amount of the note of Walter Bros., (\$500,) with interest thereon from December 5, 1889, to May 3, 1890, at 8 per cent. per annum; and by whatever sums may have been allowed by the court as costs or attorney's fees on account of said note. When so modified, the remainder of the judgment will be affirmed. The cause is remanded to the superior court for modification in accordance with this opinion. Each party will pay his own costs of this appeal.

SCOTT, DUNBAR, and HOYT, JJ., concur.

ANDERS, C. J., did not sit at the hearing of the case.

(2 Wash. St. 406)

EGLEY et ux. v. OREGON RY. &amp; NAV. CO.

(Supreme Court of Washington. June 4, 1891.)

RAILROAD COMPANIES—BOY STEALING A RIDE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

1. In an action against a railroad company for injuries to a boy of 9½ years, while stealing a ride on the back foot-board of a switch-engine out of view of the engineer, it appeared that he was of ordinary intelligence, familiar with the working of a switch-engine, and that he had been warned repeatedly by his father and servants of the company and others that he would get hurt if he went about the cars. He himself testified that he knew he might get hurt. *Held* insum-

cient evidence to support a finding that he did not know it was dangerous for him to ride upon the engine.

2. The fact that the company's servants failed to discover the boy was no evidence of negligence, especially when the company had issued a bulletin to allow no boys on the track, and its servants drove them away whenever they saw them there.

Appeal from district court, Walla Walla county.

W. W. Cotton and C. B. Upton, for appellant. Brents & Clarke, for respondents.

DUNBAR, J. The undisputed facts in this case are that Zene Egley, on the 3d day of May, 1889, was run over by the switch-engine of the defendant, in the city of Walla Walla, and as the result thereof his right leg was so crushed that afterwards it was amputated about four inches below the knee-joint. This action is brought by the plaintiffs against the defendant for the injury to the said Zene Egley, the child of the plaintiffs. The plaintiffs, as will be seen by reference to the pleadings, alleged that this injury was caused by the defendant in wrongfully inviting, inducing, and permitting said child to be and to go upon the said engine, and thereafter carelessly running and operating the same while the child was thereon, exposed to great danger. The defendant in its answer denied these allegations, and set up the defense of contributory negligence. Other matters in relation to the ownership of the road were contested at the trial below, but were abandoned by the appellant here.

The fourth special finding of the jury was entirely unwarranted and unsupported by the testimony. In answer to the question, "Did the said Zene Egley know that it was dangerous for him to ride upon the engine and freight-cars of the railway mentioned in the complaint, in the manner in which it has been shown by the evidence he was doing at the time he was injured?" Jury answer, "No." There is no evidence tending to prove this finding. The whole testimony shows that Zene Egley was a boy of ordinary understanding, capable of comprehending and acting upon what was told him. It appears from the testimony of all parties (including the testimony of the boy himself) that he had been warned time and time again, not only by his parents, but by the servants of the company and his associates, not to attempt to ride on the cars. His own father testified as follows: "Well, I often told him not to ride upon the cars; not to go near them. I cautioned him in this respect." It is not too much to say that the jury ought to have understood from the expression, "I cautioned him in this respect," that the witness meant to say or did say, in effect, "I warned him of the danger of riding on the cars." The boy himself testified that he was afraid he would get run over by the cars. On redirect examination, commencing on page 82 of the transcript, the following testimony was given: "Question by Mr. Brents. Zene, you stated yesterday that you knew it was dangerous to be on that back end of the tender. When did you first know that it was dangerous,—when did you first find out that it was

dangerous? Answer. Before I got hurt,—before. Q. Did you know it was dangerous before you got hurt? A. Yes." This was direct and positive testimony by the boy in answer to direct questions by his own attorney, and was not in any way affected by the leading and misleading examination, which immediately followed, which was as follows: "Question. Did you know it after you got hurt? Answer. Yes, sir. Q. You knew it by getting hurt? A. Yes, sir. Q. Was that the first thing that caused you to know that it was dangerous? A. Yes, sir." Cross-examination which followed was as follows: "Question. Zene, didn't your father and mother tell you not to go upon the engine? Answer. Yes, sir. Q. Did they tell you why? A. Yes, sir. Q. When did they tell you not to get upon the engine? A. Before I got hurt. Q. Why did they tell you not to get upon the engine? A. Said I would get hurt. Q. Zene, have you ever been driven away from the cars at various times? A. Yes, sir. Q. Did the trainmen ever say anything to you? A. Yes, sir. Q. What did they say to you? A. Told me to get away. Q. Did they say they would do anything to you if you got on board? A. Yes, sir. Q. What did they say? A. Said they would punish me. Q. You knew it was dangerous to get on there, didn't you, before the accident? A. No, sir. Q. Hadn't you been told it was dangerous? A. No, sir. Q. Didn't your mother tell you it would hurt you? A. Yes, sir. Q. Didn't your father tell you it would hurt you? A. Yes, sir. Q. Well, didn't you know it would hurt you? A. Yes, sir. Q. And you knew this before the accident? A. Yes, sir." Thus it will be seen that, while the boy testified that he did not know it was dangerous, it is evident that he did not definitely understand the meaning of the word "dangerous," for he testified in the next breath that his father and mother told him it would hurt him, and that he knew it would hurt him. It is too evident for discussion that the testimony of the boy, outside of any other testimony, shows conclusively that he did know it was dangerous for him to ride upon the cars in the manner in which he was riding when he was hurt, and that there was no conflict of testimony on that subject worthy of the consideration of the jury; and, while it is true that a case will not be taken from the jury when there is conflict of testimony, and that a court will not be justified in disturbing a verdict because its judgment may run counter to the judgment of the jury, or because the weight of testimony is, in the opinion of the court, opposed to the verdict, it is equally true that, where there is no conflict of testimony on material points, and there is no testimony tending to establish a fact the establishment of which is necessary to warrant the verdict, the court will not hesitate to interfere in the interests of justice, and reverse the judgment.

In this case it is shown by the testimony that Zene Egley was 9½ years old. It is shown by the testimony, and not disputed, that he was a boy of ordinary intelligence and practical experience, and that



he was familiar with the workings of railroad, and especially with the workings of the switch-engine by which he was injured, and that he had discretion enough to know that the amusement on which he was insisting was amusement fraught with danger, and that he was a trespasser on the railroad when he was stealing the rides. He may not have known the technical meaning of the word "trespass," but all the testimony, including his own, shows that he knew he had no right on the car; that not only had he been cautioned and forbidden by his parents to go upon the cars, but had been frequently driven away by the yard-master and other employees; and that they had threatened to punish him if he did not keep away, and shows that he knew he was a wrongdoer. See the following testimony: "Question. Do you know the yard-master by sight? Answer. Yes, sir. Q. Had he ever driven you off the cars? A. Yes, sir. Q. How many times? A. I don't know. Q. How many do you think? A. About three times. Q. About how many? A. Three; not more than three, though may be more. Q. Well, how many more? A. I can't tell just how many times. Q. Well, how many do you think? A. About five or six. Q. When you were on a car, and you saw him coming, what did you do? A. Got down and run. Q. And you always did that, did you? A. Yes, sir. Q. What would you do if he happened to get near you? A. I don't know. Q. Did he ever tell you to stay off the cars? A. Yes, sir. Q. Didn't he always tell you to stay off the cars when he got close enough to speak to you? A. Yes, sir. Q. And every time he saw you he said that? A. Yes, sir." Add this to the testimony of the father that he had cautioned the boy not to go on the cars, and that at one time he prevented him from doing so; and that of the yard-master, Mr. Gould, that he had at one time stopped the train and put him off; and, to use his own language, "in two or three cases I gave him to understand I would give him a thrashing when I got close to him, and he would get off a distance, and begin to swear and abuse me, and call me names, some of them, and after that they kept clear of me, and watched me pretty close;" and it plainly appears, without any doubt whatever, that the boy was of a mind sufficiently discriminating to know that he was trespassing, and to be responsible for contributory negligence. Of course, I recognize the fact that a different gauge or measure must be used in ascertaining or determining the degree of guilty negligence to be imputed to a child from that used in determining the degree of negligence to be imputed to an adult of ordinary intelligence. This is a distinction founded in justice, and the reasoning which sustains it cannot be gainsaid. Neither do I question the proposition stated by counsel for the plaintiff that since the law does not, in any case, exact an unreasonable or impossible thing from any one, the duty thus devolved upon each depends upon his powers of comprehension and performance; and the duty of a child, therefore, is proportionate to its mental and

physical capacity. But, strictly applying the principles of that proposition to the facts of this case, as shown by undisputed testimony, the conclusion above is reached. The law, as laid down by Shearman and Redfield on the Law of Negligence, (volume 1, § 73.) is as follows: "It is now settled by the overwhelming weight of authority that a child is held, so far as he is personally concerned, only to the exercise of such degree of care and discretion as is reasonably to be expected of a child of his age. No injustice is done by this limitation of the defense of contributory negligence, since the rule itself is not established primarily for his benefit, and he can only be made liable if he has not been himself in fault. Thus, where one is driving a horse with ordinary care, at a rate of speed suited to the locality, he is, of course, not liable for an injury by the horse to a child who suddenly throws itself in the way, and is run over before the driver can prevent it. So if the child, proceeding in reckless haste, however natural to its age, should rush against a railroad car while in motion, the driver of the car or engineer of the train not seeing him, it is obvious that his act is the sole cause of his injury, and, even though he may be entirely free from blame, the most that can be said in his favor is that the case is one of inevitable accident, and the owner of the car is no more responsible for his injury than would have been the owner of a wall against which the child struck himself."

The contributory negligence in this case being proven by undisputed testimony, the next question is, was there any negligence on the part of the railroad company which was the approximate cause of the injury? or, to state it negatively, could the injury have been prevented by any degree of care which the law imposed upon the railroad company? The testimony, in my judgment, shows no negligence at all on the part of the company. Whenever they saw boys about the cars, they immediately drove them off, and threatened to punish them. It appears from the testimony that the company had issued a bulletin not to allow boys on the track, and that its servants did all they could reasonably be called upon to do to carry out the instructions of the company in this respect; and it was well understood by the boys in that neighborhood generally, and by Zene especially, that they had no right to go into or about the cars. He slipped onto the engine with a view of hiding himself from the engineer, and located himself on the foot-board at the back end of the engine, where the engineer could not see him while attending to his duties. It is not claimed that any employees of the company saw him there or had any knowledge of his whereabouts. "Negligence," says Shearman and Redfield, "includes two questions: (1) Whether a particular act has been performed or omitted; and (2) whether the performance or omission of this act was a breach of a legal duty. The first of these is a pure question of fact; the second, is a pure question of law." As was said by the supreme court of Connecticut in the case of *Nolan v. Railroad Co.*,

(Conn.) 4 Atl. Rep. 106, "Negligence" may be defined to be a failure to perform some act required by law, or the doing of the act in an improper manner. The law determines the duty; the evidence shows whether the duty was performed. The duty resting upon the defendant was a question of law; was the duty performed? was a question of fact." These authorities, I think, fairly present the law, and the relative duties of the court and the jury, on this perplexing question. The theory of the plaintiff in this case is that the company was negligent in not ascertaining that the boy was on the engine at the time of the accident, and this seems to be all the negligence attributed to it; and it is evident, from the special findings and the verdict, that this view was taken by the jury, and it becomes the duty of this court to announce that the omission of the act complained of does not constitute legal negligence. As wide a range as the decisions of courts have taken on this interesting subject, no court, to my knowledge, has gone so far as to hold that railroad companies are the absolute insurers of the life and limbs of boys who, against their express commands, insist upon trespassing upon their property; and to sustain this case would, in my opinion, go that far. The only way the company could prevent this would be to keep a sufficient number of guards to detect boys in their attempt to board the cars or engines. If the presence of the boy on the engine or cars had been brought to the knowledge of the operators of the engine, it is plain that their duty would have been to have protected him from harm, no matter how great his negligence might have been. The testimony shows that they did not see the boy on the engine, and did not know that he was there; for, by reason of his location on the foot-board of the engine, the engineer, in the performance of his ordinary duties, could not have seen him. The verdict is wholly unsustained by the evidence, and, strictly, the defendant would probably be entitled to judgment on the third and fifth special findings; but, as the jury was evidently influenced both as to their general verdict and special findings by the instructions of the court, which, in its general scope, and especially in the seventeenth instruction, went to the extent that the defendant should have exercised care in ascertaining whether or not Zene Egley was on said engine immediately preceding said injury, the judgment will be reversed, and the cause remanded to the lower court, with instructions to retry the case, and to modify the instructions in accordance with this opinion.

SCOTT, HOYT, and STILES, JJ., concur.  
ANDERS, C. J., not sitting.

#### FREIDRICH V. TERRITORY.

(Supreme Court of Washington. May 14, 1891.)

#### MURDER—CHARGE UPON THE WEIGHT OF EVIDENCE.

Code Wash. § 221, provides that, in a statement of all matters of law for the information of the jury, only such allusion to the evidence shall be made as is necessary. Upon a murder trial, the evidence for the prosecution was entirely cir-

cumstantial. On the part of defendant, it rested upon denial, evidence as to good character, and absence of motive. The court charged: "Now, gentlemen, look at these facts dispassionately, without prejudice, and without thinking, so far as that goes, who this defendant is, or who the man that was killed was;" and, after stating the evidence as to the probable killing of deceased by defendant, by suicide, or by a stranger, said: "From these circumstances, we arrive at the conclusion that the man was shot by some one other than himself;" "the question now is, who did it?" and, following a review of the testimony concerning the movements of defendant from the evening of the killing, inquires, "Do they lie about it?" "Then this story that he tells you about where he went, if it is true, notwithstanding it may seem a little improbable, he was not out here," where certain witnesses "say they saw him." *Held*, that this was an invasion of the jury's province.

Appeal from district court, King county.

James Hamilton Lewis, for appellant.  
John F. Miller, Pros. Atty., and Ronald & Piles, for the State.

STILES, J. The indictment was sufficient to charge the defendant with the crime of murder in the first degree. *Leonard v. Territory*, 2 Wash. T. 381, 7 Pac. Rep. 872; *Timmerman v. Territory*, 3 Wash. T. 445, 17 Pac. Rep. 624. The appellant and the deceased had been close friends, and spent the day of July 14th, 1887, in Seattle and its suburbs. They had carried beer out with them, and drank freely of it. About sunset they walked out on the Grant-Street Bridge, and stopped for a short while at a saloon on the bridge. There they had a glass or two of beer, two other persons being present and drinking with them. They were not intoxicated, and the persons at the saloon heard no quarrel or misunderstanding between them. At about dark they left the saloon together to return to town, and within a few minutes persons in the neighborhood heard two shots on the bridge, and heard a cry of distress. Several of those who heard the shots ran in the direction from which the unusual sounds seemed to come, and found the deceased leaning over the bridge-rail, with a bullet imbedded in his head just back of the left ear. He was conscious, and able to walk with assistance. Being asked who had shot him, he answered that he did not know, and in this statement he persisted, until the appellant was brought before him, when he avowed that appellant had shot him, but gave no particulars. He gave, as a reason why he had at first said he did not know who his assailant was, that he did not then think he was very badly hurt, and did not wish to give away his friend. He died within a few days after he was shot, without making any other admissible statement. Appellant was arrested, indicted, convicted of murder in the first degree, and sentenced to death. Aside from proof of what the deceased said in the presence of the appellant, as above stated, all the evidence at the trial was circumstantial; it being devoted to showing the attempted flight of the appellant immediately after the shooting, and his confused and contradictory statements after his arrest,

with the fact that, in the presence of deceased, he made no positive denial of Scherbring's charge that he had fired the fatal shot. No effort was made to show a motive for the murder. In answer to the territory's case, appellant took the stand as a witness in his own behalf, and denied having shot deceased, or that he knew who had shot him. He told how they had spent the day together, and claimed that immediately upon their leaving the saloon on the bridge he had left deceased, who was disposed to loiter along, and hastened ahead to attend the meeting of a German singing society of which he was a member. He did not attend the meeting, for the reason, as he claimed, that, as he approached the building, he heard the members singing, and, finding that he was late, turned away, and went elsewhere. These were the only points touched upon by him in his testimony with the exception that, whereas witnesses for the territory had stated that he was taken into Scherbring's presence twice on July 16th he claimed to have been there but once. He did not dispute what was alleged to have been said there, nor did he in any other particular contradict the testimony of the prosecution. It will thus be seen that his testimony was of no great materiality to his defense, and there was no call for any extended cross-examination; since, in such cases, the cross-examination ought to be confined strictly to the matters touched upon by the defendant, excepting in so far as his history may be inquired into for the purpose of testing his credibility in the matters testified to by him. But here the cross-examination was extended to a very great length, with almost no reference to the examination in chief; but the defendant was taken over all the ground covered by the territory's witnesses, apparently for no other purpose than to place him in seeming hostility to them in order to discredit him by the contrast, and to have some foundation for the subsequent attack made upon his past history. A great part of the evidence for the prosecution was directed to showing the whereabouts and actions of the defendant from the time of the shooting until his arrest, at noon on July 15th. He was arrested at Slaughter, a number of miles south of Seattle, while walking along the railroad track, and had not been seen by any person who knew him since he and deceased left the saloon on the evening of the 14th, excepting that certain witnesses testified that they saw him on the opposite side of Seattle on the evening of the 15th. He was a shoemaker, but had not been seen at his shop from the day of the 14th. At the time of his arrest, and afterwards, the persons who arrested him endeavored to draw from him damaging statements and admissions. All these things had been testified to by the territory's witnesses; and to them the cross-examiner called his attention, and pressed him for admissions of their truth, or of the untruth of what he answered in denial or explanation of them. This was not cross-examination, but it was allowed to run itself out when the subject was exhausted, without any ob-

jection by defendant; and it is only alluded to here to show how there came to be any foundation for almost the only legitimate part of the cross-examination, viz., that wherein his past life was inquired into.

The prosecutor asked the defendant a series of questions which were intended to draw from him an admission that he was not Albert Freidrich, but one "Leubens" Freidrich, who was assumed to have been a German soldier, to have been fined in Hamburg in 1880 for a breach of the peace, and to have deserted his wife and child. Error is assigned upon the overruling of objections to these questions, and thereupon a curious state of things is presented. Against the defendant, Freidrich, the prosecution was entitled to none of the matters sought to be brought out; but, as against the witness Freidrich, it was entitled to them, to the extent that they might affect his credibility on his direct examination, but not on his cross-examination as to matters about which he had not testified in chief; for, by thus cross-examining him, the territory made him its own witness, and was bound by what he said. *People v. Irving*, 95 N. Y. 542. The defendant had returned negative answers to almost all questions thus asked. The prosecutor had presented to him a letter from Leubens Freidrich which he denied having written, a photograph which he admitted to be one of himself, a German army list which he declared did not describe him when a soldier, and some other papers which he said had no reference to him. After the defendant retired from the stand the prosecutor said: "I now offer in evidence, if the court please, the depositions of the various army officers and magistrates connected with the court, which says he belonged to a company, and the fact that this is a photograph of the Leubens spoken of in these depositions. They are in German; I will have them translated." Upon objection, the court said, "They are not admissible;" and there the matter dropped. It is now urged that this whole course of inquiry into the history of the defendant was a plan of the prosecution, to throw a cloud of suspicion over him by mere insinuation, without legal evidence tending to support it; the offer of the "depositions" being but the crowning effect in that direction. It was not fair treatment of the defendant, certainly. The outcome showed that there was no reason to expect success in the effort to identify the defendant with Leubens Freidrich. The prosecutor must have known that the "depositions" could not be received as evidence under any circumstances, and it was not proper to state in the hearing of the jury what they would show. Still, if there were nothing more objectionable in the case, we are not prepared to say that this conduct of the territory's representative ought to reverse the judgment, although it comes dangerously near it. The duty of a prosecutor is to present to the jury the facts as they can be made to appear by legitimate testimony, and when that is done his duty is ended. An offer of proof may often be made under circumstances where it is nec-

essary to explain its connection or effect in order to show its admissibility; but such an offer pre-supposes some legitimate means at hand of making the proof, not an *ex parte* statement of some German military tribunal which could have no more force than waste paper. That the matter passed, in this instance, without further challenge in the court below, alone redeems it from its legitimate effect.

But this judgment must be reversed upon the court's charge to the jury. As before said, the evidence on the part of the prosecution was entirely circumstantial; but it was clearly stated, uninvolved, and straight to the point. On the other hand, the defendant rested entirely upon his own denial, the testimony of witnesses as to his good character, and the absence of proof of motive. The charge, in such a case, ought to have been confined closely to the law applicable, with only such allusion to the testimony as was necessary to make clear the law of the case. Judges of the territorial district courts, when trying criminal cases under the territorial laws, did not have the latitude accorded to judges of the United States district courts in the matter of charging the jury. Section 221, Code, subd. 6, contemplated a statement of all matters of law necessary for the information of the jury in finding a verdict, and only such "allusion" to the evidence as was necessary. The discretion of the trial court was final in determining where and what allusion was necessary; but the power to allude was for the purpose of making clear the bearing of the law, and for nothing more. Therefore where, as in this case, a long and wholly oral charge was largely devoted to an argument of the very facts of the case, although carried on under the guise of an illustration of the meaning of circumstantial evidence, in which every material constituent of the territory's case but one was taken up, the facts dovetailed together, and a conclusion deduced and announced to the jury; and where, in reference to the one point reserved, the court's opinion was distinctly made to appear, though not stated, it is too clear for argument that, however often the jury were told that the facts were for their decision alone, the bounds of a legal charge were overstepped, greatly to the prejudice of the defendant.

As it is not possible, under our constitutional provisions, that any superior court will take the course here adopted, we shall not burden the decision with any extended extracts from the charge. The following will suffice to show the style of language used. The review commenced thus: "Now, gentlemen, let us look at these facts dispassionately, without prejudice, and without thinking, so far as that goes, who this defendant is, or who the man that was killed was." Then follows a narration of the actions of the defendant and the deceased up to their leaving the saloon together, and of the hearing of the shots, and the voice of Scherbring. Then, there was a discussion as to the probability that the man shot himself, or was shot by some other person, with a conclusion in favor of the latter theory, thus: "From

these circumstances, we arrive at the conclusion that the man was shot by some one other than himself." Again: "The question now is, who did it. That is the question that is left. If what I have said to you satisfies you that Scherbring was shot by somebody other than himself, and that he died from the wound, then the territory have proved that much of their case so that we are satisfied with it. Now, with the same impartiality, discretion, and deliberation, weighing all the circumstances, we approach the other question. Did the defendant shoot him? That is the only question left." Here occurs a review of the testimony of defendant or the cross-examination concerning his movements from the evening of the 14th, on; and of that of the prosecution's witnesses on the same point. Speaking of the latter, there are such expressions as these: "Do they lie about it? Did they mean to lie about it?" Concerning defendant: "This story that he tells you about where he went to, if it is true, notwithstanding some of it may seem a little improbable, \* \* \* that is his story; of course, if it is true, he was not out here where Longstaff, Noonan, and Stewart say they saw him." The concluding remark was: "It is for you to say, gentlemen, whether he shot Scherbring or not;" but after so "impartial" a discussion, if any juror of the 12 had been weak enough to be influenced by what the court's opinion of the undecided fact was, his verdict could not be long doubtful.

There is a technical objection made to our consideration of the charge, under this aspect, by the counsel for the territory, because the exceptions taken immediately after its delivery, 22 in number, were all very brief, and each merely called the attention of the court to a phrase or two which was formally objected to. There was no exception to the whole or a part of the charge, on the ground that it was an argument upon the facts to the prejudice of the defendant. It is true that generally we expect to be called upon to pass upon those portions of a charge which are alleged to misstate the law, only when the error was called to the attention of the court below, and the objection raised by exception. But the error in this case was not one of statement concerning the law of it, which might have been corrected upon a recall of the jury. This was an error of conduct on the part of one branch of the court by assuming the functions of the other branch,—an error which was irreparable with the jury then in the box, because the argument and conclusions rehearsed in their presence were incapable of recall; they had made their impression the instant they were uttered, and no correction from the same source would have had any effect except to confuse jurymen. This matter was fully argued in print, so that there was no surprise in this court; and, from the language of several of the exceptions actually taken, we think it probable that the same question was presented to the court below on motion for a new trial. In a capital case, if there was prejudicial error which is patent upon the face of the record, the appellate court

should not allow technical objections to deprive the defendant of a new trial. Here the error was prejudicial to the extent of denying the accused that fair and impartial trial which was his right, no matter what may have been the degree or heinousness of his offense; and the error is too patent to be mistaken. There were some specific errors which it is not necessary to notice, as they are not likely to occur upon a retrial. This holding decides the case, but we cannot refrain from going beyond the suggested errors of commission in this charge to notice one of singular omission. The opening words of the charge were: "The defendant here is charged by the grand jury of this county with having committed the crime of murder by shooting a man by the name of Scherbring on the 14th day of last July," and there all allusion to the crime charged or the elements constituting the crime ended. The indictment alleged murder in the first degree, but no explanation was given of the facts necessary to be shown to warrant a conviction, either by reading the statute or by equivalent oral statement. Nor were the jury informed that under sections 786, 790, and 1097 of the Code, if they found that the prisoner did shoot the deceased, unless they also found deliberation and premeditation, they could return a verdict of murder in the second degree only. On the contrary, having said to them that the only question left was, "Did the defendant shoot him?" the court furnished them with two forms of verdicts, the first of which was: "We, the jurors in this action, find the defendant not guilty;" and the other was: "We, the jury in this action, find the defendant guilty as charged in the indictment." The court was not called upon in this case, under the evidence, to instruct in regard to manslaughter, at least without a request therefor; but to omit to define the degrees of murder, and give the jury the liberty of saying under which head the facts proved a crime, was so great an oversight that it is to be accounted for only upon the theory that the discussion of the facts to so much length overshadowed the fundamental law of the case, and caused it to be forgotten. The judgment is reversed, and a new trial granted.

ANDERS, C. J., and HOYT, and DUNBAR, JJ., concur.

SCOTT, J. I concur in the result.

(7 Utah 356)

HYDE v. UNION PAC. RY. CO.

(Supreme Court of Utah. June 5, 1891.)

RAILROAD COMPANIES — INJURIES TO CHILD ON TRACK — DAMAGES — MENTAL ANGUISH — CONTRIBUTORY NEGLIGENCE.

1. In an action against a railroad company for killing plaintiff's child, evidence was introduced, over defendant's objection, as to the grief of the father; and the court charged on the subject of damages that the jury were to consider the comfort the parents might take with the child in bringing it up. *Held*, that such rulings were not objectionable, as authorizing damages for the father's mental anguish; the instruction being but slightly different, if any, from directing the jury to take into account the loss of the child's

society, and the evidence a natural inference, which the jury would draw for themselves; and which, although erroneously admitted, was presumably harmless, since there was no contention of excessive damages.

2. In an action against a railroad company for killing a child four or five years old, the evidence showed that the child wandered away from home, and went to sleep on the track, near a public crossing and school-house, where children were frequently passing, and that the engineer saw an object there when between 200 and 300 yards away, but could not tell what it was until within 30 feet, when it was too late to stop. *Held*, that the failure to slow down so as to be able to stop, if it became necessary, was negligence; and that the child was not such a trespasser as to prevent recovery, even though plaintiff himself was negligent in permitting it to wander there unattended.

Appeal from district court, first district; H. P. HENDERSON, Justice.

P. L. Williams, for appellant. J. L. Rawlins, for respondent.

ANDERSON, J. This is an action by the plaintiff to recover damages for the death of his infant son, aged between four and five years, whose death is alleged to have been caused by the negligence of the defendant. The plaintiff lived at Honeyville, a small village on the line of the defendant's road, and was in the employ of the defendant as a section hand at the time of the accident; his house being situated about a quarter of a mile from the railroad track. On the day of the accident the plaintiff was at work on the line of the defendant's road several miles from his home. The mother of the child was away from home, and the evidence fails to disclose when she went away, or whether the child was left in the care of any one. There were five children in all in the family, but their ages are not shown by the evidence. The child wandered away from home, and went to sleep between the rails of the track of the defendant's road, at a point in the village of Honeyville near where a public highway crosses the railroad track, upon which there is considerable travel, and was run over by a train of cars and killed. There was a store close by, and a school-house not far off, and children were frequently on and along the track at this point. The accident occurred about noon, on a clear day in the month of July. The train was a work train, composed of a locomotive, tender, and 10 cars, and was running with the tender in front of the engine. Both the engineer and fireman testified they saw the child when it was from 200 to 300 yards away, but thought it was a piece of cloth or paper, and could not tell what it was until they got within about 30 feet of where it lay, when they discovered it was a child by seeing its hair, but that it was then too late to stop the train before reaching it. They further testified that they did not slacken the speed of the train when they saw the object on the track until they ascertained it was a child, when they immediately did all they could to stop the train as soon as possible, but that the train could not be stopped in a less distance than about 125 feet. At the trial a witness was asked the following question: "I will ask you if you observed

the effect, if any, which the death of this child had upon his father when you saw him there." The witness was permitted to answer this question over the objection of the defendant, his answer being as follows: "I noticed he was very much grieved, from his moaning and speaking of his child." Permitting this question to be asked and answered, together with the instructions of the court on the measure of damages, is claimed to be contrary to the rule laid down by this court in *Webb v. Railway Co.*, 24 Pac. Rep. 616, and the case of *Munro v. Dredging, etc., Co.*, 84 Cal. 515, 24 Pac. Rep. 303.

The instructions of the court on the subject of the measure of damages were as follows: "Now, if you pass both of these questions in favor of the plaintiff, then you would come to the question of damages,—the amount that should be assessed in favor of the plaintiff for the damages that he has sustained; and, in determining that question, you are to take into consideration all the circumstances of the case, the age of the child, the kind of child that it was, and take into consideration the assistance that it might be to the parents in future years; and you may also take into account the loss of society, and the comfort that the parents might take with this child in rearing it and bringing it up, and the reliance that they could place upon it in the future years for their support and maintenance, and you can take into account all these things in determining what they should receive as compensation for the loss they have sustained. It should not be determined in a mere sentimental way. It should be determined in as nearly a business way as it is possible for jurors to determine such questions, and determine it judicially and reasonably, and not in a vindictive way, but determine it fairly and reasonably, having in view compensation to the parents for the loss they have sustained; and, when you have determined that, that would be the amount of your verdict." The part of the instructions which is objected to is that which says to the jury that they might consider "the comfort that the parents might take with this child in rearing it and bringing it up." It is contended in argument that the testimony objected to, together with the instructions, authorized the jury to give damages for the mental anguish of the father for the death of his child. We think the court erred in permitting the witness to testify that the father appeared grieved by the death of his son, but we do not think the defendant could have been prejudiced by it; for it was a natural if not necessary inference, which the jury would have drawn from the fact of the death of his child without such evidence, that the father should feel grieved. It was held by this court in *Webb v. Railway Co.*, supra, that the mental anguish or suffering of the surviving relatives of the deceased was not an element of damage for which a recovery could be had, and we do not think the instructions given in the present case can fairly be construed to lay down a different rule. To say to the jury that they might consider "the comfort that the par-

ents might take with this child in rearing it and bringing it up" is but slightly, if any, different from saying to them that they might take into account the loss to the parents of the society of the child; and, as the amount of the verdict (\$2,000) is not claimed to be excessive, we think the defendant suffered no prejudice because of the rulings of the court.

It is contended that the plaintiff was guilty of such contributory negligence in permitting a child of such tender years to get upon the track of the railroad unattended by some older person that he ought not to be permitted to recover. The questions of the negligence of the parents and of the railroad company were submitted to the jury under proper instructions by the court, to which no objection is taken, and we see no reason for disturbing their verdict on the ground that it is not supported by the evidence. But, even if the parents were guilty of contributory negligence, we think, under the circumstances of this case, such negligence should not defeat a recovery. Although an injured party may be guilty of negligence contributing to the injury complained of, yet he is entitled to recover against a defendant who, after discovering the plaintiff's negligence, fails to use due diligence to prevent accident, but who goes ahead wantonly or recklessly and commits the injury. It is now the well-settled law that "the party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible." 1 *Shear. & R. Neg.* § 99, and cases cited. See, also, *Beach, Contrib. Neg.* p. 58, § 18; 1 *Redf. R. R.* (6th Ed.) p. 225. The case of *Keyser v. Railway Co.*, 56 Mich. 559, 23 N. W. Rep. 311, was very similar in its material facts to the case at bar. In that case a child two years and six months old strayed upon the defendant's track, and was lying down between the rails when it was struck by the engine, and seriously injured. The country where the accident occurred was low and wet, and grown up to brush and berry bushes, and but sparsely settled, and a locality where to find a child upon the track would be least expected. The train was running at the rate of 30 or 35 miles per hour, and could not be stopped in a less distance than from 400 to 500 feet. The child was seen by the engineer and fireman when the engine was about 3,000 to 2,500 feet from him, but they thought it was a pig or a stick of wood until the engine was within about 1,200 feet of him. The court held that it was negligence as a matter of law for the engineer not to "slow down the speed of his engine to such a rate that, in approaching it, he could have stopped his train, if necessary, to prevent injury before reaching the object of danger." See same case in 66 Mich. 391, 33 N. W. Rep. 867. We think in this case that, when the servants of the defendant saw an object on the track, in a place frequented by children and others, and failed to slacken the speed of the engine so as to be able to stop the train before striking the child, it was negligence, and that plaintiff's child was not such a trespasser as to prevent a recovery

against the defendant for the reckless or negligent acts of the defendant, when the injury could have been avoided by proper care and caution by defendant's engineer. The judgment of the court below is affirmed.

ZANE, C. J., and BLACKBURN and MINER, JJ., concur.

(7 Utah 263)

WEBB v. DENVER & R. G. RY. CO.

(Supreme Court of Utah. June 5, 1891.)

INJURIES TO CAR-REPAIRER—FELLOW-SERVANTS—EXCESSIVE DAMAGES.

1. Plaintiff's decedent, a car-repairer, while engaged in removing a broken brake-beam, and assisting to couple the car with a chain, so that it could be set out for repairs, was killed by the unexpected movement of the engine. The court charged, in an action against the railroad, that fellow-servants were such as directly co-operate with one another in the same department of service, or such that their usual duties bring them into habitual association; and that plaintiff was entitled to recover, if the engineer was employed in a department separate and distinct from that in which decedent was employed, and if the latter's death was the result, not of his own negligence, but of that of the engineer in moving his engine without warning. *Held*, that such instructions were proper.

2. A verdict for \$4,995 was not so excessive as to justify reversal, where decedent, at the time of his death, was a strong healthy man 28 years old, of good habits, and earning \$1.75 per day.

Appeal from district court, third district; C. S. ZANE, Justice.

*Bennett, Marshall & Bradley*, for appellant. *J. L. Rawlins*, for respondent.

ANDERSON, J. This action is brought to recover damages for the death of plaintiff's decedent, Louis T. Webb, alleged to have been caused by the negligence of the defendant. The case was before this court on a former appeal, (*Webb v. Railway Co.*, 24 Pac. Rep. 616,) and was reversed, and another trial was had in the district court, and plaintiff recovered a verdict and judgment in the same amount as at the first trial. A motion for a new trial was made and overruled, and this appeal is from the judgment and from the order overruling the motion. At the trial, by stipulation between counsel, the evidence embodied in the record upon the first appeal was read to the jury. The court gave the same instructions to the jury that were given upon the first trial, except as to the measure of damages, and the same requests, made and refused at the first trial, were made and refused at the second. Plaintiff's decedent was a car-inspector and repairer in the yards of the defendant at Salt Lake City. An east-bound train, at the station, in switching, pulled out the draw-head of a refrigerator-car, and the train separated. The forward part was backed up, and broke the brake-beam of the car ahead; the forward part of the train was moved forward, and the conductor called Rice, the car inspector and repairer in charge of the shop and yards at the station, to remove the broken brake-beam so that the cars could be coupled with a chain, and the broken car set out of the train for repairs. He came with the deceased as an assistant, and

they removed the broken brake-beam. The conductor got a chain from the engine, and put it on the refrigerator-car, and then signaled the engineer to back for coupling, and he backed so that the cars came within about 18 inches of each other, and stopped, and Rice and the deceased were standing by. A brakeman went in to make the coupling with the chain, but was unable to do so, and the deceased stepped in the side opposite the brakeman to assist in making the coupling with the chain, and, while both were down on their knees, the forward cars were permitted to come back, and crushed the head of deceased, killing him instantly. It is insisted by counsel for the defendant that the engineer and the deceased were fellow-servants, and that, therefore, it is not liable for the negligence of the engineer in negligently moving the engine backward, whereby deceased was killed. The instructions given the jury by the court on this point, and which are claimed to be erroneous, are as follows, to-wit: (1) "The court charges you that if you find from the evidence that the death of Louis T. Webb was caused without fault or negligence on his part, while he was between the cars assisting the brakeman to couple the same, on account of the negligence of those in charge of said train in moving or backing said train, without notice or warning to said deceased, you will find in favor of the plaintiff; unless you also find that such backing of the train was due solely to the negligence of the fellow-servant of said deceased engaged in the same department of service." (4) "The court further charges you that servants of the same master, to be co-employees or fellow-servants, so as to exempt the master on account of injuries sustained by or resulting from the negligence of the other, must be such as are directly co-operating with each other in a particular line of employment, or such that their usual duties shall bring them into habitual association, so that in the use of reasonable diligence they may exercise a mutual influence upon each other promotive of proper precaution." (5) "If the jury find that the death of Louis T. Webb was caused, without fault or negligence on his part, by the negligence of the engine-driver or other person in charge of said freight train, and that such engineer or other person was at the time engaged in a separate and distinct department of service from that in which said deceased was engaged, then you will find a verdict for the plaintiff." We think the instructions state the law correctly, and are in conformity with the rule laid down by this court in *Daniels v. Railway Co.*, 23 Pac. Rep. 762. See, also, *Railway Co. v. Ross*, 112 U. S. 877, 5 Sup. Ct. Rep. 184; *Railway Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590. In the last case cited, Justice FIELD says, (page 653, 116 U. S., and page 596, 6 Sup. Ct. Rep. :) "The words, 'same general business,' have reference to the general business of the department of service in which the employee is engaged, and do not embrace business of every kind which may have some relation to the affairs of the employer, or even be necessary for their successful manage-



ment. If any other construction were adopted, there would be no such thing as a separate department of service in the business of railroad companies; for whatever would tend to aid in the transportation of persons and property would come under the designation of its general business." We have examined all the instructions given and refused in connection with the evidence, and find no error. It is contended that the damages are excessive. The deceased was 28 years old when he was killed. He was in robust health, was industrious, and of good habits, and was receiving \$1.75 per day from the defendant. We cannot say that, under these circumstances, \$4,995 is so excessive as to justify a reversal on that ground. The judgment of the district court is affirmed.

MINER and BLACKBURN, JJ., concur.

(7 Utah 368)

LOWE *et al.* v. HARDY *et al.* ASHTON *et al.*  
v. SAME. RAYBOULD *et al.* v. SAME.

(Supreme Court of Utah. April 18, 1891.)<sup>1</sup>

LEGISLATIVE POWERS—CONSOLIDATION OF SCHOOL-DISTRICTS—TAXATION—LEVY.

1. By Act Leg. Assen. Utah 1890, §§ 100-116, the separate school-districts in Salt Lake City were abolished and consolidated into one, and their separate property became the property of the whole district. The value of the property in the districts was unequal, and in some no taxes were collected or levied at the date of consolidation. An injunction was sought by taxpayers in an old district to restrain the collection of taxes in the new because not uniform. *Held*, that the legislature had power to abolish and consolidate the districts, and to apportion their property, and the manner of the apportionment was a legislative question, which the court cannot review.

2. The school trustees, having estimated the amount needed for school purposes, reported it to the tax-payers; who thereupon voted a levy of 1 per cent., which, upon the valuation for that year, would raise the sum required. The county officials, however, extended the tax upon the roll of the following year, thus raising thrice the sum required, which would necessarily be used for school purposes outside of the old district, which had been abolished, and its property merged in a new one. *Held* that, in construing Comp. Laws Utah 1888, § 1918, providing for the computation of taxes by county officials upon the assessment roll, the court would give effect to the intention of the tax-payers, and, to prevent injustice, would require the tax to be collected upon the roll of the year in which it was voted.

ZANE, C. J., dissenting.

Appeal from district court, third district; T. J. ANDERSON, Justice.

Stephens & Schroeder, for appellants.  
Walter Murphy and P. L. Williams, for respondents.

BLACKBURN, J. Up to March 13, 1890, Salt Lake City was divided into 21 school-districts, each district having its own officers and the power to levy taxes for school purposes. The plaintiffs are tax-payers of district No. 11, as it existed up to and prior to March 13, 1890; and the trustees of said district were authorized to provide funds for the support of public schools in said district under a statute

then in force, as follows: "All school taxes, whether levied by trustees or by a special meeting called for that purpose, shall be computed from the valuations of the county assessment roll, and shall be levied during the month of April, 1886, and during the month of December of each year thereafter; and, within ten days after any such meeting shall have been held, the school trustees shall make a certified statement of the per cent. of the taxes so levied to the county clerk, and to the county assessor. The county assessor shall assess therefor, at the same time and in the same manner that he assesses for territorial and county taxes, and he shall give to district school tax-payers the same notices as are required by law to be given to tax-payers of territorial and county taxes." Section 1918, Comp. Laws 1888. It is also provided in section 1915: "Whenever it shall be necessary to raise funds to purchase, repair, or furnish school-houses, or for other school purposes, an estimate of the approximate cost thereof shall be made by the trustees, and the rate per cent. may be fixed at any sum, not exceeding two per cent. per annum, as shall be decided by a majority vote of the property tax-payers in said district present at a meeting called for that purpose, to be assessed and collected as a special tax upon all the taxable property of the district."

By the authority of these statutes, in December, 1889, the trustees of said district, at a meeting called for the purpose, estimated the needs of the district for school purposes for the coming year to be the sum of \$5,500, which was received by the tax-payers at the meeting; and they estimated that 1 per cent. upon the assessment value of the property of the district for 1889 would raise the amount necessary, and voted the levy of a tax of 1 per cent., and the trustees duly certified the same to the county clerk and the county assessor. The assessor and collector extended the tax upon the assessment roll of 1890, instead of upon that of 1889; and upon that roll the tax voted would amount to over \$10,000.—vastly in excess of the amount needed; and the collector is now proceeding to collect the same. The legislature of Utah territory, at its session in 1890, passed an act abolishing the 21 school-districts in Salt Lake City, and consolidated them all in one district, and provided that the property of the several districts should belong to the consolidated district. It also appears that the property of the districts is vastly unequal, and that some of them have taxes uncollected in large amounts, and many of them have no taxes levied, and almost no property of any kind. These facts are alleged in plaintiffs' complaint, and they ask that the collection of this tax in district No. 11 be enjoined, and for general relief. To the complaint the defendants interposed a demurrer, which was sustained, and the appellants appeal, and allege—

1. That this tax is void because it operates so unequally in the different parts of the city, as the law is that all taxes must be uniform.

It is conceded that the legislature has

<sup>1</sup> Rehearing denied June 2, 1891.

authority to abolish these districts, and consolidate them into one, and apportion the property. How that apportionment should be made is a legislative question, and not for the courts; and, the legislature having acted upon that question, it is presumed that it did all that was necessary, and the court cannot interfere. Hence this contention is untenable. *Cooley, Tax'n*, p. 179, and following, and notes.

2. It is claimed by appellants that this tax was not fully levied, so as to cover property of the district, before it was abolished. The district went out of existence the last day of June, 1890, and the assessment roll of that year was completed at that time, so that, even if the tax was computed upon the assessment roll of that year, it was complete, and became a debt due district No. 11.

3. Appellants also contended that this tax was voted and levied upon the assessment roll of the year 1889, and not upon that of the year 1890. We think this contention is tenable, and should be sustained. Under the statute, the trustees of the district made an estimate of the funds needed for school purposes, and reported to a meeting called for that purpose that \$5,500 was needed, and upon the assessment roll of 1889 the tax-payers computed that a 1 per cent. levy would raise that amount, and voted that levy. They wanted \$5,500, and they intended to levy that amount, and they voted a levy of 1 per cent., because, computed on the assessment roll of 1889, that would raise the amount needed. They had not in mind the assessment roll of 1890. If that intention can be carried out by a reasonable construction of the statute authorizing the levy, without doing violence to its wording, we think it ought to be done. The statute provides the levy is to be made in December; that the trustees are to report the amount needed, and the tax-payers are to vote the per cent. necessary to raise that amount. In order to do that, the per cent. to be levied must be ascertained from the assessment roll of that year, not from that of the succeeding year, for it has not been made. It seems logically conclusive that the extension and collection of this tax so levied should be upon the assessment roll of the year in which the tax is levied. But the statutes say "the collector shall collect this tax at the same time and in the same manner," etc., "as the territorial and county taxes are collected." And it is said that this provision makes it conclusive that this tax should be computed upon the assessment roll of the succeeding year. Collecting this tax at the same time can as well be done, computed upon the assessment roll of 1889, as upon that of 1890, and collecting it in the same manner only has reference to the mode of collection, as by distraint, suit, or the sale of property, and does not in any way determine how the amount of the tax is to be computed. Therefore no violence is done to the terms of the statute, if the amount of this tax is computed upon the assessment roll of 1889. We think that was the intention of the legislature, and certainly it was that of the tax-payers. If the amount of the

tax is computed upon the assessment roll of 1890, the levy exceeds by \$11,000 the amount intended to be voted by the tax-payers, and makes the amount to be collected over \$16,000,—a pretty large amount for one school-district to pay. If this district had not been abolished, this excess of collection would have been for its benefit in the future; but now, if collected, it goes for educational purposes outside the district which pays it. This district ought to be protected, and courts ought to find a remedy. The statute is capable of two interpretations,—one that the tax levied should be computed, and the amount ascertained to be collected, on the assessment roll of 1889, and the other on the assessment roll of 1890. One interpretation collects the tax that was voted and intended to be levied; the other raises \$11,000 more than was intended, and compels this district to pay over \$11,000 more than was intended, and, under the law as it now stands, this amount will go for the support of all the schools of the city, and the tax-payers of that district will pay that much more than their share of the school expenses of the city. Can any one claim that such was the intention of the legislature? Courts, unless compelled by the express wording of statutes, should interpret them so as to do good, and not evil; so as to work out equity and justice, and not wrong and oppression. We conclude therefore that it is the duty of the collector, in collecting this tax, to compute the amount to be collected upon the assessment roll of 1889. This case is reversed, and remanded for further proceedings in accordance with this opinion.

The same question is involved in the case of *Ashton et al. v. Hardy et al.* It is therefore reversed and remanded.

The same principles are also in question in the case of *Raybould et al. v. Hardy et al.* But the complaint does not raise the particular question upon which the foregoing decision turns. It is therefore reversed and remanded, with leave to the plaintiffs to amend their complaint.

MINER, J. I concur in the result.

ZANE, C. J., dissents.

(3 Idaho [Hast.] 72)

PEOPLE *ex rel.* LINCOLN COUNTY v. GEORGE.<sup>1</sup>

(*Supreme Court of Idaho.* June 3, 1891.)

CONSTITUTIONAL LAW—LOCATION OF COUNTY SEAT—DIVISION OF COUNTY.

1. The act of March 3, 1891, entitled "An act to create and organize the counties of Alta and Lincoln, to locate the county-seats of said counties, and to apportion the debt of Logan county," held unconstitutional.

2. An act to divide a county, and attach the part cut off to another county, without submitting the proposition to a vote of the people in the segregated part, is in violation of section 3, art. 18, of the constitution.

SULLIVAN, C. J., dissenting.  
(*Syllabus by the Court.*)

Application for *mandamus*.

*Lyttleton Price, George M. Parsons, Texas Angel, N. M. Ruick, and George H.*

<sup>1</sup>Petition for rehearing pending.

*Roberts, Atty. Gen., for relator. S. B. Kingsbury, Arthur Brown, and R. Z. Johuson, for defendant.*

MORGAN, J. On the 3d of March, 1891, the legislature passed an act entitled "An act to create and organize the counties of Alta and Lincoln, to locate the county seats of said counties, and to apportion the debt of Logan county." The first section establishes the county of Alta, composed of the territory of Alturas county as it then existed and about half of the contiguous territory of Logan. Section 2 establishes the county of Lincoln from the residue of the territory theretofore belonging to Logan. Section 3 makes Hailey, then the county-seat of Alturas county, the county-seat of Alta county. Section 4 makes Shoshone the county-seat of Lincoln county. Section 5 authorizes the governor to appoint the county officers of the two counties thus established. Section 6 provides that all the county records, books, money, office furniture and fixtures, and all other personal property belonging to Logan county, and all real estate situate in the county of Lincoln, thus organized, before belonging to Logan county, shall become the property of Lincoln county, and that the commissioners of Lincoln county shall within 30 days cause all records, books, funds, and other personal property of said Logan county to be transferred to Shoshone. Section 7 provides that all public buildings, records, books, furniture, money, real estate, and personal property theretofore belonging to Alturas county, shall become the property of Alta county. Section 9 provides that all the indebtedness of Logan county shall be assumed and paid by Lincoln county, and that all the indebtedness of Alturas county shall be assumed and paid by Alta county. Under and by virtue of this act the commissioners of Lincoln county demanded the said books, records, and personal property then in the custody of Wesley B. George, the duly elected and qualified clerk of the district court, and *ex officio* auditor and recorder of Logan county, which being refused, the county of Lincoln, on the 17th day of April, 1891, filed its petition in this court for a writ of mandate to compel said George to deliver said property to Lincoln county. On the same day the said George filed his demurrer to said petition, and alleges that it does not state facts sufficient to constitute a cause of action. The issue thus formed raises the question as to the constitutionality of the act of March 3, 1891.

Considerable of the argument of the cause related to the question as to whether the counties, as recognized by the constitution in section 1, art. 18, as they then existed, could be abolished by act of the legislature. In the view I take of the cause it is not necessary to determine this question. It will also be apparent that it is not necessary to decide the question as to whether defendant, George, being duly elected in pursuance of the provisions of the constitution, is such a constitutional officer that he cannot be deprived of his office by an act of the legislature. The question that must determine

this case is, can a portion of the territory of one county be cut off and attached to another without a vote of the people, residing in the segregated portion, consenting thereto, in the manner adopted in this act? The first paragraph of section 3 of article 18 of the constitution is as follows: "No county shall be divided unless a majority of the qualified electors of the territory proposed to be cut off, voting on the proposition at a general election, shall vote in favor of such division: provided, that this section shall not apply to the creation of new counties." What is the evident intent of the act under consideration? What was the object to be effected? What is the result accomplished? The object was not, certainly, to change the names of the two counties. If that had been desired it could have been effected by a direct act for that purpose, as the constitution does not forbid it, and the act says nothing about changing the names of the counties of Logan and Alturas. It could not have been desired to abolish the counties of Alturas and Logan. Nothing is said in the act about abolishing the counties, and they do not seem to be abolished. The same territory that before the passage of the act constituted the counties of Alturas and Logan, under this act constitutes the counties of Alta and Lincoln. No new territory is added to them; none is taken away; but the larger half of the county of Logan is cut off, and attached to the county of Alturas, and the names of the two counties changed. There were two counties before; there are but two now. It is evident that the whole intent and object of the act was to cut this body of territory from the county of Logan, and attach it to the county of Alturas. In fact, I understand the counsel did not deny that this was the sole object. But the constitution says this cannot be done except by a vote of the people. The legislature cannot do indirectly what it cannot do directly. *People v. Marshall*, 12 Ill. 391; *Craig v. State*, 4 Pet. 410. Says the court in the case first above mentioned: "No means can be constitutional which effect an unconstitutional object. While we would not extend the prohibitions of the constitution so as to embrace measures and objects not manifestly and clearly within the design of its framers, yet, where that is undeniably the case, then by no means whatever should it be allowed to be evaded." See, also, *Rock Island Co. v. Sage*, 88 Ill. 589; *Gotcher v. Burrows*, 9 Humph. 589. It is the duty of the court to give both the statute and the constitution such construction as will give effect to both, unless the statute is so clearly repugnant to the constitution as to admit of no other reasonable construction. *Doan v. Board*, (Idaho,) 26 Pac. Rep. 167, and cases there cited. Suppose the court should hold that this provision of the constitution could be evaded in the manner adopted by this act, then successive legislatures could go on and sever a portion of the territory of one county and attach it to another in every part of the state, and continue the work indefinitely, without the vote of the people in any case.

It will be seen that it would render this provision of the constitution of no effect whatever, as the legislature and the court would have clearly pointed out a method by which it might be evaded. I think the creation of a new county under the proviso in this section must be held to be the creation of an additional county, which the legislature may do out of any territory it may see fit, and without a vote of the people. The constitution is the fundamental law of the state; must control all branches of the government. No evasion, however specious, can be permitted. No amount of circumlocution can divide a county, and attach the part cut off to another, without compliance with section 3, by submitting the proposition to a vote of the people. We are not permitted to consider the apparent necessity of the case, nor the injustice under which any county may be laboring. Wrongs, if they exist, can only be righted by constitutional means. We can only say thus it is written in the constitution. To cut off a portion of any county, and attach the part thus detached to another county, without a vote of the people in the segregated part, would be in direct violation of the clause referred to, and therefore void. The importance of the cause and the ability of the counsel engaged has induced us to examine the cases cited with more than ordinary care, but we have not been able to arrive at a different conclusion. The writ of mandate is denied, with judgment for costs against the relator, and execution may issue therefor.

HUSTON, J., (*concurring*.) I approach the consideration of this case with a full recognition of the fact that, when called upon to pass upon the validity of an act of a co-ordinate branch of the government, courts have a delicate duty to perform, but it is a duty the obligation of which must not be evaded or shrunk from. I recognize further the potency of the rule which requires that, before pronouncing an act of the legislature invalid, the court should be fully satisfied that such act is clearly repugnant to some provision of the organic law of the state. In this view let us consider the questions involved in this case. Section 1, art. 18, tit. "County Organization," of the constitution of Idaho, reads as follows: "The several counties of the territory of Idaho, as they now exist, are hereby recognized as legal subdivisions of this state." Section 2 of said article is as follows: "No county-seat shall be removed unless upon petition of a majority of the qualified electors of the county, and unless two-thirds of the qualified electors of the county voting on the proposition at a general election, shall vote in favor of such removal. A proposition of removal of the county-seat shall not be submitted in the same county more than once in six years, except as provided by existing laws. No person shall vote at any county-seat election who has not resided in the county six months, and in the precinct ninety days." Section 3 of said article 18 is as follows: "No county shall be divided unless a majority of the qualified electors of the terri-

tory proposed to be cut off, voting on the proposition at a general election, shall vote in favor of such division: provided, that this section shall not apply to the creation of new counties. No person shall vote at such election who has not been ninety days a resident of the territory proposed to be annexed. When any part of a county is stricken off and attached to another county, the part stricken off shall be held to pay its relative proportion of all existing liabilities of the county from which it is taken." Section 4 of the same article reads: "No county shall be established which shall reduce any county to an area of less than four hundred square miles, nor shall a new county be formed containing an area of less than four hundred square miles." On the 3d day of March, 1891, the legislature of the state of Idaho enacted a law entitled "An act to create and organize the counties of Alta and Lincoln, and to locate the county-seats of said counties, and to apportion the debt of Logan county." The sole purpose and effect of this act was to segregate or strike off from Logan county nearly one-half its territorial area, and attach the part so stricken off to Alturas county, and to change the name of Alturas to Alta, and that of Logan to Lincoln. The provision for the apportionment of the debt of Logan county was a necessary sequence. Was this act, so passed, repugnant to the provisions of the constitution of the state above quoted, or to any of them? We must take this constitution as we find it, as it is presented to us by its makers,—the people. It is not within the purview of our authority or the limits of our jurisdiction to hate, or set aside, or treat as naught, any jot or tittle thereof, and "no accepted canon of construction can justify us in adding to the constitution qualifying words of our own, suggested only by outside considerations, which may or may not have been of weight with the convention in framing, or the people in adopting, that instrument." Cooley, Const. Lim. Provisions similar to those above cited from the constitution of Idaho, are found in many of the constitutions of other states, and there has been no more disturbing element in the legislation and litigation in many of the states than that which arises from the organization of counties, and the location and changing of county-seats, and the changing of county boundaries. The elements of greed and self-interest enter so largely into the consideration and discussion of these questions that men have been prone, as shown in the history of several of the western states, not only to override constitutional provisions, but to set aside all legal restraints, and resort to brute force, to carry out their purposes in this direction. Idaho, while a territory, had some experience in this sort of legislation, of which, doubtless, the framers of our constitution were not unmindful; hence we find in our constitution a provision unknown to that of the older states, and which can only be found in the constitutions of nine states of the Union, to-wit, Missouri, California, Colorado, N. Dakota, S. Dakota, Washington, Montana, Texas,

and Idaho, to-wit, section 1 of article 18. The first appearance of this provision we find in the constitution of Missouri adopted in 1875. We are not at liberty to ignore or treat as meaningless this provision of the constitution more than we could any other. Its incorporation into the organic law by the makers thereof was for a purpose. Doubtless they mean what the language of the section plainly expresses,—that the existing county organizations should remain as such, subject only to such change as was permitted by the constitution. A careful examination of the authorities will fail to show a single case in which the right of the legislature to abolish a county has been recognized in any state whose constitution contained a provision like that of section 1 of article 18 of the Idaho constitution. The judges of the supreme court of the state of Missouri (55 Mo. 295) did hold that “counties are subdivisions of the state for governmental purposes, and there can be no doubt about the constitutional power of the general assembly to create, alter, abolish, and regulate them as expediency may demand, so that no vested rights are interfered with.” This opinion was rendered in 1873, and it is significant that in the constitution adopted by the people of Missouri in 1875, the following provision appears for the first time in the organic law of that state: Section 1, art. 9. “The several counties of this state, as they exist, are hereby recognized as legal subdivisions of the state.” I have been unable to find a single case in any of the states, whose constitutions contain this provision, where the legislative right to abolish a county has been upheld by the courts. The contention of the plaintiff would make this provision of our constitution a mere “oyez” clause, having no purpose or intention, save to give utterance to a self-evident fact. I dare not so mock the wisdom of the makers of our constitution. It may be conceded as elementary that the legislature has entire control of the questions of county organizations and county boundaries, except where limited by the inhibitions of the constitution; but the plaintiff contends that there are no inhibitions upon the power and authority of the legislature in this matter contained in the constitution; that the first clause in section 3 of article 18: “No county shall be divided unless a majority of the qualified electors of the territory proposed to be cut off, voting on the proposition at a general election, shall vote in favor of such division,”—is rendered null and void by the proviso “that this section shall not apply to the creation of new counties.” Without doubt this section is unhappily constructed. Strictly read, the proviso would apply to the whole of section 3, and yet the legislature did not so construe it, for they made provision in the act under consideration for the apportionment of the debt of Logan county, as required by the closing paragraph of section 3. Surely it would require most cogent reasoning to induce any court to arbitrarily set aside a provision of the constitution so plainly and unequivocally expressed, and which is plainly intended to reserve to the peo-

ple so valuable and important a right as that of having a voice in the decision of a question in which they are the parties most interested. I cannot believe that it was the purpose of the makers of our constitution to thus “palter in a double sense” with the people whom they were representing, to so “keep the word of promise to their ears, and break it to their hopes.” The constitution distinctly proclaims that “no county shall be divided unless a majority of the qualified electors of the territory proposed to be cut off, voting on the proposition at a general election, shall vote in favor of such division.” There is nothing equivocal, nothing ambiguous, in this language. The limitation upon the legislative power is direct, palpable, and imperative. The obvious intent, purpose, and effect of the act in question was to cut off or segregate a portion of Logan county, and attach the same to Alturas county. Not for the purpose of creating a new county in the sense that term is evidently used in section 3; but solely, entirely, and exclusively for the purpose of enlarging the area of Alturas county. That this was the sole purpose of the act is so plain “that he who runs may read.” The changing of names of the two counties from Alturas to Alta, and from Logan to Lincoln, was but a weak invention, of no more operative force than Faulconbridge’s boast: “And if his name be George I’ll call him Peter.” The makers of the constitution recognized the doctrine that even local governments, “long established, should not be changed for light and transient causes,” or be left entirely to the caprice of legislative bodies, to the exclusion of the rights, interests, and wishes of the people who are most interested therein. But we are told that this view does away entirely with the powers of the legislature, clearly allowed by the constitution to form new counties. A mere glance at the map of Idaho will furnish a complete answer to this objection. A very wilderness of new counties can be formed out of the area of this state without the slightest impingement of any of the provisions of the constitution. But if the contention of the plaintiff is to obtain, the whole internal structure of the state, both territorial and political, will be left to the mutative whims of each succeeding legislative assembly, and the protective provisions of the fundamental law will stand, “like counters in a barber’s shop, as much for mock as mark;” and gerrymandering will assume the position of an exact science.

No better rule, it seems to me, can be found for the guidance of courts in the decision of these cases, than that expressed by Chief Justice BRONSON in *Oakley v. Aspinwall*, 3 N. Y. 547. Says that learned jurist in his opinion in that case: “It is highly probable that inconveniences will result from following the constitution as it is written. But that consideration can have no force with me. It is not for us, but those who made the instrument, to supply its defects. If the legislature or the courts may take that office upon themselves, or if, under color of construction, or upon any other specious ground, they

may depart from that which is plainly declared, the people may well despair of ever being able to set any boundary to the powers of the government. Written constitutions will be more than useless. Believing, as I do, that the success of free institutions depends upon a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for latitudinarian constructions which are resorted to for the purpose of acquiring power; some evil to be avoided, or some good to be attained by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influence that constitutions are gradually undermined, and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But if the legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the constitution which nothing can heal. One step taken by the legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow; and so the process goes on until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them." Says Judge Cooley, in his work on Constitutional Limitations, (5th Ed.) p. 88, note, "We agree with the supreme court of Indiana, (Green-castle Tp. v. Black, 5 Ind. 557, 565,) that in construing constitutions courts have nothing to do with the argument *ab inconvenienti*, and should not bend the constitution to suit the law of the hour." What was intended to be done, what was done, by the passage of the act under consideration? Was any new county formed? The proposition is absurd; the position is untenable. The simply enlarging the area of one county by appropriating a portion of an adjoining county cannot, it seems to me, be seriously claimed to be the organization of a new county, even if the ceremony of rechristening of both counties is resorted to. It is suggestive of the view which the legislature had of the meaning of the provisions of section 3, art. 18, of the constitution, that at the same session at which the act under consideration was passed the same body enacted a law dividing the county of Ada, and erecting from the part segregated an entirely new county to be called "Canyon County," and submitting the adoption thereof to a vote of the people of the segregated territory. What rights have the people of Ada county, under the constitution, which are not shared equally by the people of Logan county? Is the constitution to receive one construction in behalf of the people of one county, and an entirely different interpretation when the rights and interests of the people of another county are involved? Is not this, in the language of the supreme court of Indiana, above cited, "bending the constitution to suit the law of the hour?" The proposition of counsel that

the provisions of the constitution are only applicable when in the judgment of the legislature it is expedient to make them so, is something more than startling, it is "monstrous and heretical." We can find no authority in support of such a view. There would be little use for written constitutions if such a rule could obtain. Constitutional provisions cannot be regarded as directory merely, to be obeyed or not, within the discretion of either or all of the departments of government. *Hunt v. State*, (Tex.) 3 S. W. Rep. 238. A strained construction or astute interpretation is not to be given to relieve against local or individual hardships. *Law v. People*, 87 Ill. 385. While it is true that the constitutions of very many of the states contain clauses similar to section 4, art. 18, of the Idaho constitution, it is equally true that only in the constitutions of the nine states above mentioned will a provision similar to that of section 1 of article 18 of the Idaho constitution be found; and I have been unable to find a single case in any of those nine states where the authority of the legislature to abolish existing counties has been sustained.

The case of *State v. Larrabee*, 1 Wis. 200, is not in point. Section 7, art. 13, of the constitution of Wisconsin provided that "no county with an area of nine hundred square miles or less shall be divided, or have any part stricken therefrom, without submitting the question to a vote of the people of the county, nor unless a majority of all the legal voters of the county voting on the question shall vote for the same." Washington county contained less than 900 square miles exclusive of that part of Lake Michigan within its boundaries. It was claimed that so much of Washington county as was covered by Lake Michigan should not be included in estimating its area; and that therefore the act of the legislature segregating a portion of said county, and erecting the county Ozaukee from the territory so taken off, was in violation of said section 7, art. 13 of the constitution. The court held that in estimating the area of Washington county the portion covered by Lake Michigan should be included, and this took it out of the provisions of said section 7, art. 13. The other question decided by the court in that case, touching the effect of the segregation and organization of the new county upon the county-seat, has no applicability here. The case of *Attorney General v. Fitzpatrick*, 2 Wis. 542, is only another phase of the same question, arising under the same act, and upon the same facts. The other authorities cited by counsel for plaintiff in support of the proposition that the legislature is supreme in the matter of creating or abolishing counties, being all decisions from states whose constitutions have no provision in similitude with section 1, art. 18, of our constitution, cannot be considered of weight herein. It seems to me that the language of Judge CATON in *People v. Marshall*, 12 Ill. 396, is peculiarly applicable to this case. Says that learned judge, in the closing part of his opinion: "There is, no doubt a certain

degree of plausibility in the course of argument by which this law is attempted to be sustained. It is truly said that the constitution is a restraint upon legislative powers, and there is no doubt but this law might be passed unless prohibited by the constitution. From this it is argued that, as there is no express prohibition to abolish counties, it is within the power of the legislature to do so, and from necessity there must be authority to organize the disorganized territory. But this reasoning is more specious than sound. As we have before seen, it leads inevitably to the overthrow of the paramount law of the state. No means can be constitutional which effect an unconstitutional object. While we would not extend the prohibitions of the constitution, so as to embrace measures and objects not manifestly and clearly within the design of its framers, yet where that is undeniably the case, then by no means whatever should it be allowed to be evaded." Suppose the legislature of Idaho, in their wisdom, had, in the language of counsel, decided that it was to the advantage of the people inhabiting that portion of the state of Idaho now known and designated as Ada county, to have that county abolished, and the territory of which it is composed attached to Washington county, and should enact a law to that effect, without submitting the question to a vote of the people to be affected thereby, can it be seriously contended that such an act would be constitutional? Or suppose a legislature of Idaho, not actuated or prompted thereto by wisdom, or any principle of righteousness or justice, but "moved and instigated by the devil," as it is said the legislatures of other states sometimes are, should "decide it is to the advantage" of the people inhabiting that portion of Ada county lying north of Main street in Boise City, that such territory should be attached to Boise county, and should pass an act to that effect, without submitting it to a vote of the people to be directly affected thereby, will it be claimed for a moment that such a law could be sustained as constitutional? And yet all these consequences are involved in the acceptance of the contention of the plaintiff. Say the supreme court of Tennessee in *James Co. v. Hamilton Co.*, 14 S. W. Rep. 601: "A county is a government within a government, and its voters must be consulted in all matters pertaining to it. It is not created, nor can it be destroyed, by an arbitrary legislative breath. The county was made at the instance of the people and for its people, and can be changed or abolished only, when at all, by their consent. If the legislature may dissolve one county and divide it out among its neighbors, it may abolish all, and destroy the state;" and it must be remembered that the state constitution of Tennessee contains no such provision as section 1, art. 18, of the Idaho constitution. It is evident to my mind that section 3, art. 18, of the constitution does not, as it stands, clearly express the intention of the makers of that instrument. A careful analysis of the section will, I think, make this apparent. It seems to

me that the proviso is misplaced in that section. Evidently it was the intention of the makers of the constitution that so much of section 3 as required a submission to the people of any proposition for the dividing of any county should not apply to the creation of a new county, and no further. My own view, therefore, is that, to express the evident intention and meaning of the makers of the constitution, section 3, art. 18, should be construed to read: "No county shall be divided unless a majority of the qualified electors of the territory proposed to be cut off, voting on the proposition at a general election, shall vote in favor of such division. No person shall vote at such election who has not been ninety days a resident of the territory proposed to be annexed: provided, that this section shall not apply to the creation of new counties. When any part of a county is stricken off and attached to another county the part stricken off shall be held to pay its relative proportion of all existing liabilities of the county from which it is taken." I do not think it was the intention of the makers of the constitution that the proviso in section 3 should apply to the last clause of said section. There is no reason grounded in any principle of equity or justice which would make the people of a segregated portion of a county responsible for a *pro rata* portion of the existing liabilities of the old county in case of a division of the county, and not in a case where the same territory was segregated for the purpose of forming or creating a new county. I am unhesitatingly of the opinion that the act of the legislature of March 3, 1891, segregating a portion of Logan county therefrom, and annexing the territory so segregated to Alturas county, was not the creation of a new county in any sense, and that said act is void, as contravening the provisions of section 3, art. 18, of the constitution of Idaho; that the provisions of said act abolishing the counties of Alturas and Logan are void as contravening section 1, art. 18, of said constitution; and that the writ of mandate should be denied.

SULLIVAN, C. J., (*dissenting*.) I am unable to concur in the opinion of the majority of the court. The question involved in this cause is whether a certain act of the legislature entitled "An act to create and organize the counties of Alta and Lincoln, to locate the county-seats, and to apportion the debt of Logan county," is in conflict with the constitution. "A state constitution is an instrument of restriction and limitation upon powers already plenary, so far as it affects the powers of the government and the objects of legislation." *State v. Lancaster Co.*, 4 Neb. 537; *People v. Draper*, 15 N. Y. 545; *People v. Flagg*, 46 N. Y. 401. It is a well-established principle that the law-making power of the legislature is supreme, subject only to the limitations imposed by the constitution. In other words, that which the constitution prohibits from being done determines the power of the legislature under it. *McMillen v. Lee Co.*, 6



Iowa, 331; *People v. Blodgett*, 13 Mich. 127. It is also a well-established rule that an express power to make laws is not necessary to enable the legislature to make them. The court is called upon, in this case, to declare a solemn legislative enactment unconstitutional and void. Judge Cooley, in his work on Constitutional Limitations, p. 192, says: "The power to declare a legislative enactment void is one which the judge, conscious of the fallibility of human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility." Courts have not the power to declare acts of the legislature void simply because, in the opinion of the court, such acts are repugnant to natural justice and expediency. Mr. Cooley says on this point, (Const. Lim. pp. 201, 202:) "The rule of law upon this subject appears to be that, except when the constitution imposes limits upon the legislative power, it must be considered as practically absolute, whether it operates according to natural justice or not, in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. \* \* \* It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power." Effect should be given to this act, unless it is clearly repugnant to the constitution. The rule of decision is, where the constitutionality of a statute is questioned, if there is any doubt, such doubt must be resolved in favor of the statute. "To doubt is to sustain the act." Sedg. St. & Const. Law, 409; Cooley, Const. Lim. pp. 88, 192, 222, 230; *Winch v. Tobin*, 107 Ill. 212; *Wulff v. Aldrich*, 124 Ill. 592, 16 N. E. Rep. 886; *Sharpless v. Mayor*, etc., 21 Pa. St. 164. "It must be clearly, plainly, and palpably in violation of the constitution." *Hess v. Pegg*, 7 Nev. 30; *Township of Mountclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. Rep. 391; *Morrison v. Springer*, 15 Iowa, 304; *Stewart v. Supervisors*, 1 Amer. Rep. 241, 242.

Construed by the light of the above principles and rules, is said act unconstitutional? That is the question. Article 18 of the constitution, entitled, "County Organization," contains all of the inhibitions upon the legislature in regard to the organization of new counties. The first four sections of said article are quoted by Mr. Justice Huston, in his opinion; but he bases his opinion upon the first and third sections thereof. The fourth section of said article is substantially the same as section 1, art. 7, of the constitution of Illinois, as to the area of counties, and is as follows: "No new county shall be established which shall reduce any county to an area of less than four hundred square miles; nor shall a new county be formed containing an area of less than four hundred square miles." It was decided by the supreme court of Illinois in *People v. Marshall*, 12 Ill. 392, that an act of the legislature abolishing two counties, and of their territory creating a new one, was not in conflict with said section, "el-

ther in letter or spirit." As the people of Idaho adopted this provision of the constitution of Illinois, the rule is that they also adopted the judicial interpretation given to said section by the highest court of that state. *Hess v. Pegg*, 7 Nev. 23; *Leavenworth Co. v. Miller*, 7 Kan. 479; *Daily v. Swope*, 47 Miss. 367. The act in question is not repugnant to section 4. Mr. Justice Huston places great stress upon section 1 of said article 18, which section is as follows: "The several counties of this state, as they now exist, are hereby recognized as legal subdivisions of this state." The learned justice states that he has been unable to find a single case, in any of the states whose constitutions contain the above provision, where the legislative right to abolish a county has been upheld by the courts. I have been unable to find a single decision, from any of the states whose constitution contains said provision, where the courts have held that said section was a prohibition upon the legislature from abolishing a county. If said section prohibits the legislature from abolishing a county, I submit, then, that it is a prohibition from changing the boundaries in any manner whatever, for said section recognizes the counties of this state "as they now exist." It is admitted by my associates that the legislature has the power to organize new counties. If a new county is organized, it must be conceded that the boundaries of some county or counties must be changed, and that such county or counties so changed would not thereafter "exist" as it or they "existed" at the date of the adoption of the constitution. The entire territorial limit of the state was included in 18 counties, and if the counties must continue as they then "existed," no new counties could be formed, unless the state acquired territory that was not within its limits at the date of the adoption of the constitution. If this section prohibits the legislature from abolishing a county, it prohibits the change of county boundaries in any manner and for any purpose. If this position is tenable, what becomes of the proviso of section 3? If by said section the counties of the state are made constitutional counties, they must each continue to exist as they "existed" at the date of the adoption of the constitution, or until the constitution is amended, permitting a change in their territorial existence or boundaries. Nearly every state constitution of which I have any knowledge recognizes the counties of such states; and many, if not all, state constitutions name each and every county of their respective states. The constitution provides for county government and county organization, but this of itself is not a prohibition upon the legislature from extinguishing a county government and establishing another in its stead, over the same territory, in connection with other territory. County government cannot be abolished by the legislature, so that the state and people would be deprived of it; and no effort has been made by the legislature to do away with county government. The mere recognition of a county by the constitution should not be construed into an

inhibition on the legislature from abolishing it.

Section 3, art. 18, provides as follows: "No county shall be divided unless a majority of the qualified electors of the territory proposed to be cut off, voting on the proposition at a general election, shall vote in favor of such proposition: provided, that this section shall not apply to the creation of new counties. No person shall vote at such election who has not been ninety days a resident of the territory proposed to be annexed. When any part of a county is stricken off and attached to another county, the part stricken off shall be held to pay its relative proportion of all then existing liabilities." By the proviso in said section it is declared that in the creation of new counties said section shall not apply. When applied to the creation of new counties, the constitution should be construed as though said section was not contained therein. The only prohibition placed upon the legislature in regard to dividing counties and changing county lines is contained in said section 3, and the prohibition therein contained does not apply to the creation of new counties. Section 3 is not to be considered, and is not applicable to the division of counties, made for the purpose of creating new ones. The power of the legislature is unrestricted, in the creation and organization of new counties, to the extent and out of such territory as it may deem best, so long as no county is created with an area of not less than 400 square miles, which limitation is contained in section 4, art. 18. It is maintained by Mr. Justice HUSTON that said section 3 is unhappily construed, and that, strictly construed, the proviso would apply to the whole section. The rules of construction would need to be carried to an extreme limit to hold that said proviso does not apply to the whole section. The proviso is in very terse and plain English, and declares that "this section" shall not apply to the creation of new counties. It is too plain to require construction. It is claimed that the legislature did not construe said proviso to apply to all of said section, for the reason that "they made provision in the act under consideration for the apportionment of the debt of Logan county, as required by the closing paragraph of section 3." Said entire section applies to the striking off of a part of one county, and attaching the part so stricken off to another county, then in existence. The effect of said section is to leave to the choice of the people, as expressed by their votes, whether they will be removed from one existing county to another. The last paragraph or sentence of said section is as follows: "When any part of a county is stricken off and attached to another county, the part stricken off shall be held to pay its relative proportion of all then existing liabilities of the county from which it is taken." I do not understand why one of my associates claims that the legislature, by the act in question, apportioned the debt of Logan county, as required by the paragraph above quoted, when section 9 of said act is as follows: "All of the indebtedness of Logan county

shall be paid by Lincoln county." There is not an intimation in said act requiring that that part of Logan county taken, in connection with Alturas county, to form Alta county, shall pay its relative proportion of all then existing liabilities of Logan county, but specifically requires Lincoln county to pay all of the indebtedness of Logan county. Said last paragraph of section 3 is not a prohibition on the legislature from apportioning the debts of the counties from which territory may be taken to organize new counties as may be just and equitable.

In the opinions of the majority of this court it is held that the words "new counties," as used in the constitution mean "additional counties." I do not think that construction tenable. Had it been the intention of the framers of the constitution to confine the meaning of the word "new" to an increase in the number of counties, they would have used the word "additional," or some term that clearly expressed the idea that the new counties to be created must increase the number of counties. In the case of *People v. Dubois*, 23 Ill. 548, and *People v. Bangs*, 24 Ill. 184, it was held that the legislature could increase the number of circuits, but that it could not deprive a judge of his office by creating a "new circuit" out of the territory from which such judge was elected, when such new circuit, so created, was not an additional circuit. The provision of the Illinois constitution, permitting the legislature to increase the number of circuits, is very different from the constitution of Idaho. Section 7, art. 5, provides: "The state shall be divided into nine judicial circuits, in each of which one circuit judge shall be elected by the qualified voters thereof, who shall hold his office for a term of six years, and until his successor shall be commissioned and qualified; provided, the general assembly may increase the number of circuits to meet the exigencies of the state." It will be observed that the state of Illinois was divided, by said section of the constitution, into nine circuits, and the legislature was authorized and empowered to increase the number of circuits to meet the exigencies of the state. Section 15 of the same article provides that, "whenever an additional circuit is created," etc. The word "new" is used in said decisions to designate the circuit created by said act. The court held that a "new" circuit had been created, but that such "new" circuit was not an additional circuit; that the number of circuits were not increased; hence said act was repugnant to the constitution. Had the framers of the constitution intended that the legislature should be confined to the creation of additional counties, apt words would have been used, and the proviso in section 3 would have read: "Provided, that this section shall not apply to the creation of additional counties." Webster defines the word "new" to mean "having existed but a short time;" "recently established." A new county does not necessarily mean an additional county. If three of the counties of the state should decrease in population and wealth, so as not to be able to sustain a county govern-

ment, or for any other reason the legislature should conclude that it was for the best interest of the people to create a new county out of the territory of the three, such county, so created, would be a new county, within the meaning of the term "new county" as used in the constitution. Only two sections of the constitution refer to the creation of new counties, to-wit, sections 3, 4, art. 18. In section 3 the word "new" is used as follows: "Provided, that this section shall not apply to the creation of new counties." And in section 4 as follows: "No new county shall be established; \* \* \* nor shall a new county be formed containing less than four hundred square miles." Said section 3 cannot apply to a legislative act creating a new county. The constitution places but one restriction upon the legislature in the creation of new counties, and that is that no county shall be created with an area of less than 400 square miles. Such new county need not necessarily be an additional county. Mr. Justice MORGAN, in his opinion, says: "It could not have been desired to abolish the counties of Alturas and Logan. Nothing is said in the act about abolishing the counties, and they do not seem to be abolished." Would not said counties have been abolished, provided said act had been held constitutional, as effectually as if said act had contained a section, or several sections, directly declaring them abolished? They certainly would.

The assessment roll of Alturas county for 1888 (before Logan and Elmore counties were created from Alturas) shows the total assessed valuation of Alturas to have been \$3,837,362. A careful estimate, made by the assessor, shows that about \$975,000 of that amount was in the present county of Alturas. The assessment roll of Alturas county for 1889 shows the assessed valuation to have been \$814,387; assessed valuation for 1890, \$649,104; being a reduction, for one year, of \$165,283, and for two years a reduction of \$326,896. This shows a decrease in the taxable property of Alturas county for the years 1889 and 1890 of about 33 per cent. In population, the loss in Alturas county, since 1888, is about 33 per cent., as indicated by the election returns. This great decrease in population and wealth may have been one of the causes that induced the legislature to pass the act under consideration. I only state these facts, by way of reply to the proposition of the majority of the court, as to one of the causes or reasons the legislature had for passing said act. This court "cannot run a race of opinions upon points of right, reason, and expediency with the law-making power," as stated by Judge Cooley, *supra*. This court has no authority to inquire into the motives of the legislature in the passage of the act under consideration. *Wright v. Defrees*, 8 Ind. 298; *Attorney General v. Supervisors*, 33 Mich. 289, *Cooley*, Const. Lim. 223, and note 4, p. 223. Because the legislature passed an act dividing Ada county, and erected from the part segregated a new county, to be called "Canyon County," and submitted the question to a vote of the people living in the segregated terri-

tory, it is suggested in the opinion of one of my associates that the legislature placed one construction upon the constitution for the people of Logan county, and a different construction for the people of Ada county. If the legislature has the power to create new counties without submitting the question to a vote of the people, the fact of having submitted the question to a vote of the people is no reason for charging the legislature with interpreting the constitution one way when applied to one county, and directly the opposite when applied to another. There is nothing in the constitution requiring the legislature to exercise all the power which it has. It is claimed that a dangerous power would be left in the hands of the legislature if it had the power to create new counties out of any territory it might deem best. Had the framers of the constitution so thought, they no doubt would have inserted in the constitution such provisions as the constitutions of Illinois or Tennessee contain, prohibiting the legislature from dividing a county, for any purpose, without a vote of the people. On the contrary, they were very careful to provide that section 3, art. 18, should not apply to the creation of new counties; that being the only section that prohibits the legislature from dividing a county without first submitting the question to a vote of the qualified electors. This court is not authorized to so interpret the constitution as to place restrictions upon the legislature which are not warranted by the plain meaning and intent of the constitution. The entire matter of the creation of new counties has been left by the people in the hands of the legislature, with but one restriction, to-wit, that no county shall be made to contain an area of less than 400 square miles. This indicates that the people were not afraid of the "mutatious whims of each succeeding legislature," or that "gerrymandering will assume the position of an exact science." Nor should this court "suppose" that the legislature would be "moved and instigated by the devil" to divide any county in this state, and for that reason attempt to place restrictions or inhibitions on the legislature which the constitution does not clearly warrant. Other departments of our government are, as I believe, quite as apt to be controlled by "mutatious whims" and "moved and instigated by the devil" as is the legislative branch. It has been held by the supreme court of North Carolina that the legislature had the general power to alter the boundaries of counties, to create new ones, or to destroy a county altogether. *Mills v. Williams*, 11 Ired. 558; *Granville Co. v. Ballard*, 69 N. C. 18. The people of North Carolina have adopted a new constitution since said decisions were rendered, and did not prohibit therein the legislature from abolishing a county whenever it saw fit to do so. The people were not afraid to leave that power with the legislature. It has been held by the supreme courts of other states that the legislature, under constitutions similar to that of Idaho, had the power to abolish, alter, modify, and create counties. State

v. McFadden, 23 Minn. 40; Opinion of Judges, 55 Mo. 296; Division of Howard Co., 15 Kan. 194; *Republica v. McClean*, 4 Yeates, 399; *State v. Choate*, 11 Ohio, 511; *Hinkel v. Stevens*, (Kan.) 3 Pac. Rep. 531; *Attorney General v. Fitzpatrick*, 2 Wis. 542-548; 1 Dill. Mun. Corp. §§ 46, 63, 65. The constitution of Illinois, in force at the time of the rendition of the decision of *People v. Marshall*, supra; and the constitution of Tennessee in force at the dates of the decisions of *Gotcher v. Burrows*, 9 Humph. 585; *Marion Co. v. Grundy Co.*, 5 Sneed, 492; and *James Co. v. Hamilton Co.*, (Tenn.) 14 S. W. Rep. 601,—prohibited the legislature from dividing a county for any purpose whatever, without submitting the question to a vote of the people, and are not in point. The opinion of the court in *James Co. v. Hamilton Co.*, supra, was rendered October 4, 1890, and the court says: "The fact that the question [as to the power of the legislature to abolish a county] has only arisen in two cases, (*People v. Marshall*, supra, and the case at bar,) goes to show that legislatures have heretofore interpreted constitutions as giving no such power, either by implication or in terms." This decision should be given no weight as authority in this case for the following reasons: (1) It proceeds upon the theory that a state constitution is a grant of power to the legislature, and that, unless the power to abolish a county is granted the legislature does not possess the power, when it is a well-established principle that a state constitution is an instrument of restriction and limitation upon powers already plenary. (2) The constitution of Tennessee prohibits the change of county lines for any purpose, without a vote of the people, either for the creation of new counties or otherwise. (3) Prior to said decision, the point as to whether the legislature had the power to abolish a county had been decided by the supreme courts of several different states, (authorities cited, supra,) while the court says: "The question has arisen in but two cases," to-wit, the Illinois case, and the case then before that court. The only states whose highest courts have held that the legislature had not the power to abolish a county for the purpose of creating a new one, that I have any knowledge of, are Illinois and Tennessee; and the constitutions of said states prohibit, in terms, the legislature from dividing a county for the purpose of creating a new county or otherwise, without submitting the question to a vote of the people. When the constitution of Idaho was framed it was known that the legislature had exercised the power of changing the boundaries of counties and creating new ones, and that certain consequences resulted therefrom. The framers of the constitution saw fit to prohibit the legislature from striking off a part of one county and attaching it to a county then in existence, without submitting the question to a vote of the people residing in the part to be stricken off, but expressly provide that such inhibition shall not apply to the creation of new counties. Section 2, art. 7, of the Illinois constitution was incorporated into section 3, art. 18, of the

Idaho constitution; and, the framers of the constitution knowing the construction that the supreme court of the state of Illinois had placed upon said section in *People v. Marshall*, supra, they inserted a proviso, thus clearly indicating that they did not intend to adopt the interpretation given said section by said court.

In interpreting the constitution this court should not apply a prohibition on the legislature which the constitution itself declares shall not be a prohibition. The convention that framed our constitution included some of the most eminent lawyers of the state. With the constitutions of other states before them, and the interpretations thereof as given by the courts of last resort, they did not place any restrictions on the legislature in the creation of new counties except as to area. Lest section 3 should be interpreted to apply to the creation of new counties, the framers of the constitution were very careful to insert a proviso, thus showing the intention to leave the entire matter of the creation of new counties with the legislature, unrestricted, except as to area. The intention of the framers of the constitution is manifest, from the manner in which section 3 deals with the subject, in making provision for existing liabilities of the counties, when a part of one is stricken off and attached to another. Was the creation of Alta and Lincoln counties a creation of new counties, within the meaning of that term as used in the constitution? As before shown, the creation of a new county does not necessarily mean an additional county. A "new county" is a new county organization, erected over and upon territory which had not before comprised, in itself, a county. Alta county included a part of the territory of what was formerly Logan, and all of the territory of what was formerly Alturas. Lincoln county included a part of what was formerly Logan county, but not the whole. Hence Alta and Lincoln counties are new counties, within the meaning of that term as used in the constitution. A new county organization was by said act erected over territory, which had not before comprised, in itself, a county. If the legislature has not the power to create new counties by dividing a county as Logan was divided in the creation of Alta and Lincoln counties, then the proviso of section 3 is not the controlling part of said section, and is given no effect whatever in the interpretation of said section; and, to apply the quotation of Mr. Justice HUSTON, it would stand in said section, "like counters in a barber's shop, as much for mock as mark." The act in question does unite a part of what was formerly Logan county to what was formerly Alturas, but within the meaning of section 3, art. 18, it does not strike off a part of Logan county and attach it to Alturas, because Logan and Alturas counties were, by said act, extinguished. The legislature, by this act, does not undertake to do indirectly what it was prohibited from doing directly. Two new counties were created out of Logan and Alturas counties. A part of Logan county was not stricken off and attached to Alturas county; but a new

county was created, and the legislature, in creating said new counties, used constitutional means, and effected a constitutional object, to-wit, created two new counties.

It is contended that the office of clerk of the district court of the county of Logan was created, and the term of office fixed by the constitution, and that the defendant was legally elected to said office, and that he could not be legally deprived thereof except by the expiration of the term for which he was elected. The fact is that the defendant held his office by appointment made by the governor. From our view of this case that makes no difference. In the case of *Republica v. McClean*, 4 Yeates, 399, the court held that the commission of the officer became void by the political annihilation of that part of the county for which the officer was commissioned. "Article 5, § 16, provides for a clerk of the district court for each county in the state, and fixes the tenure of office; yet both office and tenure of the clerk of the district court in and for a particular county are dependent upon the existence of such county." If the county is extinguished by the legislature, the office falls. *People v. Morrell*, 21 Wend. 577; *Hinkel v. Stevens*, (Kan.) 3 Pac. Rep. 531; *State v. Choate*, 11 Ohio, 511; *Hagerty v. Arnold*, 13 Kan. 367. County officers have no such vested right to their offices as would, under the constitution of Idaho, prohibit the legislature from abolishing a county in the creation of a new county. *Laramie Co. v. Albany Co.*, 92 U. S. 307. The case of *Rock Island Co. v. Sage*, 84 Ill. 589, is not in point, for the reason that the constitution of Illinois prohibits the legislature from changing county lines without submitting the question to a vote of the people. Section 2, art. 7, is as follows: "No county shall be divided, or have any part stricken therefrom, without submitting the question to a vote of the people of the county, nor unless a majority of all the legal voters of the county voting on the question shall vote for the same." In that case the legislature undertook to change the lines of a county without submitting the question to a vote of the people, which act was expressly prohibited by said section of the constitution. The proposition which Mr. Justice HUSTON mentions as having been advanced by counsel, to-wit, that the provisions of the constitution are only applicable when in the judgment of the legislature it is expedient to make them so, is a proposition that I have not been able to find advanced in any of the briefs submitted in this case, and is one that I did not hear advanced, or even intimated, in the oral argument of this cause. The counsel on both sides of this cause are, as I believe, too eminent and honorable to advance such an infamous proposition. In the case of *Edwards v. Railway Co.*, (Colo.) 21 Pac. Rep. 1011, the court says: "The view that a solemn legislative provision is a useless and lifeless thing should be entertained when no reasonable intentment can be fairly deduced therefrom after diligent and industrious search, aided by all pertinent rules of statutory interpretation." A reasonable intentment

can be fairly deduced from the act in question, and said act can be construed to stand without the slightest impingement on the provisions of the constitution. The act in question is not repugnant to any provision of the constitution, and the writ should issue as prayed for by the relator.

### Ex parte BRENNER.

(*Supreme Court of Wyoming*. March 5, 1901.)

#### HABEAS CORPUS—VENUE OF CRIME—COMMITMENT.

In *habeas corpus*, where the evidence certified by the committing magistrate fails to show the venue, the commitment is fatally defective; and where the application is to the supreme court, and the expense of supplying such evidence therein would be burdensome to the parties, the prisoner will be discharged. *GROESBECK, C. J.*, dissenting.

Application for writ of *habeas corpus*.

*Hugo Donzelmann*, for petitioner. *Atty. Gen. Potter*, for the State.

CONAWAY, J. This is a petition for a writ of *habeas corpus*, and is heard in this court upon the petition of Brenner, the return or answer of the sheriff of Carbon county, defendant herein, the demurrer of petitioner to said answer, and the testimony taken below and certified to this court by the committing magistrate. It appears that petitioner is held by virtue of a commitment, after a preliminary examination by a justice of the peace of Carbon county, upon a charge of fraudulently selling land as unincumbered which he had formerly disposed of by a mortgage which has not been discharged. We find it unnecessary to pass upon the several questions raised by the pleadings and the argument in this matter. The committing magistrate certifies that the testimony sent here is all the testimony taken in the case. The word "testimony" is not synonymous with "evidence;" but, if documentary evidence had been introduced below, it would have been produced by some witness, and must have been referred to in the testimony of such witness. As no such documentary evidence is so referred to, it is clear that this record contains all the evidence introduced at the preliminary examination before the justice of the peace; and probably the committing magistrate in his certificate, and the stenographer in his oath, both to the effect that the testimony sent to this court is all the testimony taken at the preliminary examination, use the word "testimony" in the sense of "evidence." Saying nothing of the objections raised as to the sufficiency of the complaint, and to the form of the warrant of commitment, we find the evidence totally insufficient to support the commitment. There is nothing showing that the transaction charged to be criminal occurred within the territorial jurisdiction of this court. There is not even a hint as to where it occurred. There is not a *scintilla* of evidence as to venue, which, of course, is fatal to the existing commitment. So far all is plain. What should be done in the matter is a more difficult question. Our statute provides that the court or judge, upon a

hearing of this kind, may consider the testimony taken before the committing magistrate, if it be in writing, and any other evidence procured, and may remand, commit, or discharge the petitioner, according to the circumstances of the case. No other evidence has been produced. We are loth to impose upon the parties the inconvenience and expense of appearing here for examination with the witnesses. Neither will it do to establish the practice of releasing persons charged with crime, and thus giving guilty parties an opportunity to escape justice on account of defect, however serious, in the proceedings before committing magistrates. Petitions for *habeas corpus* should, as a general thing, be presented to the judge nearest the place where the petitioner is restrained of his liberty, and parties will be held very strictly to this rule, except where special and very cogent reasons exist for a departure from it. This judge can hold the re-examination, when necessary, upon the spot, and do it as expeditiously and economically as the committing magistrate could. But this case, we think, may well be left to the authorities of Carbon county. Another prosecution can be begun there if the cause of justice require it. Under all the circumstances appearing in this case, we think the petitioner should be discharged, and it is so ordered.

MERRELL, J., concurs.

GROESBECK, C. J., (*dissenting*.) I concur in the result reached by my learned brethren. I do not think, however, that the failure to prove the venue is a sufficient ground for the discharge of the petitioner, however fatal such a lack of proof would be on the trial of a criminal case. This defect can be supplied in *habeas corpus* proceedings reviewing the action of a committing magistrate, under section 1296 of the Revised Statutes, which provides that the replication to the answer and return to the petition for *habeas corpus* may deny the sufficiency of the testimony to justify the action of the committing magistrate, on the trial of which issue all written testimony before such magistrate may be given in evidence before the court or judge hearing the writ, in connection with any other testimony which may then be produced; and also under the provisions of section 1301, Rev. St., which states that, "although the commitment of the plaintiff may have been irregular, still, if the court or judge is satisfied from the evidence before them that he ought to be held or committed, either for the offense charged or any other, the order may be made accordingly." In effect, these provisions of the *habeas corpus* act operate as an appeal from the action of the committing magistrate,—a practice that is recognized by statute in many jurisdictions, and approved by the law-writers. Under the constitution of this state this court is clothed with original jurisdiction in *habeas corpus*, and exercises this jurisdiction in the method prescribed by law. I have no doubt that the statutory power to hear additional evidence includes the right

to hear such evidence as may supply and cure defects in the preliminary examination, or that may tend to establish the guilt or innocence of the petitioner.

The complaint in this case was brought under section 1046 of the Revised Statutes, which makes it a felony, after once selling, bartering, or disposing of any tract of land, etc., to knowingly and fraudulently sell, barter, or dispose of the same. The proof shows that the petitioner mortgaged a tract of land, and afterwards sold the same to the prosecuting witness. Under a statute similar to ours, the supreme court of California held that the giving of a mortgage on land, and afterwards selling the same, did not fall within the provisions of the statute of that state, as the prior mortgaging of the premises could not be deemed to be a disposing of the same, within the intent of the statute, as the purpose of the act was confined to dealings concerning the title to the property, and looking to the parting with the title to it; and that, if merely to mortgage is to dispose of lands within the act, then to give a second mortgage would be to dispose of them a second time, and would or might be a crime; and, further, that under the same reasoning it would be a criminal offense for one to convey lands upon which he had already placed an incumbrance by way of mortgage. *People v. Cox*, 45 Cal. 342. This reasoning is sound, and can well be applied to the parallel case before us. Penal statutes must be strictly construed, and nothing can be injected into a criminal statute to extend its terms, or to include by inference or implication other offenses than those clearly defined therein. As it appears from the evidence that the acts of the petitioner did not constitute an offense as defined by the statute upon which it is admitted the complaint was made, he was rightfully discharged.

(3 Wyo. 425)

DOWNES v. PARSHALL *et al.*

(*Supreme Court of Wyoming*. April 27, 1891.)

TERRITORIES—CONSTITUTIONAL LAW—BANKRUPTCY—ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Const. U. S. art. 1, § 8, subd. 4, providing that congress shall have power to establish "uniform laws on the subject of bankruptcies throughout the United States," does not qualify the plenary legislative power of congress over the territories; and hence Rev. St. U. S. § 1851, providing that the "legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States," authorized the legislature of Wyoming to pass Rev. St. Wyo. § 118, declaring that any creditor accepting a dividend from the property of an assignor shall release him from all further liability on the claim.

2. The provision in such act, requiring a release, is not in conflict with Rev. St. U. S. § 1925, providing that the legislature of Wyoming shall not pass any law impairing the rights of private property.

3. The statute does not require that the deed of assignment shall provide for the disposition of the dividends of those who refuse to accept them and release the assignor, and a failure to so provide does not convert an assignment under the statute to one at common law.

Appeal from district court, Laramie county.

*J. J. Rowen, J. Q. Charles, and J. R. Smith, for appellant. Lacey & Van Devanter, for appellees.*

CONAWAY, J. Plaintiff in error filed his petition in the office of the clerk of the district court for Laramie county, July 17, 1890, praying an order of the court requiring and directing the defendant assignees to pay to plaintiff in error the dividend theretofore declared by them in the course of the administration of the estate of the said assignor, and such other dividends as might, from time to time, be lawfully declared and ordered, without the execution of the release of said assignor, as required by section 118, Rev. St. Wyo. 1887. On July 21, 1890, a final order was made in and by said district court, overruling and denying the prayer of said petition, to which final order plaintiff in error then and there excepted. He asks in this court the reversal of the final order.

The only question presented in the court below or in this court is the effect as to the plaintiff in error of said section 118, Rev. St. Wyo. It is urged that this section is in its nature and effect a bankrupt or insolvent law, and that the legislature of the territory of Wyoming had no power to pass a bankrupt or insolvent law. Without discussing the question as to how far this section 118 partakes of the nature of a bankrupt or insolvent law, and waiving the question as to what the effect would be upon the other portions of the assignment law if this section should be found invalid, we will consider the power or authority of the legislature to pass such a law. The argument of the plaintiff in error, stated briefly, is that the authority of the legislature of Wyoming territory was derived from congress; that congress could confer no greater power than it had itself; and that congress had no power or authority to pass a bankrupt or insolvent law for Wyoming territory. This argument rests upon the assumption, which is made as the basis of the argument, that the power of congress upon this subject is derived from and limited by subdivision 4 of section 8 of article 1 of the constitution of the United States, conferring upon congress power to establish "uniform laws on the subject of bankruptcies throughout the United States." As to this contention it is sufficient to say that the power of congress to legislate for the territories is not derived from nor limited by this or any other express provision or provisions of the constitution. As to the extent of this power the supreme court of the United States says: "All territory within the jurisdiction of the United States, not included in any state, must necessarily be governed by or under the authority of congress. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all departments of the territorial governments. It may do for the territories what the people, under the consti-

tution of the United States, may do for the states." *National Bank v. County of Yankton*, 101 U. S. 129. It is thus apparent that the doctrine that the general government is one of limited powers granted by the states, and enumerated in the express provisions of the constitution, or derived by necessary implication from such enumerated powers, however just and salutary, as applied to the states, has no application to the territories of the United States. The power of congress to legislate for the territories is not to be compared to nor measured by its power to legislate for the people of the states. It is not a power which was granted to the general government in the adoption of the constitution by the states. It is not one which was withheld by them. It is one which they never possessed, either to grant or to withhold. It is one of the essential and most important attributes of sovereignty; a sovereignty which no state ever possessed or claimed or attempted to exercise outside of its own boundaries. The source of this plenary power of legislation for the territories our courts have seldom, if ever, attempted to define. As to its existence, there is at this day no question. "Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source from whence the power is derived, the possession of it is unquestioned. In legislating for them [the territories] congress exercises the combined power of the general and of a state government." *Insurance Co. v. Canter*, 1 Pet. 541. This language was commented upon and explained in the case of *Dred Scott v. Sandford*, but not so as to interfere with its application to cases such as the one at bar. "The distinction between federal and state jurisdictions under the constitution of the United States has no foundation in these territorial governments; and consequently no such distinction exists, either in respect to the jurisdiction of the courts or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts; congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both federal and state authorities. There is but one system of government or of laws within their limits, as neither is subject to constitutional provisions in respect to state and federal jurisdiction." *Benner v. Porter*, 9 How. 242.

It would seem that, beyond a doubt, the legislature of the territory of Wyoming had power and authority to pass the statute in question, including section 118, under the act of congress conferring legislative power extending "to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States," (Rev. St. U. S. § 1851,) un-



less the exercise of that power is subject to some other objection than the one now under consideration. It is claimed that such is the case. It is contended on behalf of the plaintiff in error that section 118 is within the congressional inhibition against the enactment of any law impairing the rights of private property. Id. § 1925. It may be that this language will include a law impairing the obligation of a contract, and that the principle contended for is correct; but it is not applicable, under the existing state of facts, to this case. The petitioner cannot claim and receive the advantages of the assignment law of Wyoming without subjecting himself to its conditions.

It is urged on behalf of the plaintiff in error that, admitting that the assignor might have made a statutory assignment, securing the benefit of the statutory provision for his release by creditors accepting dividends, still he has not done so, but he has made a common-law assignment, under which no release can be had, thus waiving his right to such release. A careful scrutiny of the instrument does not reveal wherein it is not a statutory assignment. No single provision of the statute seems to have been violated or disregarded. It is argued that it is not a statutory assignment because it does not provide for the disposition of the dividends of those who refuse to accept their dividends and release the assignor. The statute does not require that it should. It would be difficult for the assignment itself to provide for this without being open to the objection of making preferences or reserving benefits to the assignor, or else in some way establishing a trust not for the equal benefit of creditors, and therefore in violation of the statute. The release is a matter which the statute provides for, and not the assignment; a result which the statute causes to follow the execution of an assignment according to the statutory terms; a result which the assignor can secure only by making his assignment comply with the requirements of the statute. When he has done this, the law provides for all else. It is also urged that the absence of a provision in the assignment for the disposition of unaccepted dividends makes the instrument vague, uncertain, and inoperative. We do not think so. The courts will be at no loss as to how these dividends should be disposed of under the law. It is contended that to require a release as the condition of paying a dividend is to make the assignment one for the benefit of releasing creditors only, in violation of its terms. This view is entirely erroneous. In fact, all of these objections apply rather to the statute than to the assignment. The law declares any assignment void "which gives preference of one debt or class of debts over another." The legislature did not consider this inconsistent with the provision that any creditor accepting his dividend should "release the assignor from all further liability on the claim or claims on which said payment may be made." Neither will the courts so consider it. None of the proceeds of the assigned property can go to the assignor until all the debts

are paid. If the law operates to prefer releasing creditors, it is not the fault of the assignor; and, if this is a defect in the law, it is one that the courts cannot remedy. It does not appear but that all may be paid. The statute secures to each creditor the right to participate in the benefits of the assignment on equal terms with every other creditor. The deed of assignment is in strict conformity with the statute, and both operate for the equal benefit of all creditors, and place them on an equal footing. Two cases are referred to by plaintiff in error as supporting his argument that the assignment is not a statutory one. They are *In re Bird*, 39 Minn. 520, 40 N. W. Rep. 827, followed by *In re Fuller*, 42 Minn. 22, 43 N. W. Rep. 486. When these cases were heard, the assignment law passed in 1876 was in force in Minnesota, and it did not provide for any release. There was also an insolvent law in force in that state, not in terms like our assignment law, which did provide for a release. It provided that the assignment might be made for the equal benefit of all creditors who should file releases of their claims. What was really decided was that the assignors had not brought themselves within the terms of the insolvent law. Were these cases in point, we should hesitate long before following them, even if the great weight of authority were not the other way. The New Jersey courts, and the courts of a number of other states, whose statutes are more like ours than were those of Minnesota, uphold provisions similar to ours for the release of assigning debtors. We are able to decide this case in accordance both with the great weight of authority and with the plain and peremptory language of the statute. The order of the district court is affirmed.

GROKSBECK, C. J., and MERRELL, J., concur.

(3 Wyo. 417)

ROY v. UNION MERCANTILE CO.

(Supreme Court of Wyoming. April 27, 1891.)

ATTACHMENT — FRAUDULENT ASSIGNMENT — APPEARANCE — BILL OF EXCEPTIONS — QUESTION NOT RAISED BELOW.

1. In attachment, where defendant denies the allegations of the affidavit, and has a trial on that issue, he cannot complain for the first time in the supreme court that the verification of the affidavit was defective.

2. Where, on attachment, defendant is personally served with summons, and appears to take issue upon the allegations of the affidavit, but makes no defense in the main action, the court acquires complete jurisdiction.

3. The fact that one who has made an assignment for the benefit of creditors retains possession of the property, and uses it in his business as before, without any attempt for nearly a month to carry out the purpose of the assignment, is sufficient evidence of fraud to sustain an attachment.

4. Where the bill of exceptions was allowed after the term, and the record fails to show that time was given under the Wyoming statute providing that time may be given for that purpose, the supreme court cannot review the ruling of the trial court on a motion for new trial.

5. Where the bill of exceptions fails to state that it contains all of the evidence, the court will not review the ruling of the trial court upon a motion for new trial on the ground that the judgment is not sustained by the evidence.

Error from district court, Laramie county.

*J. C. Thompson and J. J. Rowen*, for plaintiff in error. *Lacey & Van Devanter*, for defendant in error.

CONAWAY, J. This cause, which is brought in this court by petition in error by Horace A. Roy, who was defendant below, was begun by defendant in error in the district court of the first judicial district for Laramie county, November 18, 1886. The petition was filed and summons issued on that day. An affidavit for attachment and the proper undertaking were filed at the same time. The order of attachment was issued December 11th following. This is termed an "alias order," but it is the only one in the record, and is admitted to be the only one served. It was served December 15, 1886. On the 8th of October previous, plaintiff in error had made an assignment of all his property not exempt from execution, ostensibly for the benefit of his creditors, and had filed inventories of such property assigned on November 10 and 11, 1886, including the property seized by virtue of the attachment. He retained possession of the property assigned until it was so seized, which was on December 15, 1886. Plaintiff in error appeared in the court below, but did not contest the causes of action alleged against him in the petition of plaintiff, the defendant in error here. He traversed those allegations of the affidavit for attachment which called for and authorized the issuance of the writ, and moved the dissolution of the attachment on the ground that those allegations were untrue. Evidence was introduced, and a trial had, upon this issue. This motion was overruled, and he excepted. He objected to taxing the costs of the attachment proceedings as part of the costs of the cause, and to including them in the judgment. This motion was overruled, and he excepted. These are the matters complained of in the petition in error.

An objection claimed to be jurisdictional is raised in this court for the first time. It is based upon an alleged defect of form in the verification of the affidavit for attachment, and it is claimed, in one of the briefs of counsel, with some citations of authorities, that it is fatal to the jurisdiction in the attachment proceedings. This is followed by a numerous citation of authorities in an additional brief, to the point that errors or omissions which render the judgment void may be taken advantage of at any stage of the proceedings, and that questions which go to the jurisdiction are never waived. In this way, an alleged defect in the jurisdictional basis of the ancillary attachment proceedings seems to be perverted into an attack upon the jurisdiction of the court to hear and determine the cause to which these proceedings were appurtenant. As to this, it is sufficient to say that the juris-

isdiction of the court to render judgment in this cause in no manner depended upon the attachment proceedings. The court had jurisdiction of the subject-matter beyond question. The record shows that jurisdiction of the person of the plaintiff in error was obtained by personal service of a summons upon him, and this was followed by his appearance in the court below, and such proceedings there as to amount to a submission to the jurisdiction. It may well be held that an appearance by a party to object to the jurisdiction, to move the court to dismiss the action for want of jurisdiction, or to move the court for any action, or ask the court for any relief, not involving the exercise of jurisdiction, but rather a refusal to exercise it, would not be an acknowledgement of the jurisdiction of the court or a submission to it. On the other hand, an appearance and moving the court for any action, or asking for any relief involving the exercise of jurisdiction, is such a submission and acknowledgment. Such was the course of the plaintiff in error in the court below. He appeared, but raised no question of jurisdiction. He made no defense to the causes of action alleged against him in the petition. But he did deny such allegations of the affidavit for attachment as authorized the issuance of the writ, and introduced evidence and had a trial upon the issues thus presented. He was then in court for all purposes. *Waples, Attachm. p. 393*. After this, it seems, it was too late to raise any question as to the sufficiency of the affidavit in any respect, or even as to its existence. He was no longer in position to question the validity of the attachment or the resulting lien, whatever might have been the case as to others. *Drake, Attachm. § 112*, and cases there cited. Much less can he now be heard to urge such matters as being fatal to the jurisdiction of the court, or as rendering the judgment void. If he had raised the objection in time, the utmost it could have accomplished, in any event, would have been the dissolution of the attachment. This would not have affected in any degree the jurisdiction of the court in the cause, to which the attachment proceeding was a mere incident. A tree is not felled by sawing off a limb. All that was really necessary to say upon this point is that the court had jurisdiction of the subject-matter of this cause by law, and of the person of the plaintiff in error by the personal service of the summons upon him. In deference to the labored and ingenious arguments of counsel, we have discussed the matter, perhaps, at undue length.

But one other point is urged on behalf of plaintiff in error. It is insisted that the action of the court below in overruling the motion of plaintiff in error to dissolve the attachment, and consequently allowing the costs of the attachment to be taxed as part of the costs of the action, and in refusing a rehearing and a new trial upon these points, is not sustained by the evidence. It would seem that the state of the record is such as to present two insuperable objections to the consideration of this point: *First*, the bill of ex-

ceptions does not seem to have been legally allowed; and, *second*, it does not affirmatively show that it contains all the evidence.

1. As to the allowance of the bill. The law in force at the time of this trial, and until changed by the Session Laws of 1890, required that the party excepting should reduce his exception to writing, and present it to the court for allowance. It further provided that time might be given to reduce the exception to writing, but not beyond the first day of the next succeeding term of court. Then, if true, it was the duty of a majority of the judges composing the court, or of the court or judge before whom the trial was had, to allow and sign it. Under this law, a majority of the supreme court of the territory of Wyoming had held that the exception might be presented to and allowed by the judge in vacation. In 1890 the legislature, no doubt desiring to make the court in the future unanimous on the question, passed a law to the same effect. In this record it does not appear that any time was given to reduce the exceptions to writing, and to present them to the court or judge thereof. In such case, it is evident that any time beyond the trial term could be taken, if at all, only by consent of the opposite party. No such consent appears. At page 192 of the transcript of the record appears the following: "Each of the foregoing orders and decisions having been duly entered on the record of the court in the case, the defendant forthwith, after the entry of the orders and decisions, caused to be noted at the end thereof, on said record, the exception thereto. The foregoing bill of exceptions is hereby settled and allowed. [Signed] W. L. MAGINIS, Chief Justice, Judge, etc. [Seal.]" This is followed on the next page, without any intervening matter, by an attestation by the clerk under the seal of the court, dated February 11, 1889; and this is all that the record discloses of this branch of the case. It does not show that the plaintiff in error had any time given him beyond the term to reduce his exceptions to writing and present them to the court or judge. It does not show that this was done within any time which could lawfully have been given for such purposes, *i. e.*, not beyond the first day of the next succeeding term. This cause was tried at the term of court commencing in November, 1886. The court will take judicial knowledge of the fact that the next succeeding term would convene in the following May, and the record reveals that this last-mentioned term was in fact held. It is not doubted that if time had been given until the first day of the May, 1887; term, to reduce the exceptions to writing, the judge might, in the exercise of a wise judicial discretion, have taken additional time to examine and settle the bill of exceptions. It is a violent assumption that he would take from May, 1887, to February, 1889, for that purpose. At all events, the record does not show that the exceptions were even reduced to writing within the utmost time that could lawfully have been given. This court has no legal right and no disposition to ignore or evade these positive pro-

visions of the statute. The provisions, especially as to time, are salutary. It is a matter of no small importance that the exceptions should be reduced to writing and presented for allowance promptly, while the matters of exception are fresh in the mind of the judge and counsel. It is also desirable that there should be, within some reasonable time, an end to litigation.

2. The bill of exceptions nowhere states that it contains all of the evidence introduced in the trial of the issue in the attachment proceedings. Where a judgment or finding is assailed as not sustained by sufficient evidence, this is indispensable. This court cannot say whether or not the judgment of the court below, including, as it does, the costs of the attachment proceedings, is sustained by the evidence, unless it is affirmatively shown that all of the evidence upon which such judgment or finding was rendered is before this court. This should be done by the bill of exceptions itself. It is argued for plaintiff in error that the certificate of the clerk sufficiently shows that the transcript of the record contains all of the evidence. It is not competent to show this fact by the certificate of the clerk. The truth of the bill of exceptions, as to whether or not it correctly and fully states all of the evidence, as well as to all other of its contents, is to be ascertained by the trial court or the judge thereof, and authenticated, when so ascertained, by the signature of the judge. The office of the certificate of the clerk, in so far as it affects the bill of exceptions, is simply to identify it as the identical bill which is made part of the record in the cause in the court below. With the truth or falsity of its contents he has nothing to do, and his certificate cannot and does not go to these questions at all. Neither does it attempt to do so. The language of the certificate in this cause, so far as it affects this question, is to the effect that "the hereto annexed and next following leaves, numbered from 1 to 192, both inclusive, are a full, true, and correct transcript of the files, proceedings, journal entries, and record in the action," etc. To construe this into an assurance that the transcript so certified to contains all of the evidence is to hold that the "files, proceedings, journal entries, and record" must contain all of the evidence. Such is not the law. The evidence need not be part of the record, unless made so by the bill of exceptions, and then only so much of it as is necessary to explain the exceptions. Where the exception to a verdict of a jury, or a finding or judgment of the court, is that it is not sustained by the evidence, it is necessary to set forth the entire evidence. The bill of exceptions does not show that this is done. Therefore, as well as for reasons already given, we cannot consider the question whether the judgment of the court below is sustained by the evidence or not.

We announce these views all the more cheerfully because, waiving these questions, if they can be waived, or considering that we may be mistaken in them, we find that the evidence presented by the bill of exceptions, whether it be all of the

evidence or only a part, is amply sufficient to sustain the judgment of the district court. The plaintiff in error himself testifies that he retained possession of the property assigned, after the assignment, the same as before, and used it in his work and business just the same. He explains his possession as that of the assignee, as his agent. Such possession of the assigned property, by the assignor, after making the assignment, is very generally held to be presumptive evidence of fraud. It is not material that the assignor claims that he holds such possession as agent of the assignee. It is the fact of possession that the law regards, and not the pretext or excuse for such possession. When to the fact of possession is added the continual use of the property for his own benefit, with no movement towards carrying out the avowed purpose of the assignment, and nothing done in the interest of creditors, from November 18th to December 15th, this would seem to be something more than mere evidence of a fraudulent purpose in making the assignment, sufficient to avoid it; it would seem to be, *pro tanto*, to the extent of the value of the benefit derived by the assignor from the use of the assigned property, as well as in the delay, and the deterioration of the property by using it, an actual, accomplished fraud. These are some, but by no means all, of the matters appearing from the evidence, which courts have very generally concurred in recognizing as the ear-marks of fraud; and these are sufficient, at least, to raise a presumption of fraud, and to sustain the attachment. There is an attempt to justify the retention of possession of the assigned property by the assignor on the ground of delay by the assignee to execute his bond, as such, until the day the attachment suit was commenced. The law of voluntary assignments in force in Wyoming at the time of these proceedings did not allow the assignee to dispose of the real estate conveyed to him by the assignment before executing his bond. This was the only restriction. When not prohibited by the statute, or by terms imposed by the assignor in the deed of assignment, an assignee may execute his trust, as such, without giving bond. Besides, plaintiff in error retained possession of this property, after the assignee executed and filed his bond, on the 18th day of November, until the property was seized under the attachment, the 15th day of December, and all this time used it as his own. All this appears from the testimony of plaintiff in error himself. There were a large number of exceptions taken to rulings of the trial court in the admission and rejection of testimony. These are, however, not urged by the present attorneys for plaintiff in error. The most that could be said of these exceptions, allowing them all to be valid and well taken, is that, in that event, they would constitute error without prejudice; for, on the testimony of plaintiff in error alone, the judgment must be affirmed.

GROESBECK, C. J., and MERRELL, J., concur.

STATE ex rel. MADDOX v. KENNEY, Auditor.

(Supreme Court of Montana. June 15, 1891.)

MANDAMUS — To STATE AUDITOR — PAYMENT FOR STATE REPORTS.

Comp. St. Mont. div. 5, § 1993, provides that the state reporter shall publish 300 copies of each volume of the State Reports, "provided that the same shall be paid for at the rate of six dollars for each volume of 600 pages, and that each volume of more than 600 pages shall be paid for at the same rate for the number of pages exceeding 600," and that upon delivery the auditor "shall issue to the said reporter a warrant for the amount to be found as provided above, and also a warrant for the sum of three hundred dollars, to cover the expenses of stationery and clerical work; \* \* \* provided, that the whole expense of publication and preparation of a full volume of such Reports shall not exceed the sum of two thousand one hundred dollars." *Held*, that *mandamus* will lie to compel the auditor to issue a warrant to the reporter for the payment of all pages in excess of 600 at the rate of \$6 for 600 pages.

Application for *mandamus* by State ex rel. Fletcher Maddox against E. A. Kenney, state auditor.

Thos. C. Bach, for petitioner. H. J. Haskell, Atty. Gen., for respondent.

HARWOOD, J. This is an application for a writ of mandate to compel the state auditor to draw a warrant in favor of relator for the sum of \$150, claimed to be due and payable to him from the state, pursuant to the statute, to complete the payment for 300 copies of volume 9 of the Supreme Court Reports of this state. Relator is official reporter of the supreme court. By provisions of statute it is his duty to edit and cause to be published reports of the opinions and decisions of said court, in volumes of not less than 600 pages each. It appears by relator's affidavit that he prepared for publication and caused to be published volume 9 of such Reports; that the same contained 650 pages; and that on the 13th day of January, 1891, pursuant to the provisions of statute, relator delivered to the librarian of the Montana library 300 copies of said volume; that under the provisions of section 1993, div. 5, Comp. St., hereinafter quoted, the state auditor issued to relator a warrant for the sum of \$6 per volume for said volumes, amounting to the aggregate sum of \$1,800, and for the further sum of \$300, "to cover the expenses of stationery and clerical work in the preparation" of said volume, and refused to issue relator a warrant for any greater amount. There is no controversy as to the facts in this case. The contention is as to the true intent and meaning of said section 1993, div. 5, Comp. St., and an interpretation thereof will determine this case. Said statute, as found amended, (16th Sess. Laws, p. 218,) provides as follows: "Sec. 1993. The reporter of such volume shall print and bind three hundred copies of such edition at the expense of the state; provided, that the same shall be paid for at the rate of six dollars for each volume of six hundred pages, and that each volume of more than six hundred pages shall be paid for at the same rate for the number of pages exceeding six hundred; and upon the reporter's delivering to the

librarian of the Montana library three hundred copies of such edition, the auditor of the state shall issue to the said reporter a warrant for the amount to be found due as provided above, and also a warrant for the sum of three hundred dollars, to cover the expenses of stationery and clerical work in the preparation of each volume: provided, that the whole expense of publication and preparation of a full volume of such Reports shall not exceed the sum of two thousand one hundred dollars to the state." Relator insists that under the provisions of the statute quoted he is entitled to \$6.50 per volume for said reports delivered to the librarian, inasmuch as the volume contained 650 pages, or the further sum of \$150 from the state.

What is the true intent and meaning of the legislative assembly, as manifest by the language of said statute? The statute itself prescribes a rule relative to its construction which will aid in answering this question. That rule is found in section 630, Code Civil Proc., declared as follows: "In the construction of a statute or instrument the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted, as will give effect to all." Now, there is no difficulty in giving effect to all of the "provisions and particulars" of the statute in question. In expounding the intention manifest in a statute all of its provisions should be considered. Referring to section 1992, which is a part of the same act, we find it provides that the reporter "shall publish a volume of such Reports as often as there is sufficient matter to form a volume of not less than six hundred pages." A volume of 600 pages fills the requirement of the statute in that particular, and is undoubtedly "a full volume," referred to in the second proviso of section 1993. The payment for preparation, printing, and delivery of 300 copies of a volume containing 600 pages is limited to \$2,100. The relator asks nothing more than that for 600 pages, bound in said volume. No doubt the provision is wise, for without the requirement fixing the minimum quantity of matter which shall constitute a volume of Reports the state might, in the course of publication, be found paying the same rate for a volume containing much less matter. But as there may be a greater or less number of pages bound in a volume, the legislative assembly provided that the volumes of our Reports should not contain "less than six hundred pages," and also provided "that the same shall be paid for at the rate of six dollars for each volume of six hundred pages, and that each volume of more than six hundred pages shall be paid for at the same rate for the number of pages exceeding six hundred," and that the auditor "shall issue to said reporter a warrant for the amount to be found due as above." The "amount to be found due as provided above" means simply \$6 for the volume of 600 pages,

with payment at the same rate for any additional pages bound in the same volume, which was simply a mathematical calculation. If more than 600 pages are bound in volume 9, and this paid for, the excess will not have to be paid for in volume 10, nor will the state have to pay any sum whatever "to cover expenses of stationery and clerical work" in the preparation of such excess over 600 pages. We think, without doubt, the relator is entitled to the further sum of \$150, under the provisions of the statute quoted. To hold otherwise would deny all force and effect to the provision for the payment for the preparation, printing, and binding of the matter contained in the volume in excess of 600 pages. To our view, every provision and particular of the law may be given its full force and effect according to the evident intention of the legislative assembly. It is ordered that the writ of mandate issue as prayed for in the relator's petition.

BLAKE, C. J., and DE WITT, J., concur.

(10 Mont. 524)

OELS V. HELENA & L. SMELTING & REDUCTION CO.

(Supreme Court of Montana. June 15, 1891.)

CHANGE OF VENUE—PLEADING.

1. Code Civil Proc. Mont. § 59, provides that actions on contract may be tried in the county in which the contract was to be performed, and actions for torts in the county where the tort was committed, subject, however, to the power of the court to change the place of trial, as provided in the act. *Held* that, where an employe brought suit in Jefferson county for personal injuries received while employed upon a railroad therein, a change of venue will not be granted, although such railroad is owned by a smelting company whose principal place of business is in another county.

2. A complaint which alleged that the railroad was situated in Jefferson county, and that at the time of the injury plaintiff was "in the employment of the defendant as brakeman \* \* \* upon such railroad" sufficiently sets forth where the contract of employment was to be performed.

Appeal from district court, Jefferson county; THOMAS J. GALBRAITH, Judge.

Action for personal injuries by N. C. Oels against the Helena & Livingstone Smelting & Reduction Company.

*Cullen, Sanders & Shelton*, for appellant. *R. G. Davies*, for respondent.

HARWOOD, J. This appeal is from an order made by the district court of the fifth judicial district, within and for Jefferson county, denying appellant's motion for a change of the place of trial from said county to the county of Lewis and Clarke. For the purposes of this appeal it is admitted that defendant is a corporation, and has its principal place of business at the city of Helena, county of Lewis and Clarke. The cause of action alleged in plaintiff's complaint is to the effect that at a stated time defendant was the owner and in control of a certain railroad lying within the county of Jefferson, used by defendant for the transportation of ores over the same from its mines to its smelter; that plaintiff was in the employment of defendant as brakeman upon cer-

tain cars drawn upon and over said railroad by steam motive power; that while in such employment, and in the performance of his duty as such brakeman, through the negligence and carelessness of defendant, and without fault or negligence on the part of plaintiff, he received certain bodily injuries, which are set forth and described, whereby he alleges that he was damaged in the sum of \$20,000. Defendant filed a demurrer to plaintiff's complaint, and an affidavit of merits, setting forth, among other things, the fact that defendant is a resident of the county of Lewis and Clarke, and was there served with summons in this action; and, upon the facts set forth, demanded that the place for the trial of said action be changed to the county of Lewis and Clarke. It is provided in section 61, Code Civil Proc., that, "if the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands in writing that the trial be had in the proper county." Plaintiff's counsel in his brief urges the point that such demand was not made at the time of filing the demurrer, and for that reason the motion for change was properly overruled. But the record does not show when the affidavit of merits and demand for change was filed. Nor is there any showing that the motion for change of place of trial was overruled on the ground that the demand was made too late. It is also admitted by counsel that said affidavit and demand, as well as the other papers contained in this record, were used on the hearing of defendant's motion for a change. For these reasons we do not pass upon that point, but will consider the main question as to the right of defendant to the change demanded. It is provided in section 59, Id., that "actions on contract may be tried in the county in which the contract was to be performed, and actions for torts in the county where the tort was committed, subject, however, to the power of the court to change the place of trial as provided in this act." Counsel for appellant contends that, in view of the peculiar language of the complaint in this action, it must be held to be an action for the breach of a contract relation, and that it does not appear by the terms of the contract, as set forth, where the same was to be performed, and therefore the change demanded should be granted. It clearly appears from the complaint that a contract relation of employer and employee existed between plaintiff and defendant, and the complaint also shows that the contract of employment and service was to be performed in Jefferson county. It is alleged that the railroad upon which defendant was employed was "lying within the county of Jefferson;" and that plaintiff, at the time of the injury complained of, "was in the employment of the defendant as brakeman upon certain cars propelled by steam upon said railroad;" and that, while plaintiff was performing his duty "upon a car in the service of defendant upon said railroad,"

the alleged injury occurred. We do not agree with the learned counsel for defendant that it does not appear from the language of the complaint where the contract set forth therein was to be performed. If plaintiff was employed by defendant in the capacity of brakeman upon its railroad, "lying within the county of Jefferson," the contract for service must be performed in Jefferson county. Then the injury alleged, and for which plaintiff demands the payment of damages, is also averred as having been committed in Jefferson county. This is an example of those cases of which Mr. Bishop remarks: "There is in the legal field a not well-defined space, within which tort and contract mingle or blend or overlap each other, in ways partly plain and familiar and partly obscure." *Bish. Non-Cont. Law*, § 72; *Bish. Cont. §§ 188-187, 216, 228*. But, in whatever view counsel may regard this action as respects its nature, we do not think defendant is entitled to a change of place of trial on the grounds presented. It is unnecessary to pass upon the point presented, as to the residence of a corporate existence; for, should we hold as contended by defendant, still it would not be entitled to a change of place of trial on the ground of residence, for the reasons above set forth. The order appealed from is affirmed, with costs.

BLAKE, C. J., and DE WITT, J., concur.

#### GALLATIN CANAL CO. v. LAY.

(*Supreme Court of Montana. June 23, 1891.*)

#### EMINENT DOMAIN—DAMAGES AND BENEFITS—RECORD—AMENDMENTS TO STATEMENT FOR NEW TRIAL.

1. In actions for damages, where land was taken for canal purposes, the testimony of a witness as to damages may be considered, although he does not testify as to benefits.

2. A court need not make separate findings of damages and benefits, when there is no evidence of benefits in any sum whatever.

3. Where amendments were allowed to a statement on motion for a new trial by inserting words and matter at different places, and the same were tacked at the end of the statement with reference to pages and lines, the supreme court will not consider such amendments.

Appeal from district court, Gallatin county; FRANK HENRY, Judge.

Henry C. Smith and E. P. Cadwell, for appellant. Chas. S. Hartman, for respondent.

DE WITT, J. This is an appeal from an award of damages for the taking of land of the respondent for the purposes of a canal. Commissioners were appointed in the statutory manner, who appraised the amount of damages. From their award defendant appealed to the district court, wherein the matter was tried by the court, and findings made in favor of defendant in the sum of \$215, the value of the land taken, and for \$785 damages. Judgment was entered accordingly. The canal company appeals from an order denying a motion for a new trial, and from the judgment. We will examine the points presented by counsel for appellant.

1. Appellant argues at the bar that the

decision is not supported by the evidence in that there was no evidence of the value of the land at the date of the summons, basing his position upon section 609, Code Civil Proc., which provides that the actual value of the land at the date of the summons shall be the measure of compensation for all property to be actually taken, and basis of damages to property not actually taken, but injuriously affected. But the record discloses no specification upon this point, and it cannot be considered. The last utterance of this court on that question is in *Carron v. Wood*, 10 Mont. —, 26 Pac. Rep. 388.

2. There is evidence of a number of witnesses that the land taken was worth \$20 an acre. The court found that the land was worth \$215. Appellant contends that there is no testimony of the number of acres taken, and hence no evidence by which the court could arrive at a total of \$215. Again, consulting the specifications, we find, "fifth," that the appellant expressly specifies that it is admitted that there were 10½ acres taken by the canal, which acreage, at the value of \$20, gives a total of \$215, as found by the court.

3. Appellant claims that there was error, in that witnesses were interrogated, and allowed to testify, as to damages in gross, as he calls it; whereas they should have testified as to damages and injuries to the premises, and again as to benefits; and, citing appellant's brief, "the difference, if any, is the damage allowed to the land not taken, but the result is for the court, and not the witnesses,—it is the conclusion for the court to find, not for the witnesses to state." As a matter of course, evidence as to all damages is competent, and evidence as to all benefits is competent. But counsel seem to take the position that the witness must not speak of damages, unless, in the same utterance, he tells what he knows of the benefits,—that is to say, that he must have them each in his mind at once, and weigh them each; and that when he has finished speaking he must have presented either a net result, or the facts from which the hearer may at once deduce the net result, and say what is the balance in favor of damage, if any,—that is to say, that when a witness, in his testimony, finally informs the court or jury what the damage is, the sum arrived at must be a balance after deducting the benefits. But, in the nature of things, when a witness is asked as to damages, he thinks of injuries alone as distinguished from benefits, and responds accordingly; and when the inquiry is as to benefits, his reply is upon that subject. Appellant objects that the questions were directed to damages alone, and not to benefits, and that he, inquiring about damages, should have elicited information about benefits. The simple reply to appellant's position is that, if the canal company were interested in proving benefits, they had ample opportunity for cross-examination to ascertain whether respondent's witnesses had considered benefits in arriving at their figures, and of introducing direct evidence on that point. We have recently touched upon this proposition in *Carron v. Wood*, supra.

4. Appellant insists that there should have been separate findings of the court of the amount of damages and benefits. But the condition of the evidence upon the subject of benefits makes this matter immaterial to the appellant in this case. The whole evidence as to benefits is that two witnesses said that the cattle could drink from the canal. One said that if there is any seepage it would make the grass grow better, and another said that the canal makes water all the time, and he found it very convenient to have water upon all his fields. Not a witness testifies that the canal was a benefit in any sum whatever. A finding of benefits in any amount could not, therefore, have been sustained by the evidence; and if, on the evidence, the court had found that there were no benefits, such finding would not have helped the appellant. We are of opinion that appellant has no complaint on this ground. In the preparation of the statement, on motion for a new trial, it appears that amendments were suggested by the respondent. The amendments were allowed by the district judge in the following language: "The foregoing statement, after the same has been amended by allowing the amendments offered by the defendant, \* \* \* is allowed and settled." The amendments refer to changing words and inserting matter at different places in the statement in its original draft. Instead of making the amendments as the court ordered, and putting them into the statement at the appropriate places, the compiler tacked them on at the end of the statement, in their original language, with reference to pages and lines of the original draft. When a copy of the statement is made and sent to this court, with pages and lines all changed, and this court undertakes to arrange the amendments in their proper places, (work which should have been done by the compiler,) the matter is wholly unintelligible. The result is that we will disregard the amendments. We have heretofore endeavored to speak of this matter in unmistakable language, and we add this utterance to a long line of remarks in former cases. We find no error in the record. The order and judgment of the district court are affirmed, with costs.

BLAKE, C. J., and HARWOOD, J., concur.

#### WATERBURY v. BOARD OF COMMISSIONERS OF DEER LODGE COUNTY.

(*Supreme Court of Montana*. June 15, 1891.)

COUNTY SUBJECT TO GARNISHMENT—DEBT OF OFFICER.

1. Under Code Civil Proc. Mont. § 189, providing that all persons having possession or control of credits or property of defendant, or owing him, shall be liable as garnishees, etc., and Gen. Laws Mont. § 202, providing that the word "person" may extend to bodies politic and corporate, a county may be garnished for debts owed by it to one of its officers.

2. Such construction of the statutes is not contrary to public policy, as tending to impede the exercise of its functions, and to impair the usefulness of its servants.

Appeal from district court, Deer Lodge county; CHARLES S. MARSHALL, Judge.



The plaintiff herein brought an action in the justice's court against Thomas Harnon. The defendant in that action was at that time a deputy-sheriff of Deer Lodge county, working in that capacity upon a fixed salary. The action before the justice of the peace was upon a money demand, and the plaintiff therein obtained, in the ordinary manner, a writ of attachment against the property of the defendant Harnon. In pursuance to this writ of attachment the constable levied upon and attached in the possession of, and under control of, the defendant herein the sum of \$347.81 belonging to said Harnon, and due and owing him from the defendant herein, by delivering true copies of the writ, and leaving the same with the chairman and clerk of the board of county commissioners and treasurer of the county, together with notices that all debts owing by the county to said Harnon, and all credits and other personal property in the possession of said county belonging to said Harnon, were attached in pursuance to said writ. Afterwards plaintiff recovered judgment against Harnon in the justice's court for \$210.40. Execution was issued, which was served upon the county, with similar notice of garnishment as in the service of the writ of attachment; that at the time of the service of said respective writs the said county had in its possession and was owing said Harnon \$347.80, and answered the writ by its chairman and clerk to that effect. The judgment against Harnon has not been satisfied, and the county defendant herein has not paid any part of said money to plaintiff in that action. The said sum of money was due from the county to said Harnon for services as deputy-sheriff and expenses about said office. At the time of the levy the county had allowed said sum to Harnon. The case was tried upon an agreed statement of facts, of which the foregoing is a summary, and the decision of the district court was asked upon the point whether the defendant herein, under those facts and the law, can be charged as garnishee as to the sum of \$347.80, or any part thereof. The district court gave judgment for the county, and plaintiff Waterbury appeals from that judgment. The portion of the laws subject to construction are as follows: Code Civil Proc. § 189. "All persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant, at the time of service upon them of a copy of the writ and notice, as provided in the last section, shall \* \* \* be liable to the plaintiff for the amount of such credits," etc. A statutory construction of the word "person" is found in section 202, Gen. Laws, which says: "The word 'person' may extend and be applied to bodies politic and corporate." Section 744, Gen. Laws, provides "that each organized county of the state shall be a body politic and corporate, and, as such, shall be empowered for the following purposes: To sue and be sued; to make all contracts and do all other acts in relation to the property and concerns [of the county] necessary to the exercise of its

corporate or administrative powers; to exercise other and further powers as may be specially conferred by law," etc. The question now before this court is simply whether the county defendant is liable as garnishee under the facts agreed upon and the law as cited.

*George B. Winston*, for appellant. *Henri J. Haskell, Atty. Gen.*, and *W. S. Shaw*, Co. Atty., for respondent.

*DR WITT, J.*, (after stating the facts as above.) This action arose while this commonwealth was a territory of the United States, and the laws applicable to the contention are set forth in the introductory statement. The garnishment of towns, cities, and counties has been the subject of such conflicting views in different states, and being a first impression in this court, we incline to adopt the language of Judge *WELCH* in *City of Newark v. Funk*, 15 Ohio St. 463: "In other states authorities are quite conflicting; so much so, that we do not feel bound by any of them, and see nothing to prevent us from deciding the question as an original one, according to our own views of public policy and the meaning and intent of the statute." This conflict to some extent, but by no means wholly, dissolves, upon an inspection of the statutes upon which the decisions are made. In 2 *Wade, Attachm.* §§ 345, 419, are marshaled the states holding diverse views, and the author concludes that the majority is against holding municipal corporations as garnishees. But the author doubts the soundness, and questions the reason, of the rule. There is eminently respectable opinion upon the other side of the question. An analysis of the cases would be interesting, but we will not enter upon it, by reason of the direct conflict of the decisions, even upon similar statutes; and, furthermore, we are of opinion that the statutes of this state are so much more explicit upon the subject under consideration, that many of the decisions of sister states are inapplicable, and that, in view of our statute, the weight of authority is not against the liability of a county as a garnishee. It is not doubted that the statute may exempt a county from the process of garnishment. Our statute does not so exempt a county; and, if they are to be exempted, the authority must be found elsewhere than in the express declaration of the statute. Again, the statute may subject a county to this process. Now what do we find in the written law? It declares that "all persons" having in their possession or under their control any credits or other personal property belonging to the defendant, or owing debts to him, etc., shall be liable to the process. Furthermore, that the word "person" may be applied to "bodies politic and corporate." Hence counties, as "bodies politic and corporate," are brought within the meaning of the word "persons," and all persons may be garnished. It is therefore no strained conclusion to say that a county is subject to the process. Speaking of holding a county as garnishee, Judge *BIDDLE* (*Wallace v. Lawyer*, 54 Ind. 506) says: "And the decisions are

generally made upon statutes authorizing corporations, in terms, to be garnished; yet the courts hold that the general word 'corporation' must be restricted to mean private or ordinary business corporations, and not extended to embrace municipal corporations, or bodies politic and corporate. The words used in the statute of this state are 'persons' or 'corporations,' in general terms." But the statute of Montana, as above noticed, goes further than to use the words "persons" or "corporation" in general terms, as in Indiana, and the remarks of the judge in that case, and the authorities to which he refers, lose their force in this court. It is a general principle that one who may be sued may be garnished by the creditor of the person who may sue. Counties, with us, may be sued, (section 744, Gen. Laws,) and, therefore, under the general rule, they would be subject to garnishment. They, in this respect, do not come within the reason of exempting a sovereign state from garnishment, which sovereignty may not be sued, or ordinarily subjected to process of the courts. It being clear that the statute does not expressly exempt counties from garnishment, and it being equally clear that the letter of the statute is such that it can be reasonably applied to a county as a subject of garnishment, is there anything in the spirit of the law or the doctrine of public policy which prohibits such a construction?

We will examine, in the light of the statute, the reasons adduced for exempting counties from this process of the courts. It is objected that there is practical difficulty in summoning an artificial entity, like a county, to be examined on oath respecting its possession of property of the debtor, as provided in section 190, Code Civil Proc., and that so summoning its officers is a serious interruption to the business of the county and its officers. We cannot agree with this view. The statute (section 749, Gen. Laws) expressly provided a method for service of process against a county in all legal proceedings. In another portion of the statute (section 72) service of a summons upon a county is provided for. Answering a garnishment is by no means as large an affair as appearing in an action as a defendant. The statute providing a method for summoning a county in legal proceedings, we can see no particular difficulty in its appearing. There was certainly none in this case, and no derangement of the county's business. Again, it is said that the writ does not lie against a county by reason of its being contrary to public policy; that disasters to the public would ensue if the writ were allowed, and public servants would be impaired in their usefulness. In *Wallace v. Lawyer*, *supra*, it was held that a county cannot be held to answer as to its indebtedness to an execution debtor for his salary as an officer of such county in proceedings supplemental to execution. This case cites with approval *Merwin v. City of Chicago*, 45 Ill. 133, which was a case of garnishment of a municipal corporation, in which the court, by LAWRENCE, J. says: "The only ques-

tion presented by this record is whether municipal corporations in this state are liable to the process of garnishment. This court held in *City of Chicago v. Hasley*, 25 Ill. 595, that the property of such a corporation could not be levied on and sold under execution. This decision was placed upon the grounds of public policy. However strong the obligation of a town or city to pay its debts, it was considered that to allow payment to be enforced by execution would so far impair the usefulness and power of the corporation in the discharge of its government functions that the public good required the denial of such a right. \* \* \* Although this decision is not conclusive upon the question before us as *res adjudicata*, yet the entire spirit and reasoning upon which it is based must lead us to hold that a municipal corporation is not liable to the process of garnishment. The question has been often before the American courts, and, although the decisions are not uniform, in a large majority of the cases it has been held that the writ would not lie. The reason given for these decisions is uniformly the same, and is substantially that given by this court in the case in 25 Ill.: 'It must be decided as a question of public policy. These municipal corporations are in the exercise of governmental powers to a very large extent. They control pecuniary interests of great magnitude, and vast numbers of human beings, who are more dependent on the municipal, for the security of life and property, than they are on either the state or federal, government. To permit the great public duties of this corporation to be imperfectly performed, in order that individuals may the better collect their private debts, would be to pervert the great objects of its creation.' " Thus it is observed that 45 Ill. 133, on the subject of garnishment of a municipal corporation, adopts the reasoning of 25 Ill. 595, in the matter of an execution against the corporation, on a judgment obtained directly against the corporation. The grounds for denying an execution against a corporation are most satisfactorily put in 25 Ill., *City of Chicago v. Hasley*. The court well points out the disasters which might follow the levy of execution against the city of Chicago; how the seizure of the water-works would precipitate a water famine, the levy upon fire-engines would expose to the horrors of conflagration, and the seizure of revenues would paralyze government. To these views we have no dissent. But we cannot follow the Illinois court in 45 Ill. when it applies these arguments to the matter of garnishment of the municipal corporation. By garnishment the water-works, fire-engines, public buildings, and revenues of the corporation are not seized. The corporation is simply required to hold, and finally pay over, a sum of money or property, in which it has no interest, to one person rather than another. Its business is not interrupted; its property is not touched; its functions are not deranged.

Returning to the case at bar, we cannot agree that there is any reason why the great public duties of a county need be im-

perfectly performed, or that its business is in any danger of derangement, if it be compelled, by process of a court, to pay the salary of a servant to that servant's creditors. The county has no suit to defend, no counsel to employ, no witnesses to collect and pay. It has no burden cast upon it, and no duty to perform, except to act as temporary stakeholder, to await the determination of a court, in an action in which the county has no interest.

The argument of public policy as to inconvenience to the county and its officers does not reach our mind with sufficient force to impair another view of law and of right that is recognized throughout the civilized world; that is, that debtors should pay their debts. This, of course, with the modification that the means of livelihood should be left to the debtor, which view is embodied in the laws of exemption from execution, which in this state are very liberal. The debtor's earnings for 80 days prior to the levy of a writ are exempt from seizure. The servant of the county is thus secured in his support, if he earns it, and the county is not liable to lose the services of competent officers. Indeed, it has never been observed that a county has difficulty in obtaining employees to do its work, and the county may surely obtain as good service from those who pay their debts as from those who avoid such payment, and are protected in the avoidance by the unsatisfying doctrine of public policy.

We conclude that there is no substantial argument from public policy which requires us to read the law as to garnishment of counties differently from what its letter seems to us to declare. Counties are not exempted from garnishment by statute. On the contrary, their liability to the process is within the letter of the law. We find nothing in the spirit or the doctrine of public policy which induces to add to or take from the letter. The judgment of the district court is reversed, and the cause is remanded, with directions to that court to enter judgment in favor of the plaintiff for \$210.40, and interest at the rate of 10 percent. per annum from the 12th day of March, 1888, and for the costs of this appeal.

BLAKE, C. J., and HARWOOD, J., concur.

ESTILL *et al.* v. IRVINE.

(Supreme Court of Montana. June 15, 1891.)

WATER-RIGHTS—TRIAL—FAILURE TO MAKE FINDINGS.

In an action to restrain the diversion of water from a creek claimed by plaintiffs, the court found that plaintiffs were entitled to the use of waters therein, but did not find specifically how much; it also found that defendant was entitled to use so much of the water as flowed in the north channel of the creek. The plaintiffs requested the court to find the number of inches of water to which they were entitled. *Held*, that to avoid a multiplicity of suits, and in order to finally determine the rights of the parties, the finding should have been made; especially as Code Civil Proc. Mont. § 280, provides that no judgment shall be reversed for want of a finding of facts, at the instance of any party who shall not have requested such finding.

Appeal from district court, Deer Lodge county; D. M. DURFEE, Judge.

*Robinson & Stapleton*, for appellants. *O. B. O'Bannon and Forbis & Forbis*, for respondent.

BLAKE, C. J. The complaint alleges, in substance, that the plaintiffs (who are the appellants) are the owners of 500 inches of water flowing in Tin-Cup Joe creek, and have been using the same more than 18 years; that their predecessors in interest made an appropriation thereof in 1867 for the purpose of irrigating crops; that the defendant (who is the respondent) has been for a long time diverting this water from the stream, and depriving the plaintiffs of its use, and threatens to continue such diversion. The complaint was verified July 26, 1887. The answer consists of denials, which admit, however, that the plaintiffs are the owners of 80 inches of said water, and that the same has been used since 1867 by the plaintiffs or their predecessors in interest, and that the plaintiffs are the prior appropriators thereof. The answer denies that defendant has deprived the plaintiffs of the use of said water, or has threatened to continue any diversion thereof, and "denies that five hundred (500) inches of said waters are or always have been required or needed to irrigate the land mentioned in the complaint, or any greater amount than one hundred and forty-four (144) inches." The answer was filed July 30, 1887. The relief prayed for was a perpetual injunction to restrain the defendant from diverting said water, and depriving the plaintiffs of the same. The action was tried by the court without a jury, and the following findings of fact were filed: Prior to the year 1879, the ditch in controversy was constructed by the plaintiffs and their predecessors in interest, and their "right to the water was recognized by all parties from that time." The plaintiffs, since the year 1879, "have used the said ditch and waters of said Tin-Cup Joe creek to the full capacity of the said ditch, when there was sufficient water to fill the same, and without any interruption from said defendant. \* \* \* That at the time of the commencement of this action the plaintiffs were entitled to the use of the waters of Tin-Cup Joe creek to an amount of not less than eighty (80) inches, nor more than one hundred and forty-four (144) inches, measured by the laws of Montana, the exact amount it is unnecessary to find herein, for the reason set out in findings hereinafter mentioned. That the plaintiffs on the day of the commencement of this action, and for some time previous thereto, and during the irrigating season of 1887, had been using the waters of said creek to the full extent of their right to said waters, as far as defendant is concerned. \* \* \* That defendant, at the time of the commencement of this suit, was entitled to use of the waters of said creek the amount of which flowed in the north channel of Tin-Cup Joe creek. \* \* \* That the defendant, in the year 1880, appropriated the water that was flowing in said north channel, and used every year thereafter, up to the commence-

ment of this suit, said waters so appropriated, for the irrigation of a tract of land owned by the defendant. \* \* \* That the waters of said Tin-Cup Joe creek divide at the point \* \* \* into two channels, one called the 'South Channel,' and the other the 'North Channel,' and that the waters naturally flow in said channel in the following proportions, to-wit, one-third in the north channel, and two-thirds in the south channel. \* \* \* That the defendant in the year 1887 used only the waters flowing in said north channel, and in no greater amount than he had used in the preceding years after his said appropriation. \* \* \* The defendant has not diverted or used any of the waters of said creek belonging to or owned by the plaintiffs, or either of them. \* \* \* The point of diversion on the part of defendant is below the point of diversion of the plaintiffs. \* \* \* The defendant takes the water out of the north channel of said creek, and by means of a ditch carries it to the south channel, below the head of plaintiffs' ditch, and from said south channel runs the water into a ditch which carries it onto defendant's land. \* \* \* That at the time of the commencement of this action, and for a time previous thereto, and thereafter, waters to the amount of from fifteen to thirty inches were flowing down said south channel past the head of plaintiffs' ditch." The court found, as a conclusion of law, that "the plaintiffs are not entitled to a perpetual injunction restraining the defendant from diverting the water," and judgment was entered for the defendant for his costs.

It appears from one bill of exceptions that "at the trial of said cause, after the same had been argued by counsel, and before the same was submitted to the court for its decision, the said plaintiffs, among other things submitted to the court to find on as facts, asked the court to find definitely the amount of water that plaintiffs were entitled to and owned, and drew up a finding, and presented the same to the court, to find on as to the same, and which requests were as follows: \* \* \* That plaintiffs own, and have ever since prior to the year 1879 owned, the waters of said Tin-Cup Joe creek, to the extent and amount of ——— inches, measured under a six-inch pressure, and in the manner provided in the laws of Montana for the measurement of water; and that the court failed to find on said question as to the definite amount of water owned by plaintiffs." It is evident that this was one of the material issues in the case, and we are unable to find a legal reason for its omission by the court. The rights of the parties demanded that this matter should be passed upon so that the litigation growing out of the controversy might be finally determined. The plaintiffs are entitled by appropriation to the prior use of a certain quantity of the water which flows in Tin-Cup Joe creek, and it is not a valid finding to state that this is not less than 80 inches, and not more than 144 inches. The diversion of the stream into channels is not a controlling element. We take judicial notice of the laws of nature, and can say that the pro-

portion of the water which will run in the branches of this stream must change from year to year, and be liable to sudden variations by freshets, floating objects, shifting sands, or other causes. One-third of the water of Tin-Cup Joe creek may be found in the north channel to-day, and this portion, through natural forces, may increase or diminish to-morrow. The rights of litigants cannot be based upon such uncertainties. If we assume that, through the action of the causes which have been specified, there are 80 inches of water in this stream, and that one-tenth thereof is flowing in the south channel, and the remainder is in the north channel, what can be claimed by the appellants for their prior use, under the findings? It is maintained by the respondent that this issue is immaterial, inasmuch as the court has found that the appellants have enjoyed without interruption their right to the water in controversy. We concede that the supreme court of California has often asserted the rule that a judgment will not be reversed through the failure to find upon certain issues which would not require a different judgment. *Johuson v. Perry*, 53 Cal. 351; *Roberts v. Haley*, 65 Cal. 397, 4 Pac. Rep. 385; *People v. Center*, 66 Cal. 551, 5 Pac. Rep. 263, and 6 Pac. Rep. 481; *Malone v. County of Del Norte*, 77 Cal. 217, 19 Pac. Rep. 422. These decisions have been made under a Code of Civil Procedure which does not embody many provisions relating to findings of facts which are enforced in this state. In *North v. Peters*, 138 U. S. 271, 11 Sup. Ct. Rep. 346, Mr. Justice LAMAR in the opinion said: "In the case of *Dole v. Burleigh*, 1 Dak. 227, 46 N. W. Rep. 692, on which counsel for appellant mainly relies, the trial court omitted to find upon a material issue presented by the pleadings, but it made no additional findings. The court laid down and applied the long-established principle, nowhere controverted, that the findings of fact by a court, like a special verdict, must decide every point in issue, and that the omission to find any material fact in issue is an error which invalidates the judgment." Our statute has affixed to this doctrine the following restrictions: "No judgment shall be reversed on appeal, for want of a finding in writing, at the instance of any party who at the time of the submission of the cause shall not have requested a finding in writing, and had such request entered in the minutes of the court." Code Civil Proc. § 280. The exceptions *supra* show that the appellants complied with this and other requirements of the Code. The answer does not contain any allegations of facts, and prays for a judgment for costs, and admits, as already construed, that the plaintiffs have the prior right to the use of 80 inches of the water of Tin-Cup Joe creek. Yet there is a finding by the court, without any qualification, that the respondent is entitled to the water which was flowing in the north channel. The statute, *supra*, secures, if possible, more firmly than ever the right of a litigant to the judgment of a court upon the material issues to be tried and decided, regardless of their effect. When a proper request for such finding has been

refused, it is not a sufficient justification, in an equitable proceeding, to insist that the result would not have been altered. The judgment of the court below, if affirmed, compels the appellants to bring another action, in order that this issue may be finally adjudicated. We are of the opinion that a multiplicity of suits can be prevented by remanding the case for further proceedings. It is therefore ordered and adjudged that the judgment be reversed, and the cause be remanded, with directions to the court below to find the facts requested on the testimony taken, and such further testimony as may be taken before the court, and enter judgment thereon.

HARWOOD and DE WITT, JJ., concur.

ROSS v. ROSS *et al.*

(*Supreme Court of Oregon.* May 11, 1891.)

STARE DECISIS—DECREE AGAINST PARTY UNDER DURESS—ESTOPPEL.

1. *Bamford v. Bamford*, 4 Or. 30; *Wetmore v. Wetmore*, 5 Or. 469; and *Hall v. Hall*, 9 Or. 452,—followed on the principle of *stare decisis*; and *Weiss v. Bethel*, 8 Or. 523, so far as the same is at variance with those cases, is overruled.

2. If a decree be rendered against a party while under duress, so that such party is unable to conduct his or her case properly, the remedy of such party is to apply to the court in such case to be relieved from the decree as soon as such duress is removed. A party cannot at the same time take advantage of the decree which results favorably to him and object to another part of it on the ground of duress, when it is alleged that the entire decree was procured while such party was under duress.

(*Syllabus by the Court.*)

Appeal from circuit court, Umatilla county; JAMES A. FEE, Judge.

The object of this suit is to obtain a decree adjudging the plaintiff to be the owner of an undivided one-third of certain real property described in the complaint, situated in Umatilla county, and for a partition thereof, and for an account of the rents and profits. The complaint is not the usual complaint in partition, but it sets out the facts upon which the plaintiff relies to establish her interest in the property in controversy; in other words, pleads the evidence of her title. This is briefly as follows: That plaintiff and one William Ross were duly married in Umatilla county, Or., on the 19th day of July, 1886, and thereafter lived together as husband and wife until February 28, 1888, at which time this plaintiff commenced a suit for a divorce in the circuit court of Morrow county, Or., on the grounds of cruel and inhuman treatment and of personal indignities; and that on the 16th day of March, 1888, a decree of divorce was allowed by said court, dissolving said marriage, for the causes alleged in complaint. That at the date of the decree said William Ross was the owner of all the real property described in the complaint in fee-simple, and that no mention was made in plaintiff's complaint for a divorce of any property whatever, nor was any property right or interest mentioned or adjudicated therein, nor was there any adjudication regarding the above-mentioned real estate

belonging to said William Ross in said suit. That on the 1st day of April, 1888, William Ross died intestate, and the defendant Thompson is his administrator, and the other defendants are his only heirs at law. It is also alleged that Ross employed the attorney who prosecuted said suit for a divorce for the plaintiff, and that she was prevented by duress from setting up in that suit her claim to said real property. The defendants demurred to this complaint, which demurrer was overruled, and an answer filed, and the evidence taken, and upon final hearing a final decree was entered dismissing plaintiff's suit, from which this appeal was taken.

J. J. Balleray, for appellant. L. B. Cox, for respondents.

STRAHAN, C. J., (*after stating the facts as above.*) The plaintiff's right in this case depends upon the construction to be given section 499, Hill's Code, which is as follows: "Whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made shall in all cases be entitled to the undivided one-third part in his or her individual right in fee of the whole of the real estate owned by the other at the time of such decree, in addition to the further decree for maintenance provided for in section 501; and it shall be the duty of the court in all such cases to enter a decree in accordance with this provision." *Bamford v. Bamford*, 4 Or. 30, is the earliest case in this court in which this section of the Code received a construction. It was there held that in a suit for divorce, when the complaint contains no allegations concerning property, and the decree contains nothing on the subject, the party in whose favor a decree is granted does not acquire either a legal or equitable right to the property of the adverse party by the decree; and it was further held in that case that, when real property is transferred from one party to another by a decree granting a divorce, the judgment roll should contain a description of the land transferred, and that the investigation concerning property must be had in the same suit. In *Wetmore v. Wetmore*, 5 Or. 469, it was held that whenever a marriage contract shall be dissolved, the party at whose prayer such decree is obtained is entitled peremptorily, under section 495, Civil Code, (Hill's Code, § 499,) to the undivided one-third part of all the real estate shown to be owned by the other party at the time such decree was made; and that, when a husband conveys the bare legal title to a third party in trust for his use, to prevent the marital rights of the wife from attaching thereto, such third party is a proper party to the proceeding. In *Weiss v. Bethel*, 8 Or. 523, a question very similar to the one presented by this record was before the court, and, without noticing either of the adjudications already referred to, or making a word of comment or explanation therefor, this court seemingly departed from what had already been decided, and held the suit maintainable as to this question, but defeated the plaintiff on other grounds.

WATSON, J., announced the opinion of the court in this case. The next case in which the question arose in this court was Hall v. Hall, 9 Or. 452. It was a suit for a divorce. The court in that case granted a divorce to the respondent, and then proceeded to render a decree in her favor in general terms for the undivided one-third of all the real property then owned by the appellant, under section 499 of the Code. There was no allegation in the complaint, or in any of the pleadings, as to the existence of such property, nor any claim for such relief. Nor did the decree find that the appellant owned any such property, or described any such. The appellant claimed that this part of the decree was erroneous. WATSON, J., also delivered the opinion in this case, in which he observed: "After as thorough an examination as we have been able to give the subject, we are not satisfied that the principles enunciated in Bamford v. Bamford are incorrect, and we feel constrained to acknowledge its authority as decisive of the question before us." The decree, so far as it attempted to affect the real property of the appellant, was therefore reversed, and in all else affirmed. Finally, in Houston v. Timmerman, 21 Pac. Rep. 1037, 17 Or. 499, the subject is incidentally alluded to by LORD, J., although the question now under consideration was not before the court. But the court remarked: "It is true, in the divorce suit the property was described in the complaint and decree, which, since the decision in Bamford v. Bamford, 4 Or. 30, has been deemed essential to reach the property of the guilty party, but it is apprehended that neither allegation nor proof concerning the lands is necessary, but that it is enough, and a sufficient compliance with the latter clause of section 499 of the Oregon Code, to say in effect that the party obtaining the divorce is thereby entitled to one-third of the real property owned by the other, whatever it may be;" citing Barrett v. Failing, 6 Sawy. 475, 3 Fed. Rep. 471. The question before the court in Barrett v. Failing, supra, was whether or not a decree of divorce rendered in the state of California could operate extraterritorially and affect the title to property in Oregon under this statute, and the court very properly held that it could not; but in passing on this question the court took occasion to express some views on the subject at variance with what had been held by this court. Under this state of opinion in this court, I think Bamford v. Bamford, supra, Wetmore v. Wetmore, supra, and Hall v. Hall, supra, controlling, and that they ought to be adhered to and followed. They have stood unquestioned for many years, have become rules of property; and it is doubtful whether they ought now to be overruled, even if the court, as now constituted, should be of the opinion that the other is the better construction of the statute. But it is believed by the writer that these cases lay down the correct rule. I think it would be an anomaly in chancery practice to require or allow the court to make a decree that shall have the effect to divest the title to real property out of one of the parties to the suit, and transfer it

to another, when the pleadings are entirely silent as to such property. Such a practice would necessarily introduce such a degree of uncertainty in relation to the title to real property affected as would, in the course of a few years, become very embarrassing. Besides this, according to well-settled principles of chancery practice, a decree which is to operate on the title to real property by divesting the title out of one of the parties and transferring it to the other, operates upon the thing itself in the nature of a proceeding *in rem*; and it is not perceived how the court can properly act upon such a subject when the thing to be affected is undescribed and unknown to the court, and the record is entirely silent in relation to every fact which, in ordinary cases, gives the court jurisdiction, and enables it to act. The plaintiff alleges that she was under duress, and for that reason did not set up in her complaint a claim for the property now in controversy. It is believed that this allegation is not supported by the evidence; but, if it was, her remedy was to apply in that case to the court to be relieved from the decree as soon as the alleged duress was removed, which, in this case, according to her evidence, was when the decree was entered. We are the better satisfied with the conclusions reached for the reason that when the divorce proceedings were commenced the defendant deposited in one of the banks in the city of Pendleton a deed to the plaintiff for about 1,200 acres of land, to be delivered to her when the decree was rendered, which deed she accepted, and retained after the entry of such decree. The evidence also shows that plaintiff received personal property and money to the amount of \$2,000 or more. She brought nothing to her husband at the marriage, only lived with him for a few years, and was not troubled with the cares of a family; and it appears to us she has not been unfairly dealt with. In reaching the conclusion above indicated, it is proper to add that the case of Weiss v. Bethel, supra, so far as the same varies from the doctrines of this case, is overruled. The decree appealed from must be affirmed.

LORD, J., (*specially concurring*.) Upon the merits I concur in the result. But I am not prepared to say that by an omission or failure to allege the property owned by the defendant in the complaint, if there be a decree for a divorce, and that the party obtaining it is entitled to one-third of the real property of the defendant, that such party acquires no rights thereby under the statute.

#### COLBURN V. BARRETT *et al.*

(Supreme Court of Oregon. May 11, 1891.)

PLEADING—ANSWER—GENERAL DENIAL—WRITS—SERVICE BY PUBLICATION.

1. A denial of "any knowledge or information sufficient to form a belief" as to certain material facts alleged, is a good denial, and creates an issue to be tried.

2. An affidavit for an order for service of summons by publication must specify the prop-

erty, and show that the defendants have property within the state.

(Syllabus by the Court.)

Appeal from circuit court, Umatilla county; MORTON D. CLIFFORD, Judge.

*W. F. Butcher*, for appellants. *E. De Peatt*, for respondent.

LORD, J. This is a suit to foreclose a mortgage alleged to have been executed by J. P. Miller, deceased, in his life-time, and his wife, Ida Miller, to the plaintiff. In this suit there are two appeals, in each of which there is presented a question for our consideration and determination. These will be examined in the order stated, namely, that of the defendant C. A. Barrett, as administrator, first, which presents the question as to the sufficiency of his denials to the facts alleged in the complaint. As to such facts he denies "any knowledge or information sufficient to form a belief," which the trial court treating as insufficient, rendered a decree in favor of the plaintiff upon the pleadings. It must be admitted, then, if the denials of the administrator on information and belief were sufficient, they did raise material issues to be tried, and it was error as against him to have given judgment upon the pleadings. Of this, we think, there can be no doubt upon principle, or under the adjudications of this state. The denials of the administrator are of "any knowledge or information sufficient to form a belief" as to the facts alleged. This, within the ruling of *Wilson v. Allen*, 11 Or. 154, 2 Pac. Rep. 91, was a good denial, where it was held that a denial of "any knowledge or information sufficient to form a belief" as to the existence of particular facts was a sufficient or good denial under the Code. This being so, we must hold that the denials of the administrator were sufficient, and raise material issues to be tried, which made it error for the court below to give judgment on the pleadings. In the course of the argument it was suggested that an administrator could not deny on information and belief in such case, as the deceased would have been required, if living, and the suit against him, to have made positive denials as to the facts alleged and now in controversy. From the nature of the case it is not always possible for an administrator to have such knowledge of the facts or circumstances attending a transaction as the party to them, and whom he represents by reason of his death, and as a consequence he could not make positive denials of such facts. Yet, in the interest of the estate, it may be necessary to put the plaintiff upon his proof; otherwise, to exclude the administrator from making such denials might work great and manifest injustice to the estate. In our judgment the administrator was authorized to make such denials, and, this being so, and the denials sufficient to raise material issues to be tried, it results that the court erred in giving a decree against him upon the pleadings, and must be reversed.

We now come to the other appellants upon whom service was attempted to be had by publication, which is the ground

of the other appeal. The objection here is that it does not appear from the affidavit upon which the order of publication was made that the appellants had any property within this state. The provisions of the Code as to this requirement are found in section 55, subd. 3, and section 56 of Deady's Code. Sections 56, 57, Hill's Code. The affidavit states that "the suit is brought to foreclose a certain mortgage on real property situated in this county, made and delivered by the said J. P. Miller, deceased, in his life-time, and by the defendant Ida Miller, his wife." There is nothing in the affidavit to show that the appellants were the heirs at law of the said John P. Miller, deceased, or that they have any interest in any property situated in this county. All that appears is that the suit was brought to foreclose a certain mortgage on real property situated in the county, but there is no specification of the property which is the subject of the mortgage and the suit, nor any fact or circumstance alleged, directly or indirectly, to indicate that the appellants have any interest in such property whatever, or that they are in any way related, as heirs at law or otherwise, to the said John P. Miller. Unless the appellants have some interest in the property, and such property is specifically brought within the jurisdiction of the court, how is the plaintiff to maintain a suit against them on account of such mortgage? In *Pike v. Kennedy*, 15 Or. 420, 15 Pac. Rep. 637, the facts alleged in the affidavit specified the property that was the subject of the mortgage and suit, showing that it was situated in the county and state, and disclosed that the defendants still owned the property when the affidavit for the order was made. The result is that the affidavit nowhere discloses that the defendants have any property in this state. There is not even a bare assertion to that effect, nor is the property specified. No principle is better settled than that the requirements of the statute, in cases of this sort, must be complied with when service by publication is sought to be had on absent defendants. "When," said Mr. Justice FIELD, "constructive service of process by publication is substituted in place of personal citation, and the court, upon such service, is authorized to proceed against the person of an absent defendant not a citizen of the state, or found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions." *Galpin v. Page*, 18 Wall. 350. The affidavit is certainly fatally defective in the particulars noted, and the order based upon it cannot be sustained. It results, then, that the court did not acquire jurisdiction of the appellants, and that the judgment or decree, as against them, is void.

ADAMS v. COUCH et al.

(Supreme Court of Oklahoma. April 4, 1891.)

PLEADING — DEMURRER — EJECTMENT — TITLE TO SUPPORT.

1. Where a pleading is demurred to, all the facts well pleaded are admitted for the purposes of the demurrer.



2. Section 411, Code Civil Proc. Neb., does not authorize a recovery in ejectment on a register and receiver's duplicate receipt

3. The land department of the government will not be interfered with by the courts while it has charge of any contest proceedings between adverse claimants of the land.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county.

*Amos & C. M. Green and H. S. Cunningham*, for appellant. *Dale & Stanley, A. B. Hammer, and Selwyn Douglas*, for appellees.

SEAY, J. This is an ejectment which comes to this court on appeal from the third district Oklahoma court, JOHN G. CLARK, J. The petition is as follows:

"The plaintiff, a citizen of the United States, residing in the county aforesaid, brings suit against the said defendants, who are also residents of the aforesaid territory and county and citizens of the United States, and for cause of action says that the plaintiff is the homestead settler on the following tract of land situated and being in the county of Oklahoma and territory aforesaid, and more particularly described as follows: The southwest quarter of section thirty-three, township twelve north, of range three west, containing one hundred and sixty acres. That on the 23d day of April, 1889, he filed homestead entry on said tract of land in the United States land-office at Guthrie, Oklahoma, being application and homestead entry number nine, and received duplicate receipt of the receiver of said land-office, being duplicate receipt number nine, a copy of which is hereto filed, and marked 'Exhibit A.' Plaintiff states that by reason of his settlement and entry aforesaid he became the equitable owner, and legally entitled to the possession, of the aforesaid land, and that he still resides on a part of said land, and occupies and cultivates the same as his homestead; and that he is legally entitled to the possession of the entire tract under and by virtue of his aforesaid settlement and homestead filing. That under and by virtue of section four hundred and eleven of the Code of Civil Procedure, under the title of 'Evidence,' of the statute of the state of Nebraska, made applicable to and extended over the territory of Oklahoma by the provisions of the act of congress approved May 2, 1890, establishing and providing a territorial government for said territory, it is provided as follows: 'The usual duplicate receipt of the receiver of any land-office, or, if that be lost or destroyed or beyond the reach of the party, the certificate of such receiver that the books of his office show the sale of a tract of land to a certain individual, is proof of title equivalent to a patent against all but the holder of an actual patent.' The plaintiff states that, being the owner as aforesaid, and entitled to the possession, of the aforesaid tract of land, said defendants did, on or about the 1st day of October, 1889, unlawfully enter upon and occupy about forty-five acres off the south end of said tract of land, being all that part lying south of the extension

of the street called 'Grand Avenue,' of the city of Oklahoma, on and through said tract of land, and all the east eighty acres of said tract of land, and still illegally and unlawfully and forcibly hold and occupy the part of said tract aforesaid, to the damage of the plaintiff in the sum of five hundred dollars. The plaintiff says he is the legal owner, and entitled to the possession, of the aforesaid land so wrongfully, illegally, and forcibly occupied, held, and detained as aforesaid by said defendants; whereof he prays judgment for the recovery of the possession of said land, together with five hundred dollars damage for the wrongful detention thereof, and for other proper relief. A. & C. M. GREEN, H. S. CUNNINGHAM & D. C. LEWIS, Attorneys. John C. Adams says he is the plaintiff, and that he believes the statements of the foregoing petition are true. AMOS GREEN, Attorney J. C. Adams. Subscribed and sworn to before me, this 8th day of September, A. D. 1890. WILL H. CLARK, Clerk. By HENRY P. GREEN, Deputy.

"Copy Exhibit A. Copy 4,138. Homestead. Receiver's duplicate receipt, No. 9. Application No. 9. Receiver's Office, Guthrie, I. T. April 23rd, 1889. Received of John C. Adams the sum of fourteen dollars \* \* \* etc., being the amount of fee and compensation of register and receiver for the entry of south-west quarter of section 33, in township 12 N., of range 3 W., under section 2290, Revised Statutes of the United States. \$14.00. C. M. BARNES, Receiver."

The special answer of Cynthia Couch is as follows:

"Comes now Cynthia Couch, one of the above defendants, and for answer to plaintiff's complaint and petition filed herein states: (1) That, to-wit, April 22, 1889, she was the lawful wife of William Couch, and remained his wife until he departed this life on —, 1889. (2) That, to-wit, April 22, 1889, said William Couch settled upon, improved, and began a residence upon the S. W.  $\frac{1}{4}$  sec. 33, twp. 12 N., R. 3 W., the same being the land described in plaintiff's petition, filed herein, and continued such settlement, residence, and improvement upon said land until he departed this life. (3) That at the time said William Couch settled upon the land as aforesaid the same was a part of the public domain, open to settlement, under and by virtue of the provisions of the general homestead law, which said law was duly enacted by the congress of the United States, and was in force and effect in the territory of Oklahoma, and was the only law under which said land could be segregated from the public domain of the United States. (4) That afterwards, and within ninety days from the date of his said settlement as aforesaid, said William Couch filed in the United States land-office at Guthrie, Oklahoma, his homestead application to enter the S. W.  $\frac{1}{4}$  of section 33, twp. 12 N., of range 3 west, as his homestead, and at the same time submitted affidavits to show his qualifications to enter said land under the general provisions of the homestead law applicable to the territory of Oklahoma, and which said

application so filed as aforesaid was by the land-office at Guthrie, Ok., rejected for the reason that said land had been previously entered as a homestead by the plaintiff in this action. (5) Defendant further avers that within ninety days from April 22, 1889, the said William Couch filed in the United States land-office at Guthrie, Ok., his contest affidavit, duly corroborated, in manner and form as provided by the rules of practice in force in said land-office, at Guthrie, Ok., his contest affidavit, duly corroborated, in manner and form as provided by the rules of practice in force in said land-office, and in said contest affidavit alleged in substance that he, William Couch, settled upon, improved, and began his residence upon the S. W.  $\frac{1}{4}$ , sec. 33, twp. 12 N., of range 3 west, on the 22d of April, 1889, prior to the date upon which said John Adams filed his homestead entry for said tract of land, and prior to the date upon which said John C. Adams settled upon the same, and further alleged that said John C. Adams was disqualified from entering any land as a homestead within the territory of Oklahoma for the reason said Adams entered the territory of Oklahoma subsequent to March 2, 1889, and prior to noon of April 22, 1889, with the intent to settle upon lands therein, and asked the register and receiver to grant him relief by canceling the homestead entry of said Adams, and to permit his, William Couch's, application for said land to be placed on record. (6) Defendant avers that at the time said William Couch settled upon the tract of land as aforesaid, and at the time he filed his homestead application therefor, and contest affidavit against the entry of plaintiff herein, the United States land-office at Guthrie, Oklahoma territory, was by virtue of the acts of congress vested with full jurisdiction to try and adjudicate all questions arising between plaintiff herein and said William Couch, relating to the rights of said parties to file their entry for said land, and to try and determine which of said parties had the exclusive right to occupy and hold possession of the same; and, further, that the United States land-office, now located at Oklahoma City, O. T., now has all the powers and jurisdiction heretofore vested in the Guthrie land-office; and that the matters in controversy pending between the aforesaid parties are still undetermined in said land-office at Oklahoma City. (7) Defendant further avers that the United States land-office at Oklahoma City has full and complete jurisdiction to determine all matters set forth in plaintiff's petition filed herein; that such jurisdiction is by the congress of the United States vested in said land-office; and that congress has by special enactment created the land-office at Oklahoma City, for the purpose of trying all matters set forth in the plaintiff's petition; and that this court has no jurisdiction to hear or determine the questions set forth in said petition. (8) Defendant further avers that she, as the widow of William Couch, deceased, is entitled to all rights in the tract of land described in plaintiff's petition, which were vested in William Couch at

the time of his death. (9) Defendant denies the right of the court sitting in and for the county of Oklahoma, Ok. Ty., to eject the defendant from the tract of land described in the plaintiff's petition, or in any manner to interfere with her use and occupation of the same. Wherefore defendant prays a dismissal of this action. CYNTHIA COUCH. By her Atty., FRANK DALE."

John M. Dawson filed an answer which is as follows: "Comes now John M. Dawson, one of the above-named defendants, and for a separate answer to the complaint of the plaintiff says: *First.* That he denies each and every material allegation made by the plaintiff in his said complaint. *Second.* Defendant denies that plaintiff is the owner of, or entitled to the possession of, said tract of land described in his complaint, as against this defendant. *Third.* Defendant alleges the truth to be that the supposed title of plaintiff was obtained illegally, wrongfully, and fraudulently, for that, whereas, on April 23, 1889, at Guthrie, Indian Territory, and before the issuance of the receipt set out in plaintiff's complaint, he, the said plaintiff, was required, as a condition prior, and did take and subscribe, a certain affidavit in words and figures, to-wit: 'Land-Office at Guthrie, I. T., April 23rd, 1889. I, John C. Adams, of Oklahoma, applying to enter (or file) for a homestead, do solemnly swear that I did not enter upon and occupy any portion of the lands described and declared open to entry in the president's proclamation dated March 23rd, 1889, prior to 12 o'clock noon of April 22nd, 1889. [Signed] JOHN C. ADAMS. Sworn and subscribed before me this 23rd day of April, 1889. [Signed] JOHN I. DILLE, Register.' That said affidavit was material, and without which said receipt would not have been issued. That said John I. Dille was an officer of the United States, duly empowered to administer oaths for such purposes. Defendant avers that said affidavit was wholly false and untrue, and that the plaintiff did enter upon and occupy a portion of the lands described and declared open for entry in the president's proclamation dated March 23, 1889, prior to 12 o'clock noon, of April 22, 1889, by reason whereof the said receipt set forth in plaintiff's complaint was illegally, unlawfully, and fraudulently obtained, and should not be pleaded as evidence of title or right of possession in this action as against the defendant. Defendant further avers that on, to-wit, May 23, 1889, he filed in the land-office at Guthrie, Indian Territory, his affidavit of contest against the homestead entry of the plaintiff, charging plaintiff with being disqualified, by reason of the facts set forth in the third paragraph of this answer, from making entry of said lands. That this defendant was the first legal settler and occupant upon said tract. A hearing on said contest has been ordered by the land-office at Oklahoma City, before which said cause is now pending. *Fifth.* Defendant further avers that the title to said land described in plaintiff's complaint is in the United States, and that by reason thereof, and his contest aforesaid, and his application for title thereto, he has fully conformed

and complied with all the conditions required by the Interior department of the United States in prosecuting said contest, and has an equitable title and by reason of prior occupancy a right to the possession of said land. *Sixth.* That the defendants Cynthia Couch and Robert Higgins claim adversely to this defendant, and that they have some right or equity in and to the title and possession of said tract of land; that the claim and equitable title of this defendant is superior to that of either of said defendants; that the same would be destroyed, and the defendants irreparably injured, by ousting him of his possession before the final determination of the respective claims to the title of said land. *Seventh.* That the defendant went into possession of the N. E.  $\frac{1}{4}$  of said S. W.  $\frac{1}{4}$ , 33, 12, 3 W. I. M., while the same was open, unimproved, and unoccupied; that he has placed thereon permanent improvements of the value of \$1,500.00, and occupies the same as a permanent residence with his family. Defendant here specifically disclaims any act or intention to do in any manner trespass upon or interfere with the inclosure, improvement, or possession of plaintiff. *Eighth.* That there is now a suit pending between the same parties, and for the same subject-matter, before the United States land-office at Oklahoma City, Ok. Ty.; that the same is undetermined, and that said land-office has the original and exclusive jurisdiction to hear and determine the respective rights of all parties litigant in and to the title to said tract of land described in plaintiff's complaint. Wherefore defendant John M. Dawson prays the judgment of the court in his behalf. [Signed] JOHN M. DAWSON. By his Attorneys, HAMMER, HUDSON & LEACH."

Robert M. Higgins filed no answer, but relies upon the following stipulation and agreement made by counsel: That in the hearing of this case the "rights of alleged prior settlers might be passed upon, same as if raised by answer; also, rights of contestants as to possession when the entry is made after a filing,—what right such gives as to possession,—same as if set up in answer." This agreement seems to cover substantially all the questions raised by the answers of Couch and Dawson. To these answers the plaintiff filed the following demurrer: "That said answers do not state facts sufficient to constitute any defense to the cause of action in plaintiff's petition stated." The facts, as alleged and denied in the pleadings, may be briefly summarized as follows: The petition substantially states that plaintiff, being a citizen of the United States, having the right so to do, filed his homestead entry (No. 9) for the S. W.  $\frac{1}{4}$  of section 33, township 12 N., of range 3 W., in the United States local land-office; and that upon full compliance with the law, and residing upon and being in possession of a part, he became the equitable owner, and legally entitled to the possession, of the whole of said tract of land. That the defendants afterwards unlawfully entered upon and occupied part of the land, to plaintiff's damage in the sum of \$500, for the possession of which and damages he asks

judgment. Defendant Cynthia Couch says her husband, in his life-time, settled upon, improved, and began a residence on the property in dispute on April 22, 1889, and continuously resided thereon till his death, since which time she has resided thereon, and held unbroken possession of his title. That within 90 days after the 22d of April, 1889, he took steps in pursuance to law to enter said land, and his application was rejected because of the previous entry of the land by plaintiff, whereupon he filed his contest as provided by law, and asked the cancellation of plaintiff's entry, for the reason that plaintiff entered the territory subsequent to the 2d of March, and prior to the 22d of April, 1889, in violation of the law. That contest is now pending before the local land-office at Oklahoma City, which has exclusive jurisdiction to hear and determine all matters of controversy between them, and that this court has no jurisdiction to interfere with her use and occupancy of the land described. John M. Dawson, after denying each and every allegation of the petition, and charging plaintiff with having forfeited his rights by entering the territory prior to 12 o'clock noon of April 22, 1889, and occupying a portion of the land in controversy, avers that he, (Dawson,) on the 23d day of April, 1889, filed his contest affidavit, charging the plaintiff with the violation aforesaid, and averring that he, defendant, was the first legal settler and occupant upon said land, and that said contest is now pending and undetermined before the local land-office at Oklahoma City; that the title is still in the United States, but by reason of the foregoing facts he has an equitable title, and on account of his prior settlement and occupancy he is entitled to the possession of the land; that a judgment of ouster would destroy his title, and deprive him of his home, which is of the valuation of \$1,500, and which he built upon the land, and in which he now resides with his family. Dawson then pleads the pendency of the contest proceedings as a bar to this action, and denies the jurisdiction of this court to hear and determine it. Robert M. Higgins relies upon the stipulations, which seem to be broad enough to cover all the questions raised by the answers of Couch and Dawson. The plaintiff bases his right to recover in this case upon the fact that he entered the land, and that his receipt of the receiver entitles him to the possession of the whole tract, under the provisions of section 411, p. 790, St. Neb., which was put in force here by the organic act. The defendants rely for their defense mainly upon three propositions: (1) That the plaintiff entered the territory for the fraudulent purpose of securing a homestead prior to the 22d day of April, 1889, without authority of law; (2) that they are prior settlers, and took legal steps to secure their rights within 90 days after actual settlement; (3) that the matters now in controversy are pending before the local land-office, which has exclusive jurisdiction to hear and determine them, and that this court has no jurisdiction in the premises. Plaintiff, by demurring to the defendants' answers, ad-

mits all the facts well pleaded therein, and asks this court to declare as a matter of law said facts are insufficient to constitute any defense to the cause of action as stated.

The case of *Wilson v. Fine*, 38 Fed. Rep. 789, is referred to as authority for plaintiff. This is an ejectment case, in which plaintiff claims under a "duly-certified final certificate from the proper officers of the United States land department, under the homestead laws; that, plaintiff being in possession of the premises as the legal owner, the defendant unlawfully and with force entered upon the same, and ejected the plaintiff therefrom, and has ever since wrongfully held possession thereof from the plaintiff." To this complaint the defendant demurred for that the same "does not state facts sufficient to constitute a cause of action." The only question was as to the sufficiency of the petition. The court said this plaintiff is "the assignee and vendee of a recognized settler on the premises under the homestead law \* \* \* to whom an official certificate was issued to the effect that he had complied with the law, and was entitled to a patent." The defendant being a mere intruder and trespasser, and plaintiff being entitled to the patent, we think the demurrer was properly overruled. The case of *Colwell v. Smith*, 1 Wash. T. 92, (decided in 1880,) is also quoted as authority for the position taken by the plaintiff. We are unable to see that it supports plaintiff's contention. "The complaint alleges that plaintiff, claiming under the pre-emption laws of the United States, was in the exclusive possession of 160 acres of land, \* \* \* was wrongfully ousted and deprived of his possession by the defendant, and seeks a writ of restitution." The case was tried by a jury, who found that plaintiff was in the possession of the whole tract, and was wrongfully ousted by defendant. It does not appear that any answer was filed, or whether any defense was set up, and yet the court held that it had no jurisdiction to determine, upon conflicts between two persons claiming by priority of settlement, (both of whom are in actual possession of different portions of the tract,) so far as to dispossess one or the other from the entire claim, and then declined to give the plaintiff any relief until he filed a stipulation not "to deprive the defendant of such possession as he may have, of his dwelling-house or inclosures, made and exclusively occupied by himself." The court in that early day saw the necessity of leaving such conflicts under the control of the proper officers of the land department.

Section 411, supra, provides that "the usual duplicate receipt of the receiver of any land-office \* \* \* is proof of title equivalent to a patent against all but the holder of an actual patent." What sort of a receipt is meant by this section? Is it what is known as the "filing papers," which is the initiatory step to secure the inceptive right to the land; or does it refer to the "final receipt," which entitles the holder to a patent? In *Morton v. Green*, 2 Neb. 458, which was an ejectment under section 411, supra, the court held that

ejectment would not lie; that to entitle him to recover the plaintiff "must produce a patent, or show that he holds a final certificate in harmony with the government." In *Dale v. Hunneman*, 12 Neb. 221, 224, 10 N. W. Rep. 711, the court says: "To entitle the plaintiff to recover under the Code, he must possess a legal title in the premises, and state in his petition that he is entitled to the possession." When he secures his "final certificate," which shows that he has paid for the land, and is entitled to a patent, it would seem that such a title ought to be sufficient to support ejectment, for it is held in *Carroll v. Safford*, 3 How. 460 that "the final certificate obtained on the payment of the money is as binding on the government as a patent." *Langdon v. Sherwood* was ejectment. That case went up on appeal from Nebraska, and is reported in 124 U. S. 74, 8 Sup. Ct. Rep. 429. Plaintiff offered in evidence a certificate of the register of the land-office at Omaha, dated August 14, 1857, of the location by one Wright of a military land-warrant upon the land in controversy, which was objected to. Mr. Justice MILLER quoted with approval from *Bagnell v. Broderick*, 13 Pet. 436, that "congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the federal government in reference to the public lands declares the patent the superior and conclusive evidence of legal title. Until its issuance the fee is in the government, which, by the patent, passes to the grantee; and he is entitled to recover the possession in ejectment." He then says: "The defendants in error rely upon section 411 of the Nebraska Code of Civil Procedure, which is analogous in its provisions to the statute of Arkansas, referred to in the case of *Hooper v. Schelmer*, [23 How. 235.]" After quoting the section in full he says: "But, whatever effect may be given this statute, it is obvious that in the circuit court of the United States it cannot be received in establishing the legal title of the holder of such certificate. That certificate is given for the purpose of vesting in the receiver of it an equitable right to demand the patent of the government after such other proceedings as the laws of the United States and the course of business in the departments may require." On page 85 he further says: "To receive this evidence, and to give it the effect of proving a legal title in the holder of such receipt, because the statute of the state proposes to give it such an effect, is to violate the principle asserted in *Bagnell v. Broderick*,—that it is for the United States to fix the dignity and character of the evidences of title which issues from the government. And it is also in violation of the other principle settled by the cited decisions, that in the courts of the United States a recovery in ejectment can be had alone upon the strict legal title, and that the courts of law do not enforce in that manner the equitable title evidenced by these certificates." It seems to be clear that the supreme court of Nebraska construed section 411 to refer to the final receipt, which vests a title in the holder, and entitles him to a patent; and it is our

duty to follow that construction. In that state there are several kinds of entry of United States lands for which duplicate receipts are taken, to-wit, the homestead, the pre-emption, timber culture, and desert lands. The original entry is evidenced by filing papers. After all the requirements of the laws of congress relating to homestead, pre-emption, timber culture, or desert lands, as the case may be, have been fully complied with, the plaintiff becomes entitled to the "final receipt," which in its turn arms him with a legal title against all the world except the United States, and, as against the government itself, the right to demand and receive a patent. In consideration of the fact that congress, in organizing this territory, gave us certain of the laws of the state of Nebraska for our local government, until such time as our territorial legislature should enact a Code; that section 411, supra, was given to us as a rule of evidence only, if it should be, and so far as it might be, "locally applicable," and not inconsistent with the organic act, or with the constitution and laws of the United States; and in view of the universal rule of the highest court of the nation that a patent gives the superior title, without which ejectment cannot be maintained in the courts of the United States,—the conclusion is inevitable that section 411 is not "locally applicable" here. Certainly not with the construction placed upon it by the plaintiff.

We might now consider the demurrer with reference to the defenses set up in the answers as to the disqualification of the plaintiff to enter the land, the prior settlement of the defendants, the setting up the pendency of the contest proceedings by the defendants, and the plea to the jurisdiction of this court, and stop there; but as the eminent counsel on both sides (who took a wide range in the argument) expressed a desire and signed an agreement (heretofore referred to) to the effect that these questions should be considered by the court, we are not unmindful of the great importance (to the homesteaders throughout the territory) of a careful discussion at this time of these questions. While we regard it, ordinarily, as the better course, to pass only upon such questions as are decisive of the case, we feel that for the public good, and for the purpose of checking (so far as it is within the scope of our power and duty) unnecessary and expensive litigation, we should at least give our views on the question of jurisdiction raised by the pleadings, the decision of which will dispose of the other questions preceding it.

In the case of *Empey v. Plugert*, 64 Wis. 603, 25 N. W. Rep. 560, the plaintiff alleged in his complaint that he settled on the land in dispute as a homestead claimant under the laws of the United States, and complied with the requirements of the law by continued residence and cultivation, so as to entitle him to the final certificate therefor, of which fact he made due proof before the land department; and that, by a final decision of the secretary of the interior, he was denied the right to said certificate; and that he has

continued to reside upon and keep possession of said land; that the defendant entered upon the land by force, regardless of the plaintiff's rights, paid the amount required by law, and obtained a certificate, and now claims that he is entitled to all the rights of a homestead claimant. It is further alleged by said plaintiff that when his proof was presented for the purpose of obtaining his final certificate the defendant contested his rights, and by perjury and fraud defeated him, and caused the secretary of the interior to declare plaintiff's entry void, and gave the certificate to the fraudulent entryman, the defendant. The plaintiff further alleged that he had done every act and performed every requirement of the law to entitle him to a patent to the land. He then prays for judgment that he has complied with the homestead laws, and is entitled to the land. To this complaint the defendant demurred, and the court sustained the demurrer. The land-office department having decided against the plaintiff, the defendant has settled upon the land as a homestead claimant, and holds a certificate as such. "That certificate gives the defendant no right to the land, and he must thereafter perform all the conditions of the homestead law before he will be entitled to a certificate upon which the patent can be issued." After declaring that he had as yet secured no right to the land, but the mere privilege or permission to enter upon it for the purpose of completing title by residing thereon five years, the court says: "What right or claim to said land or interest in it has he (defendant) that he could release to the plaintiff according to the prayer of the complaint? Has he the possession? So has the plaintiff. If he is an intruder or trespasser without legal right, (and he has no right if the plaintiff is entitled to the patent of the United States, as he claims,) then the plaintiff's remedy, if he has any, is in the proper possessory action at law. The defendant's right of entry upon the land is a legal right, if he has any. If he has none, then he has no right or title to release. If he has a right so to enter, then neither a court of equity nor law could extinguish it, or adjudge its release to another. But, if all the right the defendant claims is released to the plaintiff, it would not make his right or title any better. It is apparent that the remedy sought by this part of the prayer would be ineffectual, and of no benefit to the plaintiff. If the defendant should release to the plaintiff whatever right or claim he may have, it would not give the plaintiff any more right than he had before by reason of his settlement and cultivation of the land for the requisite time. The law does not provide for any action or adjudication upon such a preliminary entry. The land-officer decides nothing. The land may or may not be subject to entry. That is the risk of the applicant." On page 611 of the opinion it is said: "If the court in such a case should decide that the decision of the secretary was wrong, and based upon perjured testimony, and that the plaintiff was entitled to the final certificate and the patent for the land,

and go further even, and reverse, set aside vacate, or annul his decision and judgment, how could it be enforced, and what would be its effect? Neither the United States nor the executive departments of the government are amenable to the state courts. The decision would still stand and be enforced, and a patent would not be issued to the plaintiff, and might be issued to the defendant upon his final proof. The judgment of the court in such a case could not operate upon or in any way affect the title of the land, for the title is still in the government, or upon the right to the title, which would be respected by the government and its departments." Then after holding that the courts may have jurisdiction to inquire into the homestead right of a homestead party to a patent, and may reverse the decision of the land department when procured by fraud and perjury, it says that jurisdiction can be effectually exercised only when the title is vested in the party amenable to the state court. "But in exercising such a jurisdiction the court will not disturb the adjudications of the land-officers in respect to such right, except in clear cases of fraud, mistake, perjury, or violation of law. This doctrine is well settled;" referring to *Lamont v. Stimson*, 3 Wis. 545; *Bross v. Wiley*, 6 Wis. 485; *Lombard v. Cowham*, 34 Wis. 486; *Morton v. Green*, 2 Neb. 441; *Corbett v. Wood*, 32 Minn. 509, 21 N. W. Rep. 734; *Gaines v. Thompson*, 7 Wall. 347; *Secretary v. McGarrahan*, 9 Wall. 298; *Litchfield v. Register*, etc., Id. 575; *Johnson v. Towseley*, 13 Wall. 72; *Shepley v. Cowan*, 91 U. S. 330; *Marquez v. Frisbie*, 101 U. S. 478; *Smelting Co. v. Kemp*, 104 U. S. 636; *Steel v. Smelting*, etc., Co., 106 U. S. 447, 1 Sup. Ct. Rep. 389; *Baldwin v. Stark*, 107 U. S. 463, 2 Sup. Ct. Rep. 473; *Smith v. Ewing*, 23 Fed. Rep. 741; *Casey v. Vassar*, 4 McCrary, 127. Holding that the land department still have jurisdiction of this case, the judgment of the court below sustaining the demurrer was affirmed.

In *Marquez v. Frisbie*, which was a case taken up by appeal from California to the supreme court of the United States, plaintiff asked the reversal of the decision of the department of the interior against his claim as a pre-emptor to a certain quarter section of land upon the ground that his title was paramount to that of the defendant. Defendant demurred. Demurrer was sustained. The legal title was outstanding in the United States, and the matter was still *in fieri*, and under the control of the land-office; and the supreme court sustained the court below, saying: "We have repeatedly held that the courts will not interfere with the officers of the government in the discharge of their duties in the disposal of public lands, either by injunction or *mandamus*. *Litchfield v. Register*, etc., 9 Wall. 575; *Secretary v. McGarrahan*, Id. 298. And we think it would be quite as objectionable to let a state court, while such a question was under the consideration and within the control of the executive departments, take jurisdiction of the case by reason of their control of the parties concerned, and render a decree, in advance of the action of the government, which would render its patent a

nullity when issued. *Johnson v. Towseley*, 13 Wall. 72; *Shepley v. Cowan*, 91 U. S. 330. We think the appropriate officers of the land department have been constituted a special tribunal to decide such questions, and their decisions are final to the same extent that those of other judicial or *quasi* judicial tribunals are. *Vance v. Burbank*, 101 U. S. 514." Mr. Justice MILLER, in *U. S. v. Schurz*, 102 U. S. 378, which was a *mandamus* proceeding to compel the secretary of the interior to deliver a patent to the relator, held that, the patent having been issued and recorded, the act of delivery was merely ministerial, and directed the supreme court of the District of Columbia to grant the writ. But in the same decision the learned justice held that "congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen. This court has with a strong hand [the italics are ours] upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the court would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere."

The question of jurisdiction is elaborately discussed, and numerous authorities cited, from which copious quotations are made in the case of *Forbes v. Driscoll*, 31 N. W. Rep. 633, by the supreme court of Dakota. That was an action to recover possession of 160 acres of land, described therein. Plaintiff alleges that he is now, and has been ever since the 20th day of May, 1879, entitled to the possession of the land described. He bases his title upon the declaratory statement of pre-emption filed in the United States land-office at Deadwood, Dak., and then avers that in January, 1880, while he was in the lawful, actual, peaceful, quiet, and exclusive possession of said premises, and entitled thereto, the defendant unlawfully entered into and upon the same, and ousted and ejected the plaintiff therefrom, and still wrongfully withholds from the plaintiff the possession of the premises, to his damage in the sum of \$2,000. There was no objection, by demurrer or otherwise, to the complaint by the defendant; but he filed a general denial, and set up new matter as a defense. Defendant alleges all the facts which, under the law, entitle him to settle upon the land by pre-emption, and avers that he filed his declaratory statement, according to pre-emption laws of the United States, at the Deadwood land-office, and immediately thereafter established his residence thereon, and cultivated continuously the lands as a homestead, and pleads the pendency of a contest before the register and receiver at Deadwood between himself and plaintiff. Upon these issues the parties went to trial before a jury, and, without objection, plaintiff introduced testimony tending to prove the allegations in the pleadings, and the court gave and refused instructions, and the jury brought in a general verdict for the plaintiff. Judgment for plaintiff was rendered thereon, and an appeal was pro-

ecuted. The court then says: "This question is therefore now presented to this court: Can a court of law, while a contest is pending, or prior to the decision of the land department, hear and determine the contestant's right of pre-emption in determining his right to possession of public lands? Plaintiff relies for his right to recover upon section 650 of the Dakota Code of Civil Procedure, which provides as follows: 'Any person settled upon the public lands belonging to the United States, on which settlement is not expressly prohibited by congress or some department of the general government, may maintain action for injuries done the same, also an action to recover possession thereof, in the same manner as if he possessed a fee-simple title to said lands.'" The court says: "It was enacted, without doubt, to set at rest any question that might arise as to the right of the settler upon public lands to protect his improvements and possession against as mere intruder or trespasser;" referring to *Atherton v. Fowler*, 96 U. S. 519. "Does the policy of the pre-emption law authorize a stranger to thrust these men out of their houses, seize their improvements, and settle exactly where they settled, and by these acts acquire the initiatory right of pre-emption? The generosity by which congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. \* \* \* It would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides and other crimes of less moral turpitude." Further on the court says in the same case: "Undoubtedly there have been cases, and may be cases again, where two persons making settlement upon the same quarter section of land may present conflicting claims to the right of pre-emption of the whole quarter section, and neither of them be a trespasser upon the possession of the other, for the reason that the quarter section is open and uninclosed, and neither party interferes with the actual possession of the other. In such cases the settlement of the later of the two may be *bona fide*, for many reasons." In *Belk v. Meagher*, 104 U. S. 287, the court, after approving the doctrine laid down in *Atherton v. Fowler*, says: "We also all agree that, if a peaceable entry had been made on the lands, which had not been inclosed or improved, a good right might have been secured." Judge TRIPP then says: "If, then, the settlement of the defendant, Driscoll, was upon unoccupied portions of the land in controversy, the plaintiff would not have the right, by virtue of his prior filing, to oust him from such possession. Nor would he have the right, as a prior pre-emptor, to oust this defendant from any portion of the land filed upon, except such as he, plaintiff, had actually

settled upon and improved; and, as the evidence does not show the defendant, Driscoll, to have been in possession of any part of the premises which had been in the prior actual possession of the plaintiff, the verdict should have been set aside." Then, preliminary to a discussion of the jurisdiction, he says the plaintiff sought "to eject a junior pre-emptor from the entire claim because he (plaintiff) had a better right of pre-emption. Has a court of law any jurisdiction to determine such a right at all? And can it exercise such jurisdiction pending or prior to the determination of such question by the land department? The power to sell and dispose of public lands is essentially of an administrative or executive character. Congress, under its constitutional power to make all needful rules and regulations respecting the territory and other property belonging to the United States, has placed this executive function in the hands of a special tribunal, subject to the supervision of one of the executive officers of the department." Mr. Justice MILLER in *Johnson v. Towsley*, supra, after laying down the general "doctrine" that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others, holds that the land department is clothed with a special jurisdiction in the disposition of the public lands of the United States, and declares that "this court has at all times been careful to guard itself against an invasion of the functions confided by law to the other departments of the general government; and in reference to the proceedings before the officers intrusted with the charge of selling the public lands has it frequently and firmly refused to interfere with them in the discharge of their duties, either by *mandamus* or injunction, so long as the title remained in the United States, and the matter was rightfully before its officers for decision. On the other hand, it has constantly asserted the right of the proper courts to inquire, after the title had passed from the government, and the question became one of private right, whether, according to the established rules of equity and the acts of congress concerning the public lands, the party holding that title should hold absolutely as his own, or as a trustee for another; and we are satisfied that the relations thus established between the courts and the land department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice, and to a sound administration of the law." In *Shepley v. Cowan*, FIELD, J., says: "The officers of the land department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlement upon the public lands, with a view to secure rights of pre-emption." In *Moore v. Robbins*, 96 U. S. 530, the court "limits the time when control over the land by the department ceases to the act of issuing the patent." In *Quinby v. Conlan*, 104 U. S. 503, re-examining the powers of the court to review the action



of the land department, Judge FIELD adhered to and reaffirms the doctrine, and then remarks: "It would lead to endless litigation, and be fruitful of evil, if a supervisory power was vested in the courts over the action of the numerous officers of the land department on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case as established before the department, and thus have denied the parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations or fraud have been practiced necessarily affecting their judgment, that the courts can in the proper proceeding interfere, and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled;" referring to *Johnson v. Towsley*, *Shepley v. Cowan*, *Moore v. Robbins*, *supra*, and again, in *Steel v. Smelting, etc., Co.*, he declares that the land "department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of title from the United States to portions of the public domain is obtained, and to see that the requirements of the different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class that is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions." 108 U. S. 451, 1 Sup. Ct. Rep. 392. Here is a strong array of federal decisions announcing the doctrine as to when the court will exercise jurisdiction over the decisions of the land department; the time when it will be and the time when it will not be exercised. The courts have uniformly held that they will not exercise such jurisdiction while the matter is still *in fieri*, and prior to the time when the United States has parted with the title. To declare the plaintiff out of court in this case is to give effect to the doctrine here laid down. A contrary view of the law would bring this court into constant collision with the land-offices in this territory. It would bring into our courts all the contested claims for title to public lands under the homestead law, and would have the effect to transfer all contests from the local land-offices to our courts, and would leave the register and receiver mere ministerial officers, with no more jurisdiction to try and determine a contest of adverse claimants than a mere clerk. We have no doubt that the manifest intent of the laws of the United States was to invest in the land department exclusive jurisdiction of all questions relating to the sale and disposition of the public lands, up to the time of the issuing of the patent. While we do not wish to be understood as saying that this court, in a proper case, might not, or would not, grant relief on the prayer of a

*bona fide* homesteader against a mere intruder or trespasser, we are of the opinion that the court, under the pleadings in this case, has no jurisdiction to eject the defendants. The plaintiff's demurrer to the defendants' answers is therefore overruled. The judgment of the district court is affirmed. Judgment for defendants, with costs. The other judges concur.

(46 Kan. 591)

## WILLARD v. OSTRANDER.

(Supreme Court of Kansas. June 6, 1891.)

## ACTION ON NOTE—BREACH OF WARRANTY—PAROL EVIDENCE.

Where, in an action upon a promissory note, the defendant answered that the note sued upon had been given as part of the purchase price of a flock of sheep, and alleged an express warranty of soundness of the sheep included in the purchase, and set up a counter-claim for damages on account of a breach of the warranty, and upon the trial testified in his own behalf that the contract was verbal, but upon further examination it was disclosed that the defendant received a bill of sale from the agent of the plaintiff that did not contain an express warranty for the sheep sold, *held*, that the oral evidence given in relation to the terms of the contract should have been excluded; that the defendant should not have been permitted to show the representations and statements made previous to the execution of such bill of sale, the presumption of law being that the written instrument contained the whole contract, and should govern, unless fraud had been alleged and proved.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Trego county; S. J. Osborn, Judge.

*J. Warner Mills, H. C. Dillon, Hollister & Hollister, and E. E. Chesney*, for plaintiff in error. *Hutchinson & Banks*, for defendant in error.

GREEN, C. This was an action upon a promissory note executed by John M. Ostrander on the 2d day of September, 1885, to Frank G. Willard, for the sum of \$965 payable in 1 year and 11 months after date, with interest at 12 per cent. per annum. The answer of Ostrander admitted the execution of the note, but alleged that it was given in part payment for a flock of sheep purchased of Willard; that Charles Weeks, the duly-authorized agent of Willard, sold and delivered to Ostrander 2,173 head of sheep, for \$5,358, and warranted them to be sound, healthy, and free from all disease; that the entire purchase price for said sheep had been paid, except the note sued upon, and one other note for \$965.11, \$200 of which had been paid; that the two notes mentioned were secured by a chattel mortgage upon the sheep so sold, but not upon the wool. The answer further alleged that, at the time of the sale and delivery, the sheep were not in a healthy condition, and free from disease, but had a contagious disease known as "mange," "scab," or "itch," all of which was well known to the plaintiff; that, at the time of the purchase, Ostrander was the owner of a large herd of other valuable sheep, and that the sheep purchased of the plaintiff were bought for the purpose of increasing his herd, and to be kept with them on his sheep ranch in Trego county, all of which was made

known to the plaintiff; that the defendant relied upon the representations and warranty of the plaintiff, took said sheep into his possession, and upon his ranch, and permitted them to mix indiscriminately with his other sheep, until he discovered their diseased condition; that the disease was communicated to the defendant's other sheep, by reason of which 300 sheep and lambs belonging to the defendant died, and that he was thereby damaged in the sum of \$750; that the remainder of this flock, consisting of 1,873 sheep, were depreciated in value in the sum of 75 cents per head, aggregating \$1,404.75; that he had been damaged by labor and expenses necessarily incurred in the care of the sheep, to arrest the spread and to cure the disease, for medicine and costs of dipping 2,700 sheep, \$200, making a total loss and damage to the defendant in the sum of \$2,354.75. The answer further alleged that the notes were the property of the plaintiff, and that they were fraudulent and void in law, and asked judgment that the plaintiff be ordered to bring each of the notes mentioned into court for cancellation; and also asked judgment for \$424, the balance due him for his damages after the cancellation of said notes, with 7 per cent. interest; that, in case the plaintiff, from any cause, should fail to bring the notes into court for cancellation, then that he have judgment against the plaintiff for the sum of \$2,354, his damages and costs, with interest on \$1,930 from September 2, 1885. A general denial was filed to this answer. The action was tried on the 19th day of September, 1888, in the district court of Trego county. The jury returned a verdict in favor of the defendant, assessing his damages at \$2,191.56.

It is claimed that the defendant's right of recovery, if any, was based exclusively upon a written bill of sale executed by Weeks, as agent for the plaintiff in error, and that the court erred in permitting oral evidence to be introduced in relation to the warranty. It seems from the evidence that negotiations had been pending for some time between Ostrander and Weeks, the agent of the plaintiff in error, for the purchase of the flock of sheep in question. The sale was consummated on the 2d day of September, 1885, and the notes and a chattel mortgage were executed, but the cash payment of \$1,500 was not made until the 14th day of September, when the following bill of sale was executed and delivered to the defendant in error: "Know all men by these presents that, in consideration of the sum of five thousand three hundred and fifty-eight (\$5,358.00) dollars, the receipt of which is hereby acknowledged, I do grant, sell, transfer, and deliver unto John M. Ostrander, of Wa-Keeney, Kansas, him, and his heirs, executors, and administrators and assigns, the following goods and chattels, viz.: Eleven hundred (1,100) grade ewes, known as the 'Willard ewes;' said ewes are all over \* \* \* to four years of age, except fifty, which may be over four years of age; also four hundred and thirty-three (433) lambs and six hundred and forty (640) wethers, from one to two years of

age,—all of which are free from disease, and in a healthy condition, to the best of my knowledge and belief. To have and to hold, all and singular, the said goods and chattels forever. And the said grantor hereby covenants with the said grantee that he is the lawful agt. of the said goods and chattels; that they are free from all incumbrances; that he has good right to sell the same, as aforesaid; and that he will warrant and defend the same against the lawful claims and demands of all persons whomsoever. In witness whereof the said grantor has hereunto set his hand this 14th day of September, A. D. 1885. CHARLES WEEKS, Agt. Executed in the presence of JOHN H. MARCH." It was claimed by the defendant in error that after he had prepared this bill of sale, and delivered it to Weeks for execution, he inserted after the words, "healthy condition," "to the best of my knowledge and belief;" that, after obtaining the signature, Ostrander placed the paper in his pocket, and did not examine it until some weeks after, when he discovered some of the sheep were diseased. The court below permitted oral evidence to be introduced in relation to the purchase of the sheep, and, when it was disclosed that a bill of sale had been given, refused to exclude from the jury all evidence as to a parol contract. This is the controlling question in this case. A careful examination of the evidence in this case convinces us that this purchase was concluded and is evidenced by this bill of sale, and that all parol evidence should have been excluded when it was ascertained that the bill of sale had been executed. The pleadings were silent as to this instrument. There was no pretense that fraud had been practiced in its execution, but the claim is made by the defendant in error that this bill of sale is not the contract the parties entered into; that he did not accept it as such contract; that he affirms instead the contract set up in his answer; that, after Weeks had executed the bill of sale, he put it in his pocket, but did not accept it, because he found that the words, "to the best of my knowledge and belief," had been added to the instrument after it had been delivered to Weeks for his signature. It is not claimed that there was any change in the writing after Weeks had signed it. The paper remained in the possession of the defendant in error, or his attorneys, all the time until it was produced in court. We do not think he can now be heard to say that the bill of sale is not the contract of purchase. He held it for two years, admitted to several parties that he had a warranty, and never intimated to the plaintiff in error that there was anything wrong with the bill of sale, but refused to let him examine it. The action of the defendant in error showed that he accepted the bill of sale. It was clearly his duty to read it after its execution and delivery, and he cannot now say that it is not the contract of purchase. If a change had been made in the instrument without his knowledge, he should have repudiated the contract as soon as he discovered the change. He admitted that he looked at the contract a few weeks after it had been

delivered to him, and found there had been an alteration, but he said nothing about it. He met the plaintiff in error frequently, and paid him different sums of money upon the said transaction, and yet made no objection to the bill of sale. In the case of *Grace v. Adams*, 100 Mass. 507, the supreme court of that state held that a party accepting a receipt was bound by its terms. The court, through Colt, J., said: "The receipt was delivered to the plaintiff as the contract of the defendants; it is in proper form; and the terms and conditions are expressed in the body of it in a way not calculated to escape attention. The acceptance of it by the plaintiff, at the time of the delivery of his package, without notice of his dissent from the terms, authorized the defendants to infer assent by the plaintiff. It was his only voucher and evidence against the defendants. It is not claimed that he did not know, when he took it, that it was a shipping contract or bill of lading. It was his duty to read it. The law presumes, in the absence of fraud or imposition, that he did read it, or was otherwise informed of its contents, and was willing to assent to its terms without reading it. Any other rule would fail to conform to the experience of all men. Written contracts are intended to preserve the exact terms of the obligations assumed, so that they may not be subject to the chances of a want of recollection or an intentional misstatement. The defendants have a right to this protection, and are not to be deprived of it by the willful or negligent omission of the plaintiff to read the paper." The same doctrine is stated in *Bigelow*, *Fraud*, 525: "No doubt it would be imprudent, in a sense, not to read or to require the reading of an instrument before signing or accepting it; indeed, the courts would turn a deaf ear to a man who sought to get rid of a contract solely on the ground that its terms were not what he supposed them to be." The same rule is laid down in *Hawkins v. Hawkins*, 50 Cal. 558; *Bacon v. Markley*, 46 Ind. 116; *Taylor v. Fleckenstein*, 30 Fed. Rep. 103; *Hazard v. Griswold*, 21 Fed. Rep. 178; *Rice v. Manufacturing Co.*, 2 Cush. 87; and *Jaeger v. Whitsett*, 8 Colo. 105.

The validity of the bill of sale was not challenged by the pleading, and, the defendant below having accepted it, we think he cannot now be heard to say that it was not the contract. When it was disclosed that there was a bill of sale given at the final consummation of the purchase of this flock of sheep, it was clearly the duty of the court to have excluded all oral evidence in relation to the sale. The rule is stated by the supreme court of Mississippi: "When parties have deliberately put their engagements in writing, it is conclusively presumed that the whole contract, and the entire extent of their undertakings, were reduced to writing; and oral testimony of a previous, contemporaneous, or subsequent *colloquium* is rejected, as it would tend to substitute a new contract for the one really agreed on." *Wren v. Hoffman*, 41 Miss. 619, and authorities there cited; *Kerr v. Kuykendall*, 44 Miss.

146. This court has said, in one of the early cases, that where one of the main questions in dispute, the initial point in the case, is an alleged purchase, and it is disclosed that the alleged purchase was concluded in and is evidenced by a bill of sale, all parol testimony should be excluded until the writing is produced. The latter is the best evidence. *Barnett v. Williams*, 7 Kan. 341. In *Dunn v. Hewitt*, 2 Denio, 637, it was held that, where a bill of sale had been given for the purchase of personal property, a party making title by virtue of such purchase must produce the writing, and cannot prove the transfer by parol; and, where the existence of the bill of sale was first disclosed on cross-examination of a witness who had orally proved the transfer on his direct examination, the parol testimony should be stricken out. In *Van Ostrand v. Reed*, 1 Wend. 424, it was decided that a party, on the sale of an article, made representations amounting to a warranty, and the sale was consummated by a written transfer without a clause of warranty being inserted. The vendee, in an action of *assumpsit*, was not permitted to show the representations and assertions made previous to the execution of the instrument of transfer; the presumption of the law being that the writing contained the whole contract. The supreme court of Iowa has enunciated the same rule. All agreements and negotiations preliminary or contemporaneous to the written contract are merged therein, and the party signing a contract without having read it, or taken precautions to ascertain its contents, is bound thereby. *Railway Co. v. Cox*, 76 Iowa, 306, 41 N. W. Rep. 24; *McCormack v. Molburg*, 43 Iowa, 561; *McKinney v. Herrick*, 66 Iowa, 414, 23 N. W. Rep. 767. It is contended by the defendant in error that the warranty was given after the sale was consummated, and was therefore void. The evidence does not sustain this position. The cash payment of \$1,500 was made the same day the bill of sale was executed, and the defendant below insisted that he should have a contract in writing. The view we take of the law applicable to this case necessitates a reversal, for the reasons stated upon the first assignment of error. It will not be necessary for us to consider the other numerous assigned errors, as they will not likely occur again, upon a second trial. It is recommended that the judgment of the district court be reversed, and a new trial be granted.

PER CURIAM It is so ordered; all the justices concurring.

(46 Kan. 543)  
MEYER BROS. DRUG CO. v. BROWN *et al.*  
(Supreme Court of Kansas. June 6, 1891.)

PROPERTY SUBJECT TO MECHANIC'S LIEN—PRIORITIES.

1. A person in possession of real estate under a verbal agreement to convey the fee-simple title to him is an owner thereof within the meaning of our statute relating to material-men's liens, and may subject his interest therein to such a lien.

2. Where a person in possession contracts for material for the erection of a building upon the

premises, and a portion of the material has been furnished and the construction of the building begun, and afterwards, pursuant to said agreement, the full title is conveyed to him, *held*, that the lien for the material so contracted, if filed in time, is prior to mortgage liens obtained subsequent thereto.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Woodson county; L. Stillwell, Judge.

W. H. Slavens, for plaintiff in error. M. C. Smith and J. B. Larimer, for defendants in error.

STRANG, C. This was an action to determine the priority of certain liens between the parties thereto. It was tried by the court June 12, 1888, on the following agreed statement of facts: "S. A. Brown & Co. entered into a contract with D. A. Wilson, defendant, in December, 1886, to furnish lumber and materials to erect a building on lots 1, 2, and 3, block 7, Yates' fourth addition to the city of Yates Center, Kan. At the date of said contract G. H. Phillips held the legal title to said lots, which were at that time unimproved, but there was an agreement between said Phillips and D. A. Wilson by which said Phillips was to convey said lots to D. A. Wilson. That on January 1, 1887, G. H. Phillips and wife conveyed said lots to said D. A. Wilson by warranty deed, and that on January 6, 1887, said D. A. Wilson and wife executed and delivered to Scott & Brier, defendants herein, a mortgage on said lots to secure the payment of \$550, for the purpose of obtaining money to pay for the lumber and materials to erect a dwelling on said lots. S. A. Brown & Co. had, prior to January 1st, furnished a portion of said lumber and work and commenced on said house, and balance of said lumber was furnished at different times subsequent to January 1, 1887, and the house was completed some months afterwards; and that within four months after the completion of said building the mechanic's lien statement of S. A. Brown & Co. was properly filed in the district clerk's office. That to secure a part of the purchase money said D. A. Wilson and wife executed and delivered to said G. H. Phillips on January 6, 1887, a mortgage of \$150, which was afterwards transferred to the Meyer Bros. Drug Company, one of the defendants. That said mortgage was made subsequent to said mortgage of said Scott & Brier. That said Phillips had knowledge that said mortgage of Scott & Brier was executed to obtain money for the erection of said building, and that said Phillips sold the lots with the understanding that a building was to be erected thereon. Some time in December, 1886, said Phillips by contract with Wilson agreed to sell to him the lots in question for \$100, to be paid January 1, 1887, time on balance, but length of time not mentioned. Wilson commenced to build, but without any understanding with Phillips that any one should acquire any lien prior to his, (Phillips'). When Phillips gave a deed it was with the understanding with Wilson that there should be no liens except Scott & Brier's mortgage ahead of

his mortgage, which was for part purchase money, and Phillips never had any talk or understanding with Brown & Co. about the matter. That Brown & Co. had no knowledge of the talk between Phillips and Wilson in regard to liens or mortgages aforesaid." On said statement of facts the court found that S. A. Brown & Co. were entitled to a first lien upon the premises for the amount of their claim, \$120.46; that Moses Clark, assignee of the defendants Scott & Brier, was entitled to a second lien on the premises for the amount of his claim, \$648.25; and that the plaintiff in error, the Meyer Bros. Drug Company, assignee of G. H. Phillips, was entitled to a third lien upon the premises for \$176. Meyer Bros. objected to the judgment of the court, and bring the case here for review, and say they should have been given a second lien upon the premises, it being conceded by the plaintiff in error that Scott & Brier should have the first lien thereon, and that the lien of S. A. Brown & Co. should have been postponed to both the lien of Scott & Brier and their own. The agreed statement of facts, which contains all the evidence in the case, shows that in December, 1886, G. H. Phillips was the owner of the lots described in the petition of the plaintiff below, and that some time during that month he verbally promised to sell the premises to D. A. Wilson for \$250; \$100 to be paid January 1, 1887, with time to Wilson on the balance. Wilson paid the \$100 on the 1st of January, 1887, and Phillips and wife made to him a deed for the lots on that day. On the 6th day of the same month Wilson and wife executed to Scott & Brier a mortgage covering the premises for \$550, to secure that amount of money borrowed of them by Wilson for the purpose of erecting a house on said lots. At the same time Wilson also executed to G. H. Phillips a mortgage for the balance of the purchase money for said lots. These mortgages were immediately placed on record. It was understood between Phillips, Wilson, and Scott & Brier, that Scott & Brier should have the first lien upon the premises, and Phillips should have the second lien thereon. The agreed statement also shows that in December, 1886, Wilson contracted with S. A. Brown & Co. to furnish him lumber and material to erect a house on said lots; that they furnished him some lumber on the 3d of December, 1886, and the balance from time to time subsequent thereto, until September 21, 1887, when the last material was furnished. The amount of lumber in value furnished December 3, 1886, was \$122.12. January 31, 1887, there was paid on said contract for lumber \$122.12. The next payment, \$138.41, was made February 25, 1887, and the last one September 27, 1887. The agreed statement also shows that work was commenced on the building before the 1st of January, 1887.

The contention of the plaintiff in error is that Wilson had no title to the lots in December, when he contracted for the lumber with S. A. Brown & Co., and consequently no interest therein to which a lien for lumber and material sold before the 1st of January could attach; and, second, that, if Wilson had any interest in the

lots to which a lien for the lumber furnished in December could attach, that lumber was fully paid for January 31, 1887, and any claim for compensation or a lien therefor was thus fully satisfied. And as to material furnished after January 6, 1887, any lien therefor must be subsequent to the lien of the plaintiff in error. We do not think either of the positions of the plaintiff in error are tenable. It is conceded that, at the time Wilson contracted with S. A. Brown & Co. for material, Phillips had by a verbal agreement promised to convey the lots to Wilson on the 1st of January, and that said agreement was executed at that time by Phillips deeding the lots to Wilson. The agreed statement shows that work was actually begun on the building in the month of December. It follows, then, that Wilson was in possession of the lots, and had commenced the erection of the building for the construction of which S. A. Brown & Co. had contracted to furnish material, before any mortgage was placed on record against the lots. It is true that the legal title to the lots was in Phillips when the contract for material was made between Wilson and Brown & Co., but as Phillips had agreed to convey the lots to Wilson, and gave Wilson possession of them for the purpose of erecting a building thereon, Wilson had sufficient title therein to enable him to contract for material for the construction of the building, and sufficient for a lien to attach thereto under the law of this state giving a material man a lien for materials furnished for the erection of buildings. When Phillips, in December, agreed to convey the lots to Wilson and gave him possession of them, Wilson got such an equity therein as made him an owner within the meaning of our statute relating to liens for material. Hence Brown & Co. had a right under the law to contract with him to furnish material for the construction of a building thereon, and also to secure a lien on the premises for the material so furnished, in preference to any subsequent lien obtained against the lots. *Hathaway v. Davis*, 32 Kan. 683, 5 Pac. Rep. 29; *Phil. Mech. Liens*, §§ 69, 139; *Lumber Co. v. Osborn*, 40 Kan. 168, 19 Pac. Rep. 656; *Huff v. Jolly*, 41 Kan. 537, 21 Pac. Rep. 646; *Lumber Co. v. Schweitzer*, (Kan.) 25 Pac. Rep. 522; *Trust Co. v. Sutton*, (Kan.) 26 Pac. Rep. 406.

As to the second point made by the plaintiff in error, while it is true that the lumber furnished by Brown & Co. December 3, 1886, was fully and exactly paid for by the payment made January 31, 1887, yet it does not necessarily follow that the lumber delivered subsequently was sold on a separate and distinct contract from the one made in December. The fact that lumber and materials amounting in value to \$122.12 were sold and delivered in December, and no more lumber was delivered until February 25th, coupled with the fact that on the 31st of January, 1887, a payment was made for the exact value of the lumber first delivered, creates an inference perhaps, that there were two separate contracts for lumber, and that the lumber first purchased had been fully paid for by

the payment of January 31, 1887; but this inference, and it is but a mere inference, arising from the exhibit attached to the petition, is overcome by the agreed statement of facts, which says: "S. A. Brown & Co. entered into a contract with D. A. Wilson, the defendant, in December, 1886, to furnish lumber and material to erect a building upon lots 1, 2, and 3," being the lots described in the petition of the plaintiff below. From this statement it appears that Brown & Co. in December contracted to furnish lumber and materials for the building, which means the whole building. This statement completely excludes the idea that there was one contract for part of the lumber in December, and another for the balance in February following. If the contract for lumber and materials to erect the building was made in December, there was no occasion for a new contract in February for lumber and materials for the same building. And besides, if there were two contracts for the lumber, the agreed statement should have shown that there were, instead of stating that a contract was made in December for the material for the building, which, as stated above, means the whole building. It is recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

“Kan. 531)

MAYOR, ETC., OF CITY OF GARDEN CITY v. HALL.

(Supreme Court of Kansas. June 6, 1891.)

MANDAMUS — MOTION TO QUASH — CANVASS OF VOTES.

Where an alternative writ of *mandamus* is granted to compel the officers of a city to canvass the votes cast at an election for a member of the school board held in an outlying territory of the city, and the alternative writ shows that illegal votes were cast at the election, but that it is impossible for the officers of the city to separate the legal votes from the illegal votes, or to tell for whom the legal votes were cast, such writ states no cause of action, and a motion to quash the writ should be sustained.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Finney county; A. J. AB-BOTT, Judge.

A. G. C. Bierer, Geo. E. Morgan, and Milton Brown, for plaintiffs in error. Hopkins & Hoskinson, for defendant in error.

STRANG, C. This was a proceeding in *mandamus* to compel the plaintiffs in error to canvass the votes cast at an election held in the outlying territory attached to Garden City for school purposes on the 1st day of April, 1890, for the election of a member of the school board of said city. On the hearing of the application the defendants below demurred to the application, which demurrer was overruled. An answer was then filed, which was in turn demurred to by the plaintiff below. This demurrer was sustained, and thereupon the court allowed the writ ordering the defendants below to canvass the returns of said election, to declare the plaintiff be-

low elected as a member of the school board of said city, and issue to him a certificate of election. To such action on the part of the court the defendants below objected, and bring the matter here for review. The court, in allowing the peremptory writ in this case, required the defendants below to not only canvass the returns of the election described in the petition as having been held, but required them to declare the plaintiff below elected as a member of the school board of said city, and also issue to him a certificate of his election. In this the court exceeded its authority. It had no power, in any event, to require the defendants below to declare that Hall had been elected a member of said school board. This action of the court, therefore, was erroneous. But should the defendants below, on the petition in this case, have been required to canvass the returns of said election at all? We think not. The law never, under any circumstances, requires the performance or attempted performance of an impossibility. Nor does it ever require a useless thing to be done. The petition in this case, with the exhibit attached thereto as a part of it, shows that, with but one officer to elect, 27 electors cast 44 votes. The petition thus shows that illegal votes were cast at that election. The petition does not show, nor attempt to show, how many of the votes cast were illegal, nor for whom such illegal votes were counted. Nor is it possible from the face of the returns, made a part of the petition, to ascertain for whom the illegal votes were cast and counted. It is easy to discern from the returns that at least 17 illegal votes were cast, and there may have been more than that number, because there was but one officer to be elected, and there were 44 votes polled with but 27 electors voting. The plaintiff below, in the body of his petition, assumes that there were 27 legal votes cast, and that he received 17 of them. This he attempts to establish by attaching to his petition the returns of the election board of said election. But the exhibit fails to support the allegation in the body of his petition, but, on the other hand, shows that it is impossible to ascertain from said exhibit the number of legal votes cast at said election, or for whom they were cast. The petition, as it stands, showing that it was impossible for the defendants below to separate the legal votes from the illegal votes cast at said election, or to tell therefrom for whom the legal votes were cast, it was impossible for them to canvass the votes of said election, and declare the result thereof. It follows, then, that the plaintiff below, by his petition, did not make a sufficient showing to entitle him to the writ allowed. We think the demurrer to said petition should, therefore, have been sustained. As to the answer, if the plaintiff below had otherwise been entitled to the writ, we think the third defense set up in the answer was a sufficient defense to any right the plaintiff below claimed in his petition as ground for the writ, and that the demurrer thereto should therefore have been overruled. For these reasons we recommend that the judg-

ment of the district court be reversed, and the cause remanded for new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 534)

# STATE V. HESCHER.

(Supreme Court of Kansas. June 6, 1891.)

## SALE OF INTOXICATING LIQUORS—CRIMINAL PROSECUTION—EVIDENCE.

1. In prosecutions for selling intoxicating liquor in violation of the prohibitory law, when the information is not verified by the oath of the county attorney, and there is filed with it the testimony of a private person at an examination made by the county attorney, the defendant cannot be found guilty of any offense except one of which the person who was examined by the county attorney had notice or knowledge at the time of his examination.

2. At the trial of such a case, it is error for the trial court to refuse to instruct the jury, at the request of the defendant, "that no conviction can be had of any offense except such as the county attorney, or the party who made the statement that was filed with the information, knew of at the time; and if you believe, from all the facts and circumstances surrounding the case, that any offense relied upon for conviction by the prosecution was not known by the county attorney, or such person who made such statement, then you cannot convict of such offense," when it appears from the record that neither the information nor the statement filed with it charges any such offense.

(Syllabus by Simpson, C.)

Commissioners' decision. Appeal from Wyandotte county; O. L. MILLER, Judge. W. E. Brown, for appellant. L. B. Kellogg, Atty. Gen., and Winfield Freeman, for the State.

SIMPSON, C. The appellant was convicted in the district court of Wyandotte county for a violation of the prohibitory liquor law on 4 counts, and sentenced to pay a fine of \$100 and to be imprisoned in the county jail for 30 days on each of the 4 counts. He appeals to this court from the judgment of conviction, and complains that the information was not verified, and that two jurors were improperly placed in the box by the trial court. In view of other and more serious errors, we do not deem it necessary to discuss these questions.

He was convicted on the first count upon a sale to a party unknown, in the month of July, 1889. There was filed with the information the testimony of one witness named John M. O'Neil, and the information was not supported by any other testimony. On the examination of O'Neil by the county attorney, he was asked to "state the names and residences of all persons you have seen buy and pay him for intoxicating liquors since the 1st day of June, 1890." O'Neil answers this by giving the names of 20 persons. This conviction was based upon a sale to a party unknown. O'Neil enumerates all persons to whom he had knowledge of sales having been made. This conviction was based upon a sale made in 1889. The sales testified to by O'Neil were made since June 1, 1890. It is consequently shown that the prosecuting witness had no knowledge of the sale upon which conviction was had

at the time the information was filed. These facts bring this particular sale within the cases of *State v. Brooks*, 33 Kan. 708, 7 Pac. Rep. 591; *State v. Skinner*, 34 Kan. 265, 8 Pac. Rep. 420, and the subsequent cases. So as to the conviction upon the eleventh count, which was for a sale to one W. W. Berry, in August, 1890, he not being one of the persons enumerated in the testimony of O'Neil. *State v. Whisner*, 35 Kan. 271, 10 Pac. Rep. 852; *State v. Lawson*, (Kan.) 25 Pac. Rep. 864.

On the third and fourth counts the conviction was based upon a somewhat different state of facts. But the defendant asked the trial court to instruct the jury as follows: "The court further instructs the jury that no conviction can be had of any offense except such as the county attorney, or the party who made the statement that was filed in this action with the information, knew of at the time; and if you believe, from all the facts and circumstances surrounding this case, that any offense relied upon for conviction by the prosecutor was not known by the county attorney, or such person who made such statement, or that said county attorney, or such other person who made such statement, had some information in relation to it, then you cannot convict of such offense." This instruction, as asked for, had application to the facts as presented on the trial; it embodies the law as declared by this court; and it was material error to refuse to give it, without the substance of it was embraced in the general instructions given to the jury. Unfortunately, we have not been able to find the substance of this instruction, or the question presented by it, referred to in the instructions that went to the jury. We recommend that the judgment of conviction be reversed, and a new trial granted.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 498)

STATE v. FALK.

(Supreme Court of Kansas. June 6, 1891.)

SALE OF INTOXICATING LIQUORS—PLEAS IN ABATEMENT—ELECTION OF COUNTS—INSTRUCTION—EVIDENCE.

1. Where the defendant filed a plea in abatement to an information wherein he was charged with violating the prohibitory law, upon the ground (1) that he was informed against as Rheinhardt Falk, when his true name was Rheinhardt Falk; (2) that the information was not founded upon any information or knowledge of the county attorney, when he verified the same; and there was a hearing upon the plea and the same was sustained as to certain counts and overruled as to others; and the defendant afterwards was arraigned and entered the plea of not guilty, and was tried upon the counts in the information to which the plea in abatement had been overruled, and found guilty,—held, that no error was committed.

2. When a plea in abatement has been sustained as to certain counts in an information, it is not proper for the state to ask a conviction upon any of such counts; and, when an election is made in writing, at the close of the evidence upon the part of the state, it cannot modify such election, after all the evidence is admitted.

3. Where the court has instructed the jury

properly, but omits some matter which might, with propriety, have been given, no substantial error is committed, unless the court has been requested to instruct with reference to such matter. *State v. Peterson*, 38 Kan. 204, 16 Pac. Rep. 268, followed.

4. It is not error, in a criminal case, for the trial court to receive the evidence of a witness, notwithstanding the fact that he has violated an order of the court to remain outside of the courtroom while other witnesses are testifying. He may be punished for disobeying a rule of the court, but the state or the defendant should not be deprived of his evidence.

(Syllabus by Green, C.)

Commissioners' decision. Appeal from district court, Wyandotte county; O. L. MILLER, Judge.

W. E. Brown, for appellant. L. B. Kellogg, Atty. Gen., and Winfield Freeman, for the State.

GREEN, C. The appellant was charged, in an information containing 60 counts, with violating the prohibitory law in Wyandotte county. A plea in abatement was filed and sustained, except as to the first 14 counts in the information. The defendant was afterwards arraigned, and entered the plea of not guilty, and was tried and convicted on 14 counts.

1. The appellant claims that the court erred in overruling in part his plea in abatement, and assigns as a reason that the information did not state his name correctly; that it purported to inform against Rheinhardt Falk while his name was Rheinhardt Falk. We fail to see wherein the defendant was prejudiced by the ruling of the court. After the plea in abatement had been heard, he was proceeded against by the name of Rheinhardt Falk, and by that name was tried and convicted, and no substantial error was committed. Other objections are urged against the information,—that it nowhere showed who had knowledge of any of the offenses charged; that it was not supported by the oath or affirmation of any one, and no statement of any witness was filed with the information. All of these objections were waived by the defendant in pleading not guilty. No motion was made to quash the warrant or information. *State v. Allison*, 44 Kan. —, 24 Pac. Rep. 964; *State v. Ash*, 44 Kan. 84, 24 Pac. Rep. 72; *State v. Jessup*, 42 Kan. 422, 22 Pac. Rep. 627. Besides, we cannot say, from the record before us, that the testimony of the witnesses was not filed. The recitals in the record would indicate that the evidence was filed with the information. The certificate of the clerk of the district court simply states that the record contains the evidence, proceedings, and verdict. We cannot say, from this certificate, that the record before us is complete.

2. It is next contended that the verdict of the jury should not be upheld, because the state elected to stand upon several of the counts of the information to which the plea in abatement had been sustained. It appears from the record that there were two elections,—the first, at the close of the evidence upon the part of the state, when the state asked for a conviction on the 6th, 7th, 12th, 13th, and 14th counts of the information, to which the plea in abatement



had been overruled, and also 9 other counts in the information, to which the plea in abatement had been sustained. Elsewhere in the record it appears that the state elected to stand upon the first 14 counts of the information. This election seems to have been made after the state and defendant had introduced their evidence. We think the state is bound by the first election, and the verdict can only stand as to the 6th, 7th, 12th, 13th, and 14th counts, and as to all of the others it should be set aside.

3. Complaint is made that the instructions of the court are vague, indefinite, and that the court did not inform the jury what sales the state elected to ask a conviction upon. We think it would have been the better practice for the court to have stated to the jury each of the counts upon which the state relied for conviction in the instructions; but no request was made by the defendant for any such instructions. The rule is well established that where the court properly instructs the jury, but omits some instructions which might have been given, and no request was made for such instructions, no reversible error is committed. *State v. Pfeiffer*, 36 Kan. 96, 12 Pac. Rep. 406; *State v. Peterson*, 38 Kan. 204, 16 Pac. Rep. 263; *State v. Estep*, 44 Kan. —, 24 Pac. Rep. 986.

4. The last assignment which we shall notice is that the witnesses for the state were placed under the rule and admonished not to state what their evidence would be and to remain out of hearing of the witnesses on the stand, and that the rule was violated. The fact that a witness remained in court, in disobedience to an order to remain outside the court-room, is not a ground for rejecting his evidence. He may be punished for violating the order of the court. *Davenport v. Ogg*, 15 Kan. 364; 2 Phil. Ev. (5th Amer. Ed.) 744. It is recommended that the judgment of the trial court be modified by setting aside the verdict and judgment of conviction of guilty, except as to the 6th, 7th, 12th, 13th, and 14th counts in the information, and that the judgment be affirmed as to the counts named.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 494)

**SNIVELY v. HILL et al.**

(Supreme Court of Kansas. June 6, 1891.)

**TRIAL BEFORE JUSTICE OF THE PEACE—AGREEMENT TO ARBITRATE.**

1. In an action before a justice of the peace that had been continued to a day certain by the agreement of both parties, an attorney for the defendant has no right to rely on a promise of the justice that the case should not be called for trial until the attorney had been notified.

2. An agreement to arbitrate all matters in dispute made by the parties to an action then pending before a justice of the peace, the record failing to show that such agreement was made in the presence of the justice, or that his attention had ever been called to the same, or that it was ever made the basis of a motion to dismiss or discontinue the suit, or that any arbitration had ever taken place, is not of itself sufficient to discontinue the suit.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Brown county; R. C. BASSETT, Judge.

W. D. Webb and F. W. Raymond, for plaintiff in error. Sample F. Newlon and C. W. Johnson, for defendants in error.

SIMPSON, C. Action in the district court of Brown county by Snively against A. J. Hill, Fred F. Hill, and L. S. Herbert, justice of the peace, to restrain the collection of a judgment rendered by Herbert as a justice of the peace against Snively and in favor of Hill Bros. for \$161.37 and costs of suit. The trial court sustained a demurrer to the petition of the plaintiff, and he brings the cause here for review, standing on the petition. The petition alleged the commencement of the action before the justice. On the return-day of the summons both parties appeared in person and by counsel, and the cause was continued by agreement until the 1st day of August, 1888, at 10 o'clock A. M. That on the same day it was agreed by the parties that the matters in dispute should be submitted to arbitration, and under said agreement Hill Bros. selected an arbitrator, and Snively chose one, and these two were to select a third, and the decision of two was to be binding upon the parties. That the arbitration was postponed at the request of one of the defendants in error, on account of sickness and death in his family. That a day or two before the 1st day of August, 1888, the attorney of the plaintiff in error went to the office of the justice of the peace, and was then informed by the said justice that he had made no entry on his docket of the adjournment of the trial from the return-day of the summons until the 1st day of August; and that it was then agreed by the justice and the said attorney that the case would not be called for trial without the said attorney was notified of the time. That the attorney then went away and awaited such notice, but that no notice was ever given to him. On the 1st day of August Hill Bros. appeared, and continued the case until the 16th day of August at 10 o'clock A. M. On the 16th the plaintiffs below appeared by counsel, and continued the case until August 31st, the defendant below not appearing. On the 31st the plaintiffs appeared, and continued the case until the 15th day of September at 10 o'clock A. M. On the 15th of September, the defendant not appearing, the plaintiffs below took judgment for \$161.37 and costs. There were all the other necessary averments in the petition. The plaintiff in error bases his claim for reversal on these three propositions: *First*. The judgment was fraudulent because there was an agreement with the justice that Snively's attorney should be notified before the case was called for trial, and judgment was rendered weeks after, without the knowledge of the plaintiff in error or his attorney, or without giving the plaintiff in error his day in court, and by lulling him to repose. *Second*. That by the neglect of the justice to make the entry of the order of continuance on his docket he lost jurisdiction of the cause. *Third*. That the agreement to arbitrate

was a discontinuance of the suit, and for the defendants in error to afterwards take judgment without notice was unfair, dishonorable, and fraudulent. The question for us is, does the petition state a good cause of action by its various recitations respecting these matters?

1. As to the first of these it is apparent both from the recitations of the petition and the entries on the justice's docket, a transcript of which is embodied in the petition, that the plaintiff in error was present on the return-day of the summons, when the case was continued by agreement; that it was set for trial on the 1st day of August; and that it was his bounden duty to be there in person or by attorney. The justice, in the absence of the parties who brought the action, had no legal right to assure the attorney of the plaintiff in error that the case should not be called for trial until the attorney was notified of the time. The time of trial had been fixed on the 1st day of August by agreement. The justice could not change it without a further agreement by the parties. The petition does not allege that either the plaintiff in error or his attorney was not present on the 1st day of August by reason of the pending proposition to arbitrate, but the claim is based exclusively upon the proposition that the justice had agreed with the attorney that the case should not be called for trial until the attorney was notified of the time, and the time had already been fixed by agreement of all parties. Again, it is said that the justice informed the attorney that he had made no entry of the continuance from the return-day of the summons to the 1st day of August; and yet they place in the petition an extract from the docket of the justice that recites "that now, on this 2d day of July, 1888, at 10 o'clock A. M., the plaintiffs appear in person and by attorney; defendant also appeared in person; and by agreement this case was continued till August 1st, 1888, at 10 o'clock A. M. of said day." With these two contradictory statements both contained in the petition,—one that no entry was made, the other showing by the docket itself on its face that it was made at the proper time,—we will not disturb the ruling of the district court on this question.

2. The second contention is that the justice lost jurisdiction of the case by reason of not having made the proper entries at the time the particular proceeding took place, but what we have already said with respect to the continuance from the return-day of the summons is a sufficient answer.

3. The third contention is that the agreement to arbitrate was a discontinuance of the suit. As it is not alleged that this agreement was made before the justice or in the justice's court, or that it was ever called to the attention of the justice, or that it was ever made the basis of a motion to dismiss the action or to discontinue the suit, it is difficult to see how it could have had the effect claimed. Without adverting to other evident reasons, this contention is not sound.

4. The record shows affirmatively that

from the return-day of the summons the plaintiff in error and his attorney paid no attention to the proceedings in this action. The parties who instituted it before the justice continued it three times in the absence of the plaintiff in error, and these continuances, made under such circumstances, are very strong protests against any inference of fraud or undue means. If there was an agreement to arbitrate such as could have been enforced, ordinary care in the management of a lawsuit would have prompted any reasonable man to have called the attention of the justice to it. We recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 525)

# JAY V. BOARD OF EDUCATION OF CITY OF EMPORIA.<sup>1</sup>

(Supreme Court of Kansas. June 6, 1891.)

## BOARDS OF EDUCATION—RIGHT TO ELECT MEMBERS.

Outlying and adjacent territory attached to a city of the second class for school purposes is not entitled to elect members of the board of education of the city, to represent said territory, unless such territory contains a population equal to that of any one ward of the city, or its taxable property equals that of any one ward of the city.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Lyon county; C. B. GRAVES, Judge.

J. Harvey Frith and J. Jay Buck, for plaintiff in error. C. N. Sterry, for defendant in error.

SIMPSON, C. W. S. Jay caused an alternative writ of *mandamus* to issue from the district court of Lyon county to the board of education of the city of Emporia, to show cause why he is not permitted to act and serve as a member of the board. He alleged that in 1874 territory lying outside of, but adjacent to, the limits of the city of Emporia was duly attached to said city for school purposes; that an election was duly ordered and held in 1874 for two members of said board, representing said territory; that from that time until May, 1890, said territory has been continuously represented on said board by members duly elected and qualified; that he was duly elected a member of said board in 1886, and acted as such during the succeeding two years; that he was duly re-elected in 1890, and qualified and acted as such until the 5th day of May, 1890, when a majority of said board excluded him from his seat; that no election for member of the board was ordered or held in the year 1890, and no successor elected, but that he holds over until a successor is elected and qualified. The board of education filed its answer to the alternative writ, admitting the election of members from the attached territory from 1874 until the last election of Jay; claimed that at an election held in 1889 one Caull claimed to be elected, but the board refused to canvass the vote and declare the result, and that no election

<sup>1</sup>Petition for rehearing pending.

has ever since been called by the board. The board admitted that, if said outlying territory is entitled to representation, and if the said Jay is entitled to hold his office for more than two years, and until his successor is elected and qualified, in such case he is a member of the board; but it alleged the fact to be that at no time before or since the 20th day of March, 1874, has the outlying territory mentioned and described in the alternative writ ever had a population equal to that of the smallest ward in the city of Emporia, and it never has had during that time an assessed valuation of property within its limits equal to that of the smallest and poorest ward in the city of Emporia, and that by reason of these facts said outlying territory is not now, and never has been, entitled to representation on said board of education. Jay filed a motion to quash the answer and return upon the ground that it contains no defense; and he further moved the court for a peremptory writ upon the pleadings. These motions were overruled by the trial court, and these rulings are assigned as errors here.

If the allegations in the return and answer, that the outlying territory never was entitled to representation for want of population and assessed valuation of property equal to the smallest and poorest ward in the city, stood alone, there could be no successful contention but that the return and answer stated a complete defense. The claim of counsel for plaintiff in error, however, is that by reason of the other recitations in the return and answer, showing acquiescence for 16 years,—a *de facto* representation all that time,—the board of education are estopped from now asserting that the outlying territory is not entitled to representation. It is also said on behalf of the plaintiff in error that the legality of his election cannot be determined by a *mandamus* proceeding. The authorities cited to sustain the *de facto* representation are all cases that go to the existence of a school-district or other public corporations. There is no question here as to the legality or existence, either legal or *de facto*, of the board of education of the city of Emporia. Jay's action is founded on the theory that the board of education of the city of Emporia is a legal body, and that he is a member of it. If he had been permitted to meet with the board, and participate in their proceedings, a question might have arisen as to whether he was acting as a *de facto* or *de jure* member of the board. A *de facto* officer is one who is surrounded with the *insignia* of office, and seems to act with authority. We find difficulty in making an application of the *de facto* principle to the details of this case. It will not do to say that the board of education of the city of Emporia, by calling elections in the outlying territory from 1874 to 1888, and by permitting persons to act as members from that territory during all that time, has created a *de facto* right of representation. A public or private corporation may have a *de facto* existence. We all

know there are *de facto* officers. There may be a *de facto* court or office, the legality of which cannot be called in question except in a direct proceeding by the state, as when a court or office is established by a legislative act apparently valid, under which a court has gone into operation, or an office is filled and exercised. There may be *de facto* schools and school-masters, and even *de facto* school-houses. *Kidder v. Chellis*, 59 N. H. 473. A man may have a *de facto* wife,—being one whose marriage is voidable by decree. 4 Kent, Comm. 36. But this is about the limit of a principle that has grown out of an imperative public necessity. An office must be created by law; but an officer may be created by place, surroundings, appearances, and circumstances. But this one thing all lawyers agree about: that an office that does not have a *de jure* existence cannot have a *de facto* incumbent. If the outlying territory is not entitled to representation, if there was no such office as member of the board of education from the outlying territory, neither Jay's presence on the board, nor the length of time others had intruded on the board, or other acts of the board, could create an office not provided for by law. We are not considering Jay's action as a member of the board, or how his acts as such might affect third persons or the public. The inquiry he makes is as to whether he is entitled to a seat as a member of the board. To maintain this action he must show that the board of education, in its refusal to recognize him as a member, is violating some plain duty enjoined by law. His right depends upon the existence of certain statutory conditions, and these are that the outlying territory he claims to represent contains a population equal to that of any one ward in the city, or that its taxable property equaled that of any one ward in the city. The answer says neither of these conditions ever did exist, and there is nothing recited in the answer that mutilates or destroys the force and effect of the fact stated, either by acquiescence, estoppel, or the previous service of persons as members of the board from the outlying territory. While, as to such service, their acts might be held good, as those of *de facto* officers, yet they create no succession, or originate no right of representation, which by time and acquiescence can ripen into legal right; and to succeed he must show that he was legally elected. It is not necessary, we think, to consider any other question discussed by counsel, as our decision is based upon the fact that there was no such office as a member of the board of education of the city of Emporia from the outlying territory. This decision, being on demurrer to admitted facts, is final, unless the facts are not fairly stated in the answer. We recommend that the ruling of the district court of Lyon county adverse to the motion to quash the return be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 529)

## STATE v. GEER.

(Supreme Court of Kansas. June 6, 1891.)

## SUBORNATION OF PERJURY — INFORMATION — EVIDENCE.

1. An information for subornation of perjury which fails to state that the false affidavit or testimony of the suborned witness was used, or procured to be used, in some cause, matter, or proceeding before some court, tribunal, or public body or officer, is fatally defective.

2. In subornation of perjury, the same rule as to the materiality of testimony prevails as in perjury.

(Syllabus by Green, C.)

Commissioners' decision. Appeal from district court, Coffey county; CHARLES B. GRAVES, Judge.

S. M. Porter, for appellant. J. N. Ives, Atty. Gen., for the State.

GREEN, C. Appellant was prosecuted and convicted of the crime of subornation of perjury in the district court of Coffey county, and sentenced to confinement in the penitentiary for three years, and adjudged to pay the costs of the prosecution. He appeals from such sentence and judgment. The information charged substantially that Margaret F. Mickens unlawfully, feloniously, willfully, corruptly and falsely committed willful and corrupt perjury, by swearing and subscribing to a complaint before L. S. ROBINSON, a justice of the peace of Coffey county, in which she charged her father, John Mickens, with rape, incest, and bastardy, and that the defendant persuaded, incited, procured, and suborned her to make the false oath. The information did not charge that the complaint was to be used in any proceeding pending or about to be instituted in any court or tribunal, or that it was made to be used as a complaint for the arrest, apprehension, and examination of the person therein charged with crime, or that it was ever used or offered in any court or tribunal, or before any public body or officer. The information was challenged by a motion to quash before trial, and by a motion in arrest of judgment after a verdict of guilty.

Paragraph 2287, of the General Statutes of 1889, under which the information was filed in this cause, reads: "Every person who shall procure any other person, by any means whatsoever, to commit a willful or corrupt perjury, in any cause, matter, or proceeding in or concerning which such other person shall be legally sworn or affirmed, shall be adjudged guilty of subornation of perjury." We think the information is materially defective. It is necessary, in a prosecution for subornation of perjury, that all of the elements constituting the offense of perjury should be alleged and proved. It was nowhere alleged in this information that the false affidavit solicited and procured by the defendant was to be used as evidence in any cause, matter, or proceeding, or before any court, tribunal, or public body or officer, or that such evidence was even material. In prosecutions for subornation of perjury, the same rule as to the materiality of testimony prevails as in perjury. 2 Whart. Crim. Law, § 1330. This court has recently decided that to

constitute perjury the false oath must be in some material matter, and that an information in a prosecution for perjury is insufficient where there is no allegation that the false testimony was given in any cause, matter, or proceeding before any court, tribunal, public body or officer. State v. Ayer, 40 Kan. 43, 19 Pac. Rep. 403; State v. Smith, 40 Kan. 631, 20 Pac. Rep. 529. See, also, State v. Simons, 30 Vt. 620; U. S. v. Wilcox, 4 Blatchf. 391. We think the motion to quash the information should have been sustained, for the reason that it failed to state a public offense. We recommend a reversal of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 511)

## FT. SCOTT, W. &amp; W. R. CO. v. KARRACKER.

(Supreme Court of Kansas. June 6, 1891.)

## HARMLESS ERROR—FINDINGS OF JURY—FIRES SET BY LOCOMOTIVES—BURDEN OF PROOF—ATTORNEY'S FEE.

1. An inapplicable, and therefore improper, instruction to the jury will not require or authorize a reversal of the judgment of the trial court, where such instruction could not have prejudiced any of the substantial rights of the complaining party.

2. A jury will not be required to answer special questions submitted to them, where no evidence is introduced upon which answers could be given.

3. In an action against a railroad company for loss or damage suffered by the plaintiff by fire caused by the defendant in the operation of its railroad, proof that the fire was so caused is, under the provisions of chapter 155 of the Laws of 1885, *prima facie* evidence that it was so caused through the negligence of the railroad company; and it then devolves upon the railroad company to show, not only that its appliances to prevent the escape of fire were sufficient and in good order, and that its engineer was a competent and skillful engineer, but also that there was no mismanagement or negligence on the part of any of its servants or agents causing the fire.

4. In such a case, where the plaintiff desires, under said chapter 155, to recover a reasonable attorney's fee, it is necessary that he should demand the same in his petition, and then submit the question to the court or jury trying the case upon its merits.

(Syllabus by the Court.)

Error from district court, Greenwood county; A. L. L. HAMILTON, Judge.

This was an action brought in the district court of Greenwood county by C. Karracker against the Ft. Scott, Wichita & Western Railroad Company, to recover damages for the destruction by fire of a certain amount of prairie hay, flax straw, fence wire, and fence posts belonging to the plaintiff, of the alleged value in the aggregate of \$404. The fire was alleged to have been caused by the railroad company on November 15, 1887, by reason of its negligent operation of its railroad. The plaintiff prayed judgment for the aforesaid sum of \$404, and for costs of suit. The defendant answered, setting forth—*First*, a general denial; *second*, that the plaintiff's damages were caused by his own carelessness and negligence, without any fault or negligence on the part of the railroad company. The plaintiff replied by filing a general denial. The case was tried by the court and a jury, and the jury

rendered the following general verdict, and made the following special findings, to-wit: "Verdict. We, the jury in the above-entitled cause, do upon our oaths find for the plaintiff, and assess the amount of his recovery at \$365.50. Special Findings. (1) How did the fire originate that caused the damage to plaintiff's property? Answer. Coals or sparks from defendant's engine. (2) If you answer that the fire was caused by defendant's engine or train, state, in answer to this question, whether it was caused by the negligent operation of said train or engine. A. Yes. (3) If you answer that last question in the affirmative, state fully in what the negligence consisted. A. We do not know. (4) Was the engine of defendant alleged to have set out the fire furnished with the best appliances to prevent the escape of fire? A. Yes. (5) Were the appliances to prevent the escape of fire from said engine in good order at the time of the fire? A. Yes. (6) If you answer the last question in the negative, state fully wherein said appliances were defective. A. —. (7) Was the engineer in charge of the engine which it is claimed set out this fire a competent and skillful engineer? A. We don't know. (8) Was said engineer operating the engine at the time said fire was claimed to have been set out in a competent manner? A. No. (9) If not, state wherein he was careless, incompetent, or unskillful. A. We don't know. (10) Did the defendant allow dry grass, weeds, or other combustible material to accumulate on its right of way at the place where it is claimed the fire originated? A. Only a natural growth. (11) What effort did the defendant or its employees make to burn off its right of way at the place where the fire originated? A. An effort was made, but failed. (12) How far were plaintiff's stacks of hay and straw from defendant's railroad? A. A little over a mile. (13) Is it not true that dry grass intervened all the way from defendant's right of way to plaintiff's straw and hay? A. Yes, with the exception of a plowed strip fourteen feet wide and one-quarter of a mile long. (14) What, if anything, had plaintiff done to protect his hay and straw from fire? A. He plowed a strip on the south side of his land fourteen feet wide and one-quarter of a mile long. (15) How many good stacks of hay belonged to plaintiff were destroyed by fire? A. Four. (16) How many stacks of inferior hay belonging to plaintiff were destroyed by fire? A. Three. (17) What do you allow per ton for the good hay? A. \$3.50 per ton. (18) What do you allow per ton for the inferior hay? A. \$3.00 per ton. (19) How many tons of marketable hay were destroyed? A. 77 tons. (20) What do you allow for the flax straw that was destroyed? A. \$35.00. (21) How much do you allow for the posts destroyed, and how much for the wire? A. \$2.00 for the posts; \$5.00 for the wire." This verdict and these findings were returned to the court on May 18, 1888. The defendant at the time moved the court to require the jury to answer the third, seventh, and ninth questions, and to more fully and definitely answer the tenth question, which motion was

overruled. On May 19, 1888, the defendant moved for a judgment in its favor upon the special findings of the jury, notwithstanding the general verdict, which motion was overruled. On May 21, 1888, the defendant filed a motion for a new trial. Afterwards, and on June 2, 1888, the plaintiff applied to the court orally for a reasonable attorney's fee. The defendant objected, for the reason that no claim for an attorney's fee was set forth in the plaintiff's petition. It also claimed that it was not ready to try the new issue presented, and asked for further time to prepare for its defense; and also demanded a jury to try this new issue; but the court overruled all these objections, requests, and demands of the defendant, except that the court gave to it five minutes within which to prepare for its defense. The court then tried this new question, but the plaintiff only introduced evidence; and the court then found upon this new issue in favor of the plaintiff, and against the defendant, and found that a reasonable attorney's fee was \$50, and the defendant again moved for a new trial, including the matter of attorney's fees, and the court then overruled both motions for new trials, and rendered judgment in favor of the plaintiff, and against the defendant, for \$305.50 damages, and for the sum of \$50 as attorney's fees, and for the costs of suit; and the defendant, as plaintiff in error, brings the case to this court for review.

*J. H. Richards and C. E. Benton*, for plaintiff in error. *T. L. Davis*, for defendant in error.

*VALENTINE, J.*, (after stating the facts as above.) It is claimed that the court below erred in giving an instruction to the jury relating to the railroad company's permitting dry grass, weeds, and other combustible material to accumulate upon its right of way. This instruction was perhaps inapplicable under the facts of this case, and therefore improper, but we do not think it could have prejudiced any of the substantial rights of the defendant railroad company in any particular. The jury found with reference to this matter as follows: "(10) Did the defendant allow dry grass, weeds, or other combustible material to accumulate on its right of way at the place where it is claimed the fire originated? Answer. Only a natural growth. (11) What effort did the defendant or its employees make to burn off its right of way at the place where the fire originated? A. An effort was made, but failed." And with reference to negligence, the jury found as follows: "(1) How did the fire originate that caused the damage to plaintiff's property? Answer. Coals or sparks from defendant's engine. (2) If you answer that the fire was caused by defendant's engine or train, state, in answer to this question, whether it was caused by the negligent operation of said train or engine. A. Yes. (8) Was said engineer operating the engine, at the time said fire was claimed to have been set out, in a competent manner? A. No." Evidently the jury found against the defendant be-

cause of negligence in so operating its railroad as to permit fire to escape from its engine, and not negligence in permitting dry grass, weeds, or other combustible material to accumulate upon its right of way; and therefore the giving of the foregoing instruction will not require nor authorize a reversal of the judgment of the court below.

With reference to the failure of the court below to require the jury to answer the third, seventh, and ninth special questions submitted to them, and to answer the tenth more definitely, and the affirmative action on the part of the court in rendering judgment against the defendant notwithstanding the jury's answers to the fourth and fifth special questions submitted to them, together with the other findings, want of findings, the evidence and want of evidence, it will be perceived from what we shall hereafter say that, under the evidence and the law as it now exists, the jury could not have given answers to the foregoing questions any more favorable to the defendant than those they did give, and the court below could not have rendered any judgment with respect to damages different from the one which it did render. There was not a particle of evidence introduced on the trial tending to show how the fire escaped from the defendant's engine, or what the engineer was doing at the time when it escaped. But, taking the record as it is, did the court below err in any of the foregoing particulars? Upon the authority of the case of Railroad Co. v. Riggs, 31 Kan. 622, 3 Pac. Rep. 306, and the cases of Railway Co. v. Fray, 35 Kan. 700, 12 Pac. Rep. 93, and Insurance Co. v. Hathaway, 43 Kan. 399, 23 Pac. Rep. 428, the judgment of the court below would probably have to be reversed, unless the provisions of chapter 155 of the Laws of 1885, which took effect May 1, 1885, will authorize an affirmance. The first and second sections of said chapter read as follows: "Section 1. That in all actions against any railway company organized or doing business in this state, for damages by fire, caused by the operating of said railroad, it shall be only necessary for the plaintiff in said action to establish the fact that said fire complained of was caused by the operating of said railroad, and the amount of his damages, (which proof shall be *prima facie* evidence of negligence on the part of said railroad:) provided, that in estimating the damages under this act the contributory negligence of the plaintiff shall be taken into consideration. Sec. 2. In all actions commenced under this act, if the plaintiff shall recover there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment."

This statute, containing the above-quoted sections, has been held to be constitutional and valid by this court in the case of Railway Co. v. Merrill, 40 Kan. 404, 19 Pac. Rep. 793. Under this statute, when the plaintiff in a case like the present has shown that the fire which destroyed or injured his property was caused by the operation of the railroad, as the plaintiff sufficiently showed in the present case, he has then made out a *prima facie* case of

negligence, as against the railroad company, and he may then recover, unless the railroad company shall show by sufficient evidence that no negligence on its part supervened to cause the fire. In other words, the railroad company must then show that the fire did not escape from its engine because of any imperfection in its appliances to prevent the escape of fire, nor from any mismanagement of the engine on the part of its servants or agents. In the present case it must be presumed, under the evidence and the findings of the jury, that all the appliances to prevent the escape of fire were sufficient and in good order. But the question is still left, was there any mismanagement on the part of the railroad company's agents or servants with respect to the engine which caused or permitted the fire to escape? Presumptively, under the statute and the facts proved by the plaintiff, there was such negligence, and the jury, in effect, found that there was such negligence; and, in order to rebut this presumption, the defendant introduced a witness by the name of E. Johnson, who testified that he was the engineer in charge of the engine supposed to have caused the fire; that he had been an engineer on that railroad for five years, and an engineer in all for six years, and that he had been a fireman prior to that time; and that the engine supposed to have caused the fire was at the time in good order, and that it had been repaired only two months prior to that time; and then the following questions were asked him and answered, to-wit: "Question. State if you know of its [the engine's] ever setting out any fire after it was repaired. Answer. I do not."

\* \* \* Q. You may state whether in running this train you were managing the train properly and carefully, as an engineer should. A. In the usual manner, as carefully as could be done." The defendant then introduced another witness by the name of J. B. Key, who testified that he was on the train that day as an extra fireman, with Mr. Jackson as engineer; that the appliances on that engine to prevent the escape of fire were the best; that he had had experience as a fireman with a great many different engineers; and then the following questions were asked him, and answered, to-wit: "Question. I will ask you from your experience to state whether Mr. Jackson, the engineer in charge of this engine on the day named, is a careful and skillful engineer. Answer. Yes, sir; he is. Q. Do you know of this train setting out any fire after the time, as he spoke of, of being repaired? A. No, sir; I do not."

There was not a particle of evidence introduced tending to show how the fire escaped from the engine, or that any one knew how it escaped, or the precise time when it escaped. All this is left for inference from the facts proved and under the statute. The question now arises, does the foregoing testimony of E. Johnson and J. B. Key, along with the facts that were actually proved, so conclusively show that the fire that escaped from the engine and caused the injury to the plaintiff's property was not caused by the neg-

ligence or mismanagement of E. Johnson, or of Mr. Jackson, or whoever was the engineer, or by the negligence or mismanagement of any one else for whom the railroad company is responsible, that the verdict and judgment rendered in the court below must necessarily be set aside and reversed? It does not appear that either Johnson or Key knew anything concerning the fire that caused the injury to the plaintiff's property. They did not know how it escaped, or, indeed, that it escaped at all. And either Johnson or Key was not on the train from which the fire escaped, or else Key did not know Johnson's name, or had forgotten it; for in his testimony he spoke of his engineer's name as being Jackson. And Johnson could not well testify that he was managing the train or the engine "in the usual manner, as carefully as could be done," at the time when the fire escaped, for he did not know when the fire escaped. He did not attempt to state what he was doing when the fire escaped. Possibly he was doing something that caused it to escape. But what was the fireman doing at that time? There was no evidence that he was acting carefully. Possibly all the trouble was caused by his acts. And it devolved upon the railroad company to show that the fire did not escape through the negligence of any one of its agents or servants. This was not sufficiently shown in the present case, and therefore we cannot say that either the court below or the jury erred in holding the railroad company liable. We shall assume that all the appliances to prevent the escape of fire were in the present case perfect and in good order, and that the engineer in charge of the engine was a competent and skillful engineer, though this last matter was hardly proved; but that through the engineer's negligence, or the negligence of the fireman, the fire causing the injury was permitted to escape. There was nothing, however, in the case that tended to show just wherein the engineer or fireman was careless, unskillful, or negligent, or wherein consisted the negligence, and nothing to show what their acts were, or what they were doing when the fire escaped. While this want or absence of any such showing would have been against the plaintiff prior to the taking effect of chapter 155 of the Laws of 1885, yet after that time, and under the provisions of that chapter, and as the law now is, such want or absence of showing would be and is against the railroad company; and, as the railroad company did not sufficiently rebut the *prima facie* case of negligence made out against it by the evidence and under the statute, it must be held to be liable.

It is next claimed that the court below erred in rendering a judgment for an attorney's fee against the railroad company, and we are inclined to think that this claim is well founded. In the case of *Railway Co. v. Merrill*, 40 Kan. 404, 409, 19 Pac. Rep. 793, the following language is used: "The question, what was a reasonable attorney's fee? was properly submitted to the jury. It is true the statute provides that the court shall allow a reason-

able attorney's fee, which shall become a part of the judgment. The word 'court,' however, was doubtless used by the legislature in the broader sense, as including both judge and jury or judge alone, according as the court may be constituted when the trial occurs. What is a reasonable attorney's fee is a question of fact, which should be submitted and determined the same as any other fact arising in the case." This indicates that the question of the allowance of a reasonable attorney's fee should be presented for hearing at the same time that the case is tried upon its merits, and to the same tribunal, and, if so, it would also seem that the demand for a reasonable attorney's fee should be set forth in some manner in the plaintiff's petition. The cases of *Railway Co. v. Abney*, 30 Kan. 41, 1 Pac. Rep. 385, and *Railroad Co. v. Burge*, 40 Kan. 736, 21 Pac. Rep. 589, show what would be sufficient allegations, statements, or demands in the petition of the plaintiff to authorize the recovery of an attorney's fee under the railroad stock-killing law of 1874. These cases apply with some force to the present case. In all cases where the plaintiff desires to recover an attorney's fee, we think a demand therefor should be made in his petition, and then the question of an allowance of an amount for such attorney's fee should be submitted at the same time that the case is submitted for trial upon its merits, and to the same trier or triers. The manner in which the plaintiff in this case presented his claim for an attorney's fee, and the manner in which his claim was heard and allowed, and the judgment therefor rendered have all been stated in the statement of facts preceding this opinion, and it is not necessary now to restate them. We think that error was committed in the allowance of the attorney's fee, and to the extent of this attorney's fee the judgment of the court below must be reversed. In all other respects the judgment will be affirmed. All the justices concurring.

(46 Kan. 486)

HAMILTON *et al.* v. MILLER.

(Supreme Court of Kansas. June 6, 1891.)

EXAMINATION OF WITNESSES—CHattel MORTGAGES—SUFFICIENCY OF DESCRIPTION.

1. While a trial court should always be liberal in permitting a full and exhaustive cross-examination, yet it may nevertheless, in the exercise of a sound judicial discretion, impose reasonable limits.

2. Where a matter of evidence is brought out for the first time on the cross-examination of a witness, the other party may re-examine upon the same matter.

3. Other matters considered.

4. Immaterial errors must be disregarded.

5. Where L., claiming to be the owner of certain cattle, mortgages them to M., and afterwards, in an action in which M. is the plaintiff and L. and C. are defendants, C. claims to own the cattle, and to have owned them, as against L., at the time when they were mortgaged by L. to M., and L. admits the validity of the mortgage, it is immaterial as between M. and C. whether the mortgage contained a perfect description of the cattle or not.

(Syllabus by the Court.)

Error from district court, Sumner county; J. T. HERRICK, Judge.



*McDonald & Parker*, for plaintiffs in error. *George, King & Schwinn*, for defendant in error.

VALENTINE, J. This was an action of replevin brought in the district court of Sumner county by George M. Miller, as cashier of the First National Bank of Wellington, against L. W. Hamilton, C. C. Hamilton, John H. Hamilton, and ——— Horsley, to recover certain neat cattle, of the alleged value, in the aggregate, of \$9,450. The plaintiff claimed a special ownership therein, with the right to the immediate possession thereof, under a certain chattel mortgage executed by L. W. Hamilton, as the owner of the cattle, to Miller, as cashier, etc. The case was tried before the court and a jury, and the jury found generally in favor of the plaintiff and against the defendants, and also found that the value of the property in controversy was \$4,305, and that the amount of the mortgage debt was \$6,223.56; and the court rendered judgment accordingly in favor of the plaintiff and against the defendants in the alternative for a return of the property or for the value thereof, to-wit, \$4,305, together with interest and costs; and all the defendants except L. W. Hamilton bring the case to this court for review, making themselves the plaintiffs in error, and George M. Miller, cashier, the defendant in error. The only substantial question involved in this controversy is whether the aforesaid L. W. Hamilton was the owner of the cattle in controversy at the time of the execution of the aforesaid chattel mortgage, or whether the aforesaid C. C. Hamilton, his father, and John H. Hamilton, his brother, were at that time the owners thereof. Ample evidence was introduced on the trial to prove that L. W. Hamilton was the owner of the cattle, and that his father and brother were not the owners; and therefore that question must now be considered as at rest. But it is claimed by the plaintiffs in error that various errors occurred during the trial in the court below which will require a reversal of the judgment of that court. Whether this is correct or not we shall now proceed to consider.

The first and principal claim of error, as stated in the brief of counsel for the plaintiffs in error, is as follows: "The evidence showed that L. W. Hamilton did not claim any cattle except those he claimed to have bought from his father and their increase, and that there were about thirty or thirty-five head of cattle bought by John (J. H. Hamilton) in 1884 or 1885, and put in the herd. They were marked in the same way as the balance of the herd, and were never separated from it up to the time the suit was brought; yet when L. W. Hamilton was put on to prove his title to the cattle included in the mortgage, and their identity with the cattle he had bought from his father, the court refused to permit the defendants to show upon the cross-examination of said witness as to how many of those cattle were separated from the cattle taken in replevin, although the witness assisted in making the separation." Counsel for the defend-

ant in error, who was plaintiff below, answer this as follows: "The court did not refuse to permit the defendants to show upon cross-examination of L. W. Hamilton how many of the said thirty or thirty-five head of cattle were separated from the cattle taken in replevin, as claimed in the brief of the plaintiffs in error, but, on the contrary, allowed very great latitude in the cross-examination of witness upon that question, and only refused to allow such examination continued after it had been thoroughly gone over by the witness on cross-examination." The question objected to and the objection and the ruling of the court thereon, as shown by the record, are as follows: "Question. How many of those cattle that John put in there did you pick out? (Counsel for plaintiff objects to this question, for the reason that it has been answered, and for the further reason that the witness shows that he cannot tell. The court sustains the objection.)" Up to this point the record contains about 70 pages in type-writing of cross-examination,—about five times as much as all the examination in chief,— "and the end is not yet." This matter had already been amply gone over on the cross-examination. And the record shows specifically, with respect to this matter, that the following among other questions had been propounded and answered, to-wit: "Question. How many did you pick out? Answer. I don't know; I didn't keep any memorandum. It seems to me, though, that it was some twenty, may be thirty; I don't recollect just how many." While a trial court should always be liberal in permitting a full and exhaustive cross-examination, yet it may nevertheless, in the exercise of a sound judicial discretion, impose reasonable limits. The next claim of error is that the court below permitted L. W. Hamilton on his redirect examination to testify as to threats made to him by a Mr. Horsley, who claimed to have purchased from the witness' father and brother a portion of the cattle. The question and answer objected to are as follows: "Q. What did he say about your getting out of the country? A. He said that I had better get out of the country." This had reference to matters testified to upon the cross-examination of this witness, and brought out originally and for the first time by the defendants below, a portion of which testimony brought out on cross-examination is as follows: "It was right at the time,—the morning after the cattle were attached. Mr. Horsley came up there and tried to bluff me, but I did not take a bluff very well. He told me that if I did not get out of the country that they would put me in the penitentiary." Certainly no error was committed by the trial court in permitting the plaintiff, after the foregoing testimony was given on the cross-examination, to ask and to have answered by the same witness the above question on the redirect examination. The next supposed error is that the court below permitted a witness to answer a question over an objection of the defendants that the question was "double" and "leading." No error was committed in this respect either in

substance or in form. The next complaint is that the court below permitted the plaintiff to prove the signature of the wife of C. C. Hamilton; but in what respect this was prejudicial is not shown. There are many other supposed errors, but we do not think that it is necessary to mention all of them, nor to follow them in their order as presented by the plaintiffs in error. Of the remaining alleged errors the ninth is perhaps the most serious. The court permitted evidence of conversations had between the defendant L. W. Hamilton and others, not in the presence of any of the other defendants, tending to show that L. W. Hamilton was the owner of the cattle in controversy. The most of these conversations were had while L. W. Hamilton was in the actual custody of the property, and were therefore competent as evidence, not only as against him as a defendant, but also as against the other defendants. But some of them were possibly had at a time and place when and where L. W. Hamilton was not in the actual custody of the property. But in the light of the whole of the evidence,—over 750 pages of type-writing,—the error, if error, was wholly immaterial, and immaterial errors must be disregarded. In answer to the tenth supposed error we might say that there can be no question in this case with regard to any supposed imperfect description of the property in controversy as contained in the mortgage. L. W. Hamilton, the mortgagor, is not complaining of any imperfect description, and if the property really belonged to him, as he claims, then the other defendants can have no reason to complain. The other defendants can have no right to recover property which does not belong to them. But the description was sufficient. There was sufficient evidence introduced on the trial to authorize the giving of the instruction with regard to estoppel; but even if there was not, still no sufficient exception was taken to that or to any other instruction. Believing that substantial justice has been done in this case, and that no material error has been committed, the judgment of the court below will be affirmed. All the justices concurring.

(46 Kan. 597)

**WAFFER *et al.* v. HARVEY COUNTY BANK *et al.***

(Supreme Court of Kansas. June 6, 1891.)

**FRAUDULENT CONVEYANCES — KNOWLEDGE OF GRANTEE—EVIDENCE.**

1. An antecedent creditor, who knows that his debtor procured goods and merchandise by fraudulent means, cannot by a chattel mortgage secure a lien on such fraudulently procured goods, adverse to the innocent vendors of such goods.

2. An antecedent creditor, who knows that his debtor has procured goods and merchandise by fraudulent means, when the sale of such goods is partially induced by the representations of such antecedent creditor as to the credit of his debtor, cannot by a chattel mortgage secure a lien on such fraudulently procured goods, adverse to the innocent vendors of such goods.

3. The failure of a chattel mortgagee to have his mortgage recorded for 48 days, or to disclose its existence to other creditors, when the financial condition of the debtor is being discussed, and who promised the debtor that he would not disclose its existence to other creditors who were

demanding payment or security for their claims, is strong evidence tending to show a fraudulent intent to hinder and delay creditors.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Harvey county; L. Houx, Judge.

*J. D. Snoddy and Green & Shaver*, for plaintiffs in error. *Bowman & Bucher, J. W. Ady, and Jetmore & Jetmore*, for defendants in error.

**SIMPSON, C.** This is an action begun by the Harvey County Bank and R. M. Spivey as plaintiffs, against John F. Wafer, who was then sheriff of Harvey county. Wafer, as sheriff, had seized under various orders of attachment a stock of goods belonging to the attachment debtor, R. M. Hamill. The bank and Spivey claimed to have the right to the possession of the attached property by virtue of a chattel mortgage thereon executed by R. M. Hamill on the 20th day of March, 1884. The attaching creditors were made parties, and filed answers alleging that the chattel mortgage was fraudulent and void as against them. The case was tried to a jury at the March term, 1883, of the district court of Harvey county. The jury returned a verdict for the bank, and fixed the value of the goods at \$21,896.17, and the value of the plaintiffs' right of possession at \$12,035.03. A motion for a new trial was overruled, and a judgment rendered on the verdict. The material facts disclosed at the trial are these: For many years prior to the commencement of this action the firm of Hamill Bros. had been engaged in merchandising in the city of Newton, and were a firm of good credit, and of high repute. As a matter of fact, on or before the 20th day of March, 1884, the firm, and especially D. Hamill, the principal partner, was largely indebted, both as a member of the firm and individually. D. Hamill was the active and controlling member of the firm, and his brother, R. M. Hamill, appears up to a certain date to have been subordinate. There is evidence tending very strongly to show that in October, 1883, the firm was dissolved, a notice of dissolution was published, and in the next issue of the paper after the publication of the notice of dissolution the card of the business firm was changed from Hamill Bros. to D. Hamill. The terms of this dissolution were such that D. Hamill assumed all the debts and liabilities of the firm, and alone had the right to collect all the claims and outstanding accounts of the old firm. In January, 1884, a contract was entered into between D. Hamill and R. M. Hamill that reads as follows: "This agreement witnesseth that in consideration and as a full, final settlement of the respective rights, claims, accounts, and interests of D. Hamill and R. M. Hamill, recently partners as Hamill Bros., the said parties have agreed and do hereby agree upon the following: R. M. M. Hamill shall be solely liable for all goods purchased and put into the store situated upon the lot hereafter described from and after the first day of January, 1884, and said D. Hamill shall in no event be liable in any way for any por-

tion of such goods, and has no interest therein except as herein specifically provided. Said R. M. Hamill may, for the purpose of establishing his own business interests, advertise said business as his own, and purchase and incorporate into said stock of goods such goods as he may desire, upon his own individual credit. Said R. M. Hamill shall contribute his own efforts towards the carrying on of said business in the same way and under the same conditions and restrictions that he has been since the first day of January, 1884. Until all the debts owing by the former firm of Hamill Brothers, as shown by the books of said firm, are fully paid, D. Hamill shall remain in charge of said business, as financial manager thereof, applying the net proceeds of all sales to the liquidation of said debts of Hamill Bros., until the same are fully paid. All goods in said store, whether they are goods formerly owned by Hamill Bros., or such as have since been or may in the future be put in said store by R. M. Hamill, shall be subject to sale in the ordinary course of business, and the net proceeds of such sale to be applied in liquidation of the debts of said firm, as above agreed upon. When all of said debts have been fully paid, as above indicated, then said R. M. Hamill shall be the absolute owner of all goods in the store, and said D. Hamill shall execute and deliver to him a bill of sale for all of his interest therein, and deliver to him the absolute and exclusive control of said business and all goods in said store. The store herein referred to is that kept in the building upon lot No. 8, in block No. 38, in the city of Newton, Harvey county, Kansas, and the said D. Hamill, being the owner of said lot and building, together with the fixtures and furniture in said store, agrees that when full control of said business is transferred to R. M. Hamill, as above contemplated, he will execute to said R. H. Hamill a lease of said store and fixtures and furniture used therein, at the rate of \$50 per month, payable monthly in advance, from month to month, and said lease may be terminated by either party upon giving sixty days' notice to the other party. This lease shall include only the store-room, ware-room, and cellar now used in the business, and free ingress and egress to and from the same over said lot. D. HAMILL. R. M. HAMILL." At this time this contract was entered into the firm of Hamill Bros. were indebted to various creditors in the sum of \$4,800, and they owed the Harvey County Bank a note of \$5,000. R. M. Spivey was then, and for a long time before had been, the vice-president and active manager of the Harvey County Bank, and was in the full charge of its business. Some time after the contract of January, 1884, was made, R. M. Hamill went to Chicago to buy goods with which to replenish the stock. He carried with him a letter from Spivey, as follows: "Harvey County Bank. Successor to the Harvey County Savings Bank. C. B. Schmidt, President. R. M. Spivey, Vice-President. Julius Simon, Cashier. Newton, Kansas, Feb'y 29, 1884. To whom it may concern: The bearer, R. M. Hamill, succeeds the

firm of Hamill Bros., merchants of long standing in this city. Mr. R. M. Hamill is not indebted to this or any other bank, and with his long experience and general acquaintance in this country, believe he will do a good business, and with continued prosperity no doubt he will make prompt payment for any goods he may purchase. Respectfully, R. M. SPIVEY, V. Pt." While R. M. Hamill was in Chicago, Spivey wrote the following letter to a wholesale firm there, from whom R. M. Hamill bought goods: "Harvey County Bank. C. B. Schmidt, President. R. M. Spivey, Vice-President. Julius Simon, Cashier. Newton, Kans., March 8, 1884. Kahn, Schoenbrun & Co., Chicago, Ill.—Gentlemen: I had a telegram from R. M. Hamill yesterday, stating that Harvey Co. Bank reports him as owing \$8,000. The statement which we sent you regarding his financial standing was intended to be confidential, but it seems you have not made the information confidential, but informed him the contents. Under the circumstances, I do not care to confide in you further statements, but will add that Mr. R. M. Hamill does not owe this bank but \$200, and does not owe any bank, which I wired you last night. Yours, R. M. SPIVEY." On the 1st day of March, 1884, D. Hamill wrote to Norton & Cahill, salesmen for two large wholesale houses, from whom R. M. Hamill bought goods, the following letter: "Monarch Mills. D. Hamill, Proprietor. Newton, Kans., March 1, 1884. Messrs. I. R. Norton & J. H. Cahill, Chicago, Ill.—Gentlemen: Robert M. has just handed me your letter to him of the 27th ult. So far as the report is concerned to which you refer, I wish to say that there is not a word of truth in it. As a matter of fact Robert does not owe a dollar. So far as my own liabilities are concerned, they are a matter of record, and concern none but me personally, and I am fully able to take care of them. Gentlemen, Robert could have bought his goods several times since arrangements were made with you, and was strongly urged to do so, but his preference has been to buy of you. I only ask that you sell him goods at the right kind of prices, so that he can meet competition. I wish also to say, gentlemen, that the First National Bank of this city and myself have been, and are now, on anything but friendly terms. This feeling was brought about from the fact that I did not patronize that bank, but did my business through the Harvey County Bank. The First National Bank has lost no opportunity to injure my business whenever they had the opportunity. So far I have been able to come out ahead in every encounter, and I think I can manage to take care of myself. I did not suppose that they would on that account endeavor to injure Robert's credit. Very respectfully, D. HAMILL." The Harvey County Bank loaned R. M. Hamill \$200 with which to pay his expenses on the Chicago trip. He bought on this trip from Farwell & Co., Kahn, Schoenbrun & Co. and C. M. Henderson & Co. goods exceeding in value \$18,000. He writes to the wholesale houses on the 17th day of March that the goods had all ar-

rived safely at Newton. While at Chicago he made a sworn statement of his financial condition to J. V. Farwell & Co., that reads as follows:

"Chicago, Ill., March 4, 1884. I, R. M. Hamill, of Newton, county of —, state of Kansas, for the purpose of obtaining a credit with John V. Farwell & Co., of Chicago, Ill., for goods which — may now or hereafter purchase of them, do make the following statement and representations of — present true financial circumstances, wealth, and mercantile respectability, which said representations shall be the basis of — credit with John V. Farwell & Co., both for — present purchase, and for all purchases for and during the period of five years from this date, agreeing to immediately notify them of any material change in or of — business matters during the period above mentioned.

"— a copartnership of —.

Assets.	Amount.
Stock of goods on hand at value.....	\$12,555
Notes and accounts, good.....	2,000
"    "    doubtful.....	
"    "    worthless.....	
Cash in hand or in bank.....	
Other personal property.....	
Insurance, will increase.....	6,000
Real estate in my name at market value, store-house.....	7,500

Liabilities.	Amount.
Incumbrances on real estate.....	\$ 2,500
Incumbrances on personal property.....	
For merchandise not to exceed.....	2,842 58
For borrowed money.....	None.
Individual liabilities.....	None.
For confidential and all other liabilities.....	None.
Amt. of debts past due, included in merchandise indebtedness.....	None.

[Signature] "R. M. HAMILL."

On the 18th day of February the Harvey County Bank, by Spivey, made a commercial report on R. M. Hamill to the reporting agency of Bond & Welgley, that was furnished by them to Kahn, Schoenbrun & Co. It is as follows:

"Name in full of each member: Rob't M. Hamill. Business: Dry goods, clothing, etc. Amount of capital in business, \$15,000; amount borrowed capital, \$8,000; value of real estate, \$3,000; incumbrance, \$1,700; value of personal property, \$500. Any chattel mtgs. or other liens? None. Value of stock? None. Married? Yes. Character? Good. Attentive to business? Yes. Prompt pay? Fair. Insured? Yes. Credit largely? More or less. Prospect of success? Fair. Ever failed to ask extensions? None. Do you consider — good for — a credit of 1,000 dollars? Yes.

"Remarks: R. M. Hamill will in a month or so succeed to the business of Hamill Bros. If country continues prosperous, he will succeed.

"Yours, HARVEY CO. BANK."

On the 20th day of March, 1884, the following agreement was made in writing between R. M. Hamill, D. Hamill, and R. M. Spivey: "Newton, Kansas, March 20, 1884. In consideration of D. Hamill releasing and assigning to R. M. Hamill all of his right, title, and ownership in and to all of the goods (not including store furniture and fixtures) kept by Hamill Bros.

and D. Hamill in their store upon lot 8, block 38, Newton, Kansas, which he hereby does, we, the undersigned, R. M. Hamill and R. M. Spivey, agree and bind ourselves to pay and hold the said D. Hamill harmless of all the following debts now owing by the said Hamill Bros. to R. L. McDonald, \$94.00; Jno. V. Farwell, \$1,600.00; C. M. Henderson, \$400.00; A. N. Shueter, \$650.00; J. W. Bailey & Co., \$200.00; Noyes, Norman & Co., \$144.00; H. M. Price, \$250.00; Tootle, Hosea & Co., \$350.00; Reynolds Bros., \$300.00; I. Weil, four notes in bank; all debts of said firm to Harvey County Bank,—all of which debts we assume; and R. M. Hamill agrees to pay any other debts of said old firm, should any be found not included in this agreement. Should D. Hamill be compelled to pay any debts in violation of this agreement, we agree to repay him all costs and expenses he may be put on account thereof. Made in duplicate. R. M. HAMILL. D. HAMILL. R. M. SPIVEY."

On the same day R. M. Hamill executed a note for \$10,000 to the Harvey County Bank, and a chattel mortgage to secure the same. The consideration of the mortgage is alleged to be the note of D. Hamill to the bank for \$5,000; the debts of the firm guaranteed by Spivey, \$4,800; and the \$200 borrowed by R. M. Hamill from the bank, with which to pay the expenses of his Chicago trip. This mortgage was kept in the vaults of the bank, and not recorded until the 3d day of May, 1884, and not until the Chicago creditors had appeared at Newton, and demanded security for the payment of their claims. These are some of the material facts as they appear in the record.

The jury returned answers to the following special interrogatories: "First. At the time John F. Wafer, as sheriff, took the stock of goods, how much was the Harvey County Bank entitled to hold the same as security for? Answer. \$10,000. Second. What items of indebtedness made up the amount of the \$10,000 note secured by chattel mortgage? State fully the amount of each. A. One note of \$5,000; guaranteed claims to eastern creditors, \$4,800; borrowed money, \$200. Third. Was the stock of goods pledged to R. M. Spivey; and, if so, for what? State specifically amount of each item. A. Pledge void. Fourth. Were the goods pledged to R. M. Spivey, among other things, for future advances to be made to R. M. Hamill for the support of himself and his family? A. Pledge void. Fifth. Did R. M. Hamill obtain the goods from the attaching creditors by false and fraudulent means? A. Yes. Sixth. Did the Harvey County Bank, through its officers, know that R. M. Hamill had purchased the goods by false and fraudulent means at the time it took this \$10,000 mortgage? A. No. Seventh. Did R. M. Spivey, by his letters of February 29, 1884, and March 8, 1884, and his telegram of March 8, 1884, tend to and partially induce the attaching creditors to give R. M. Hamill credit, and to sell him goods? A. Yes. Eighth. Did R. M. Spivey have knowledge, at the time he accepted the pledge, that R. M. Hamill had purchased the goods by false and

fraudulent means? A. Pledge void; and if time above refers to the pledge of May 3, 1884, we say 'Yes.' *Ninth.* At the time R. M. Spivey wrote his letters of credit of February 29, 1884, and his letters and telegrams of March 8, 1884, did he not know that Hamill Bros. were largely indebted to Harvey County Bank and eastern creditors? A. Not as a legal firm, as the evidence proves that the firm was in reality dissolved October 3, 1883. *Tenth.* At the time David Hamill wrote his letter of credit for R. M. Hamill to Norton & Cahill, dated March 1, 1884, did he know that Hamill Brothers were indebted to the Harvey County Bank and eastern creditors? A. Not as a legal firm, as the evidence proves that the firm was really dissolved October 3, 1883. *Eleventh.* What persons composed the firm of Hamill Brothers during 1882, 1883, and 1884? A. D. Hamill, and R. M. Hamill composed the firm of Hamill Brothers in 1882, and until the 3d of October, 1883."

1. It has been said that "every case must create its own law;" but this is one in which the fraud alleged is not purely a question of law, nor yet exclusively a question of fact, but the two are so closely interwoven, and so intimately blended together, that they both concur to produce the belief that a part of the truth was suppressed, and cunning artifice resorted to, and that both actual and constructive fraud was committed in the attempt to hinder and delay honest creditors receiving their just dues. These two important facts are established by the evidence and found by the jury: *First*, that R. M. Hamill procured the goods covered by the chattel mortgage to the bank from the attaching creditors by fraudulent misrepresentations; *second*, that R. M. Spivey, by his letters and telegrams, partially induced the attaching creditors to give R. M. Hamill credit, and to sell him goods. There are some other important facts established by the evidence contained in this record. Spivey was the active and controlling officer of the Harvey County Bank, and he knew of the indebtedness of Hamill Bros. to the bank and to the other creditors. He had loaned R. M. Hamill the money to pay his expenses on the Chicago trip, and knew that Hamill went there to buy goods. A short time before this he had made a confidential report of the financial condition of R. M. Hamill to a mercantile agency in Chicago. He had every opportunity to know, and did know, the exact financial condition of Hamill Bros., of D. Hamill, and of R. M. Hamill. Again, as matters of law, the knowledge of Spivey as to the financial condition of the firm of Hamill Bros. and of the individual members of the firm was the knowledge of the bank, whose managing officer he was. He knew as a matter of law that D. Hamill had an agreement with R. M. Hamill that he was to pay the outstanding debts of the firm, or that the goods on hand were pledged to their payment, and that R. M. Hamill, as a member of the firm, was still liable for their payment, notwithstanding his agreement in January with D. Hamill; and by reason of his knowledge the bank

knew this. He knew that the creditors of the firm had never accepted the individual assumption of the debt of Hamill Bros., and that at the time the credit was extended had not released R. M. Hamill, and the bank had not done so. In a word, both Spivey and the Harvey County Bank knew all about the financial condition of the firm of Hamill Bros., and of the individual members composing it, at the time R. M. Hamill went to Chicago, and procured these goods from the attaching creditors. All these things were apparent from this record. One of the questions arising on this state of facts is this: Can an antecedent creditor, who knows that his debtor has procured goods and merchandise by fraudulent means, take a chattel mortgage on goods thus procured, and acquire a lien adverse to the interest of the vendors? Another question is: Can an antecedent creditor of a debtor who procures goods fraudulently from wholesale merchants, who were partially induced to give such debtor credit on the strength of letters of the antecedent creditor, acquire by chattel mortgage a lien of the goods so procured, adverse to the interests of the wholesale merchants? Another question is: Can one who knows that goods and merchandise are procured by fraudulent means acquire any interest in or lien on such goods against the innocent vendors?

2. The legal principle applicable to the first fact is that, these goods having been obtained from the attaching creditors by fraudulent means by R. M. Hamill, he acquired no title or right of possession in them, and the attaching creditors would be justified in retaking the goods; or they could waive the tort, and bring an action to recover their value, or an action to recover damages for the deceit. *Story, Sales, (4th Ed.) § 172a; Newm. Sales, § 360; note Lyons v. Briggs, 14 R. I. 222; Genesee Sav. Bank v. Michigan Barge Co., 52 Mich. 164, 435, 17 N. W. Rep. 790, and 18 N. W. Rep. 206; Cain v. Dickenson, 60 N. H. 371; Delckerhoff v. Brown, 21 Reporter, 583; Newell v. Randall, 32 Minn. 171, 19 N. W. Rep. 972; Fitzsimmons v. Joslin, 21 Vt. 129.* They elected in this case to waive the tort, and bring an action to recover the value of the goods. The law applicable to the second fact is that, where the fraud consists in inducing by false representation a sale of goods to an insolvent third person, from whom the misrepresenting party afterwards obtains them, the seller may bring suit for the price against the latter party as though he had bought the goods in his own name. *Biddle v. Levy, 1 Starkie, 20; Hill v. Perrott, 3 Taunt. 274; Phelan v. Crosby, 2 Gill, 462; Thomson v. Davenport, 2 Smith, Lead. Cas. 407; Meyer v. Amidon, 23 Hun, 553; 1 Benj. Sales, (4th Ed.) § 491; 2 Schouler, Pers. Prop. (2d Ed.) § 612.* The particular act of Spivey that was evidently in the minds of the jury that produced the special finding was that his letter and telegram in which he asserted that R. M. Hamill did not owe the Harvey County Bank but \$200, when in fact and in law he was indebted to the bank in a large sum, partially induced the sale of goods to Hamill

by the Chicago merchants. This representation, known at the time it was made by Spivey to be untrue, is fraudulent. Chief Justice MARSHALL, in *Russell v. Clark's Ex'rs*, 7 Cranch, 69. "The ground of the action," said the court in *Boyd's Ex'rs v. Browne*, 6 Pa. St. 310, 316, "is the deceit practiced upon the injured party; and this may be either by the positive statement of a falsehood, or the suppression of material facts, which the inquiring party is entitled to know. The question always is, did the defendant knowingly falsify or willfully suppress the truth, with the view of giving the third party a credit to which he was not entitled? It is not necessary that there should be collusion between the party falsely recommending and him who is recommended; nor is it essential, in support of the action, that either of them intended to cheat and defraud the trusting party at the time. It is enough if such has been the effect of the falsehood relied on." In the case of *Allen v. Addington*, 7 Wend. 10, reviewed in the court of errors, 11 Wend. 375, the letter of the defendant was written to a third person, and never shown to the plaintiff, but the plaintiff gave credit in consequence of what the third person was induced by the letter to say. The design of the defendant was to have the goods sold to the party recommended, from which he, as a creditor, might satisfy his own debt; and the fraud was held to consist mainly in the suppression of the fact that he held judgments against the person recommended, which the latter was unable to satisfy. The court say it was a case of outrageous fraud and conspiracy. This is an exhaustive and elaborate case. In the case of *Patten v. Gurney*, 17 Mass. 182, the action was brought by the plaintiffs against the defendants for fraudulently affirming another to be trustworthy, in order that they might levy on the goods with which he was trusted, in satisfaction of debts owing by him to themselves. PARKER, C. J., says: "A false and fraudulent affirmation, relative to the credit and ability of a person to a merchant, who is thereby induced to trust such person with goods, is a sufficient ground for action, although there may have been no dishonest purpose of appropriating the goods to the use of the party making the recommendation, or in any way deriving a benefit from the fraud." See other cases cited in the American notes to the case of *Pasley v. Freeman*, 2 Smith, Lead. Cas. (6th Ed.) 116.

3. Spivey knew that the goods had been procured from the wholesale merchants at Chicago by fraudulent representations. He knew that at the time R. M. Hamill went to Chicago to buy the goods Hamill had no money, because Spivey loaned him the money necessary to the expenses of the trip. He knew that under the agreement between R. M. and D. Hamill the stock on hand was pledged to the payment of the then outstanding indebtedness of the firm. He knew that the store-room and fixtures were the individual property of D. Hamill. He knew that the firm of Hamill Bros. was indebted to the Harvey County Bank in a sum in excess of \$5,000.

He knew that since the agreement in January R. M. Hamill had contracted debts for which he alone was responsible under that agreement, and which the firm was responsible for, unless the merchants from whom the goods were bought had knowledge of that agreement. The knowledge of all these facts, many of them fastened by his own admissions upon the witness stand, leads to the inevitable conclusion that he must have known that the goods were obtained fraudulently, and that the fraud was aided and abetted by Spivey's suppression of all these facts. A failure to disclose a material fact is equivalent to active misrepresentation, for the withholding of that which is suppressed may make that which is stated absolutely false. *Devoe v. Brandt*, 53 N. Y. 462; *Brown v. Montgomery*, 20 N. Y. 287; *Hanson v. Edgerly*, 29 N. H. 843; *Armstrong v. Huffstutler*, 19 Ala. 51; *Stephens v. Orman*, 14 Fla. 21; *Marsh v. Webber*, 13 Minn. 109, (Gil. 99); *Pease v. McClelland*, 2 Bond, 42. The protection of a *bona fide* purchaser from a fraudulent vendee is almost universally recognized by the courts of this country, on the ground that the fraudulent purchaser has a voidable or defeasible title which, before its annulment by the vendor, the defrauding purchaser can transmit to a *bona fide* purchaser who is without knowledge or notice of the fraud, and because he has parted with value. One who buys with notice or knowledge of the fraud of his vendor in obtaining the property, is not a *bona fide* purchaser, and is liable, not only to lose the goods, but, if he sells, to pay their value. *Stearns v. Gage*, 79 N. Y. 102; *Ratzen v. Bernard*, 3 Blatchf. 244. To constitute good faith there must be an absence not alone of participation in the fraud, or collusion with the vendee, but also of knowledge, or even notice, of the fraud, or of facts and circumstances calculated to put an ordinarily prudent business man on inquiry, so that he would ascertain the truth. *Grant, Fraud. Vend.* 568; *Lynch v. Beecher*, 38 Conn. 490; *Allison v. Matthieu*, 3 Johns. 235; *Stearns v. Gage*, 79 N. Y. 102; *Dows v. Kidder*, 34 N. Y. 121; *Cochran v. Stewart*, 21 Minn. 435. And it has been frequently held that the burden of proof to show good faith and purchase for value, as against the defrauded seller, is upon the party claiming to be a *bona fide* purchaser. *Devoe v. Brandt*, 53 N. Y. 462; *McLeod v. Bank*, 42 Miss. 99; *Lynch v. Beecher*, 38 Conn. 490; *Schouler, Pers. Prop.* (2d Ed.) § 609; *Jones v. Franks*, 33 Kan. 497, 6 Pac. Rep. 789; *Wygall v. Bigelow*, 42 Kan. 477, 22 Pac. Rep. 612. Fraudulent intent is shown by turning the property over to another creditor very soon after it has been received. 1 Benj. Sales, p. 577, § 656, note 18; *Wiggin v. Day*, 9 Gray, 97; *Jordan v. Osgood*, 109 Mass. 462; *Parker v. Byrnes*, 1 Low. 539; *Davis v. McWhirter*, 40 U. C. Q. B. 598; 2 Kent, Comm. 484. A sale is void where a creditor pays a debtor a surplus in purchasing his stock of goods with knowledge of fraud of vendor. *Davis v. McCarthy*, 40 Kan. 18, 19 Pac. Rep. 356. Where a merchant makes a sale to defraud his creditors the purchaser is only protected as to the

extent of the payments made in good faith without notice. *Bush v. Collins*, 35 Kan. 535, 11 Pac. Rep. 425; *Burke v. Johnson*, 37 Kan. 337, 15 Pac. Rep. 204; *Moxley v. Haskin*, 39 Kan. 654, 18 Pac. Rep. 820; *Green v. Green*, 41 Kan. 474, 21 Pac. Rep. 586. The intent to defraud is shown by acts and declarations. If a party is guilty of an act which defrauds another, his declaration that his intentions were honest cannot be taken as sufficient to overthrow the act. *Babcock v. Eckler*, 24 N. Y. 623. Where the fraud as to the creditors is participated in by both parties thereto, a chattel mortgage is void *in toto*. *Winstead v. Hulme*, 32 Kan. 568, 4 Pac. Rep. 994; *Wallach v. Wylie*, 28 Kan. 138; *Marbourg v. Manufacturing Co.*, 32 Kan. 636, 5 Pac. Rep. 181; *Hughes v. Shull*, 33 Kan. 127, 5 Pac. Rep. 414; *Bush v. Bush*, 33 Kan. 567, 6 Pac. Rep. 794; *Miller v. Krueger*, 36 Kan. 345, 13 Pac. Rep. 641.

4. The chattel mortgage executed by R. M. Hamill to the Harvey County Bank on the 20th day of March was not placed on record until the 3d day of May, and not then until after conversations had by an agent of the attaching creditors with both Hamill and Spivey, in which conversations the existence of the chattel mortgage was not disclosed by either of them, and this was done in pursuance of an agreement made between them, and this agreement was made at a time when an agent of the attaching creditors was there urging payment or security by R. M. Hamill. The fact that the chattel mortgage was not recorded until the 3d day of May, and that there was an agreement by Spivey and R. M. Hamill not to disclose its existence to other creditors, taken in connection with all the other facts and circumstances disclosed by this record, is to be regarded as tending very strongly to show the fraudulent intent of these parties. *Bank v. Jaffray*, 41 Kan. 691, 19 Pac. Rep. 626.

5. The court charged the jury in effect that the knowledge of Spivey was the knowledge of the bank, but the jury, in their sixth special finding, either did not understand or deliberately evaded such instruction. They find that the Harvey County Bank, through its officers, did not know that R. M. Hamill had purchased the goods by false and fraudulent means at the time it took this \$10,000 mortgage. It was known to Spivey, and he was the active manager of the bank, and had been for some years prior to this time. If the jury meant that Spivey had no knowledge, there is not a particle of evidence to sustain this finding, as we view the facts. If they overlooked or gave no meaning to the words as used in the instructions of the trial judge, "If the bank, through its officers, knew," and supposed that the bank itself, as distinguished from its officers, did not know, then they misapplied the law. The other two findings, already largely discussed, are inconsistent with and antagonistic to the general verdict. In the fourth special finding the jury evaded an answer to a question of fact, and gave a legal conclusion. In the ninth and tenth special findings the evasion of the jury to a plain question of fact is self-evident. At the time the verdict was re-

turned into court the plaintiffs in error demanded that the jury be required to answer interrogatories Nos. 4, 9, and 10 more fully and specifically, which demand was refused by the court, and the jury was discharged. We think this was error. We are satisfied that justice has not been done; that material error was committed in the trial; that strong evidences of fraud and fraudulent intent are abundant in the record; and hence recommend that the judgment be reversed, and a new trial ordered.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 548)

BABCOCK *et al.* v. FARMERS' & DROVERS' BANK.

(Supreme Court of Kansas. June 6, 1891.)

PLEADING—FAILURE TO REPLY—JUDGMENT.

Where a plaintiff declares upon a note which is set out in the petition, and the defendants answer that it was given for usurious interest, and was void for want of consideration, and no reply was filed by the plaintiff to the answer, and the court overruled the motion of the defendants to require the plaintiff to file a reply to such answer, and proceeded to trial over the objection of the defendants, and instructed the jury to return a verdict for the plaintiff, *held*, that such verdict, and the judgment based thereon, are erroneous.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Kingman county; S. W. LESLIE, Judge.

*L. M. Conkling & Son*, for plaintiffs in error. *Lydecker & Cooper*, for defendant in error.

GREEN, C. The Farmers' & Drovers' Bank sued the plaintiffs in error in the district court of Kingman county upon a promissory note for \$1,776.50. S. G. Babcock answered, admitting the execution of the note, and set up the affirmative defense that the note was void for want of consideration; that he had at different times and in different sums borrowed money from the Farmers' & Drovers' Bank, and had agreed to pay usurious interest for the use of the money so borrowed; that the whole sum of such usurious interest agreed to be paid by him amounted to the sum stated in the note sued on, and that this note was executed for the usurious interest over and above the legal rate of interest on the various sums loaned to him. This answer was verified, and before the trial the district court made an order permitting the defendants below Alexander and Culver to adopt the pleading filed by Babcock as their answer. No reply was filed by the plaintiff below to this answer. The defendants asked for judgment upon the pleadings, which was overruled, and the court ordered the case to be tried without a reply to the answer, over the objection of the defendants. A jury was impaneled and sworn, and the plaintiff introduced its note in evidence, which was objected to. The defendants then offered in evidence the verified answer filed by Babcock, which was objected to, and the



trial court sustained the objection. No other evidence was offered. The court instructed the jury to return a verdict for the plaintiff for the amount due on the note sued on. A verdict was returned for the sum of \$1,952.37, and a judgment was rendered for that amount in favor of the plaintiff below. The plaintiffs in error bring the case to this court. It is first claimed that the answer of the defendants below contained such material allegations of new matter or affirmative defense as required a reply from the plaintiff to put the same in issue, and, having failed to reply, it admitted the same to be true, and that the defendants' motion for judgment on the pleadings should have been sustained. The reply was not waived, and we think it was error for the trial court to proceed without requiring a reply to the new matter set up in the answer. Section 128 of the Civil Code provides that every material allegation of new matter in the answer, not controverted by the reply, shall, for the purposes of the action, be taken as true. The defense set up was that the entire consideration of the note was usurious, which, if true, was a complete defense to the note set out in the petition. We think a reply was necessary, and, none having been filed, we are of the opinion that the plaintiffs in error should have had judgment upon the pleadings. *Scott v. Morning*, 18 Kan. 489. It is unnecessary for us to notice the other errors. We recommend a reversal of the judgment, and that a new trial be granted.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 523)

DE WOLF *et al.* v. ARMSTRONG.

(*Supreme Court of Kansas.* June 6, 1891.)

FRAUDULENT CONVEYANCES—PREFERENCES.

The facts and the law being the same as in *Furniture Co. v. Armstrong*, (Kan.) 26 Pac. Rep. 693, that case is followed.

(*Syllabus by the Court.*)

Error from district court, Osage county; R. B. SPILLMAN, Judge.

*Ellis Lewis* and *W. A. Madaris*, for plaintiffs in error. *L. T. Wilson*, for defendant in error.

JOHNSTON, J. This was an action by Charles W. De Wolf & Son to recover from E. M. Armstrong the sum of \$147.01. They obtained an order of attachment alleging that the defendant had sold, conveyed, and disposed of his property with the intent to cheat and defraud his creditors, and to hinder and delay them in the collection of their debts. After the order of attachment had been issued and served, the defendant filed an affidavit alleging that the grounds alleged for an attachment were untrue, and upon the proofs offered at the hearing of the motion the attachment was discharged. The case was submitted upon the same testimony as was *Furniture Co. v. Armstrong*, (Kan.) 26 Pac. Rep. 693. It appears that the debts which were paid and secured by the defendant were *bona fide*; and it is

settled that a debtor in falling circumstances may in good faith prefer one creditor to another, and may transfer and mortgage his property to secure a *bona fide* debt, although such action may result in depriving other creditors of either satisfaction of or security for their claims. In the case cited the *bona fides* of the debt and the good faith of the preference has been found, and, following the decision in the cited case, there must be an order and judgment of affirmance in this. All the justices concurring.

(46 Kan. 306.)

DEARBORN v. VAUGHAN.

(*Supreme Court of Kansas.* June 6, 1891.)

ATTACHMENT OF PROPERTY OF THIRD PERSON—RELEASE.

1. Where real estate attached in a civil action as the property of the defendant does not belong to him, and he has no title, estate, or interest therein, such property is not subject to the payment of the defendant's debts.

2. Where land has been levied upon under an order of attachment against a defendant, and such defendant has no title, estate, or interest in the land attached, the district court may, upon the motion of the person owning the same, and sufficient facts to establish that fact, discharge the property from the attachment. *Long v. Murphy*, 27 Kan. 375.

(*Syllabus by the Court.*)

Error from district court, Harvey county; L. HOUK, Judge.

*Clarence Spooner*, for plaintiff in error. *Bowman & Bucher*, for defendant in error.

HORTON, C. J. On January 19, 1886, John Funk and James F. Funk, at Raymore, Mo., executed and delivered their promissory note to Lucinda B. Dearborn for \$5,500, payable four years after date, with 8 per cent. interest, payable semi-annually. On the 2d day of June, 1888, Lucinda B. Dearborn brought her action against James F. Funk in the district court of Harvey county, in this state, to recover the amount of the promissory note before the note became due. At the same time, upon her affidavit, she obtained an order of attachment from the district judge. The order of attachment was levied on June 5, 1888, upon section 31, township 22, range 3, in Harvey county. In May, 1887, James F. Funk was the owner of a certain quarter section of land in Cass county, Mo. On the 17th day of May, 1887, he exchanged with James M. Vaughan, the father of his wife, the Cass county land for the land attached. The conveyance for the land attached was executed and delivered to Mrs. Ina B. Funk, the wife of said James F. Funk. On November 15, 1887, Mr. and Mrs. Funk conveyed this land to James M. Vaughan in exchange for other property in Harvey county, in this state. After the land was attached, James M. Vaughan filed his motion to discharge the property from the attachment, upon the ground that James M. Funk had no title, estate, or interest therein, and that he (Vaughan) was the owner of the land, and had been such owner for a long time prior to the levy of the attachment. The motion to discharge the land from the attachment was sustained. The plaintiff ex-

cepted and brings the case here. It clearly appears from the evidence introduced upon the hearing of the motion to discharge the attached property that James F. Funk had no title, estate, or interest therein at the time of the levy. There is nothing in the evidence showing or tending to show any fraud in the conveyance from James M. Vaughan and wife to Mrs. Ina B. Funk on the 17th day of May, 1887, or in the conveyance from Mrs. Ina B. Funk and husband to James M. Vaughan, of the 15th of November, 1887. The deed to Mrs. Ina B. Funk on the 17th of May, 1887, was made to her instead of her husband, because her father donated to her a part of the land. At that time, and also at the date of the deed of the 15th of November, 1887, he had no knowledge or notice of any fraud or wrong intended by James F. Funk. The deed of the 15th of November, 1887, seems to have been made to Vaughan in good faith; and that deed, whatever may be said of the deed of the 17th day of May, 1887, deprived both James F. and Mrs. Ina B. Funk of all interest in the land attached. It was ruled in *Long v. Murphy*, 27 Kan. 375, that "when land has been levied upon under an order of attachment any person claiming to be the owner thereof and interested in discharging the property from the attachment may, although he is not a party to the original action, move the court to discharge the attachment as to the property so claimed by him." Of course if, as appeared upon the hearing of the motion, James F. Funk had no title, estate, or interest in the land attached, the land could not be subjected to his debts. Therefore Lucinda B. Dearborn has no grounds of complaint against the discharge of the attached property. The order and judgment of the district court, being sustained by oral evidence, must be upheld. *Urquhart v. Smith*, 5 Kan. 447; *Wilson v. Lightbody*, 29 Kan. 446. Judgment for an affirmation will be rendered. All the justices concurring.

(46 Kan. 568)

CHICAGO, K. & W. R. CO. v. DRAKE.

(*Supreme Court of Kansas*. June 6, 1891.)

EMINENT DOMAIN—COMPENSATION—EVIDENCE.

In an action to determine the value of certain town lots condemned for the right of way of a railroad, the opinions of witnesses, as to the value of the lots at the time they were condemned, will not be deemed conclusive, but the jury may consider such opinions in connection with all the other testimony in the case, and then, for itself, determine from all the testimony the value of such lots.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Bourbon county; C. O. FRENCH, Judge.

*Geo. R. Peck, A. A. Hurd, and Robt. Dunlap*, for plaintiff in error. *A. A. Harris and Henry E. Harris*, for defendant in error.

GREEN, C. The plaintiff in error condemned three lots in block 8 of Carroll's plaza, in the city of Ft. Scott, in Bour-

bon county, for railroad purposes. All the lots were appropriated, and the commissioners awarded as compensation for them \$240. The defendant in error appealed from the award. The case was tried in the district court, and the jury returned a verdict in favor of the owner of the lots for the sum of \$881.93. A motion for a new trial was overruled, and judgment was entered in accordance with the verdict. The plaintiff in error contends that the jury disregarded the evidence in arriving at their verdict, and that it is contrary to and unsupported by the evidence. Six witnesses testified for the plaintiff, upon the trial in the district court, that the lots were worth \$1,500. Five witnesses, in behalf of the defendant below, fixed the value of the lots at from \$240 to \$375. There was no evidence from any witness fixing the value of the property at the amount returned by the jury. The defendant below requested the court to permit the jury to view the premises, but this request was denied. It is claimed that the verdict is neither in accord with the plaintiff's nor defendant's witnesses, and hence is unsupported by any evidence. It was the particular province of the jury to determine the value of the lots. Their value was purely a question of fact, to be determined from all of the evidence before them. They had the testimony of the witnesses, upon the part of the plaintiff and defendant, giving their opinions as to the value of these lots. There was evidence, too, of the location and condition of the lots, as well as the purposes for which they might be utilized. The testimony as to the value of the property condemned was opinion evidence. The witnesses gave their best judgment as to the value of the lots, and this evidence depended upon a knowledge of the value of real estate at the time the property was taken. Now, an opinion as to the value of a piece of property is not, strictly speaking, a fact, but is received in evidence upon the same principle as that on which the opinions of experts are admitted. In a well-considered case, decided by the supreme court of the United States, Mr. Justice FIELD observed: "The evidence of experts as to the value of professional services does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed, and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry." *Head v. Hargrave*, 105 U.S. 45. The same court quotes approvingly the case of *Anthony v. Stinson*, 4 Kan. 211, where this court said that the jury were not to be instructed as to

what part of the testimony before them should control their verdict; that, in order to control it, the testimony of experts should be of such a character as to outweigh, by its intrinsic force and probability, all conflicting testimony; and that they could not be required to accept, as a matter of law, the conclusions of the witnesses instead of their own. In a recent case this court has said that a court or jury trying the question of the value of legal services is not bound to accept as conclusive the opinions given by attorneys respecting the value of certain services; that such opinions are only to be considered in connection with other testimony in the case, in the light of which and of its own general knowledge the court or jury should, for itself, determine the value. *Bentley v. Brown*, 37 Kan. 14, 14 Pac. Rep. 435. In *Patterson v. Boston*, 20 Pick. 166, the question was as to the damages to be awarded to the plaintiff for his property taken to widen a street in Boston. The trial court instructed the jury that, in estimating the amount of the damages, if any of them knew, of his own knowledge, any material fact that bore upon the issue, he ought to disclose it, and be sworn, and communicate it to his fellows in open court, in the presence of the parties; but that, in making up their verdict, they might rightfully be influenced by their general knowledge on such subject, as well as by the testimony and opinions of witnesses. The case being taken to the supreme court of the state, it was held that the directions were not open to exception. Said Chief Justice Shaw, speaking for the court: "Juries would be very little fit for the high and responsible office to which they are called, especially to make an appraisal, if they might not avail themselves of those powers of their minds when they are most necessary to the performance of their duties." In *Murdock v. Sumner*, 22 Pick. 158, the same court, speaking through the same distinguished judge, said that "the jury very properly exercise their own judgment, and apply their own knowledge and experience, in regard to the general subject of inquiry." In that case a witness had testified as to the quality, condition, and cost of certain goods, and giving his opinion as to their worth; and the court said that "the jury were not bound by the opinion of the witness. They might have taken the facts testified by him as to the cost, quality, and condition of the goods, and come to a different opinion as to their value." *Lawson*, Exp. Ev. 68. The jury is to decide what weight, if any, shall be given to the opinions or evidence of an expert, or to the opinion of a non-professional witness. They are not bound by such evidence, and may exercise their own experience in deciding the question touching which the opinions were given. 7 Amer. & Eng. Enc. Law, 516; *Railroad Co. v. Thul*, 32 Kan. 255, 4 Pac. Rep. 852; *Davis v. State*, 35 Ind. 496; *Rose v. Spies*, 44 Mo. 20. We recommend an affirmance of the judgment.

PER CURIAM It is so ordered; all the justices concurring.

OTT *et al.* v. DOAK *et al.*

(Supreme Court of Kansas. June 6, 1891.)

FORECLOSURE OF CHATTEL MORTGAGE.

In an action to foreclose a chattel mortgage, in which many other lienholders are made parties and file answers in the nature of cross-petitions, and distinct issues are made between the plaintiffs and other mortgagees, and between other mortgagees as to the priority of the liens of their respective mortgages, it is error for the trial court to sustain a demurrer to the evidence of the plaintiffs, on behalf of certain mortgagees, and dismiss the action as to them, and deprive other parties from having issues between them and those who filed the demurrer heard and determined.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Kearney county; A. J. ABBOTT, Judge.

*Culhoun & Garwood* and *D. H. Ettien*, for plaintiffs in error. *Morgan, Lawrence & Mason*, for defendants in error.

SIMPSON, C. Ott & Tewksbury commenced this action against J. H. Allen, A. P. Allen, D. P. Doak, A. T. Irvin, the Kendall Exchange Bank, Kirtland & Flash, the Bank of Hartland, the Hamilton Land Company, G. W. Williams, W. C. Hasler, as assignee of G. W. Williams, Aaron S. Drake, R. B. Clark, M. F. Cooley, and James L. Lombard. Their petition alleged that on the 28th day of July, 1887, the Allens executed their note to them for \$2,000, payable at the Central National Bank of Topeka on November 1, 1887. That on the 1st of August, 1887, the Allens executed four promissory notes to the Topeka Investment & Loan Company for the following sums: One for \$148, one for \$200, one for \$220, and one for \$240, payable at various times. That the payment of these notes were guarantied by the said Ott & Tewksbury, and that they were compelled to pay them when the same became due and payable. That to secure the payment of the first sum mentioned the Allens executed a chattel mortgage to Ott & Tewksbury on certain ranch cattle described therein. This chattel mortgage was filed for record in Hamilton county on the 30th day of July, 1887, at 9 o'clock A. M. It is alleged that the present county of Kearney was then a part of Hamilton county, and that the mortgaged property was situated in what is now Kearney county. It is alleged that the defendants herein named are claiming liens on the mortgaged property adverse to the claims of the plaintiffs Ott & Tewksbury, to the aggregate amount of \$22,200, but that all of said liens are subsequent and inferior to that of Ott & Tewksbury. That the Allen brothers are insolvent, and are now non-residents of the state. They aver that the defendants Doak and Irvin pretend to hold mortgages on 380 head of cattle, 400 tons of hay, and a large amount of other property owned by the Allens, and were attempting to sell and dispose of said property at one-fourth of its actual value, and that a large amount of said property was embraced in their mortgage. They pray judgment against the Allens. Ask that their chattel mortgage be foreclosed; that they may be adjudged to have the first

men; that the defendants be required to plead and set forth their respective liens to or interest in said mortgaged property, and for other relief. The Hamilton Land Company filed its answer by way of cross-petition, claiming that John H. Allen executed his note to said company on the 1st day of November, 1886, for \$7,482.63, with interest at 8 per cent. per annum; and that John H. Allen execute a chattel mortgage on 315 head of cattle to secure the same. Said chattel mortgage was filed for record in Hamilton county on the 6th day of January, A. D. 1887, at 6 o'clock P. M., and was renewed on the 12th day of November, 1887. And for a second cause of action the land company avers that on the 2d day of May, 1887, the Allens executed a note to James L. Lombard for \$3,000, with interest at 10 per cent. That on the 15th day of April, 1888, this note was sold and transferred to the Hamilton Land Company. Same as to a note for \$1,350. Same as to a note for \$273.30. That all of said notes were secured by a chattel mortgage executed by the Allens on all this stock of cattle, estimated at 1,200 head, located on their ranch in Kearney county, Kan. That said chattel mortgage was filed for record on the 14th day of November, 1887, at 9 o'clock A. M., in Hamilton county. D. P. Doak filed his answer, averring that on the 2d day of September, 1887, the Allens executed and delivered to him a chattel mortgage on 6 head of work mules, 80 head of ranch cattle, branded "I. D.," 35 head of 3 and 4 year old steers, branded "H. L.," all being at the time on the Allen ranch, six miles from Kendall; that said chattel mortgage was filed for record in Hamilton county on the 8th day of May, 1888; that default was made on said chattel mortgage, and he took possession of the property therein described, and sold the same at public auction on the 20th day of April, 1888, and bought them in to satisfy his debt, and is now the sole owner of the same. A. T. Irvin files an answer, claiming that on the 7th day of February, 1887, the Allens executed and delivered to him a certain chattel mortgage, and that on the 14th day of April, 1887, the Allens executed and delivered to him a second chattel mortgage on certain property described in said mortgages. That the conditions of these mortgages were not complied with, and he took possession of the mortgaged property, and sold the same at public auction on the 20th day of April, 1888, to satisfy his debt. Doak and Irvin filed a joint answer to the cross-petition of the Hamilton Land Company, in which it is alleged that on the 24th day of December, 1887, the Allens executed and delivered to them two certain chattel mortgages upon property described therein; that said mortgages were recorded in Hamilton county on the 6th day of January, 1888; that the conditions of said mortgages were not complied with, and that they took possession of the mortgaged property and sold the same at public auction on the 20th day of April, 1888, to satisfy their debt. Some other of the defendants filed answers, and Ott & Tewksbury and the Hamilton Land Company filed replies to the answers of D.

P. Doak, A. T. Irvin, and Doak and Irvin. In this state of the pleadings this cause came on for trial in the district court of Kearney county at the October term, 1888. Ott & Tewksbury, to maintain the issues on their part, introduced S. S. Ott as a witness, who testified as to his partnership with Tewksbury, and as to the amount of the indebtedness of the Allens to his firm, how it accrued, and how it was secured. The note of the Allens to Ott & Tewksbury and the chattel mortgage securing it, were then read. Also the notes of the Allens to the Topeka Investment & Loan Company, and their assignment to Ott & Tewksbury, were read in evidence. Then J. C. Lester, the manager of the Hamilton Land Company, testified as to the indebtedness of the Allens to the company and to Lombard, that was transferred to the company. The chattel mortgage given by the Allens to Lombard was read in evidence. The chattel mortgage given by J. H. Allen to Lombard was read in evidence. A. E. Guy then testified that, as receiver in this case, he took possession of all of the property of the Allens that he could find in the county, but states two different dates at which this was done,—on the 20th day of April, and the 14th day of May, 1888. A part of the property he took possession of was found in the possession and under the control of D. P. Doak and A. T. Irvin, amounting to 285 head. Lester was again called to the witness stand, and identified certain cattle that he saw in Doak's possession at the Bear Creek ranch on the 18th day of April, 1888, as being covered by the mortgage to the Hamilton Land Company, and the mortgage to Ott & Tewksbury, but stated that there were other cattle held by other parties on the ranch. Ott & Tewksbury having rested, the defendants, Irvin and Doak, the Kendall Exchange Bank, and Thomas Doak, filed a demurrer to their evidence for the reason that it fails to show facts sufficient to constitute a cause of action. The court sustained this demurrer, and entered the following judgment: "Wherefore it is by the court considered, ordered, and adjudged that the defendants, Thomas Doak, the Kendall Exchange Bank, D. P. Doak, and A. T. Irvin, be discharged without day, and that this cause be dismissed as to them, such dismissal being a final judgment in such cause, and the said defendants recover their costs, taxed at ——— dollars." The ruling of the trial court in sustaining this demurrer and dismissing D. P. Doak, A. T. Irvin, the Kendall Exchange Bank, and Thomas Doak are assigned here as errors. Ott & Tewksbury, the Hamilton Land Company, and M. F. Cooley are the parties complaining here. There is a strange admixture of interests represented by the plaintiffs in error, and in some respects the interests of the several plaintiffs in error are adverse to each other; but, as there has been no objection made in this court, we will not complain. The record gives no reason for the ruling of the trial court. There seems to be a belief on the part of the counsel for the defendants in error that the reason was that, there being no legal record of

the various chattel mortgages, and no proof that Doak, Irvin, the Kendall Exchange Bank, or Thomas Doak had notice or knowledge of the other mortgages, and the evidence of the plaintiffs showing that before the time of the commencement of the action Doak and Irvin were in possession, the result legally followed that they must prevail. In other words, it is contended that in order to make a *prima facie* case for themselves, Ott & Tewksbury must show that their mortgage was recorded according to law. The due execution of all the notes and mortgages is admitted by the pleadings. The mortgage of Ott & Tewksbury was recorded in Hamilton county on the 30th of July, 1887. The Hamilton Land Company's mortgage was recorded in Hamilton county on the 6th day of January, 1887, and was renewed on the 12th day of November, 1887. The Lombard mortgage, transferred to the Hamilton Land Company, was recorded in Hamilton county on the 14th day of November, 1887, at 9 o'clock A. M. The mortgage of A. T. Irvin was recorded in Hamilton county on the 7th day of February, 1887, and renewed on the 4th day of January, 1888. The Doak and Irvin mortgages were filed for record in Hamilton county, January 6, 1888. The M. F. Cooley mortgage was recorded in Hamilton county on the 11th day of July, 1887, and renewed March 24, 1888. If the date of the record is to govern, the Hamilton Land Company's mortgage of January 6, 1887, is first, and Irvin is second, and Ott & Tewksbury third; all this upon the theory that there were proper renewals of the various chattel mortgages before the commencement of this action. If the recording of these various mortgages in Hamilton county were not in accordance with law, the party who first obtained possession of the mortgaged property without knowledge of the other incumbrances would probably have a great advantage. Kearney county was created by an act of the legislature that went into effect on the 23d day of March, 1887, a part of it being taken from Hamilton county, which was created by an act of the legislature years before, but Hamilton county was not organized until 1886. When Kearney county was organized the record does not disclose. Neither are we certain from the recitations of this record where all this chattel property was located at the time these mortgages were executed and recorded. Hence we are not in possession of all the facts necessary to pass intelligently upon these various questions. We do think that there were issues made by the pleadings as between the Hamilton Land Company and M. F. Cooley and these defendants, they had a right to have determined; that Ott & Tewksbury had the right to have all the liens on this property adjusted, and this could not be done without these defendants in error were still parties to the record. It would seem from a mere inspection of the record that these various chattel mortgages to the contending parties all covered, more or less, the same property, but the identification was not made clear by evidence on the trial, and yet there was some evidence

of it. We are not called upon to make that identification by a comparison of the descriptions of the chattels from the face of the mortgages. For these and various other reasons we conclude that the ruling on the demurrer and the judgment of dismissal are erroneous, and that justice can better be subserved by a new trial, when all the facts on all sides can be presented by the parties to this action, and all their rights intelligently determined. We recommend a reversal of the judgment of the district court of Kearney county, and that a new trial be granted.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 504)

COLUMBIA LAND & CATTLE CO. V. DALY.

SAME V. MURKINS.

(Supreme Court of Kansas. June 6, 1891.)

REVERSAL ON APPEAL — AUTHORITY OF SPECIAL PARTNER.

1. Where the judgment rendered by a district court is not supported by the pleadings filed in the case, and is contrary to the statutes of the state, the judgment, upon proceedings in error, will be reversed, and no motion for a new trial or exception to the judgment is necessary to bring the case to the supreme court for review.

2. A special partner, under the provisions of paragraph 3992, Gen. St. 1889, has no authority to transact any business on account of the partnership, nor to make the partnership liable for his contracts as such special partner only.

(Syllabus by the Court.)

Error from district court, Ellis county; S. J. OSBORN, Judge.

J. G. Waters, for plaintiff in error.  
Reeder & Reeder, Rohrt, Dunlap, and Curtis & Safford, for defendants in error.

HORTON, C. J. The same questions are presented in both cases, and therefore we consider them together. The Columbia Land & Cattle Company is a corporation organized under the laws of Colorado. In the first case Thomas Daly brought his action against that corporation to recover the value of certain goods, wares, and merchandise alleged to have been purchased by D. B. Powers, as a "special partner" of the corporation, and also for the amount of certain sight drafts made by D. B. Powers upon H. S. Halley, the general manager of the corporation. The total amount of these claims is \$529.70. In the second case Joseph Murkins brought his action against the corporation and D. B. Powers, the "special partner," to recover \$224 50 for use of a pasture. The corporation in both cases filed verified answers containing general denials, and also denials that D. B. Powers was a "special partner" or any other partner of the corporation. There was no further appearance on the part of the corporation, and judgment was rendered against it for the several amounts claimed. The case is brought here by the corporation upon the ground that, under the pleadings, the plaintiffs below were not entitled to recover. Both of the petitions, as amended, allege that D. B. Powers is a "special partner" of the corporation, and as such partner made the corporation liable for

the amount sued for. A pleading is always construed most strongly against the pleader, and the allegation in the amended petitions concerning D. B. Powers, as a "special partner," under the provisions of paragraph 3992, Gen. St. 1889, renders the petitions fatally defective: "A special partner may, from time to time, examine into the state and progress of the partnership concerns, and may advise as to their management; but he shall not transact any business on account of the partnership, nor be employed for that purpose as agent, attorney, or otherwise. If he shall interfere, contrary to these provisions, he shall be deemed a general partner." Gen. St. 1888, c. 74, § 16. The corporation could not be made liable upon the contract or purchase of D. B. Powers as a "special partner." He had no authority, under the allegations of the amended petitions and the statutes, to bind the corporation or partnership; therefore, upon the amended petitions, the plaintiffs below were not entitled to recover. Again, the amended petitions alleged a special partnership with Powers, under a written contract set up in the petitions. The answer alleged under oath that there was no partnership of any kind, and that the plaintiffs below well knew that there was none when they dealt with Powers, and that he was acting solely upon his own responsibility. There were no replies filed, and the corporation did not waive anything by appearing at the trial. In support of the judgments, it is said that no motion for a new trial was made, and no exceptions taken. Therefore it is contended that this court has no errors before it to review or reverse. This is not correct. Where a judgment is not supported by the pleadings, the error is manifest in the record, and can be reversed without any motion for a new trial, and without exceptions being taken to the erroneous judgment. It was said in *Brown v. Tuppeny*, 24 Kan. 29, that, "where the error of the court is apparent in the record, no exception is necessary to bring the case to the supreme court for review." See, also, *Koehler v. Ball*, 2 Kan. 160; *Dexter v. Cochran*, 17 Kan. 447. The judgments will be reversed, and the causes remanded. All the justices concurring.

(46 Kan. 520)

# CITY OF SYRACUSE v. REED *et al.*

(Supreme Court of Kansas. June 6, 1891.)

## SALE OF BONDS FOR CITY—COMPENSATION—DEMURRER TO EVIDENCE.

1. Where funds derived from the sale of bonds of a city of the third class are received either by the city treasurer or other person acting in behalf of the city, the entire amount, should, on demand, be paid into the city treasury. Such persons cannot fix their own compensation for services in respect to such funds, or withhold a part of the proceeds as compensation for their services; but any such claim must be presented to the city council in writing, and allowed in the manner prescribed by statute.

2. A demurrer to the evidence admits not only the truth of the facts directly proven by the plaintiff, but also all that may fairly be inferred from those facts; and in the present case the plaintiff's testimony is deemed sufficient to show

a liability against the defendants, and to resist their demurrer.

(Syllabus by the Court.)

Error from district court, Hamilton county; A. J. ABBOTT, Judge.

A. A. Howard and Geo. Getty, for plaintiff in error. S. M. Tucker, for defendants in error.

JOHNSTON, J. The city of Syracuse brought an action against W. F. Reed & Co. to recover \$218.79. It was alleged that the defendants received from N. W. Harris & Co., of Chicago, \$8,360, which was the proceeds of certain bonds of the city of Syracuse that had been sold in Chicago, and that the defendants had only paid over the sum of \$8,141.02, and had refused to pay to the city the balance of the amount received, although payment thereof had been demanded. In the answer it was admitted that Syracuse was a city of the third class, and that the defendants were a copartnership; but the further allegations of the petition were denied. A jury was waived, and the cause was submitted to the court for trial. After testimony had been introduced by the city, the court sustained defendants' demurrer to the evidence, and gave judgment in their favor. The plaintiff complains of this ruling, and the question before us is whether the testimony offered, although it may be weak and inconclusive, tends to prove all material facts in issue. A demurrer to the evidence admits not only the truth of the facts directly proved by the plaintiff, but also all that may be fairly inferred from them; and unless the plaintiff has utterly failed to prove its case, or some material fact in issue in the case, the demurrer cannot be rightly sustained. *Railroad Co. v. Foster*, 39 Kan. 329, 18 Pac. Rep. 285, and cases cited. Governed by these rules, which are well settled, we think the demurrer in the present case should have been overruled. Looking at the testimony in the light most favorable to the plaintiff, it appears that W. F. Reed was city treasurer of Syracuse, and while he was the incumbent of that office the bonds mentioned were executed and placed in his custody as city treasurer. Guy & Son negotiated the sale of the bonds in Chicago, where they were forwarded by the city treasurer; but before the sale was effected Reed was superseded, and Frank Bentley was appointed as his successor. About a week after Reed surrendered the office to Bentley, the bonds were sold, and the proceeds placed in a Chicago bank to the credit of Reed, who had transmitted the bonds there. He paid Guy & Son a commission for the negotiation of the bonds, and for compensation, and to reimburse himself for the commission paid to Guy & Son, he retained 3 per cent. of the proceeds, paying the balance to the city treasurer. The amount so retained was \$218.79, and this sum the city seeks to recover. While the salary or compensation of Reed as city treasurer is not shown, it does appear that his claim for salary or compensation was never acted upon nor allowed by the city council. The proceeds of the bonds belonged to the city, and neither Reed nor W. F. Reed & Co. were authorized to retain

any part of the same. It appears that W. F. Reed & Co. are bankers, and it is stated that they received the money as bankers; but so far as the record shows neither Reed nor his firm were employed by the city to negotiate a sale of the bonds, or to employ others to make such sale. This work was done by Guy & Son, who claim that they represented the city in the transaction. When the funds derived from the sale of the bonds were received by the bank, W. F. Reed & Co. should have turned them over to the city, and presented any claim for commission or compensation to the city council to which they might be entitled. It may be that some portion of the salary of W. F. Reed remains unpaid, or it may be that some compensation is due to the firm for services in regard to the negotiation of the bonds or the receipt and payment of the proceeds of the sale after W. F. Reed ceased to be treasurer; but if Reed or his firm has any such claim against the city, it must be presented in writing, and allowed in the manner prescribed by the statute. Gen. St. 1889, pars. 967, 971. They cannot fix their own compensation, and appropriate the city funds in payment of the same, simply because funds of the city happen to be in their hands. If anything is due to them, it must be obtained in the manner pointed out by the statute. The fact that Reed had charged himself as treasurer upon the books of the city with the amount derived from the sale of the bonds will not affect his right to compensation, nor the correctness of the ruling of the court upon the demurrer. The claim for compensation must, in any event, be presented to the city council, and the mayor and council alone can appropriate the funds of the city to the payment of such a claim. Under the rule which governs us in considering a demurrer to the evidence, we think a *prima facie* showing of liability on the part of the defendants had been made, and that the demurrer to the evidence should have been overruled. The judgment of the district court will therefore be reversed, and the cause remanded for another trial. All the justices concurring.

(46 Kan. 536)

**FARMERS' STATE BANK OF SOLOMON CITY  
v. BLEVINS.**

(Supreme Court of Kansas. June 6, 1891.)

**PLEDGE OF NOTE—RIGHTS OF PLEDGEE.**

Where negotiable promissory notes, pledged to an innocent holder to secure a pre-existing debt due from the payee to the pledgee, are subject to equitable defenses as between the maker and payee, and are of a greater amount than the pre-existing debt, the recovery of the pledgee against the maker is limited to the amount of the pre-existing debt.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Dickinson county; M. B. NICHOLSON, Judge.

Garver and Bond, for plaintiff in error. Stambaugh, Hurd & Dewey, for defendant in error.

SIMPSON, C. The Farmers' State Bank, as plaintiff in the court below, brought this action against defendant in error on

three notes, made June 13, 1887, by defendant, to one J. H. Brady, and by Brady indorsed and transferred to plaintiff before maturity, as collateral security for certain indebtedness then owing from Brady to said bank. The notes sued on were for the aggregate sum of \$5,000, with interest at the rate of 8 per cent. from their date. No part of said notes had been paid. They secured a debt of \$4,367.63. On the trial the defendant pleaded, and attempted to prove, a failure of consideration for said notes; but the court, having found that plaintiff was a *bona fide* holder for value before maturity, and without notice of any defenses thereto, refused to hear the evidence offered by defendant as to the claimed invalidity of said notes, and rendered judgment thereon in favor of plaintiff for \$4,367.63, the amount of the indebtedness from Brady to plaintiff which said notes were security for. The plaintiff claimed judgment for the full amount of the collateral notes, which claim was denied by the court, and exceptions to the ruling taken by plaintiff. The only question for determination by this court is whether, in an action against the maker of notes which have been transferred before maturity to an innocent and *bona fide* holder as collateral security for an indebtedness existing between the payee of such notes and the indorsee, the endorsee and holder is entitled to recover against the maker the full amount of such collateral notes, where such amount exceeds the indebtedness which they were transferred to secure, without regard to any defenses that may exist between the original parties to such notes, or whether, in such case, the right of the plaintiff to recover is limited to the amount of the principal debt. The plaintiff in error in this case has no interest in the question, except as the decision of the court below might involve it in a controversy with Brady, should he call upon it to account for the difference between the amount of the collateral notes and the debt he was owing to the bank. No trial or determination was had as to the merits of the defense made against the notes, and it does not appear at this time whether, as between Brady and Blevins, the full amount thereof could be collected. It is said that Brady may demand of the bank to account to him for the full amount of these notes, and that it cannot defend against such claim by saying that the surplus over its debt was not collected because Blevins had a defense to them as against Brady. If the bank is limited in its right to recover to the amount of its claim against Brady, the right to the balance of the notes being undetermined, can Blevins be subjected to another action by Brady to recover such balance? Brady, or his assignee, must have his day in court before he can be deprived of any portion of these notes; but, if the bank can only recover to the extent of its interest, and Brady is given the right to sue for the balance of the notes, do we not subject Blevins to two actions for the same cause? On the other hand, it does not seem just that Blevins shall be deprived of his defenses, except to the extent of the actual interest of the bank, simply because the



bank took the notes before maturity in good faith, and without notice of such defenses.

1. The question involved in this case is not presented in a fair attitude by the plaintiff in error. At the commencement of this action to recover on the notes as pledged, the bank ought to have made Brady a party. He was the payee of the notes sued upon. He had transferred them by indorsement to the bank, who claims to be an innocent holder for value. Even after Blevins filed his answer setting up his various defenses as against Brady, and the knowledge of the bank of these equitable defenses, the bank, for protection against Brady, ought to have made Brady a party, as it now insists upon a recovery for the full amount of the notes; and yet it is shown that Brady's pre-existing indebtedness to the bank is less than the face of the notes and interest. As Brady was not a party then, and is not now, he will not be bound by the decision of this court on the question presented. As to the controversy between the bank and Blevins respecting the amount of the recovery, we think the ruling of the trial court was right. Where negotiable promissory notes, pledged as collateral security, are subject to equitable defenses, as between the maker and payee, and the collateral securities are of greater amount than the pre-existing debt of the payee to the pledgee, the recovery of the pledgee against the maker is limited to the amount of the pre-existing debt. This is the text of section 92, p. 123, *Coleb. Coll. Sec.*, and it is supported by many cited cases, notably that of *Bank v. Hemingray*, 34 Ohio St. 381. It is said in that case: "If the pledgee sues the maker, the latter may attempt a complete defense, without, in case of failure, thereby incurring a liability to pay to the pledgee anything in addition to the amount of the debt secured by the notes." In this case we note the equitable defenses made by the pleadings. It is true that, under the rulings of the trial court, the defendant in error was not allowed to show them, but he should have been permitted to have done so for the purpose of limiting the recovery of the bank to the amount of the pre-existing indebtedness of Brady to the bank. 34 Ohio St. 381. The trial court finds that amount, however, and also finds that there is a controversy between Brady and Blevins respecting said notes, and we regard these findings as sufficient to make the rule above stated applicable to the facts presented in this record. This same rule applies in cases of fraud by the payee against the maker, or where there is a failure of consideration, or where the paper indicates the amount it can be pledged for, or where the paper is subject to equitable set-offs, or in cases of accommodation paper, or in cases of misappropriation between makers, payees, or indorsers, and possibly in other cases. The trial court finds that the bank is an innocent holder for value of the notes sued upon, and there is no doubt but that the bank taking these notes under these circumstances is protected against equities. 1 Daniel, Neg. Inst. § 832, and the many authorities cited in the foot-note.

We apprehend that the degree of protection afforded the bank by reason of being a *bona fide* holder for value is measured by the extent of the pre-existing obligation. It is said in this same section: "When it appears that the bill or note was acquired by the holder as collateral security for a debt, he is entitled to recover upon it; but he is still limited to the amount of the debt, if there be a valid defense against his transferrer." This text is supported by the cases of *Duncan v. Gilbert*, 29 N. J. Law, 527; *Fisher v. Fisher*, 96 Mass. 303; *Stoddard v. Kimball*, 6 Cush. 469; *Bank v. Chapin*, 8 Metc. (Mass.) 40. We are not aware that this question has ever been passed upon by this court, but we think that the doctrine that the pledgee cannot recover more than the amount of the debt of the pledgeor is in accord with natural justice, and, while we hesitate to state that as a rule, yet we do think that any other rule, or any exceptions to or limitation of this doctrine, ought not to be indulged in without great caution. It is true that cases can be found that hold that the pledgee can recover the full amount expressed by the face of the collateral paper, without reference to the amount of the debt secured thereby, where none of the limitations heretofore referred to exist; but, without a special examination of them, we expect that it will be found that in such cases the payee and indorser are parties as well as the holder and maker, or else that none of the questions that affect the *bona fides* of the pledgee, or the equities between maker and payee, were raised by the pleadings. Be that as it may, upon the question now before us, and under the circumstances surrounding it, we recommend that the judgment of the district court of Dickinson county be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 541)

STUMBAUGH *et al.* v. ANDERSON *et al.*

(Supreme Court of Kansas. June 6, 1891.)

FRAUDULENT CONVEYANCES—WANT OF CONSIDERATION.

A conveyance of real estate by a father to a minor son, for the son's services during his minority, is a voluntary conveyance, without legal consideration, and therefore void as to the creditors of the parent if made when the latter had no other property subject to execution.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

*Stumbaugh, Arnold & Hilton*, for plaintiffs in error. *M. E. Mathews*, for defendants in error.

GREEN, C. This action was brought by the plaintiffs in error to set aside a deed made by Beverly Anderson and wife for two lots on Clay street, in the city of Topeka, to their two sons, William Mack and Jones Anderson, on the 20th day of January, 1886. On the 29th day of December, 1884, the plaintiffs recovered a judgment against Beverly Anderson before a justice of the peace in Shawnee county, and

caused an abstract of such judgment to be filed in the office of the clerk of the district court on the 30th day of July, 1886. An execution was issued thereon, which was returned, "No property found." The plaintiffs then commenced this suit, and a trial was had and special findings of fact returned by the jury, and judgment was rendered for the defendants, and the plaintiffs ask a review of the record by which such judgment was obtained. It seems from the evidence upon the trial that Beverly Anderson had agreed to give his two sons \$150 if they would go ahead and do the best they could in working on the homestead farm owned by the father; that the sons, one of whom was 22 and the other 19, resided with their parents, except at such times as they worked out for themselves; that, instead of paying them the \$150, the father deeded to them the two lots in question, and the jury found this consideration in support of the deed. Was this consideration sufficient to uphold the deed as to Jones Anderson? The evidence clearly established the fact of his minority when the promise was made by the father, and there was no evidence that he had reached his majority when the deed was executed. The jury found that when the deed was signed by Beverly Anderson and wife he was indebted to his two sons in the sum of \$150. Now, this indebtedness, so far as it related to the minor son, was created by the promise of the father to pay the son for doing that which the law says it was his duty to do. The father had not relinquished the right he had to the son's services until he reached his majority. He was entitled to the very labor the son was to perform, without compensation; and it is difficult to see how any debt or obligation could be created which would support a consideration for the deed, so far as it related to this minor, as against existing and *bona fide* creditors of the father. The obligation rested upon the father to support the son who, in turn, owed the father his services until he became of age. The conveyance was voluntary so far as it related to the minor son, and was without consideration. A promise to do what one is already bound to do is not a consideration. 3 Amer. & Eng. Enc. Law, p. 834, and authorities there cited. While a voluntary conveyance of land from a parent to his infant would be valid, where the claims of creditors do not intervene, but, if creditors are prejudiced by such conveyance, they would have an equitable right to set it aside, or to avoid it to the extent at least of the debts due them. Field, Infants, § 51; Reeve, Dom. Rel. 422; Bump, Fraud. Conv. 232; Swartz v. Hazlett, 8 Cal. 118. In the latter case, the court said: "Where a parent executes to his infant son a conveyance of property in consideration of services performed, it must be considered as a voluntary conveyance without legal consideration, as he is not legally bound to pay for his son's services. Such a deed is therefore void against the creditors of the parent if made when his remaining property is insufficient to pay his debts." We think there was no evidence to support a consideration in the deed for the lots in

question from Beverly Anderson and wife to their minor son. We do not deem it necessary at this time to pass upon the sufficiency of the consideration of the conveyance as to William Mack Anderson. We recommend a reversal of the judgment, and that a new trial be granted.

**PER CURIAM.** It is so ordered; all the justices concurring.

(46 Kan. 666)

**COLUMBUS WATER-WORKS CO. v. CITY OF COLUMBUS et al.**

(Supreme Court of Kansas. June 6, 1891.)

**MANDAMUS—PASSAGE OF ORDINANCE—CORRECTION OF MINUTES—LEVY OF TAX.**

In an action of *mandamus* brought by a water-works company against a city of the second class and its officers and others to compel the levy and collection of a tax to pay rent for hydrants, contracted for by the city under an ordinance, it appears that the minutes for the passage of the ordinance, as entered upon the journal, do not show that the ordinance was regularly passed, but the evidence outside of the journal shows that the ordinance was in fact regularly passed and approved and attested and published, and it appears to be valid upon its face, and was accepted and acted upon as valid by all parties, and the city at two different times passed two other ordinances relating to the water-works, and purporting to be amendments to the aforesaid original ordinance, and under these ordinances the water-works were constructed to the satisfaction of the city, and the city afterwards accepted the hydrants and their use, and levied taxes for three years to pay for their use, and paid the rent therefor for  $2\frac{1}{4}$  years, and then refused to further levy taxes or to pay rent for the use of the hydrants, *held*, that a writ of *mandamus* may be allowed and issued requiring that the minutes of the passage of the said original ordinance shall be so corrected by an entry *nunc pro tunc* as to make them show that the ordinance was regularly passed, and that the mayor and council shall then levy taxes, and perform all the other duties which may be incumbent upon them under the provisions of the ordinance as a valid ordinance.

(Syllabus by the Court.)

Application for *mandamus*.

John N. Ritter and Rossington, Smith & Dalls, for plaintiff in error. J. D. McCleverty, for defendants in error.

VALENTINE, J. This is an action of *mandamus*, brought originally in this court by the Columbus Water-Works Company against the city of Columbus and its officers and others, to compel the defendants to levy and collect certain taxes, especially a tax sufficient to raise the sum of \$3,000, with which to pay for the use of 50 hydrants for the year 1891. The facts supposed to be involved in the decision of this controversy have been largely agreed upon by the parties, and evidence has also been introduced. It is admitted by the parties that from a time prior to March 23, 1887, up to the present time, the city of Columbus has been a city of the second class; and it is claimed by the plaintiff that on that day an ordinance was duly passed by the city council and approved by the mayor, and afterwards published, granting to R. A. Long and L. L. Doubleday, and their heirs and assigns, the exclusive right and privilege to construct a

<sup>1</sup>Petition for rehearing pending.

system of water-works in such city, and to maintain the same for a period of 99 years, and binding the city to pay for the use of at least 50 hydrants the sum of \$60 a year for each hydrant for the period of 21 years; that the provisions of the ordinance were duly accepted by Long and Doubleday, and that afterwards they constructed the water-works in accordance with the terms and provisions of the ordinance, and that the water-works and hydrants were approved and accepted by the city. Afterwards, and on February 9, 1888, Long and Doubleday sold, assigned, and conveyed all their rights and interests in and to the water-works to the present plaintiff, the Columbus Water-Works Company. Afterwards the city levied taxes to pay for the rent of the hydrants for the years 1888, 1889, and 1890, and paid the rent for such hydrants up to the middle of the year 1890, the payments being made semi-annually, when the city refused to levy any further taxes, or to pay any further rent; and this action is brought principally to require the city to levy a tax for the payment of such rent for the year 1891.

The question as to whether an action of *mandamus* is the proper remedy or not is waived by the defendants, so far as to enable this court to determine the question whether the city is liable or not, under or in accordance with the terms and provisions of the aforesaid city ordinance. They claim that the ordinance is wholly void for the reasons hereafter stated. It is claimed on the part of the city that a city of the second class has no power, by ordinance or in any other manner, to enter into a contract such as was attempted to be made between the city of Columbus and Long and Doubleday in the present case; and this for the following reasons: *First*. It is claimed that the contract grants exclusive rights and privileges, and this for such a great length of time that they amount in effect to a perpetuity. *Second*. It is claimed that no such contract as was attempted to be made in the present case, nor any contract like it, can be made, except under or by virtue of a valid city ordinance, properly passed and published. *Third*. It is claimed that the ordinance under which the plaintiff claims in the present case is not a valid ordinance, for the reason that the records of the city do not show that, on the final passage of the ordinance, the yeas and nays were taken and entered upon the journal by the city clerk, but, on the contrary, show otherwise; and that in fact the yeas and nays were not taken, nor was there any vote taken, upon the final passage of the ordinance. *Fourth*. It is claimed that the journal of the city council's proceedings is the only evidence that can be considered in ascertaining the facts with regard to whether a city ordinance was passed or not, and the manner in which it was passed. *Fifth*. It is also claimed that nothing could afterwards be done by the city or Long and Doubleday, or between the parties, that would make the aforesaid ordinance valid, or that would make the contract entered into under it valid, or that would give to either any force or effect

whatever. The plaintiff claims the reverse of all this. It claims that a valid contract such as was made in the present case between the city and Long and Doubleday, requiring, among other things, the city to pay rent for hydrants, could be made by the city, either by means of an ordinance or otherwise; that the ordinance in the present case was regularly passed, approved, and published; that the yeas and nays on its final passage were in fact taken; that this may be shown, and has been shown, by the evidence introduced in this case, and the facts agreed upon outside of the journal; that this evidence and the agreed facts do not contradict the journal, but simply supply an omission; but whether they do contradict the journal or not, or whether the original ordinance and the original contract were valid or not in their inception, is now immaterial, for the reason that the parties have since so acted as to ratify and confirm the contract, and make it valid and binding upon both parties.

The facts with respect to the passage of the original ordinance, which was numbered 70, and the facts claimed by the plaintiff to show a ratification and affirmation of the ordinance and of the contract made under it, and the facts claimed to create an estoppel against the city, are substantially as follows: On March 23, 1887, the council of the city of Columbus were regularly convened in special session, the mayor, E. A. Crewson, presiding. The aforesaid ordinance was presented to them for their consideration. It contained sixteen sections. Each of these sections was considered separately by the council, and a vote taken thereon by yeas and nays, and upon each section there were five yeas and one nay; Councilmen Lea, Malone, Morris, Spencer, and Bowles voting yea, and Councilman Vincent voting nay. It does not appear that there were any other councilmen of the city of Columbus at that time, and probably there were not. As to whether any vote was taken upon the final passage of the ordinance the journal shows as follows: "Section one was read. The mayor then submitted the question, 'Shall said section one of ordinance No. 70 be passed as read?' On call of roll the members voted as follows: Vincent, no; Lea, aye; Malone, aye; Morris, aye; Spencer, aye; Bowles, aye. There being a majority of the council-elect voting for the passage of said section, the same was declared duly passed and adopted. Each subsequent section of said ordinance from one to sixteen, inclusive, was read separately, and voted on separately by calling the yeas and nays, and each vote on each section separately resulted in five votes for the passage of each section of said ordinance; Morris, Malone, Spencer, Lea, and Bowles voting aye, and Vincent voting nay, upon each section. The mayor now declared that each section of said ordinance from one to sixteen, inclusive, had been separately passed by a majority of the council-elect. That therefore he declared said ordinance duly passed. That he thereupon approved and signed said ordinance. The same was duly attested by the city clerk, and

the city clerk was ordered to have the same published as provided by law. On motion, the council now adjourned. "Affidavits of Councilmen Vincent and Malone, which affidavits were by consent introduced in evidence, show that no vote was had upon the final passage of the ordinance; while, on the contrary, the deposition of E. M. Tracewell, who was the city clerk and also the city attorney, and the affidavits of Councilmen Lea and Bowles, all of which were by consent introduced in evidence, show that a vote was had upon the final passage of the ordinance, that the yeas and nays were taken, and that Councilmen Lea, Malone, Morris, Spencer, and Bowles voted in favor of the ordinance, while Councilman Vincent voted against it. Also 'the ordinance appears to be valid upon its face. It was duly approved by the mayor, attested by the clerk, and published. Afterwards, and on April 8, 1887, the council were in regular adjourned session. Mayor Crewson and Councilmen Lea, Bowles, Malone, Spencer, Morris, and Vincent were present, and at such meeting the minutes show the written acceptance of Long and Doubleday "of ordinance Number 70, as passed by the council on the twenty-third day of March, 1887, granting to the said Long and Doubleday a franchise and contract for the erection of water-works in the said city," was presented to the council, and by order of the council was spread upon the record as a part of the minutes; and the acceptance itself shows that it was an acceptance of the provisions of "ordinance No. (70) seventy, passed by the mayor and councilmen of the city of Columbus, Kansas, at a special meeting called for the purpose, and held on the 23d day of March, 1887." Long and Doubleday then commenced openly and publicly to construct the water-works in accordance with the provisions of said ordinance No. 70, and continued to so construct them until they were finally completed, in December, 1887, without objection on the part of any one; and in constructing them they expended a great deal of money and labor. On May 25, 1887, after there had been a change with regard to the person occupying the mayor's office, and a partial change with regard to the members of the council, another ordinance numbered "71" was duly passed, purporting to amend sections 6 and 7 of the original ordinance No. 70, authorizing the use of a stand-pipe, etc., upon the passage of which ordinance all the members of the city council present, to-wit, Malone, Morris, Butler, Crisman, Wilson, and Bowles, voted for the amendatory ordinance. Councilmen Vincent and Best were absent. This ordinance was approved by the new mayor, R. N. Cheshire. On June 13, 1887, at a special meeting of the city council called by the mayor at the request of Councilmen Crisman, Vincent, and Bowles, at which meeting all the members of the council and the mayor were present, the hydrants provided for by the original ordinance No. 70 were located. At the regular meeting of the city council on October 3, 1887, Long and Doubleday were present, and asked for an extension of time for the

completion of the water-works, and the city council then passed an ordinance, No. 75, purporting to amend section 16 of the original ordinance No. 70 so as to extend the time for the completion of the water-works to January 1, 1888; on the final passage of which ordinance No. 75, Councilmen Morris, Crisman, Wilson, Malone, Butler, and Bowles voted yea, and Councilman Vincent voted nay. This ordinance was approved by the mayor, Cheshire, and was duly published. At a special meeting called by the mayor upon the request of Councilmen Wilson, Butler, and Morris, and held on January 27, 1888, the following proceedings were had, as shown by the minutes, which read as follows: "Pursuant to the foregoing call the council met at 8 o'clock P. M., Mayor Cheshire presiding. On roll-call the following councilmen responded 'present': Morris, Crisman, Butler, Malone, and Bowles. The mayor then stated that all councilmen-elect had been personally notified of the call for this special meeting, and announced that the council would now proceed with business before them, there being a quorum present. Councilman Malone then requested a report from Councilman Crisman, as chief of the fire department, as to the efficiency of the water-works, and the test made of same. Councilman Crisman then stated in open council that in accordance with section 9 of ordinance 70, granting to R. A. Long and L. L. Doubleday a franchise to construct and operate water-works in the city of Columbus, Kansas, that a test of the water-works aforesaid having been made by the fire department, mayor, and council of said city on or about the 30th day of December, 1887, and a second test made January 6th, 1888, and that from such test said water-works fulfilled the requirements of said ordinance, he thereupon introduced the following resolution: 'Be it resolved by the mayor and council of the city of Columbus, now in council assembled, that the water-works constructed in the city of Columbus by Messrs. R. A. Long and L. L. Doubleday, under and by virtue of ordinance No. 70, entitled "An ordinance granting to R. A. Long and L. L. Doubleday, their heirs and assigns, the right to construct and operate water-works in the city of Columbus, Kansas; also contracting for the supply of water for extinguishing fires, and other purposes," and also under ordinance numbered 71 and 75, being amendments to said ordinance No. 70, be, and are hereby, approved and accepted, and that the rental of the fire hydrants of said water-works constructed as aforesaid shall commence on January 1st, 1888. J. A. CRISMAN, Chief of Columbus Fire Department.' By motion, Councilman Bowles moved that said resolution be adopted, and that it be voted upon by yeas and nays. The roll of councilmen then being called, the vote was as follows: Morris, aye; Crisman, aye; Butler, aye; Malone, aye; and Bowles, aye. The mayor then declared the resolution unanimously adopted. There being no further business, the council adjourned. R. M. CHESHIRE, Mayor. Attest: W. J. MOORE, City Clerk." Ast-

erwards and for the years 1888, 1889, and 1890, taxes were levied by the city to pay for the use of the hydrants as provided for in the original ordinance No. 70, and the rent for such hydrants was in fact paid for the years 1888, 1889, and the first half of the year 1890. The plaintiff, the water-works company, and its predecessors, Long and Doubleday, complied with all the terms and provisions of all the ordinances and fulfilled their part of the contract in every respect, furnishing to the city the hydrants and the water contracted for; while the city, on its part, complied with all the terms and provisions of the ordinances, and fulfilled its part of the contract, by receiving the hydrants and the water, and levying taxes to pay for the same, and paying for the same up to July, 1890, when the city refused to levy any further taxes or to pay any further rent for the hydrants.

The only grounds upon which it is now claimed that ordinance No. 70 is not valid are that no vote was taken upon its final passage; that the yeas and nays upon its final passage were not taken; and that they were not entered upon the journal by the city clerk; and it is claimed that all these things must occur in order to render the ordinance valid. Section 9 of the second-class city act, so far as it is necessary to quote it, reads as follows: "Sec. 9. All ordinances of the city shall be read and considered by sections at a public meeting of the council, and the vote on their final passage shall be taken by yeas and nays, which shall be entered on the journal by the clerk, and no ordinance shall be valid unless a majority of all the members-elect vote in favor thereof. In our opinion the evidence satisfactorily shows that the ordinance was finally passed; that a vote was taken upon its final passage; that the vote was taken by yeas and nays; that Councilmen Morris, Malone, Spencer, Lea, and Bowles voted yea, and that Councilman Vincent voted nay; but that such vote was not entered upon the journal by the city clerk; and the clerk himself testifies with reference to how this failure happened. The clerk at the time was Edward M. Tracewell. He was also at the same time the city attorney, and he advised the council not to pass the ordinance. The meeting was held in the office of the mayor, while the journal was at his own office in another part of the city. Tracewell, at the time the ordinance was passed, had, as the city attorney, the statutes, prescribing how city ordinances should be passed, open before him, and he remembers, not only that a vote on the final passage of the ordinance was taken, and that it was taken by yeas and nays, but also that it was taken in exact accordance with the statutes as he then had them open before him. He took minutes of the meeting at the time on slips of paper, but afterwards, when he came to record the minutes, he thinks he must have lost the slip containing the final vote, and by that means failed to enter it upon the journal. His evidence is contained in a deposition, and counsel for the city appeared at the time the deposition was taken, and cross-ex-

amined him. Upon the entire evidence we think the ordinance was legally and properly passed; that the vote on its final passage was taken by yeas and nays, and was in all probability entered upon a slip of paper, but was not properly entered upon the journal; and this is the only irregularity. Will this irregularity render the ordinance invalid? It is not every irregularity that will invalidate an ordinance. Many irregularities may occur in bringing an ordinance into existence, or in recording or preserving the evidence of its existence, and the ordinance still be valid. *City of Troy v. Railroad Co.*, 11 Kan. 519; *City of Solomon v. Hughes*, 24 Kan. 211. The ordinance in the present case was passed by the city council, approved by the mayor, and attested by the clerk, all on March 23, 1887, and it was duly published on April 8, 1887; and it appears to be valid upon its face. Whether at the time of its publication any of the minutes of the meeting of March 23, 1887, had been entered upon the journal, the evidence does not show. That some of such minutes had not been so entered, the evidence does, however, show. And will this failure, or any failure on the part of the clerk to properly enter the minutes upon the journal, render the ordinance invalid, or place it in abeyance until he does so enter the minutes upon the journal? Usually the failure of the clerk to make proper entries of the proceedings of the body or tribunal for which he acts as clerk will not invalidate such proceedings. *Gillett v. Commissioners*, 18 Kan. 410; *Railroad Co. v. Tontz*, 29 Kan. 460. Even a judgment may be valid and binding before any entry thereof is made, or notwithstanding an improper entry thereof. Upon this subject Mr. Black, in his work on Judgments, (volume 1, §§ 106, 110,) uses the following language: "The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and the verdict. The entry of a judgment is a ministerial act, which consists in spreading upon the record a statement of the final conclusion reached by the court in the matter, thus furnishing external and incontestable evidence of the sentence given, and designed to stand as a perpetual memorial of its action. It is the former, therefore, that is the effective result of the litigation. In the nature of things, a judgment must be rendered before it can be entered. And not only that, but though the judgment be not entered at all, still it is none the less a judgment. The omission to enter it does not destroy it, nor does its vitality remain in abeyance until it is put upon the record. The entry may be supplied, perhaps after the lapse of years, by an order *nunc pro tunc*. But it must not be supposed that this proceeding is required to give existence and force, by retrospection, to that which before had none. As is said by the supreme court of California: 'The enforcement of a judgment does not depend upon its entry or docketing. These are merely ministerial acts, the first of which is required to be done for putting in motion the right of appeal from the judgment it-

self, or of limiting the time within which the right may be exercised, or in which the judgment may be enforced; and the other, for the purpose of creating a lien by the judgment upon the real property of the debtor. But neither is necessary for the issuance of an execution upon a judgment which has been duly rendered. Without docketing or entry, execution may be issued on the judgment, and land levied upon and sold, and the deed executed by the sheriff in fulfillment of the sale not only proves the sale, but also estops the defendant from controverting the title acquired by it.' And it follows, *a fortiori*, that if the entry, though attempted to be made in due form, does not correctly record the sentence of the court, or is defective or ambiguous or otherwise exceptionable, still this will not weaken the force of the judgment as a judgment." Section 106. "The object of this entry is to furnish an enduring memorial and incontestable evidence of the judgment, and to fix its date for purposes of appeal or creating a lien. But, as was stated in the beginning of this chapter, this proceeding is ministerial only, and is not essential to the validity of the judgment itself. It is none the less the judgment of the court because not entered by the clerk; and, except for certain special purposes, it does not remain inchoate or unfinished until so entered. Hence the neglect or failure of the clerk to make a proper entry of record of the judgment, or his defective or inaccurate entry of it, will not, as between the parties, operate to invalidate the judgment. 'The fact that the clerk did not perform his entire duty in making up the record cannot deprive parties of their rights.'" Section 110.

Suppose that in the present case, after the ordinance was passed, approved, published, and accepted, Long and Doubleday had immediately constructed the water-works at a cost of perhaps \$75,000, and suppose that the minutes of the passage of the ordinance had not yet been entered by the clerk upon the journal, or had been entered inaccurately, would all that had been done be void, and would Long and Doubleday have no remedy? This certainly cannot be the law. Could the city clerk by his failure to perform his duty defeat the ordinance and everything done under it? Or could all the officers of the city combined, after the ordinance has been acted upon by others, destroy its effect, and repudiate all obligation under it on behalf of the city? For the purposes of this case, but without so deciding, we shall assume that an ordinance in the nature of a law regulating future conduct would be void unless the journal kept by the city clerk should show that the ordinance was regularly passed; but can it be possible than an ordinance in the nature of a contract between the city and an individual person should be void because of any failure on the part of the city clerk to enter upon the journal an accurate statement of the passage of the ordinance? Can contracts between cities and individual persons be destroyed, canceled, or annulled in that manner? Can a city, after inducing persons to expend time, labor,

and money under an ordinance regularly passed, approved, attested, published, and accepted, then take advantage of any failures on the part of its own officers to perform their duties and repudiate its own obligations? It must be remembered that in this case the work of constructing the water-works went on at great cost, openly and publicly, from month to month, under the eyes of the officers of the city and its inhabitants, without objection, but really with encouragement, until they were finally completed; and can the contract now be repudiated by the city? We would think not, and, as we have all the interested parties before us,—the city in its corporate capacity, and nearly all its officers, its mayor, its councilmen, the city clerk, the city treasurer, and others,—we think we can make an order that will do full justice in the case. It is our opinion that a peremptory writ of *mandamus* should be allowed and issued in this case, requiring that the entry now on the city's journal concerning the passage of the ordinance No. 70 should be so corrected by an entry *nunc pro tunc* as to make it show that the ordinance was regularly passed as required by law, and in accordance with the findings and judgment of this court, and that the mayor and council shall levy the tax asked for in the alternative writ, and perform all other duties which may be incumbent upon them under the provisions of the ordinance as a valid ordinance. With reference to the ratification of irregular or void contracts, see the following authorities: *Tube-Works Co. v. City of Chamberlain*, 5 Dak. 54, 37 N. W. Rep. 761; *Moore v. Mayor*, 73 N. Y. 238; *Peterson v. Mayor*, 17 N. Y. 449; *State Board v. Railway Co.*, 47 Ind. 407; *Mills v. Gleason*, 11 Wis. 470; *Knapp v. Grant*, 27 Wis. 147; *Supervisors v. Schenck*, 5 Wall. 772; *Howe v. Keeler*, 27 Conn. 538; *Brown v. City of Atchison*, 39 Kan. 37, 17 Pac. Rep. 465; *Sullivan v. School-Dist.*, 39 Kan. 347, 18 Pac. Rep. 287; 1 Dill. Mun. Corp. (4th Ed.) § 463; 15 Amer. & Eng. Enc. Law, 1102.

Some further questions have been presented to this court by the briefs and oral arguments of counsel, but we do not think that they require any further comment on our part. Whether a city can grant a special or exclusive privilege to any one, for either a long or a short period of time, we do not think it is necessary now to consider, for we do not think that any such question is fairly presented by the facts of the case. A city has the power to grant a privilege to a person or corporation to establish water-works in the city, and has the power to rent hydrants from such person or corporation, (*Manley v. City of Atchison*,<sup>1</sup> just decided;) but it is not necessary now to consider the question whether such privilege can be made special and exclusive or not, or whether it would be valid or not after the lapse of 5, 10, 15, or 20 years, or after a substantial change had taken place in the affairs of the city, or in its wants or needs or those of its inhabitants. The per-

<sup>1</sup>Opinion held by court pending rehearing.

emptory writ of *mandamus* will be allowed and issued as heretofore stated.

All the justices concurring.

(46 Kan. 490)

**BAUSERMAN V. CHARLOTT.**

(*Supreme Court of Kansas.* June 6, 1891.)

**ACTION ON FOREIGN JUDGMENT — LIMITATIONS — CLAIM AGAINST DECEDENT'S ESTATE.**

1. Where an action is brought in this state upon a judgment of a court of record of a sister state, which is in full force in that state, the statute of limitations of this state, and not that of the sister state, will control.

2. The statute of limitations of this state is a statute of repose, and must be favorably considered. *Taylor v. Miles*, 5 Kan. 498; *Sibert v. Wilder*, 16 Kan. 176; *Freeman v. Hill*, (Kan.) 26 Pac. Rep. 870.

3. The cases of *Railroad Co. v. Burlingame Tp.*, 86 Kan. 623, 14 Pac. Rep. 371, and *Rork v. Commissioners*, 45 Kan. —, 26 Pac. Rep. 391, followed.

4. Under the provisions of the statutes of this state, a creditor of a decedent, having a claim which he wishes to establish against the estate, may, if the widow or next of kin refuse to take out letters of administration, obtain letters for himself or some other person, after 60 days from the death of decedent; and he cannot, without any good cause or reason therefor, defer making such application until the statute of limitations has run, and then claim that all of the time from the death of the debtor to the appointment of the administrator the statute of limitations is suspended on account of the non-appointment of such administrator. If a creditor would save his claim against the estate of a decedent from the bar of the statute, he must exercise reasonable diligence, if the widow or next of kin refuse to take out letters of administration, to obtain administration for himself or some other person.

(*Syllabus by the Court.*)

Error from district court, Leavenworth county; ROBERT CROZIER, Judge.

*J. H. Gillpatrick* and *William Green*, for plaintiff in error. *William A. Porter*, for defendant in error.

HORTON, C. J. On the 15th day of December, 1874, C. S. Charlott recovered a judgment against Joseph Pulitzer and Gen. James G. Blunt in the circuit court of the city of St. Louis, in the state of Missouri, for \$1,023.72. Gen. Blunt died on the 25th of July, 1881. On the 14th day of December, 1885, J. P. Bauserman was appointed administrator of his estate by the probate court of Leavenworth county. On the 14th day of December, 1888, C. S. Charlott brought his action in the district court of Leavenworth county against J. P. Bauserman, as administrator of the estate of Gen. Blunt, deceased, to recover a balance of \$535 upon the Missouri judgment. The defendant pleaded the statute of limitations. Judgment was rendered in favor of Charlott for \$535 and costs. The defendant below excepted, and brings the case here. It was admitted upon the trial that during all the time from December 15, 1874, and prior thereto, until the death of Gen. Blunt, on July 25, 1881, he had kept and maintained his home and usual place of residence in Leavenworth city, in this state; that during all said time this was continuously open and occupied by his family, consisting of his wife and children, where service of a summons could have been made upon him by leav-

ing at his usual place of residence a copy thereof. It was also admitted upon the trial that Gen. Blunt was personally absent, or "out of the state," so much of the time from the 15th day of December, 1874, to the date of his death, on the 25th of July, 1881, that, if such personal absence from the state prevented the running of the statute of limitations, the judgment was not barred at his death. But it is further admitted that if the periods of time during which Gen. Blunt was personally present in Kansas from the 15th of December, 1874, to his death, on the 25th of July, 1881, were taken with and added to the time from July 25, 1881, to the appointment of Bauserman as the administrator of his estate, on the 14th of December, 1885, less the time allowed by the statute for the widow or next of kin to be granted administration, they aggregated more than five years. It is also admitted that, if the periods of time which Gen. Blunt was present in Kansas after the 15th day of December, 1874, to the 25th of July, 1881, (the date of his death,) were added to the time from his death to the commencement of this action, (the 14th day of December, 1888,) more than six years had elapsed. The administrator was appointed more than eleven years after the rendition of the Missouri judgment; more than four years after the death of Gen. Blunt; and this action in this state to recover upon that judgment was not commenced until three years after the appointment of the administrator. This action was therefore commenced fourteen years after the rendition of the judgment in Missouri, and more than seven years after the death of Gen. Blunt. We are asked, in a very able argument presented by the counsel representing the estate of Gen. Blunt, to re-examine and reconsider the prior decisions of this court, ruling that, if the debtor is out of the state for a temporary purpose, such temporary absence cannot be computed as any part of the period within which the action must be brought. Section 21, Civil Code. And we are further asked to re-examine and reconsider the prior decisions of this court, holding that the death of the debtor suspends the running of the statute, where the statute has commenced to run in the life-time of the debtor. For the purposes of this case, and the full protection of estates of decedents from all liability for stale or dishonest claims, which in the nature of things the heirs of a decedent could not as successfully defend against as if the intestates were living, it is not necessary at this time to reconsider any of the former decisions of this court, and therefore it is not necessary now for us to comment upon the prior decisions referred to. It is true that this court has said that the question of personal absence of the debtor from the state, and not the question of residence or non-residence, affects the running of the statute, under the provisions of section 21 of the Civil Code. *Bonifant v. Doniphan*, 3 Kan. 26; *Lane v. Bank*, 6 Kan. 74; *Hoggett v. Emerson*, 8 Kan. 262; *Morrell v. Iugle*, 23 Kan. 82; *Conlon v. Lapphear*, 37 Kan. 431, 15 Pac. Rep. 600; *Railway Co. v. Cook*, 43 Kan. 83, 22 Pac. Rep. 968.



It is also true that this court has said that the death of the debtor operates to suspend the statute. *Toby v. Allen*, 3 Kan. 399; *Hanson v. Towle*, 19 Kan. 273; *Nelson v. Herkel*, 30 Kan. 456, 2 Pac. Rep. 110; *Mills v. Mills*, 39 Kan. 455, 18 Pac. Rep. 521. But this court has never said, when the question was properly presented, that the creditor can indefinitely prolong the time of limitation by his own omission or refusal to act, or that the death of the debtor operates to suspend the statute of limitations indefinitely. Within the provisions of our Civil Code concerning limitations, an action can only be brought within this state upon a Missouri judgment within five years after its rendition, if during all that time the judgment debtor is personally present within the state. Civil Code, § 18, subds. 1, 6; *Mawhinney v. Doane*, 40 Kan. 676, 17 Pac. Rep. 44.

The precise question is, II, under the prior decisions of this court, the death of the debtor operates to suspend the statute of limitations, is the statute indefinitely suspended? Clearly, a creditor ought not to gain any advantage by his own laches or by his own delay. "When a party knows that he has a cause of action, it is his own fault if he does not avail himself of those means which the law provides for prosecuting his claim or instituting such proceedings as the law regards sufficient to preserve it." *Amy v. Watertown*, 180 U. S. 825, 9 Sup. Ct. Rep. 530; *Tynan v. Walker*, 35 Cal. 643. "In a case where some act is to be done, or condition precedent to be performed, by a party to entitle him to his right to sue, and no definite time is fixed at which the act is to be done or condition performed, he must exercise reasonable diligence to do the one or perform the other, or he will be barred by the statute of limitations; otherwise it would be in his power to defeat the law by his own negligence and wrong." *Shelburn v. Robinson*, 8 Ill. 597, 598. It is the contention of the counsel of the plaintiff below that the statute of limitations was suspended all the time Gen. Blunt was "out of the state," from the 15th of December, 1874, to his death, on the 25th of July, 1881, and also all the time from the 25th of July, 1881, to the 14th of December, 1885, when the administrator was appointed at the instance of the alleged creditors. This latter period of time was over four years. Under the provisions of paragraph 2796, Gen. St. 1880, (Gen. St. 1868, c. 37, § 12,) 80 days are given the widow or next of kin to take out letters of administration. If they do not do so, then, upon the application of any one interested, they may be cited by the probate court or the judge thereof for that purpose, and if they neglect, for 20 days after the service of the citation, to take administration, the court must commit it to one or more of the principal creditors, if any are competent or willing to undertake the trust. Therefore, if the plaintiff below had availed himself of those means which the law provides for prosecuting his claim, he could have taken action as soon as 50 days had elapsed after the death of his alleged debtor. If a creditor would save his debt from the statute bar, he should take out adminis-

tration himself. *Granger v. Granger*, 6 Ohio, 85. The statute of limitations in this state is a statute of repose. It was enacted for the benefit of defendants, "to exempt them from being called to account in respect to transactions long gone by." Such statutes are favorably considered. *Taylor v. Miles*, 5 Kan. 498. In that case it was said: "When the statute has run its full time, the effect is to leave the parties in possession of just what they had before, nothing more and nothing less, and neither party has a right of action against the other. The injured party has lost his remedy." *Sibert v. Wilder*, 16 Kan. 176; *Freeman v. Hill*, 45 Kan. —, 25 Pac. Rep. 870. This statute ought to be liberally construed as to claims against the estates of decedents. The dead man cannot speak or answer, and the next of kin may have no knowledge respecting the claim which the creditor has not attempted to sufficiently enforce in the life of the decedent. It was decided in *Railroad Co. v. Burlingame Tp.*, 36 Kan. 623, 14 Pac. Rep. 271, "that a person cannot prevent the operation of the statute of limitations by delay in taking action incumbent upon him." It was also said in that case that "to permit a long and indefinite postponement would tend to defeat the purpose of the statutes of limitations, which are statutes of repose, founded on sound policy, and which should be so construed as to advance the policy they were designed to promote." It is also said in *Rork v. Commissioners*, 46 Kan. 175, 26 Pac. Rep. 393, that, "if the plaintiff could delay the presentation of his certificates to the board of county commissioners for five years, then he could delay for ten, fifteen, or any indefinite period of time. He should have presented his tax certificates to the board of county commissioners 'for refunding' (for the return of his taxes, interest, etc.) before the expiration of three years after their issue. This he failed to do, and he also failed to allege any reason or excuse for his delay."

Following these decisions, the claim of plaintiff below is both stale and barred by the statute. He has slept so long upon his rights, if he had any at the death of Gen. Blunt, that he cannot now recover. If in fact the plaintiff below was disabled for 50 days after the death of Gen. Blunt from instituting any proceedings or action to recover on his judgment of the 15th of December, 1874, the disability ended with the expiration of the 50 days. If he was denied the right to sue that period of time, he could have taken action as soon as that time expired, but he did not then act. He did not act within any reasonable time thereafter. He delayed more than four years after the death of Gen. Blunt before he had an administrator appointed, and then delayed three years after such appointment before commencing this action. The reasonable time within which a creditor, having a claim against a decedent, and wishing to establish the same against his estate, should make application for administration, would be, under the statute, 50 days after the decease of the intestate, or at least within a reasonable time after the expiration of 50 days

But a creditor cannot, as in this case, postpone the appointment for months and years, and then recover upon his claim. If he can do so for several months or several years, he can do so for any indefinite length of time, and then resort to administration, and establish his claim. This is not in accord with the policy of the statutes nor with our prior decisions. We do not think it accords with right or justice in establishing claims against the estates of decedents. Upon the pleadings and the agreed facts, the judgment of the district court will be reversed, with direction to render judgment against plaintiff below, and in favor of the administrator of the estate of James G. Blunt, deceased. All the justices concurring.

(21 Or. 121)

PEABODY v. OREGON RY. & NAV. CO.<sup>1</sup>

(Supreme Court of Oregon. June 24, 1891.)

EJECTION OF PASSENGER — DAMAGES — RAILROAD COMPANIES — PRESUMPTION OF OWNERSHIP.

1. It is the duty of a passenger, if he has not the required ticket or token evidencing his right to travel on that train, to pay his fare or quietly leave the train when requested, and resort to his appropriate remedy for the damages he has sustained; and if he attempts to retain his seat without paying his fare, and is expelled by the conductor, using no more force than is necessary, he can recover no damages for the injury incurred by such expulsion.

2. When it is admitted that a railroad company is the owner of a railroad then being operated, a presumption arises that the same is operated by the company owning it, and the burden of proof is upon such company to show to the satisfaction of the jury that such is not the fact.

(Syllabus by the Court.)

Appeal from circuit court, Wasco county; J. H. BIRD, Judge.

W. W. Cotton and Snow & Gilbert, for appellant. A. S. Bennett, for respondent.

**LORD, J.** This is an action in tort to recover damages for the wrongful acts of the defendant's agents or servants in ejecting the plaintiff from one of its cars. There are mainly two questions presented by this record, but the controlling one arose substantially out of this state of facts: The plaintiff, who is a stock-dealer, had shipped stock from Grant's station to Portland, and had received from the railroad company a shipping contract which entitled him, upon the performance of certain conditions, to a passage from Grant's to Portland and return. Going to the office of the company earlier than its business hours, he was unable to get the ticket stamped, and otherwise perform its conditions so as to ride upon it, without taking a later train, so he went on the train then ready, and seated himself in the car. When the conductor came around for tickets, he presented to him his shipping contract, but it not being stamped, etc., as required, the conductor refused to receive it, and informed him that he must pay his fare, which the plaintiff did, giving the conductor a \$20 gold piece, from which the amount of his fare from Portland to Grant's was to be taken. At this time, according to his testimony, he asked the conductor if he would be allowed to stop over at The Dalles, and go to Grant's on

the next train, to which the conductor replied that he could do so, and that it would be all right. The conductor, not being able to make the necessary change for the fare, after an absence of about 20 minutes, during which time he was engaged in taking up tickets, etc., returned with the change and a drawback check, which he delivered to the plaintiff. Upon the back of the drawback check was a receipt for the fare, but the check itself had printed upon it in large and legible words, "Good for this day and train only." The plaintiff does not seem to have given any attention to the check, or what was written or printed upon it, but, acting upon the assurance of the conductor that he would be permitted to stop over at The Dalles, he did so, and, after remaining some hours, he took another train for the completion of his journey to Grant's. A short time after he entered upon this train, the conductor called upon him for his ticket, and he presented the drawback check and the receipt, which the conductor refused to accept, stating that it did not entitle him to ride upon that train, when he then explained to him the circumstances under which it was delivered to him by the other conductor, and claimed the right to continue his ride to Grant's station. The conductor told him that he was required by the rules and regulations of the company to collect fare, or a ticket entitling the passenger to ride, and that none of the papers which he had presented entitled him to ride on that train, and that, unless he paid his fare, his duty would require him to expel him from the cars. After waiting until the train had proceeded several miles and arrived at a station, the conductor informed him that, unless he paid his fare, he would be under the necessity of requiring him to leave the train. The plaintiff pointedly refused to leave or to pay his fare, when the conductor, finding he would do neither one nor the other, with the aid of the brakeman undertook to expel him from the car, which the plaintiff resisted with all his force, and manifested a disposition to fight, but when finally expelled from the train he tendered his fare, was received again on the train, and carried to his destination. His own evidence concedes that the duty of expelling was an unpleasant task to the conductor, and performed under the circumstances indicated. From this statement of the facts it is apparent that the plaintiff was without any proper evidence or token of his right to transportation on that train, other than his statements to the second conductor of the oral representations of the other conductor of such permission. Although a disputed fact at the trial, the conductor denying he ever made such representations or gave such permission, we shall assume its verity after verdict. Under such circumstances, was it the duty of the plaintiff, when notified by the conductor that he could not receive the drawback check, to pay his fare under protest, or leave the train without rendering it necessary for the conductor to resort to force to secure his removal. The drift of the defendant's contention is that it is a recognized right

<sup>1</sup>Petition for rehearing pending.

of every railroad company to make such reasonable rules and regulations for the conduct of its business as may be necessary, and that it is a reasonable exercise of this right to require that every passenger shall, when called upon by the conductor, present a ticket conforming to its reasonable rules and regulations, or, if he is unable so to do, that he shall pay his fare, but if he cannot produce the required ticket, and refuses to pay his fare, that he may be lawfully ejected from the train. In this view, as between the plaintiff and the conductor of the train from which he was expelled, unless he could produce the required ticket as evidence of his right to ride on that train, or in default thereof to pay his fare, the conductor would not be authorized to allow him to proceed to his destination on such train on his statement of the oral representations of the other conductor, inconsistent with the face of his ticket, and contrary to the rules and regulations of the company. To that conductor the ticket which the plaintiff produced was to be taken as conclusive evidence of his right to travel on that train, and, it failing, the conductor could not receive the statements of the plaintiff contradicting its plain terms, and allow him to retain his seat. Upon this assumption, when the plaintiff was unable to produce the required ticket evidencing his right to travel on that train, and refused to pay his fare or to leave the train when requested, stopped at a proper place, the conductor was authorized lawfully to expel him from the train, and the defendant is not responsible in damages for injuries incurred in resistance to such expulsion. Summed up, then, the considerations in support of the principle invoked are: That as between the conductor and passenger, the right of the latter to ride must be evidenced by some proper token or ticket; that neither the time nor the occasion is suitable for an investigation, whether of explanation, or representations of another conductor in conflict with the terms of the ticket, and contrary to the rules of the company; that it is better, under such circumstances, that the passenger comply if he is unable to produce the required ticket, and pay his fare, or leave the train quietly and suffer the temporary inconvenience which results, than that the business of the road be interrupted to the annoyance of the traveling public; that such a course would avoid all liability to unseemly struggles, often occurring in the presence of women and children, and prevent breaches of the peace, and at the same time secure the passenger ample redress in the remedies which the law provides. The application of this principle includes a variety of cases, as where the passenger is unable to produce any token or ticket as evidence of his right to ride, or the ticket which he does produce is irregular or defective, due to the fault or negligence of the agents of the company.

In *Frederick v. Railroad Co.*, 37 Mich. 342, the plaintiff held an insufficient ticket, caused by the fault of the company's agent in delivering to him a ticket to the wrong station. He asked and paid for a

ticket to a given station, and received what he supposed was such ticket, but which on its face was only good to a point short of his destination. In passing upon this question the court observed: "How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company, where a ticket is purchased and presented to him? Practically there are but two ways,—one, the evidence offered him by the ticket; the other, the statements of the passenger contradicted by his ticket. Which should govern?" In judicial investigations we appreciate the necessity of an obligation of some kind, and the benefit of a cross-examination. At common law, parties interested were not competent witnesses, and even under our statutes the witness is not permitted, in certain cases, to testify as to facts which, if true, were equally within the knowledge of the opposite party, and cannot be procured. Yet here would be an investigation as to the terms of the contract where no such safeguards could be thrown around it, and where the conductor, at his peril, would have to accept of the statement of the interested party. I doubt the practical workings of such a method, except for the purpose of encouraging and developing fraud and falsehood, and I doubt if any system could be devised that would so much tend to the disturbance and annoyance of the traveling public generally. As between conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon, as evidence of his right to the seat he claims. Where a passenger has purchased a ticket, and the conductor does not carry him according to its terms, or if the company, through the mistake of its agent, has given him a wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract, but he would have to adopt a declaration differing essentially from the one resorted to in this case." In *Townsend v. Railroad Co.*, 58 N. Y. 295, the court say: "The question in this case is whether a wrongful taking of a ticket of a passenger by the conductor of one train exonerates him from compliance with the regulations on another on which he wishes to proceed upon his journey. I am unable to see how the wrongful act of the previous conductor can at all justify the passenger in violating the lawful regulations upon another train. \* \* \* The conductor of the train upon which he was not bound to take his word that he had had a ticket showing his right to a passage to Rhinebeck, which had been taken up by the conductor on the other train. His statement to that effect was wholly immaterial, and it was the duty of the conductor to the company to enforce the regulation, as was repeatedly held by the trial judge by putting the plaintiff off in case he persistently refused to pay fare. The question is whether, under the facts found by the jury, his resistance in the performance of this duty was lawful on the part of the plain-

tiff. If so, the singular case is presented where the regulation of the company was lawful, where the conductor owed a duty to the company to execute it, and at the same time the plaintiff had a right to repel force by force, and to use all that was necessary to retain his seat in the car. Thus a desperate struggle might ensue, attended by very serious consequences, when both sides were entirely in the right, so far as either could ascertain. All this is claimed to result from the wrongful act of the conductor of another train in taking a ticket from the plaintiff, for which wrong the plaintiff had a perfect remedy without inviting the commission of an assault and battery by persisting in retaining a seat upon another train, in violation of the lawful regulations by which those in charge were bound to govern themselves." In *Yorton v. Railroad Co.*, 54 Wis. 234, 11 N. W. Rep. 482, the plaintiff had purchased a ticket to the place of his destination, and asked the conductor for a stop-over ticket, and, through the fault or mistake of the conductor, he received a trip or train check instead of a stop-over ticket for which he asked, and which the conductor undertook to give him. The conductor of the second train refused to recognize it for fare, and demanded passage money or a ticket, which being refused, the plaintiff was ejected from the train. The court say: "Then the question arises, was the plaintiff entitled to ride on a subsequent train, not having the proper stop-over check, or was the second conductor justified, under the circumstances, in putting him off the train when he refused to pay his fare? \* \* \* He was perfectly justified in ejecting plaintiff from his train when plaintiff had no proper voucher, produced no sufficient evidence of his right to ride thereon, and refused to pay fare, and he himself was ignorant of the transaction between plaintiff and Conductor Sherman, [the first conductor.] It seems to us there was no other course for him to pursue under the rules of the company, for he was certainly not bound to take the plaintiff's word that he had paid his fare, and that Sherman had made a mistake in not giving him a stop-over check. It is apparent that the right of plaintiff to ride on the train without a proper voucher, and the right of the second conductor to eject him for want of said voucher, were inconsistent rights. Each could not co-exist at the same time. Mistake or fault of the conductor in not giving him, on request, such a check, would not give him a lawful right to ride on the second train, though he might require damages against the company for the wrongful act of the first conductor." In *Bradshaw v. Railway Co.*, 135 Mass. 407, the court say: "It is no hardship upon the passenger to put upon him the duty of seeing to it in the first instance that he receives and presents to the conductor a proper ticket or check, or, if he fails to do this, to leave him to his remedy against the company for a breach of its contract. Otherwise the conductor must investigate and determine the question as best he can while the car is on its passage. The circumstances would not be fu-

vorable for a correct decision in a doubtful case." See, also, *Mosher v. Railroad Co.*, 23 Fed. Rep. 326; *Hall v. Railroad Co.*, 15 Fed. Rep. 57; *Petrie v. Railroad Co.*, 42 N. J. Law, 449; *Railroad Co. v. Gants*, 38 Kan. 618, 17 Pac. Rep. 54; *Railroad Co. v. Griffin*, 68 Ill. 499; *Shelton v. Railroad Co.*, 29 Ohio St. 214; *Railroad Co. v. Fleming*, 14 Lea, 128; *Railroad Co. v. Connell*, 112 Ill. 295; *Prince v. Railroad Co.*, 64 Tex. 146; *Hufford v. Railroad Co.*, 53 Mich. 118, 18 N. W. Rep. 580; *Downs v. Railroad Co.*, 36 Conn. 287; *Jerome v. Smith*, 48 Vt. 230.

On the other hand, the contention for the plaintiff is that when he paid his fare from Portland to Grant's, upon the representation and promise of the conductor that he could stop over at The Dalles and ride upon the next train, and the conductor delivered to him a drawback check with a receipt for the money indorsed on the back thereof, and that, in pursuance of such agreement and promise, he, having stopped over, and then gone upon the second train without notice of any contrary regulation until after he commenced his journey, was not compelled to pay fare or leave the train, but that he was lawfully there, and might stand upon his rights, and, if wrongfully ejected by the conductor, he could recover damages for any injuries which he suffered in consequence of such ejection. Upon the facts there is no doubt but that the plaintiff had no knowledge of the rules or regulations of the company, and, as the agreement for a ticket with the right to stop over was made before the ticket was delivered, the plaintiff cannot be deemed to have assented to any part of the contract expressed by the ticket different from that made with the conductor. As he wished to make his journey over the road on different trains to accommodate his business engagements, the conductor must be supposed to have known what the rules and regulations required in respect to the matter upon which he desired information. He was the person appointed by the company to impart the information asked, and to sell and deliver to him a ticket as evidence of his right to ride. This agent assures him that he can pay his fare to Grant's station, and that he can stop over at the place designated, and the plaintiff, relying upon his representations, pays his fare. His ticket is not delivered to him immediately for want of change, and not until some 20 minutes after his contract or understanding of permission to stop over was made, showing that he parted with his money in reliance upon the contract made or permission given, and not upon a ticket which he had not seen, expressing different terms, or terms inconsistent with his right to pursue his journey upon the next train. When the ticket was delivered to him, supposing that it is sufficient, or that the conductor whose duty it was to furnish it would deliver one conforming to their engagement, and relying upon his contract as made, he puts the ticket into his pocket without observing its terms, or that it expressly limits his right to ride on that day and train only, and stops over at The Dalles; and when he commences his

journey on the next train, and his ticket is demanded of him, he is informed by the conductor that it is insufficient, when he explains to him the contract he made with the other conductor, and that he is on that train in pursuance of his assurances and contract, but the second conductor refuses to receive his explanations, and demands of him the payment of his fare, or the alternative of leaving the train, both of which he refuses to do, claiming that he is lawfully upon the train, and resisting with force his expulsion from it. Under such circumstances, the plaintiff contends that the contract established the relation of passenger and carrier, and, if the ticket furnished by its agent was insufficient to notify the second conductor of his right to travel on that train, that it was the negligence of the other conductor, and that he, being without fault, had a lawful right to travel on that train, and might resist his ejection, and, if ejected, he could recover damages for any injury which he suffered by reason of such ejection.

In support of this contention numerous authorities are cited, to which it is not possible to make full reference. Perhaps as strong a case as any is *Head v. Railroad Co.*, 70 Ga. 358, 7 S. E. Rep. 217, which, like the case at bar, was an action in tort for the expulsion of the plaintiff from the cars of the defendant. By some negligence of the company's agent the plaintiff's ticket was not stamped or signed as required by the conditions of the ticket and the regulations of the company. He presented the ticket for his fare, but it was refused by the conductor, and for his expulsion the court held that he could recover "his proper damages of all sort," and among other things saying: "The company could no more be heard to say that an error was committed by its agent, resulting in a breach of duty on its part to the plaintiff, than it can be heard to say that an error was committed by its own action. \* \* \* He [the plaintiff] had a right to assume that all these agents understood their duties and would perform them; and, if he performed his, he could stand upon his contract, and upon his relation as a passenger which the contract generated." In *Railroad Co. v. Rice*, 64 Md. 63, 21 Atl. Rep. 97, the plaintiff had gone upon one of the trains of the company with a proper ticket, and the conductor canceled it by mistake, but afterwards attempted to correct it, and assured the plaintiff that it would be all right, and that he could ride upon it on the next train in that condition. It was not properly corrected, and when the plaintiff went upon the returning train and presented the ticket the conductor refused to take it, and the plaintiff, refusing to pay his fare or leave the train, was expelled therefrom. The court says: "The return coupon was canceled through the mistake of the conductor. This error he attempted to correct, and informed plaintiff that it was all right. The latter had a right to rely on this assurance, and that the ticket for which he had paid his money entitled him to return to Wilmington. If the servants of the appellant, un-

der such circumstances, laid their hands forcibly upon the plaintiff, and compelled him to leave the car, there was not merely a breach of contract on the part of the company, but an unlawful interference with the person of the plaintiff and an indignity to his feelings for which an action will lie, and for which he is entitled to be compensated in damages. Such is the well-settled law of this state and of this country. The mistake by which plaintiff's ticket was canceled was the mistake of the appellant's servants, and it must abide the consequences." In *Hufford v. Railroad Co.*, 64 Mich. 631, 31 N. W. Rep. 544, the plaintiff purchased in good faith of the ticket agent a genuine ticket, issued by the company, which the agent had a right to sell, covering the distance between two stations, and was informed by the agent that it "was good, and entitled him to ride between said stations." The court says: "When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he paid to the agent who gave him the ticket he presented, and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out that it was not true, no matter what the ticket contained in words, figures, or other marks." See, also, *Railroad Co. v. McDonough*, 53 Ind. 289; *Burnham v. Railroad Co.*, 63 Me. 298; *Hamilton v. Railroad Co.*, 53 N. Y. 25; *Palmer v. Railroad Co.*, 3 S. C. 580; *Railroad Co. v. Fix*, 88 Ind. 381; *English v. Canal Co.*, 66 N. Y. 454; *Tarbell v. Railroad Co.*, 24 Hun, 53.

In the case at bar, the plaintiff never had any valid ticket or evidence of his right to ride or travel on the train from which he was expelled. His ticket was not even apparently valid on its face when offered, and is not within the principle or reason of some of the cases cited in support of his contention. That he had paid his fare to his destination, and that the conductor represented that he might stop over at The Dalles, may be admitted, but the ticket he received furnished no evidence of that permission, was inconsistent with it, and when offered it was after the right, according to its terms, had expired to travel upon it. It is not the case of a passenger with a valid ticket entitling him to a ride on the train from which he was ejected, or with such a ticket as he was required to have, and by some mistake or fault of the conductor wrongly canceled, as in *Railroad Co. v. Rice*, 64 Md. 63, 21 Atl. Rep. 97; or surrendered to the proper agent of the company on demand, and receiving back what the agent believed to be the proper evidence of a right to ride on it, and when presented to the other conductor refused, despite the explanations offered, as in *Railroad Co. v. Fix*, 88 Ind. 384; or as in *Railroad Co. v. McDonough*, 53 Ind. 293; or where the ticket appears upon its face to be good, although not a regular ticket, but which the ticket agent assures the passenger is sufficient, after his attention has been recalled to it, and is afterwards refused by the conductor on the train, as in *Hufford v. Railroad Co.*, 63 Mich. 118, 18 N. W. Rep. 580, 64 Mich. 631, 31 N. W.

Rep. 544; or where the plaintiff has paid his fare, and the same conductor to whom he paid it asks for it again, and insists, unless it is paid, that he would put the plaintiff off, and the latter, refusing to pay, is forcibly ejected from the train, as in *English v. Canal Co.*, 66 N. Y. 454; or where the plaintiff was not guilty of any negligence in accepting his ticket, but carefully examined it, saw everything there was on it, and received explanation of the meaning of the punched holes, and assurances that the ticket in the condition in which it was would be good for the trip, and the conductor refused to receive it, as in *Murdock v. Railroad Co.*, 137 Mass. 298, and in some other cases cited which might be distinguished. It is true that the principle announced in some of the authorities cited is in conflict with the contention for the defendant, and, while I own some reluctance, it seems to me that the weight of authority and reason, as applicable to the facts as disclosed by this record, is that it is the duty of the passenger to pay his fare or quietly to leave the train when requested, if he has not the proper ticket, and resort to his appropriate remedy for the damages he has sustained; but that if he attempts to retain his seat without paying his fare, and is expelled by the conductor, he can recover no damages for the injuries incurred by the expulsion. This result will tend to avoid unseemly struggles occurring on railroad trains, usually filled with passengers, including women and children, and thereby prevent breaches of the peace, and at the same time will fully protect the passenger by making the company responsible for all damages resulting from any breach of its contract. It is not disputed that the business of ejecting the plaintiff was extremely disagreeable to the conductor, and that he made considerable effort to induce the plaintiff to pay his fare or peaceably to leave the train, but that the plaintiff not only insisted on being put off by force, but resisted with all the force he could command. It is hardly necessary to say that no reference is intended to apply to agents of the company who act wantonly or willfully or maliciously, or that a trespasser upon a train can be treated in a willful, wanton, or malicious manner.

2. The motion for nonsuit was based principally upon the idea that the evidence for the defendant was the only evidence in the case, and that this so conclusively showed that the defendant had leased its road and ceased to operate it at the time of the injury that the court erred in submitting the case to the jury. The stipulation and pleadings admit that the defendant was the owner of the road. When it is admitted that a railroad company is the owner of a railroad then being operated, a presumption arises that the same is operated by the company owning it, and the burden of proof is upon such company to show to the satisfaction of the jury that such is not the fact. Thus in *Ferguson v. Railroad Co.*, 63 Wis. 145, 23 N. W. Rep. 123, the court say: "When a railroad company owns a railroad in operation, bearing the name of the company, the

presumption is that such company operates it, and in order to relieve itself from liabilities for injuries to persons upon such road, caused by the negligence of the employees operating the same, the burden of proof is upon it to show that it does not operate the same." Now, is it disputed but that at common law the general rule was, where unimpeached witnesses testify distinctly and positively to a fact and are uncontradicted their testimony was to be credited, and to have the effect of overcoming a mere presumption? "But this rule," as *RAPALLO, J.*, observed, "is subject to many qualifications." *Elwood v. Telegraph Co.*, 45 N. Y. 553. Our Code provides that the jury "are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption, or other evidence satisfying their minds." *Hill's Code*, § 845, subd. 2. This seems to indicate, as was contended, that where a presumption arises in any case the jury are not bound to believe the declarations of a witness, or a number of them, contradicting the presumption, but that the credibility of such witness or witnesses then becomes a question for them, and, if they are not satisfied of the truthfulness of the evidence of such witnesses, they are not bound to believe it, but may find in accordance with the presumption. The execution of the lease is admitted, but the transfer and possession under it are disputed, and the establishment of that fact is dependent upon the testimony of Mr. Cookingham, and certain telegrams and circulars offered through him for that purpose. The lease itself purports to have been executed in April, 1887, and before the statute for its authorization had gone into effect; but, waiving this, the truth of the transfer and possession, which ought to have been clear and decisive, was vague and unsatisfactory. From the nature of the circumstances, and as Mr. Cookingham stood related to them, it was not possible for him to testify positively or distinctly as to this transaction. Nor do the telegram and circular relied upon to establish the transfer and possession, aided by the testimony of Mr. Cookingham, render the proof in that regard much more definite and satisfactory. Owing to their vagueness as applied to the subject-matter in dispute, without his testimony they are of little value as evidence. Much that he testifies to is but hearsay, much mere conclusions, and as to what may be regarded as relevant, it was for the jury to pass upon the weight to be given to his statements in respect thereto, and his credibility. Taking, then, into consideration the presumption of operation of the road from its ownership, and in addition thereto that the stock contract upon which plaintiff shipped his cattle and rode to Portland was drawn in the name of the defendant company, and signed by the agent, as the agent of the defendant, for that company; that the lettering upon its cars and tickets, draw-back checks, and other writings, etc., were likewise in the name of the defendant company; together with the testi-

mony of the plaintiff, keeping in mind that the jury are the judges of the credibility of the witnesses,—it would be difficult on this record to assign any just or legal reason to withdraw the case from the jury. Leaving out of view the question of credibility, before a withdrawal of a case from a jury can be justified, the facts of the case should not only be undisputed, but the conclusion to be drawn from them indisputable. But, whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them the case should be properly left to the jury. *Railroad Co. v. Van Steinburg*, 17 Mich. 99; *Railroad Co. v. Stout*, 17 Wall. 657. Upon this point we think there was no error in refusing the motion for nonsuit. But in view of the considerations already expressed the judgment is reversed, and the plaintiff remitted to his remedy in accordance therewith.

### BALDOCK v. ATWOOD *et al.*

(*Supreme Court of Oregon.* June 24, 1891.)

#### AMENDMENT OF PLEADINGS—CONTRACTS—PERFORMANCE—STATUTE OF FRAUDS.

1. While the power to permit an amendment of the pleadings is vested in the court below it ought to be liberally exercised in furtherance of justice. The insertion of new additional allegations in support of the claim made by the plaintiff, when the subject-matter of the suit continues the same, is in the discretion of the trial court.

2. When B. paid to F. a valuable consideration for the right to dig a ditch across F.'s land so as to flow water into Baldock slough, and B. takes possession thereof and cuts the ditch, and causes the water to flow through the same for many years, the contract is executed, and a purchaser from F. takes with notice of B.'s interest, which is such that a court of equity will protect it.

3. When B. had the right to flow water into Baldock slough, and defendants, wishing to fill up a part of said slough, agreed with B. that if he would abandon said slough and the right to flow water therein the defendants would give him the right of way on a section line through their land, and the defendants then caused said line to be surveyed and the line of said ditch marked with stakes, and the plaintiff accepted said offer, and dug his ditch on the line marked by the defendants for that purpose, and abandoned the slough, which is filled up by the defendants, and the plaintiff continuously uses said new ditch for many years, the same amounts to an exchange of the plaintiff's rights to flow water through the slough for the right of way on the section line, and said contract, though existing in parol, being executed by both parties, is taken out of the operation of the statute of frauds.

(*Syllabus by the Court.*)

Appeal from circuit court, Baker county; M. D. CLIFFORD, Judge.

The cause was finally tried upon the second amended complaint, which was filed by leave of the court after the evidence was all taken, apparently to conform the pleadings to the facts proved. Said amended complaint alleges "That at all times stated in complaint plaintiff was a citizen of the United States and over twenty-one years of age; that ever since 1864 plaintiff has been the owner of certain real estate in complaint described, and resided upon the same continually, and used the same for stock-raising and agri-

culture. That at the time of plaintiff's settlement, in 1864, said lands were unoccupied public lands of the United States. That at and ever since said time there flowed through the lands of the plaintiff a natural water-course, now known and called 'Baldock Slough,' which slough headed on a natural water-course in said county called 'Powder River,' at a point about four and one-half (4½) miles from said lands of the plaintiff, at or near the corporate limits of Baker City, and on lands now owned by the defendants, which lands are particularly described; and that the lands now owned by the defendants at the time of plaintiff's settlement were unoccupied public lands, and that said slough runs through the lands of the defendants. That plaintiff's lands are dry and arid in character, and that the use of water artificially caused to flow over the same is required and necessary to make said lands produce an agricultural crop. That in the year 1865 the plaintiff appropriated of the water of said Baldock slough, and used, in irrigating crops on his said lands by means of ditches from said slough, three hundred inches of water; and at all proper times and seasons thereafter, continuously in each year and up to the present time, the plaintiff has actually used three hundred inches of water for the purpose of irrigating said land, watering stock, and for domestic uses, and that he has remained in the uninterrupted and peaceable use of the same up to the time of committing of the acts of the defendants hereinafter set forth. That plaintiff's use and enjoyment of said water continued for twenty years next preceding the commencement of this suit. That in furtherance of said appropriation of said water, and to obtain a larger supply thereof, plaintiff gave notice in writing by filing the same in the office of the county clerk of said Baker county, which notice is set out *in hæc verba* in the amended complaint, and claims three thousand (3,000) inches instead of three hundred (300.) That when said notice was filed the lands now owned by defendants were owned by one C. B. Fisher. That in 1869 the channel of said slough where it heads on Powder river became so obstructed from the effect of dams in the river, and the acts of Chinese gardeners being on defendants' land above described, that the natural capacity thereof was lessened, and the amount of water therefor appropriated and used by the plaintiff was prevented from flowing therein; and that for the purpose of allowing said water so appropriated by the plaintiff to flow down said slough to his lands the plaintiff, by and with the consent of said C. B. Fisher, constructed a dam in the bed of said Powder river at a point near the original town-site of Baker City, and on the lands of said C. B. Fisher, from said dam cut and dug a ditch to said Baldock slough; and that by means of said ditch and dam, and the water flowing through and flowing naturally in said slough, the said three hundred inches of water appropriated by said plaintiff did flow down and through said slough to the lands of the plaintiff, and were then used by him for agricultural



and domestic purposes. That said appropriation by plaintiff of three hundred inches of water, and the increase thereof made at the time of filing and recording said notice, were each and all made and done prior to any other appropriation of the water of Powder river or Baldock slough by any other person. That plaintiff is the owner of said three thousand inches of water so diverted and appropriated, and entitled to have said water flow down said slough to and upon plaintiff's lands, and to use the same thereon for irrigation, watering stock, and for domestic purposes. That said dam and ditch were owned and used by the plaintiff, peaceably, uninterruptedly, without hindrance from Fisher, and continuously from the year 1879 to the year 1881, for the purpose of conducting the water so appropriated and belonging to the plaintiff from said Powder river to Baldock slough. That in the year 1881 the defendants herein, being the grantees of said C. R. Fisher, and the owners of the land whereon said ditch and dam were situated, so changed the channels of said Powder river and obstructed said ditch and slough that neither said ditch nor slough would carry the waters so appropriated by the plaintiff, nor any amount of water whatsoever, from said Powder river. That plaintiff, by and with the consent of the defendants, and at their suggestion and request, and in consideration of their reclaiming a large portion of their said lands for streets, agricultural and building purposes, then occupied and covered by said Baldock slough and ditch, changed the location of his said ditch, and the point of diversion of his water from Powder river, by placing a dam in the bed of said river at a point about three hundred feet above the dam last mentioned, and by cutting a ditch along the south line of defendant's said lands connecting said river and Baldock slough; and defendants did thereupon fill up and reclaim the lands formerly covered by said ditch and slough channel upon their said lands. That since about the year 1881, at a point near where said three hundred inches of water are diverted from Powder river into said Baldock slough, the defendants have interfered with and interrupted the flow of said water in said ditch of the plaintiff, and diverted the same from flowing into said ditch and slough, and did attempt thereby wrongfully, unlawfully, and inequitably to appropriate said waters flowing in said ditch and slough to their own use and benefit, and have repeatedly, since said time, prevented him from using and enjoying his said water and water-right, to his damage in the sum of two thousand dollars. That on the 17th day of November, 1885, defendants again wrongfully entered upon said ditches and water-right of the plaintiff, and interfered with the waters of plaintiff flowing in said ditch and slough, and with a large force of employes, and with picks and shovels, began to divert said waters from said ditch and slough, and began to construct in said ditch and slough a dam of a permanent character, with the intent thereby, and by means of said dam, to prevent any of the waters so appropriat-

ed by the plaintiff from flowing in and down said ditch or slough to his said lands, and wholly and forever deprive the plaintiff of the use of the same. That defendants threaten to continue the construction of said dam in said ditch of the plaintiff, and to entirely close up the same, and to wholly and forever prevent said water, or any part thereof, from flowing through said ditch or dam, and defendants will, unless restrained, erect in said ditch at said point a permanent dam, and by said means divert all of said water from plaintiff's said lands that ought of right to flow through the same, all of which acts of the defendants are wrongful and will cause the plaintiff irreparable damage. That plaintiff's lands are of the value of three thousand dollars per annum for agricultural, stock and fruit-growing purposes, and said value is solely dependent on the use of said three thousand inches of water, and that without the use of said water said lands would be rendered entirely valueless, and plaintiff has no plain, speedy, or adequate remedy at law. That plaintiff has sustained other damages by the said wrongful acts of defendants in the sum of one thousand dollars, and that they are wholly insolvent. That defendants, after an ineffectual motion to strike out this complaint, answered the same, denying most of the material allegations, and thus allege that at the time of the alleged location of the water-rights by the plaintiff one C. B. Fisher owned the land where said alleged water-right was located, and had on the 18th day of September, 1888, located a water-right on Powder river for irrigating his said land. That said Fisher consented that plaintiff might have the use of a portion of his said land to cut a ditch and run water from said Powder river through the lands of said Fisher in irrigating his said land, and that said permission or license was not in writing, and was without consideration. That afterwards the defendants and their grantors succeeded to all the rights of said Fisher to said land and water-rights, and in the dam used for the same, by good and sufficient deeds. That at the time of the purchase of said lands and water-rights the defendants knew nothing of the license to the plaintiff by said Fisher. That afterwards, in the year 1881, the plaintiff expressly recognized the rights of the defendants in said land, and agreed that the terms by which the plaintiff should use the lands of the defendants to conduct water to such slough should be reduced to writing, and signed by the parties, but plaintiff refused to sign said agreement when so made. That defendants have never agreed or consented that plaintiff should use their land for the purpose demanded by plaintiff, except as the same might not interfere with defendants' rights in the premises. That defendants have been and are now willing that plaintiff have a ditch on their land to convey water to said slough as a favor, so long as the same does not interfere with the defendants' proper and reasonable use of their water-right, and all defendants' acts in relation to the use of said water have been reasonable and proper, and in such

manner as to accommodate the plaintiff as much as possible. That the ditch used by the plaintiff is now so constructed as to entirely deprive the defendants of the use of their said water-right. That on or about July, 1881, defendants notified the plaintiff not to use the ditch cut by him on defendants' land, and not to interfere with any property of defendants, and that plaintiff's use of said land under said Fisher was a mere license, and that the same was thereby revoked, and long prior to any of the acts complained of by the plaintiff." The reply denied the new matter in the answer, and then, as a further defense thereto, alleges that plaintiff paid Fisher a valuable consideration for the right to erect said dam on his land, and to cut and maintain said ditch; and by way of charging the defendants with notice the reply further alleges that said ditch, and the water flowing therein, were in plaintiff's possession and use at the time of the defendants' purchase, and were visible objects, and also that plaintiff paid Fisher a valuable consideration for the right to use his land for such purpose. The court rendered a decree in favor of the plaintiff in accordance with his claim upon the trial, from which the defendants have appealed.

*T. C. Hyde and Glenn O. Holman*, for appellants. *A. J. Lawrence*, for respondent.

*STRAHAN, C. J.*, (after stating the facts as above.) The first question made by the appellant is the action of the court below in allowing the plaintiff to file the second amended complaint. It is contended that it is such a departure from the cause of suit set up in the original and first amended complaint that it is in no sense an amendment, but an original complaint, setting up an entirely new and distinct cause of suit. It is true it contains a number of allegations not found in either the original complaint or the first amended complaint, but this of itself is not sufficient to deprive the plaintiff of the right to amend upon leave of the court. The amendment does not change the controversy. The suit still is in relation to the water alleged to have been appropriated by the plaintiff, and his right to have it flow to and upon his land. This is the real gist of the suit. Any amendments of the pleadings which would further support this right might be permitted by the court in furtherance of justice; so, also, any amendment of the answer which tended to defeat the cause of suit set up by the plaintiff might be allowed the defendant on the like terms. The power of amendment under the Code ought to be liberally exercised in furtherance of justice. While the parties are in court they ought to be permitted to shape their pleadings in such a form as they may be advised so as to present the real questions at issue, that the same may be determined with as little delay and expense as possible. Nothing is ever gained by turning a party out of court, or compelling him to take a nonsuit, on account of some defect in his pleading, not discovered, perhaps, until during the progress of the case, when an

amendment could supply the defect, and the action or suit be brought to an early determination. The defendants did not request to take any additional evidence after the amendment, and it is not claimed that they were in any way prejudiced on the merits by allowing it. We therefore think the court below properly allowed the amendment. *Miner v. O'Harrow*, 60 Mich. 91, 26 N. W. Rep. 848; *U. S. v. Telephone Co.*, 39 Fed. Rep. 716; *Rogers v. Hodgson*, (Kan.) 26 Pac. Rep. 732; *Railroad Co. v. Small*, Id. 695.

2. It appears from the pleadings and evidence that the plaintiff, as early as 1862, appropriated and commenced to use the water from Baldock slough for irrigating his land, and for domestic and stock purposes. This slough at that time was connected with Powder river, and from one-third to one-half of the water of said river flowed into it, although called "slough," it was to all intents and purposes a natural water-course. Some time thereafter the channel of Powder river changed, either from natural or artificial causes, so that the head of the slough ceased to connect with said stream. Baldock then put a dam in said river, and cut a ditch again connecting the river and slough. This ditch was cut through lands in the possession of one C. B. Fisher, and owned by him, or else the legal title was in the state. However that may be, Fisher subsequently succeeded to the state's title, and the defendants have acquired whatever interest Fisher had in the premises. The evidence tends to prove that Baldock paid Fisher a valuable consideration for the right to cut said ditch, one or two witnesses testified expressly to the fact, though the circumstances and the price paid do not appear with as much distinctness as they ought. Baldock slough was a crooked, sluggish stream, and in some of its windings a lot of Chinese gardeners established themselves and engaged in gardening. For the purpose of raising the water high enough so as to use it on their gardens, they threw willow brush and other debris into the stream, which obstructed the flow of the water, and interfered with the plaintiff's supply. The evidence further tends to prove that the defendants were desirous of filling up said slough, and causing a ditch to be dug on the section line between sections 16 and 21, and for that purpose employed C. M. Foster, a surveyor, to ascertain the exact location of said line, and to mark the place where said ditch was to be dug, by the setting of stakes. Soon after the stakes were set, Baldock with his men entered upon said premises with the consent of the defendants, as clearly appears by a preponderance of the evidence, and cut a ditch on the line marked out and designated by the defendants for that purpose. This new channel was cut about the year 1880, and was thereafter continuously used by the plaintiff as the means of his water supply for his farm. It followed the section line through the defendants' premises to where it connected with Baldock slough, through which the water was conveyed to the lower part of Baldock slough, and from there to plaintiff's farm,

three miles or more from the head of the ditch. The concise detail of all the facts would be too voluminous for this opinion. It suffices to say we think the evidence tends very strongly to prove that the plaintiff acquired the right of Fisher, for a valuable consideration paid, to cut through his land so as to continue his supply of water, if, indeed, he had not already acquired the right by prescription. Whether he had such right, it is perhaps unnecessary for us to decide at this time. Several reasons would incline us to hold that the change of the channel of Powder river, under the circumstances detailed in the evidence, did not deprive the plaintiff of the right to have the accustomed amount of water flow from the river into the slough, but, if it did, the plaintiff acquired the right of Fisher by contract and payment of a valuable consideration therefor. This, followed by the digging of the ditch, and the work and labor connected therewith, and the continuous possession thereof for a length of time sufficient to bar an entry, would give perfect legal title; but, if any circumstances were lacking to make the legal title perfect by adverse possession, the facts create a right so strong that no court of equity could fail to recognize and protect the interest thus acquired. When the defendants acquired Fisher's land they took it with notice of the fact that Baldock's ditch was there and used by him to convey water into Baldock slough. They therefore took it with notice of Baldock's rights, and subject to his interest, whatever it might be. This statement of the case is conclusive against the defendants' contention, but, if it were necessary to look further, the defense must fail for another reason. When the change was made and the present ditch cut on the line, and that part of Baldock slough abandoned by the plaintiff, it was at the special request of the defendants, and for their interest and advantage. They wished to fill up that part of Baldock slough so as to make that part of their land available as an addition to Baker City. They employed the surveyor to survey and mark the line where the new ditch was to be cut, and under their direction the stakes were set on the exact line where the ditch now is. They were bound to know from the facts and circumstances in evidence that this ditch was for the permanent use of the water, and not a mere temporary arrangement, revocable at their pleasure. In legal effect the plaintiff exchanged his right to use the slough and the part of the ditch at its head for the right of way where the ditch now is. The defendants accepted the slough, and filled it, and received whatever advantage would accrue to their land by platting that part of it, so that a street now passes over what was once a part of Baldock slough. The plaintiff also took possession of the new line agreed upon for his ditch, and has used it ever since. The plaintiff thus acquired the right of way where his ditch now is, for a valuable consideration received by the defendants, and he cannot be disturbed in the possession and use of the same, and by the transaction the de-

fendants extinguished the plaintiff's right in that part of the slough. The defendants contend that the contract with Fisher, as well as with the defendants, was within the statute of frauds, and therefore the plaintiff acquired no rights that can be recognized, because the alleged contract was not in writing. It may be conceded that each of such transactions was within the statute of frauds, and void for that reason, if nothing else had been done; but they were followed by performance on both sides, and were thus taken out of the operation of the statute, according to well-settled equitable principles, and to allow the statute to be invoked, under the circumstances, would be to allow the grossest kind of a fraud to be consummated under the protection of the statute. The principle upon which the court below proceeded is affirmed, and a decree will be entered here in accordance with this opinion.

(21 Or. 84)

McLEOD v. SCOTT et al.<sup>1</sup>

(Supreme Court of Oregon. June 24, 1891.)

MANDAMUS—TO COUNTY COURT—CLERK—LIQUOR LICENSE—REFUSAL TO ISSUE—PAYMENT OF TAX—BOND—APPROVAL.

1. In an application for an alternative writ of *mandamus* to the county court for refusing to grant a liquor license, it is improper to make the county clerk a party, unless it be made to appear that he has refused to perform some act which the law specially enjoins upon him by virtue of his office. Until such refusal he is not in default.

2. The writ of *mandamus* should contain every material fact alleged in the petition upon which the plaintiff relies, making or creating the duty upon the defendant to act, or do the particular thing which the plaintiff demands.

3. A party wishing to apply for a license to sell intoxicating liquors in quantities less than one gallon must pay into the county treasury the amount of the tax before the license can issue, and, if the county court refuse the license, the party cannot sue the county to recover back the sum paid. *Trainor v. County of Multnomah*, 2 Or. 214, followed.

4. A party applying for a license to sell intoxicating liquors in quantities less than one gallon, having complied with all the prerequisites of the statute, is entitled to the license, and, if the same be refused, has his remedy by a resort to the revisory court.

5. When a bond in legal form and proper conditions is presented to the county court, with the requisite number of sureties, who severally justify in the proper form and amount, it is the duty of such court to approve the bond. In such case they have some discretion, and no more than other persons called on to approve bonds. They have no right to disregard the affidavits without legal proof, and they have no right to reject the sureties without at once giving the reason, and a speedy opportunity to meet the facts or to supply other sureties.

6. It is a general principle of statutory construction that when the word "may" is used in conferring power upon an officer, court, or tribunal, and the public or a third person has an interest in the exercise of the power, then the exercise of the power becomes imperative. *Kohn v. Hinshaw*, 17 Or. 308, 20 Pac. Rep. 629, and *Smith v. King*, 14 Or. 10, 12 Pac. Rep. 8, approved and followed.

7. If the county court improperly refuse to grant a liquor license to a person who complies with the prerequisites of the statute on that subject, *mandamus* will lie to compel such license to issue. The writ of review provided by sec-

<sup>1</sup>Petition for rehearing pending.

tion 588, Hill's Code, is not an adequate remedy in such case.

(*Syllabus by the Court.*)

Appeal from: circuit court, Sherman county; R. P. Boise, Judge.

This is an application for a writ of *mandamus* to the county court of Sherman county, requiring said court to grant the plaintiff a license to sell spirituous liquors in quantities less than one gallon in Grant's precinct, in said county. The facts alleged in the petition for the writ bring the plaintiff within the law authorizing a license for such purpose. It appears from the record before us that the county court of said county, notwithstanding such compliance, refused the license. It is true, the record of the county court recites that the bond tendered was insufficient; but no specific objection was made to it, either as to form or substance. The other facts necessary to a proper understanding of the case will be noted in the opinion.

J. L. Story and C. H. Carey, for appellants. Huntington & Wilson, for respondents.

STRAHAN, C. J., (*after stating the facts as above.*) The first question which requires our attention is the proper construction of the statute in relation to the granting of license to sell spirituous, malt, or vinous liquors in this state in less quantities than one gallon. The statute in force when the application for license was made by the plaintiff was the act of February 18, 1889. It is entitled "An act to regulate the sale of spirituous, malt, and vinous liquors, and to prevent the sale thereof without first having obtained a license therefor, and to repeal all laws and parts of laws in conflict therewith." The first section provides that no person shall be permitted to sell spirituous, malt, or vinous liquors in this state in less quantities than one gallon without having first obtained a license from the county court of the proper county for that purpose. The second provides that every person obtaining a license to sell spirituous, malt, or vinous liquors shall pay into the treasury of the county granting such license the sum of \$400 per annum, and in the same proportion for a less period; or \$200 per annum, and in the same proportion for a less period, to sell malt liquors only. Section 3, among other things, provides that every person applying for such license, before securing the same, shall execute to such county a bond in the penal sum of \$1,000, with two or more sufficient sureties, to be approved by such court, with certain specified conditions; and it is further provided that, in case of the violation of the foregoing conditions by any person giving such bond, he shall be liable to pay a fine of not less than \$50 nor more than \$200 for such violation, and the bond so given as aforesaid by such person shall also be liable to be prosecuted as therein after prescribed. Section 4 provides that any person wishing to sell spirituous, malt, or vinous liquors, before obtaining a license as hereinafter provided, shall, at his own trouble and expense, obtain the signatures of an actual majority of

the whole number of legal voters in the precinct in which he wishes to carry on said business to a petition to said county court praying that said license be granted; and no applicant shall be deemed to have a majority of the legal voters of such precinct whose petition does not contain the names of a number of legal voters of such precinct equal to a majority of all the votes cast in such precinct at the last preceding general election, and greater than the whole number of names of legal voters of such precinct which may be signed to any remonstrance against the granting of such license. Section 5 provides that when the signatures of an actual majority of the whole number of legal voters have been obtained, to be determined as provided in the preceding section, the applicant shall at his own expense cause the said petition to be published in such county for four consecutive weeks in any daily or weekly newspaper published in such county, together with notice of the day on which he will apply to the county court for such license, and, if no paper be published in the county, the petition and notice shall be plainly written and posted in three of the most public places of such precinct, and proof of such posting shall be made by the affidavit of one of the petitioners and two resident householders of the precinct. Section 6 provides that on the applicant producing to the county court the receipt of the county treasurer for the payment of the sum hereinbefore prescribed, and proof of compliance of all the preceding provisions of this act, the county court may give him a license of the character and for the term his receipt may call for. Sess. Acts 1889, p. 9. These are the material provisions of the statute in relation to obtaining a license to sell intoxicating liquors.

The petition and the exhibits attached to it, and accompanying the same, showed that the petitioner had complied with every provision of the statute, except that on the day which his notice specified he would present his petition to the county court, and at the time the same was presented, he offered a bond which was made payable to the county court, and not to the county, as the law required. Upon the plaintiff's application, the further hearing of said petition was continued until the next succeeding day, at which time the petitioner presented a bond which obviated the irregularity in the first, and, after hearing the application, the same was refused, and the following entry made by the county court: "Now, on this day came on to be heard the petition of M. McKenzie and others in the above matter, continued from October 8th; and it appearing that the bond of Neil McLeod, with August Buchler and C. M. Fontas as sureties, which was on file with the clerk of this court, and which was taken from the files on October 8th by J. L. Story, counsel for the petitioner, in the presence of this court, at his own request, and with the promise to return the same to this court in good order, was on this day returned to this court; and the said bond showed that it had been altered or tampered with while removed from the file in

this particular, to-wit: A scroll has been drawn around the word 'Seal' opposite the signature of C. M. Fontz; no scroll appearing there when the said paper was taken from the file. Now, therefore, the court condemns the act of said J. L. Story in altering, or allowing the same to be altered, the papers of this court while in his possession. And it further appearing that a new bond is this day filed by the said Neil McLeod, with M. McKenzie, George Gray, and Walter M. Fraime as sureties, and the same is not approved; and it further appearing that the applicant has failed to comply with all the provisions of the statute in such matters made and provided, and that no sufficient bond as required by law has been executed to this court; and it further appearing to this court that said petition and application should not be granted: It is therefore considered, ordered, and adjudged that said petition and application be, and the same is hereby, disallowed and refused." Upon the refusal by said court to grant the license as prayed for, the plaintiff applied for an alternative writ of *mandamus* to the county court, by which they were required to grant the license, or show cause for its refusal. This writ was directed to the defendants, composing the county court of said county, and to the clerk as well. The reason for sending the writ to the clerk does not appear to us, because it does not seem that he refused to perform any duty which the law specially enjoined. If he should refuse to issue the license after the same is authorized by the court, then, no doubt, compliance with such order might be compelled by means of this writ; but until such refusal or failure it is not perceived that he is in default. As to the county clerk, therefore, no sufficient cause is shown for the issuance of the writ to him. The writ itself does not set out the facts out of which it is claimed by the plaintiff the duty arises to issue the license. The defendants demurred to the writ for that reason, but, the demurrer having been overruled, they filed their answer.

Hill's Code (section 598) provides: "On the return-day of the alternative writ, or such further day as the court or judge thereof may allow, the defendant on whom the writ shall have been served may show cause by demurrer or answer to the writ in the same manner as a complaint in an action." There can be no question as to the proper practice in such case. The writ itself ought to contain every material fact alleged in the petition upon which the plaintiff relies, making it the duty of the defendant to act, or do the particular thing which the plaintiff demands. *Mos. Mand.* p. 206, and Hill's Code, § 598, *supra*, requires in effect the same thing. But the defendants refusing to stand on their demurrer, and having answered over, the case was argued in the court below, as well as in this court, upon the theory that the petition and exhibits might be looked into for the purpose of finally determining the rights of the parties to this proceeding. It is true, respondent's counsel made the point upon the argument here that the writ itself ought to contain all the requisite facts up-

on which the plaintiff relies; and in that we think he is correct. But the case was argued by both sides on the further assumption that the petition and exhibit might be looked into, and we have concluded that after answering over, and proceeding to a trial on the merits, and treating the petition and exhibits as being before the court, it is best to look into the entire record that was before the court below, and endeavor to ascertain what duty the law devolved upon the defendants under the facts disclosed by the record. These defendants answered the writ and showed cause as follows: "Come now the defendants, O. M. Scott, John A. Moore, and Robert J. Ginn, above named, and returning the writ heretofore served in the above-entitled case upon them, and show why they have not issued the license to Neil McLeod mentioned in said writ, as follows: *First.* That the receipt produced to the county court of Sherman county at the time said Neil McLeod presented a petition for the liquor license referred to in the writ aforesaid from the treasurer of said Sherman county does not name a definite period for which a license should issue, and does not name any person to whom a license should issue, and does not set forth for what purpose the money named therein was paid to the county treasurer. *Second.* That said Neil McLeod never executed to said Sherman county a bond in the penal sum of \$1,000.00, with two or more sufficient sureties, as by law required; and that said O. M. Scott, county judge, and said John A. Moore and Robert J. Ginn, county commissioners, sitting as the county court in and for said county, never approved any bond presented or filed by said Neil McLeod, but found and adjudged that the so-called bond filed by him on October 8, 1890, was not properly executed, was insufficient in substance and form, and that it was not executed by two or more sufficient sureties; and further found and adjudged that the bond presented by Neil McLeod on the 9th day of October, 1890, was not executed by two or more sufficient sureties, but found that the sureties were insufficient, and therefore refused to approve such bond. *Third.* That at the time of the presentation to such county court of the petition praying that such license be issued for the sale of liquors in Grant precinct, Sherman county, Or., no evidence was presented or offered tending to show, and it was not proved or shown, that said petition was signed by an actual majority of the whole number, or any, of the legal voters in said precinct, nor tending to show that said petition was signed by a number of legal voters of such precinct equal to a majority of all the votes cast in said precinct at the last preceding election, nor that said petition was signed by any legal voters, nor that the names appearing upon said petition were the names of legal voters of said precinct, nor that the names appearing upon said petition were placed there by such persons. *Fourth.* That at the time of the presentation of said petition said Neil McLeod failed to produce to said county court any proof of compliance with all the provi-

lions of sections 1, 2, 3, 4, 5, and 6 of the act of the legislative assembly of the state of Oregon entitled 'An act to regulate the sale of spirituous, malt, and vinous liquors, and to prevent the sale thereof without first having obtained a license therefor, and to repeal all laws and parts of laws in conflict therewith,' filed in the office of the secretary of state February, 1889. All of which more fully appears by the records and files of said court in said matter, which are hereby referred to and made a part of this return. *Fifth.* That at the time said county court refused to grant said petition, and to issue said liquor license, it found and determined that said petitioner had failed to comply with all the provisions of said law; and that it was for the best interests of said Sherman county that said petition should not be granted or said license issued; and that in the exercise of a wise and sound discretion, under the laws of this state, it could grant or refuse, in the exercise of such discretion, such petition."

It will be observed that this answer does not controvert a single fact upon which the writ issued. It refers to the proceedings had in the county court, and which are appended to the return. A reference to those papers shows that the first bond tendered was informal, because made payable to the county court, instead of Sherman county; but the bond tendered on the 9th of October, 1890, to which day the proceeding had been adjourned, is in proper form, conditioned according to law, and is for the sum of \$1,000, and is signed by three sureties. To this bond is also attached the affidavits of the sureties to the effect that each is a resident and householder within the state of Oregon, worth the sum of \$1,000 over and above all just debts and liabilities, and exclusive of property exempt from execution. Upon the argument, counsel failed to point out any defect in this bond, only that it was filed on the 9th day of October, to which day the hearing had been adjourned. The treasurer's receipt, which is also attached, is as follows: "Wasco, Oregon, October 6th, 1890. Received from Nell McLeod two hundred & no 100 dollars for liquor license to sell in Grant precinct, Sherman county, Oregon. \$200.00. LEVY ARMSWORTHY, County Treasurer, Sherman Co., Or." Many objections are taken to this receipt by the return, but they are of a nature that do not require special notice. They are so utterly frivolous that a discussion of them would seem wholly out of place. All of the other objections suggested by the return seem equally unfounded, when examined in the light of the record attached to the return. The practical question, therefore, is whether or not, conceding the plaintiff has fully complied with all the requirements of law in relation to the granting of license to sell intoxicating liquors, the county court may capriciously, or at its mere will and pleasure, or because in the opinion of that court the policy of the law is wrong, refuse to execute it, by granting a license when its terms have been complied with. But before proceeding to consider that question it may be proper to remark that the legislature

evidently had two main objects in view in the enactment of this law. The first was to place such restraint about the seller of intoxicating liquors as would tend to compel a compliance with certain restrictive requirements, the effect of which would be to mitigate some of the evils resulting from the traffic, and for this purpose a bond with certain stringent provisions was required. In the second place, a tax was levied upon the business to be paid into the county treasury by the seller, over and above the general tax on his property, for reasons founded in public policy, and in the past experience of the state on that subject. In addition to this, the tax must be paid into the county treasury before the license can issue; and, if the county court refuse to issue the same, the party cannot recover back the money paid. *Trainer v. County of Multnomah*, 2 Or. 214. Hill's Code, § 593, defines when and to whom the writ of *mandamus* may issue, as follows: "It may be issued to any inferior court, corporation, board, officer, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. But though the writ may require such court, corporation, board, officer, or person to exercise its or his judgment, or proceed to the discharge of any of his or its functions, it shall not control judicial discretion. The writ shall not be issued in any case where there is a plain, speedy, and adequate remedy in the ordinary course of law."

Having said this much by way of preliminary statement, we proceed to consider the real question at issue: Did the plaintiff, by a compliance with the law, acquire a right to have a license issued which the court was not at liberty to refuse? This identical question was raised in this court for the first and only time, so far as we have been able to discover, in *Trainer v. County of Multnomah*, supra, and seems to have been answered in the affirmative. That was an action to recover back money paid over to the county treasurer for license to sell spirituous liquors, which license was refused by the county court. In disposing of that question, this court said: "Having complied with all these requirements, the applicant is entitled to a license, and, if the same be refused, has his remedy by a resort in a proper manner to the appellate or revisory court." And the court continued: "The payment of the amount required by statute is a condition precedent to his applying for a license, and is not a deposit in the hands of the county treasurer, which can be withdrawn at the pleasure of the applicant, but goes at once into the county treasury, and becomes at once a part of the general county funds, and cannot be distinguished from the other funds of the county, and can never become the foundation for an action for money had and received, either against the county or its treasurer." If this last extract states the law correctly, and the respondents' contention were sustained, an application for a license would become a very hazardous proceeding. The plaintiff could not be heard in court until he paid over his

money to the treasurer; though, as he had complied with all the law on the subject, the court might, without any reason therefor appearing upon the record, refuse to grant a license, which action of the court is final, because discretionary, and the money paid could not be recovered back, because its payment was a condition precedent to his being heard, and the same had been covered into the treasury. A position which leads necessarily to such consequences ought to be sustained by very conclusive authorities before we are asked to give it our sanction. But the decided weight of authority seems to be the other way. *Potter v. Village of Homer*, 59 Mich. 8, 26 N. W. Rep. 208, which was a proceeding to compel by *mandamus* the town council to approve a liquor dealer's bond, is identical in principle with this case. In that case the court said: "The statute itself has fixed the conditions, and nothing is left to the council except to pass upon the sufficiency of the sureties. But this is only so far within their discretion that they may inquire, where there is substantial reason to do so, beyond the mere general averments of the affidavits of justification. In this they have some discretion, and no more than is possessed by other persons called on to approve sureties. They have no right to disregard the affidavits without legal proof, and they have no right to reject sureties without at once giving the reason, and giving a speedy opportunity to meet the facts or supply others." *Amperse v. City of Kalamazoo*, 59 Mich. 78, 26 N. W. Rep. 222, involves the same question, and was decided the same way. In that case the court said: "The duty of this board, under the statutes, is a simple one. They are concerned, under the law, solely with these questions: Is the bond proper in form, and the penalty therein named sufficient? Are the bondsmen residents of the municipality, and financially responsible for their undertaking? If they are not satisfied as to any of these matters, it is their duty to reject the bond, and to acquaint the petitioner with the grounds upon which they reject it, so the bond may be remedied, if possible. If these questions are found in the affirmative, it is the duty of the board to approve it. They have no power to arbitrarily reject a bond without having any valid reason, or without assigning any good reason therefor. And we think the reason for rejecting the bond should appear of record." *State v. County Court*, 41 Mo. 221, is another case when a county court capriciously refused to approve a bond without giving any reason for their action; and the court said: "In approving of the sheriff's bond as collector of the state and county revenue, the justices of the county court act in a ministerial, and not in a judicial, capacity. Their discretion is confined to an examination of the sufficiency of the securities offered, and that must be a sound legal discretion, and not capricious, arbitrary, or oppressive." And *Ex parte Candee*, 48 Ala. 386, is to the same effect. In *re Prospect Brewing Co.*, (Pa.) 17 Atl. Rep. 1090, is another case when an evasive return was made to an

alternative writ of *mandamus* issued in a liquor license case, and the writ was made peremptory. And in 11 Amer. & Eng. Enc. Law, pp. 662, 663, the principle is stated that, when a discretion is vested in a designated body or person to grant license to sell intoxicating liquors, such person or body cannot be controlled in the honest exercise of such discretion; but if such authorities, in the arbitrary exercise of their discretion, refuse, without sufficient reason, to issue a license to a suitable person, they will be compelled by *mandamus* to issue the license.

But it was argued on behalf of the respondents that in section 6 of the act of 1889, *supra*, the word "may" was used instead of the word "shall," which was contained in the former statute, and that by this change of terms the legislature intended to and did vest in the several county courts of the state a discretion to issue a license to sell spirituous liquors according to their own sense of propriety. There is much force in this argument, but we do not think it is decisive. The law still provides for the payment of the money before a license can issue, which is not recoverable back if the same be refused, as we have seen. In addition to this, the petitioner must incur a considerable expense in securing the majority of all the legal voters of the precinct, and in the publication of his petition and notice as prescribed by the act. These requirements of the statute are of substance, and evince an intention on the part of the legislature that upon compliance with the terms of the act a license would issue. Is the change in the phraseology above noticed sufficient of itself to overthrow the plain intent deducible from the other portions of the act? We think not. Besides this, it was held by this court in *Kohn v. Hinshaw*, 17 Or. 308, 20 Pac. Rep. 629, that it is a general principle of statutory construction that when the word "may" is used in conferring power upon any officer, court, or tribunal, and the public or a third person has an interest in the exercise of the power, then the exercise of the power becomes imperative; and *Endl. Interp. St. § 310; Sedg. St. & Const. Law*, 377; *Potter, Dwar. St. p. 220, note 27*,—are referred to as authority. *Smith v. King*, 14 Or. 10, 12 Pac. Rep. 8, is to the same effect, and the undoubted weight of authority is the same way. *People v. Commissioners*, 6 Lawy. Rep. Ann. 161, and note, 22 N. E. Rep. 596. In the light of these authorities, the defendant's contention on this point cannot be sustained.

But it was contended by respondents that *mandamus* could not issue to control judicial discretion. This is true, not only as a general principle of law, but by the letter of the statute; but we have shown that the county court, in the sense contended for upon the argument, was not vested with any such discretion. The length of this opinion precludes a full examination of the cases to distinguish when *mandamus* is, and when it is not, the proper remedy in case of a refusal of license; but in the view we have taken of the statute in this state we hold it to be a proper remedy here. And this construc-



tion is sustained by these authorities, in addition to those already referred to: *Bean v. County Court*, 33 Mo. App. 635; *Seymour v. Ely*, 37 Conn. 103; *State v. Ruark*, 34 Mo. App. 325; *McLaughlin v. Commissioners*, 7 S. C. 375; *People v. Jeffers*, 4 Thomp. & C. 398; *Brown v. Atkin*, 1 Utah, 277; *Goss v. Common Council*, 44 Mich. 319, 6 N. W. Rep. 684; *State v. Judge*, 35 La. Ann. 248; *State v. Adams*, 12 Mo. App. 436; *Braconier v. Packard*, 136 Mass. 50; *State v. Judge*, 36 La. Ann. 578; *Pettigrew v. Washington County*, 43 Ark. 33; *People v. Osborn*, 38 Mich. 313. These cases do not all relate to the granting of liquor license, but they illustrate the various applications of the principle under consideration. It was suggested upon the argument by respondents' counsel that the writ of review provided by section 583, Hill's Code, furnished an adequate remedy to the plaintiff in this case, and for that *mandamus* would not lie. But the remedy provided by that section is wholly inadequate to meet all contingencies that might arise in the course of such litigation. Suppose the right claimed or denied depended upon the existence of certain facts which could only be ascertained or known by the introduction of evidence, the writ of review would not be an appropriate proceeding in which to try the question of fact. Let it be supposed that the county should enter in the journal that they refused the license for the reason the petitioner did not have a majority of the voters of the precinct, or that his sureties were wholly insolvent, and that the license was refused for one or both of these reasons. Would it be contended that this question could be re-examined on writ of review? Other objections might be suggested just as insuperable, but these will suffice. Respondents' counsel also argued that the treasurer's receipt was insufficient, but we do not think any particular formality is required in such case. The amount of money paid into the treasury will determine the time for which the license may properly issue. That is expressly regulated by the statute. We have examined this case in all of its legal aspects, and though reluctant to interfere with the county court, which no doubt acted and was governed solely by a sense of public duty, still we have reached the conclusion that it disregarded the rights which the statute secured to the petitioner. We have no discretion, therefore, but to reverse the judgment of the circuit court, and to remand the cause to that court, with directions to award a peremptory writ of *mandamus* to the defendants to issue a license to the petitioner, to take effect and be in force from and after its issuance.

#### STATE V. KINGSLEY.

(Supreme Court of Montana. June 15, 1891.)

INDICTMENT AND INFORMATION — CONSTITUTIONAL LAW — APPEALABLE ORDER.

1. Article 5, Organic Act Mont., provided that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." Const. Mont. art. 3, § 8, provides that "all crim-

inal actions in the district court \* \* \* shall be prosecuted by information after examination and commitment." Held, that one charged with grand larceny, committed before the state constitution took effect, could not be convicted under an information.

2. Comp. St. Mont. div. 3, § 394, provides that "an appeal to the supreme court may be taken by the defendant, as a matter of right, from any judgment against him, and, upon appeal, any decision of the court or intermediate order made in the progress of the case may be reviewed." Held, an order denying a motion in arrest of judgment is appealable.

Appeal from district court, Deer Lodge county: D. M. DUFFEE, Judge.

Edward Scharnikow, for appellant.  
Henri J. Haskell, Atty. Gen., for the State.

BLAKE, C. J. The appellant was convicted of the crime of grand larceny in March, 1891, and judgment was entered upon the verdict. The information was filed March 23, 1891, by the county attorney of the county of Deer Lodge, and alleged that the offense was committed September 20, 1889. A plea of not guilty was entered, and it is conceded that the verdict was supported by the evidence. The appellant moved to arrest the judgment upon the following grounds: That the county attorney had no authority to file the information; that the court had no jurisdiction to try the alleged offense by information; that there was no authority for the proceeding by information; and that the information did not state facts sufficient to constitute a public offense. The motion was overruled, and the appeal has been taken from the action of the court below and the judgment.

A motion in arrest of judgment in a criminal action "may be granted by the court for either of the following causes: First, that the grand jury who found the indictment had no legal authority to inquire into the offense charged, by reason of it not being within the jurisdiction of the court; second, that the facts stated do not constitute a public offense." Comp. St. div. 3, § 357. The act "relating to informations in criminal cases," approved March 2, 1891, provides that all laws which are applicable to prosecutions upon indictments, and "to motions, demurrers, amendments, pleadings, trials, penalties, and punishments, the passing or the execution of any sentence, appeals, and to all other proceedings in cases of indictment, whether in the court of original or appellate jurisdiction, shall, in the same manner, and to the same extent and effect, as near as may be, apply to prosecutions by information, and to all proceedings therein, the same as if prosecuted by indictment." Section 4. The criminal practice act contains this section: "A defendant who has failed to demur to an indictment for any of the defects appearing upon its face shall be deemed to have waived the same, except the defects that the court has no jurisdiction over the same, or that the indictment does not state facts sufficient to constitute an offense. These he may take advantage of on the trial, or on motion to arrest judgment." Section 217. It is further provided: "An appeal

to the supreme court may be taken by the defendant, as a matter of right, from any judgment against him, and, upon appeal, any decision of the court or intermediate order made in the progress of the case may be reviewed." Section 394. The contention on behalf of the state is that the order of the court in denying the motion in arrest of the judgment is not appealable, and this position is fortified by the following authorities: *People v. Markham*, 64 Cal. 157; *People v. Majors*, 65 Cal. 100, 3 Pac. Rep. 401; *People v. Henry*, 77 Cal. 445, 19 Pac. Rep. 830; *People v. Cline*, 83 Cal. 374, 23 Pac. Rep. 391. There is a material distinction respecting this matter between the statutes of this state and those of California, which destroys the weight of these cases. In *Territory v. Duncan*, 5 Mont. 478, 6 Pac. Rep. 353, Chief Justice WADE, in the opinion, said: "There was a motion in arrest of judgment, \* \* \* which was overruled, and judgment entered upon the verdict, from which the defendant appeals to this court. This appeal properly brings the indictment here for review. The indictment must at all times support the judgment, and the question whether it does or does not may be raised in this court for the first time." This is a sound interpretation of the statutes *supra*, and the decision of the court upon the motion is properly before us.

Was the prosecution of the appellant by information in accordance with the law? The offense of which he has been convicted was committed during the existence of the territory of Montana. This political organization was created by an act of congress, approved May 26, 1864, and continued until November 8, 1889, when the government of the state was established. The sixth section of its organic act provided "that the legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and provisions of this act." The fifth article of the amendments to that constitution declares that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." Subject to this limitation the legislative assembly possessed and exercised the power to define offenses against persons and property, and regulate the trial of the parties who might be accused of unlawful conduct; but any statute which required prosecutions for a capital or infamous crime to be made by informations instead of indictments would have been without validity. If, therefore, the appellant had been arrested at the time of the commission of this offense, he could have been held to answer only "on a presentment or indictment of a grand jury." This was then "the supreme law of the land." How was this right of the appellant affected by the government of the state of Montana? The following provisions of the constitution should be weighed: "All criminal actions in the district court \* \* \* shall be prosecuted by information, after examination and commitment by a magistrate, or after

leave granted by the court, or shall be prosecuted by indictment without such examination or commitment, or without such leave of the court." Article 3, § 8. "No *ex post facto* law \* \* \* shall be passed by the legislative assembly." Article 3, § 11. "No person shall be deprived of life, liberty, or property without due process of law." Article 3, § 27. "The style of all process shall be, 'The State of Montana' and all prosecutions shall be conducted in the name and by the authority of the same." Article 8, § 27. "All laws enacted by the legislative assembly of the territory of Montana, and in force at the time the state shall be admitted into the Union, and not inconsistent with this constitution or the constitution or laws of the United States of America, shall be and remain in full force as the laws of the state until altered or repealed, or until they expire by their own limitation." Article 20, Schedule, § 1. "No crime or criminal offense committed against the laws of the territory of Montana shall abate, or be in any wise affected, by reason of the change from a territorial to a state form of government: but the same shall be deemed and taken to be an offense against the laws of the state, and the appropriate courts of the state shall have jurisdiction over and to hear and determine the same." Article 20, § 3. "Parties who, at the time of the admission of the state into the Union, may be confined under lawful commitments, or otherwise lawfully held for alleged violations of any of the criminal laws of the territory of Montana, shall continue to be so confined or held until discharged therefrom by the proper courts of the state." Article 20, § 8. "All writs, processes, prosecutions, actions, causes of actions, defenses, claims, and rights of individuals, associations, and bodies corporate, existing at the time the state shall be admitted into the Union, shall continue and be respectively executed, proceeded with, determined, enforced, and protected under the laws of the state." Article 20, § 9.

The constitution of the United States and the territory of Montana guaranteed by appropriate legislation the right of the appellant to be prosecuted for the offense charged against him through the intervention of a grand jury. The state, in pursuance of the power which has been conferred by constitution, has authorized by the act *supra* the proceeding by information in a case of this degree. The effect of similar statutes was determined by the supreme court of California in *People v. Campbell*, 59 Cal. 243. It appeared that Campbell committed the crime of manslaughter in August, 1879, when the constitution declared that "no person shall be held to answer for a capital or otherwise infamous crime \* \* \* unless on presentment or indictment of a grand jury." The new constitution, which was in force January 1, 1880, provided for the prosecution of offenses by information, and the legislature passed, April 9, 1880, an act to carry the same into effect. Chief Justice MORRISON, in the opinion, said:

"The claim on behalf of the defendant is that neither the constitution nor the act of the legislature is applicable to the present case, because, as has already been remarked, the homicide was committed in the year 1879." The conclusion of the court is stated in the following sentences: "On principle and authority, we think there can be no objection to the new remedy prescribed by the constitution and the act of the legislature. It was as competent to introduce the prosecution by information, and to make the same application to past offenses, as it was to establish a new forum in which prosecutions for past offenses should take place. \* \* \* We are therefore of opinion that the case is one in which an information was a proper mode of prosecution." Three justices, MYRICK, ROSS, and MCKEE, concurred, and three justices, SHARPSTEIN, MCKINSTRY, and THORNTON, dissented. This is the leading case upon the important question to be decided in this appeal, and the reasons must be critically compared and analyzed. The main proposition of the majority of the court is that prosecutions by indictment or information relate wholly to the mode of procedure, which is a creature of the legislative will. We will repeat some of the citations: Chief Justice PARKER, in *Springfield v. Commissioners*, 6 Pick. 508, said: "But there is no such thing as a vested right to a particular remedy. The legislature may always alter the form of administering right and justice, and may transfer jurisdiction from one tribunal to another." Mr. Bishop, in his work on *Statutory Crimes*, says: "There is no vested right in any particular remedy." 2d Ed. § 178. The court in *People v. Mortimer*, 46 Cal. 118, said: "But laws changing the mere forms of procedure in a criminal action are no within this category;" and it was held that a statute which modified the rule, and prescribed the order in which counsel for the state should address the jury, was applicable to offenses which were perpetrated before the Penal Code took effect. The following language of Judge Cooley in his work on *Constitutional Limitations* is also relied on in *People v. Campbell*, supra: "But, so far as mere modes of procedure are concerned, a party has no more right, in a criminal action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure, in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime. Statutes giving the government additional challenges, and others which authorized the amendment of indictments, have been

sustained and applied to past transactions, as doubtless would be any similar statute calculated merely to improve the remedy, and its operation working no injustice to the defendant, and depriving him of no substantial right." 5th Ed. p. 329, and notes. None of the precedents which support the text of this learned author is on all fours with the case at bar, and we do not question them, or the doctrine which is applied to the facts in *People v. Mortimer*, supra. But the minority of the court in *People v. Campbell*, supra, maintain, in the dissenting opinion of Mr. Justice SHARPSTEIN, that the provisions of the old constitution respecting the presentment or indictment of a grand jury "was one of the substantial protections with which that instrument surrounded persons accused of crime;" and that "a presentment or indictment of a grand jury was not a mere mode of procedure which the legislature might in its discretion dispense with or change." No cases are cited to uphold these views. It should be observed that after the publication of the report of the case of *People v. Campbell*, supra, the supreme court of the United States investigated kindred subjects, and we enjoy the great benefits of its profound and exhaustive discussions in *Kring v. Missouri*, 107 U. S. 221, 2 Sup. Ct. Rep. 443; *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. Rep. 202; *Hurtado v. People*, 110 U. S. 516, 4 Sup. Ct. Rep. 111, 292; *In re Medley*, 134 U. S. 160, 10 Sup. Ct. Rep. 384; and *Cook v. U. S.*, 138 U. S. 157, 11 Sup. Ct. Rep. 268.

The investigation by a grand jury of a capital or infamous crime of which a party may be accused has been regarded for centuries as a bulwark of personal liberty. It has been treated in many volumes as a vital substance, and the history of the foregoing amendment to the federal constitution deserves thoughtful consideration. Judge Story, in his work on the Constitution, says: "But, although this provision of a trial by jury in criminal cases is thus constitutionally preserved to all citizens, the jealousies and alarms of the opponents of the constitution were not quieted. They insisted that a bill of rights was indispensable upon other subjects, and that upon this further auxiliary rights ought to have been secured. These objections found their way into the state conventions, and were urged with great zeal against the constitution. They did not, however, prevent the adoption of that instrument; but they produced such a strong effect upon the public mind that congress, immediately after their first meeting, proposed certain amendments, embracing all the suggestions which appeared of most force; and the amendments were ratified by the several states, and are now become a part of the constitution." Section 1782. The eminent author reviews the duties of this body, and concludes: "From this summary statement it is obvious that the grand jury perform most important public functions, and are a great security to the citizens against vindictive prosecutions, either by the government or by political partisans, or by private enemies." Section 1785. Chancel-

lor Kent, in his Commentaries, says: "The right of personal security is guarded by provisions which have been transcribed into the constitutions in this country from *Magna Charta*, and other fundamental acts of the British parliament, and it is enforced by additional and more precise injunctions." Volume 2, (12th Ed.) p. 12. This amendment to the constitution is then mentioned. Chief Justice SHAW, in *Com. v. Holley*, 8 Gray, 459, said: "The object of the declaration of rights was to secure substantial privileges and benefits to parties criminally charged, not to require particular forms, except where they are necessary to the purposes of justice and fair dealing towards persons accused, so as to insure a full and fair trial. \* \* \* The great principle asserted by the declaration of rights is that no man shall be put to answer a criminal charge until the criminating evidence has been laid before a grand jury, and they have found probable cause, at least, to believe the facts true on which the criminality depends." These assertions concerning the ancient institution of the grand jury, which can be reiterated, shows that this has always been one of the grand rights of freemen. The formalities which are its incidents can be amended, but the fundamental privilege which has been declared and protected by the articles of the constitution cannot be disregarded. In *State v. Ah Jim*, 9 Mont. 167, 23 Pac. Rep. 76, this court held that a party could be prosecuted by indictment which had been found by a grand jury of seven persons, although the alleged offense was committed within the territory of Montana when the statute fixed a higher number, and that the substantial rights of the accused were not thereby impaired, and that this ruling, in its consequences, was not *ex post facto*. The majority of the court in *People v. Campbell*, *supra*, have in our judgment misapplied the authorities on which they relied, and arrived at an erroneous decision in holding the matter one of mere procedure. The prosecution of the appellant by an information gives to the act, *supra*, of the state a retrospective operation. The supreme court of Washington in *McCarty v. State*, (Wash.) 25 Pac. Rep. 299, decided under the same conditions in accordance with our deductions, but, upon a petition for a rehearing, the following opinion was delivered by Mr. Justice DUNBAR: "The petition for rehearing in this case is not allowed; but the court desires to say that in view of the public importance of some of the questions raised, and in view of the fact that the case was submitted without oral argument on the part of the state, in cases hereafter it will not be bound by the opinion rendered in this case on the constitutional questions involved." We confess that the reasons given in the opinion for its action are peculiar and unsatisfactory, but the case cannot be cited as an authority. It is therefore ordered and adjudged that the judgment be reversed, and that the cause be remanded, with directions to grant the motion in arrest of the judgment.

HARWOOD and DE WITT, JJ., concur.

## SEELEY v. ADAMSON.

(*Supreme Court of Oklahoma.* April 4, 1891.)

## FORCIBLE ENTRY AND DETAINER—PLEADING AND PROOF—VARIANCE.

Where the petition in forcible entry and detainer asks the recovery of possession of a whole quarter section, and the proof shows plaintiff to be in possession of a very small part of it, the variance is immaterial.

Error to district court, Logan county.

*H. S. Cunningham*, for plaintiff in error.  
*Williamson & Seeley*, for defendant in error.

CLARK, J. This action was brought in the county court of Logan county by Maggie Seeley to recover from the defendant the possession of the S. E.  $\frac{1}{4}$  of section 28, in township 15 N., of range 3 W., in said county. On the trial in the county court it appeared that the plaintiff had a certificate of entry of said land; that the plaintiff had served upon the defendant notice to quit said land; that the plaintiff had erected on the south-west corner of said land a house 10x12 feet, and that she had erected a barbed-wire fence on the north, east, and west lines of said land; that subsequently defendant broke down said fence, and entered upon said land and built a house, and fenced 85 or 40 acres of said land, and cut hay on the other portions, and has occupied the same ever since. On motion of the defendant, the action was dismissed by the county court at the costs of the plaintiff, because of a variance between the evidence and the petition in this, that the plaintiff occupies a part of said 160 acres, (10x12 feet in the extreme south-west corner;) to which judgment the plaintiff excepted. On petition in error in the district court, the judge of the first district reversed the judgment of the county court, and ordered the said cause to be retained for trial, to which the defendant excepted. The case now comes to this court on petition in error.

In this court it is argued that the district court could not reverse the judgment because the bill of exceptions from the county court contains the following statement, to-wit: "The land described in the notice and petition was the south-east quarter of section 28, Tp. 15 north, of range 3 west, and the evidence showed that the plaintiff held a certificate of entry issued by the United States land-office at Guthrie under date of June 7, 1889, and in August, 1889, erected a house on the south-west corner 10x12 feet in size, and that she had erected a barbed-wire fence on the north, east, and west lines of said quarter, and the defendant, on or about October 6, 1889, took down the wire by pulling out the staples, and entered upon said land, built himself a house, fenced in 35 or 40 acres of said quarter, cut hay on other portions, and has occupied the same ever since. The motion of the defendant was sustained upon the ground that the evidence showed that the plaintiff occupied the said 10x12 feet of said quarter in the extreme south-west corner, and the case was dismissed, and judgment rendered against the plaintiff for costs; to the sustaining of which motion and dismissal of

said action and rendition of said judgment the plaintiff at the time excepted." After judgment reversing the judgment of the county court, the defendant, John Q. Adamson, moved the court to grant a new trial, and dismiss the action, which motion was overruled. John Q. Adamson thereupon brought this case to this court, and alleged the following errors: *First*, in finding that the notice aforesaid was sufficient; *second*, in finding that there was no variance between the proof and the notice; *third*, and generally because the court had not before it the testimony on which the county court acted. In the court below no objections were made to the sufficiency of the bill of exceptions. The insufficiency of the description of the land in the notice and in the complaint were relied upon; it being conceded in the argument that the plaintiff, Maggie Seeley, was in possession only of a tract 10x12 feet square in one corner of the 160-acre tract, the defendant in the occupancy of the remainder, and these facts appear from the bill of exceptions. It is not necessary that testimony should always be set out in the language of the witness. From the bill of exceptions the facts appear, and no amount of verbiage or quotations could make them more definite. The real question is, was that such a variance as to make the proceedings void? In *Dimmett v. Appleton*, 20 Neb. 208, 29 N. W. Rep. 474, Dimmett was notified to quit certain lots and to surrender the possession thereof within three days. It was objected to because it did not particularly describe the premises, the possession of which was sought to be recovered. The testimony showed the property, the possession of which was sought to be recovered, was an hotel, "consisting of the upper stories of the buildings on said lots, and the stairway and back-yards appertaining thereto, wells, cisterns, etc., being all of the buildings and premises except one (1) store on the ground floor occupied by tenants of Appleton." The notice did not describe particularly the premises sought to be recovered, but the whole premises. The court held that while accuracy in the description of the property in the notice is required, yet, as in all cases of the kind requiring notice, what is required is substantial and not technical accuracy. The law will not regard mistakes which do not mislead the party notified. Mr. Adamson could not be misled by the description in this case. Had he surrendered the possession of what he held, then Maggie Seeley would have had all that the notice called for. In the case of *Dimmett v. Appleton* the tenants of Appleton had possession of about a quarter of the premises, whereas in this case Maggie Seeley had possession of less than 1-58000 part. The law does not take notice of such small matters. The judgment of the district court is affirmed, with costs.

(39 Cal. 533)

DENNIS V. STRASSBURGER. (No. 13,151.) 1

(Supreme Court of California. June 25, 1891.)

VENDOR AND VENDEE—RESCISSION—TENDER.

1. Where one makes a deposit upon a contract for the sale of real estate, which provides

1 Petition for rehearing pending.

that 15 days shall be allowed for the examination of title, and, if defective, 30 days shall be allowed to perfect the same, he cannot sue to rescind, and recover the amount deposited, upon the ground of failure of title, before the expiration of the 30 days.

2. Where a deposit is made in part payment of real estate, under a contract for a deed, the vendee cannot recover the amount so deposited if he fails to tender the full amount of the contract price, and demand a deed as therein provided.

Department 1. Appeal from superior court, city and county of San Francisco: JOHN HUNT, Judge.

J. C. Bates, for appellant. E. F. Preston, for respondent.

GAROUTTE, J. This action is brought to recover \$800 as a deposit and part payment of O. L. block 986 in the city and county of San Francisco, under a contract in writing, set forth in the complaint, as follows: "I. Strassburger and Co., Real-Estate Agents, 326½ Montgomery St., Safe-Deposit Building. San Francisco, August 22, 1887. Received of S. W. Dennis eight hundred dollars as a deposit and in part payment of the following property, being situate in the city and county of San Francisco and state of California, and more particularly described as follows, to-wit, O. L. block 986, sold to him this day for the sum of eight thousand dollars, U. S. gold coin, fifteen days allowed for examination of title and completion of purchase, *i. e.*, seventy-two hundred dollars is to be paid upon the tender of a good and sufficient deed conveying the title; if title is defective, thirty days are allowed to perfect the same; and if, after the expiration of said term, unless extended by mutual consent, the title shall not have been perfect, the deposit is to be returned on demand. If the sale is not consummated according to the foregoing conditions, the deposit is to be forfeited, and become the property of the undersigned. Time is the essence of this contract. [Signed] I. STRASSBURGER." The complaint further alleges that the title was defective; that no deed was tendered within 30 days after the making of the agreement, or at any time, and the time was not extended by mutual consent; that plaintiff has done and performed all the conditions and terms of the contract on his part to be done and performed, and that defendant has refused to return to plaintiff said deposit of \$800, although demanded so to do, upon September 22, 1887. Defendant by his answer admits the making of the contract; denies that the title is defective; admits that he never tendered a deed, and that the time was not extended by mutual consent; denies that plaintiff has done and performed all the conditions and terms of the contract set forth in the said complaint on his part to be done and performed; admits that he refused to deliver the amount paid to plaintiff upon demand. At the trial plaintiff introduced evidence showing the pendency of two certain suits in the superior court of the city and county of San Francisco, one in ejectment and the other in partition, and which litigation included, among other land, the land described in the complaint.

It was further testified that these suits included within their claims the larger portion of the city of San Francisco, and that the witness had no knowledge as to the merits of the litigation. Defendant gave to plaintiff's attorney an abstract of title to the property September 3d, and, shortly after, said attorney rejected the title; and upon September 22d a demand was made for a return of the money, plaintiff at that time notifying defendant that he was not satisfied with the title. Plaintiff rested his case, whereupon defendant made a motion for a nonsuit, which motion was granted, and plaintiff appeals from that judgment, and from the order denying his motion for a new trial. The grounds upon which the motion for a nonsuit was based are not stated as clearly and concisely as they should be, but they appear to be mainly that plaintiff failed to show that the title to the land was defective, and, again, if the title was defective, defendant was entitled to thirty days under the contract to remove such defects, and that he neither had notice that such defects existed, nor was given 30 days in which to correct or remove them.

This is an action to rescind a contract, and, in order for plaintiff to recover, it was necessary for him to allege and prove that he had performed all the conditions on his part to be performed, and that defendant was in default as to conditions to be performed by him. Under the contract, 15 days was allowed plaintiff to examine the title, and then, if the title was defective, defendant was allowed 30 days to perfect the same. It is extremely difficult to comprehend how plaintiff was entitled to recover back the \$800 until he had first given defendant 30 days' time to examine the title, (if the title was defective.) In order to recover in this action, plaintiff should have tendered the balance of the purchase price and demanded his deed; and, if such demand was refused, he should then have demanded the return of his money. If he based his right of recovery upon defective title, he should have notified defendant that the title was defective, and if, upon the expiration of 30 days from that time, defendant had not perfected his title, then he should have demanded the return of the amount paid, and a refusal would have formed a basis for a good cause of action. He demanded a return of the money upon September 22d. If he based his right to rescind upon defective title, then his demand for a return of the amount paid was premature, and of no avail; for the time in which defendant was allowed to perfect his title had not yet expired. The allegation and proof that the defendant, within 30 days after the making of the contract, did not tender plaintiff a deed adds no weight to his contention; for it was as much the duty of the plaintiff to tender the money as it was the duty of the defendant to tender the deed. "The obligation of the parties to an agreement for the sale of land are mutual and dependent, where one is to convey and the other at the same time to pay the purchase price; neither can put the other in default except by tendering a performance on his part, unless the other party

waives the tender, or by his conduct renders it unnecessary." *Englander v. Rogers*, 41 Cal. 420. To the same effect are *Hill v. Grigsby*, 35 Cal. 661; *Barron v. Frink*, 30 Cal. 488. Conceding the title to be defective, and conceding the allegation of plaintiff's complaint to be true, by reason of the insufficiency of the defendant's denial thereof, to-wit, "that plaintiff has done and performed all the conditions and terms of the contract on his part to be done and performed," yet, in addition to these facts, he must prove that defendant has made default in the performance of some of the conditions upon his part to be performed; and we look in vain, either in allegation or proof, for anything alleging or showing neglect or refusal to perform such conditions upon his part. The defendant not being in default, the plaintiff has shown no ground upon which to base a rescission of the contract. The contract was a valid, binding contract, and it was only requisite that it should be signed by the party to be charged. *Cavanaugh v. Casselman*, (Cal.) 26 Pac. Rep. 515. For the foregoing reasons let the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

89 Cal. 602

WATT *et al.*, Directors, v. SMITH. (No. 13,-417.)

(*Supreme Court of California*. June 26, 1891.)

SUPPORT OF INSANE PERSON—HUSBAND'S LIABILITY.

Acts Cal. 1885, pp. 32, 33, which provide that, in case an insane person is able to pay actual expenses, a guardian may be appointed, whose duty it shall be to pay such expenses to the board of directors of the insane asylum, and, if indigent insane persons have kindred of degree of husband or wife of ability to pay, they shall support, etc., give such board power to collect a debt due the directors from a husband of an inmate, and they may maintain an action for such recovery as trustees of an express trust.

Commissioners' decision. Department 2. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

This was an action brought by Watt and others, as directors of the state insane asylum at Stockton, against one Smith, to recover for the charges and expenses of his wife while an inmate of the asylum. Judgment was rendered upon the pleadings in favor of defendant, and plaintiffs appeal.

*Wm. Fitzmaurice and Louttit, Woods & Levinsky*, for appellants. *N. C. Briggs*, for respondent.

TEMPLE, C. This appeal is from the judgment and on the judgment-roll. The action is to recover from defendant, as husband of an inmate, the amount fixed by the directors to be paid by paying patients. Judgment was entered for defendant on the ground that plaintiffs were not the real parties in interest, and had not legal capacity to sue; and this is the only question raised here. All the facts necessary to enable the plaintiffs to recover, if they can sue in their own names, are found by the court. The defendant's wife was an indigent inmate, duly committed to the asylum; and the board had by res-

olution, in due form, fixed the amount to be paid by paying patients. The powers of the board are defined by section 2137 of the Political Code; but neither in that nor in any other statute existing at the time this suit was commenced is the board expressly authorized to sue. Such authority was given them by act of March, 1889, passed after this suit was commenced. The duties of the board with reference to such moneys are defined by St. 1885, pp. 32, 33. It is provided, in case an insane person is able to pay actual charges and expenses, a guardian may be appointed, whose duty it shall be to pay such expenses to the board; and "if indigent insane persons have kindred of degree of husband or wife, father, mother, or children, living within this state, of sufficient ability, who are otherwise liable, said kindred shall support such indigent insane person to the extent prescribed for such paying patients;" and, further: "All moneys belonging to the state received by the board of trustees other than that appropriated by the state shall be kept by said trustees in a separate fund, to be known as a 'contingent fund,' and the same shall by the said trustees be expended at such times and in such manner as to the said board appears for the best interest of said asylum, and for the improvement thereof, and of the grounds and buildings therewith connected. A full, strict, and itemized account of such receipts and expenditures shall be included in the biennial report of said board of trustees." It appears from the Code that all the expenses of the asylum are paid from the money appropriated by the state; and we have not found any source from which moneys belonging to the state can come into their possession except these funds, received by them in payment for inmates as provided in this act. At all events, these constitute a portion of this contingent fund, which the board is authorized to receive and to expend, and which, impliedly, it is made their duty to collect.

The obligation is fixed and certain upon the defendant to pay. Independently of the statute, he is liable for the support of his wife. The statute makes it his duty to pay the directors for such support. It is a debt due from him to the directors, as trustees of the asylum. Authorities may be found to the effect that all public officers have an implied power to take all legal measures in their official character which may be requisite to enable them to execute the trust or discharge the duty imposed upon them by law, where there is no statute prescribing the means by which such trust shall be executed; and therefore, if to accomplish their official duty, or to discharge their trust, it is necessary to sue, power to do so is implied. *Cornell v. Town of Guilford*, 1 Denio, 510 and authorities cited. This seems a rational conclusion, and logically follows from the fact of the trust or duty imposed, which can be performed in no other way. The difficulty arises from our Code, which requires all suits to be brought in the name of the real party in interest, except (section 360, Code Civil Proc.) an ex-

ecutor, administrator, trustee of an express trust, or one specially authorized by statute to sue. This last clause, it must be confessed, raises a presumption against the authority of any officer to sue unless specially authorized by statute; and we accordingly find, wherever similar Code provisions have been adopted, care is generally taken to authorize suits where it may be necessary. If the plaintiffs have capacity to sue, it must be on the ground that they are trustees of an express trust. And we see no reason why they are not such. The moneys are never to go to the state treasury. So long as the law is unchanged, the state can exercise no control over the funds, except to compel a faithful execution of the trust. The fund really belongs to the board as trustees, and the terms of their trust and their duties are plainly declared. Among these duties is that of collecting the money which shall constitute the fund, and there is no procedure prescribed. Under such circumstances, we think it a part of plaintiffs' duties to collect by suit if necessary, and as trustees of an express trust they may do so. It follows that the judgment should be reversed, and judgment entered for plaintiffs on the findings for the sum demanded in the complaint.

We concur: BELCHER, C. C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to enter judgment for the plaintiffs on the findings for the sum demanded in their complaint.

30 Cal. 324  
**BLAKELY V. BLAKELY.** (No. 13,410.)

(*Supreme Court of California.* May 29, 1891.)

DIVORCE—CROSS-COMPLAINT—HARMLESS ERROR.

In an action for divorce for abandonment, where a cross-complaint was filed alleging a subsequent abandonment of defendant, and the court refused to consider the same except by way of answer, it was error without injury, where the findings show that defendant abandoned plaintiff at the time alleged, and lives apart from him against his will and without his consent.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

*Louis F. Dunand and Henry Eickhoff*, for appellant. *Geo. B. Gillin*, for respondent.

FITZGERALD, C. This is an appeal upon the judgment roll from a judgment granting to plaintiff a divorce on the ground of desertion. The complaint alleges their intermarriage on the 22d day of September, 1887, and the willful desertion of plaintiff by defendant on the 23d day of September, 1887. The allegation of desertion is denied by the answer, and the defendant, by her cross-complaint, seeks affirmative relief on the same ground, and fixes the date thereof on the 24th day of February, 1888. This is denied by the answer to the cross-complaint. It appears from the record that the court be-



low refused to consider the cross-complaint except by way of answer and defense, and declined to grant any affirmative relief based thereon, because no cross-complaint, as such, could be considered in an action for divorce. This ruling of the court, which was excepted to at the time, and is assigned for error, was clearly erroneous, (*Wadsworth v. Wadsworth*, 81 Cal. 182, 22 Pac. Rep. 648; *Mott v. Mott*, 82 Cal. 413, 22 Pac. Rep. 1140; *Kirsch v. Kirsch*, 83 Cal. 633, 23 Pac. Rep. 1083,) and unless the record affirmatively shows that the defendant was not injured thereby the judgment should be reversed, (*Spanagel v. Dellinger*, 38 Cal. 278; *Leonard v. Kingsley*, 50 Cal. 628.) The court in its decision found "that on the 23d day of September, 1887, the defendant willfully and without cause deserted and abandoned the plaintiff, and ever since has and still continues so to willfully and without cause desert and abandon said plaintiff, and to live separate and apart from plaintiff without any sufficient cause or any reason, and against plaintiff's will and without his consent." As none of the evidence taken at the trial was brought up by the record, it will be presumed that the finding is supported by evidence. It therefore follows that the allegation of the cross-complaint that plaintiff deserted the defendant on the 24th day of February, 1898, could not in point of fact be true, for the reason that the court found that the defendant deserted the plaintiff on the 23d day of September, 1887, and that she "ever since has and still continues to so desert \* \* \*." It might, perhaps, be well to state, in this connection, that the same evidence necessary to sustain the allegation of desertion made by the cross-complaint would be equally competent in support of defendant's answer denying the desertion; hence the ruling of the court in refusing to consider the cross-complaint "was error without injury." We deem it but fair to the learned judge who presided at the trial of this case in the court below to state that while the point upon which his ruling was evidently based was not decided in *De Haley v. Haley*, 74 Cal. 491, 16 Pac. Rep. 248, yet it is manifest that what was said by Mr. Justice McKINSTRY in that case (the cases above cited not having been decided when this case was tried) was accepted by him as a very strong indication of what the action of this court would be when this question came fairly before it for decision. We advise that the judgment appealed from be affirmed.

We concur: FOOTER, C.; VANLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

89 Cal. 474

YATES v. JAMES. (No. 13,404.)

(*Supreme Court of California*. June 17, 1891.)

CONTRACT TO CONVEY LANDS—BREACH—MEASURE OF DAMAGES—INCREASED VALUE—OBJECTIONS WAIVED.

1. Civil Code Cal. § 8806, provides that the detriment caused by the breach of an agreement v.26p.no.16—68

to convey realty is the price paid, and expense of examining title, with interest, and, in case of bad faith, the difference between the price paid and the value of the land at the time of the breach, with expenses in preparing to enter on the land; and where the failure to convey was caused by the refusal of the vendor's wife to join in the deed, the vendor being willing to convey, there is no bad faith, and it is error to allow as damages the increase in the value of the property.

2. The failure of defendant to object to evidence of the increase in value, and his concurring in submitting that question to the jury, does not prevent him from urging the error on appeal.

Department 1. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

*Ernest Sevier*, (*Willson & Willson*, of counsel,) for appellant. *J. H. G. Weaver*, for respondent.

PATERSON, J. On November 15, 1884, the parties to this action entered into a verbal agreement, by the terms of which the defendant agreed to convey the land in controversy to the plaintiff upon the payment to him by plaintiff of the sum of \$300, which was to be paid on or before the end of four years from the date of the contract. The court found that at the time the contract was made the defendant was, and ever since has been, the owner in fee-simple of the property; that immediately after the contract was entered into, defendant delivered the possession of the property to the plaintiff in pursuance of the agreement, and that plaintiff has ever since held the same, and has placed thereon improvements amounting in value to the sum of \$280; that defendant saw the improvements as they were made, and offered no objection thereto; that the land has increased in value over the price agreed to be paid to defendant \$250 per acre; that before the expiration of the four years, to-wit, on or about November 11, 1887, plaintiff offered in writing to pay defendant the full sum of \$300, but defendant refused to accept the offer, and declared that he would not make a deed to the land; that plaintiff has performed all the conditions of the contract on his part to be performed; that \$40 is the value of the use and occupation of the premises, which consist of three acres; that plaintiff has received from the sale of wood taken from the premises the sum of \$36. The court further found that on September 2, 1884, defendant executed and filed a declaration of homestead, claiming as a homestead, together with other lands, the lands in controversy, and that the same has not been abandoned. It will be seen from the findings of the court that the plaintiff was allowed as damages \$750, the enhanced value of the land, and the sum of \$280, the value of his improvements, amounting in all to \$1,030. From this amount the court deducted the sum of \$76, that being the amount received from the sale of wood, and the value of the use and occupation of the premises, and rendered judgment in favor of the plaintiff for \$954 and costs.

We think the court erred in allowing the plaintiff \$750 on account of the increase in value of the property. Section

§306, Civil Code, provides: "The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land." In this case bad faith on the part of the defendant was not alleged, found, or proved. It appears in evidence that the defendant would have conveyed the premises as he had agreed to if his wife had been willing to unite in the deed, but she refused. There has been much conflict of judicial opinion on the question as to what is the just measure of damages in such cases. Mr. Parsons, speaking on the subject, says, "If the action is brought on a contract to sell, and against the party who had promised to sell, and had failed to do so, many authorities have held that the result may depend upon the cause of the failure. For, if the intended vendor was honest, and was prevented from making the sale by causes which he did not foresee and could not control, then the plaintiff recovers only nominal damages, or, if he has paid the price, the same with interest, adding perhaps, in both cases, his expenses in investigating the title, or for similar purposes." 3 Pars. Cont. \*229. The provisions of our Code referred to above were doubtless intended to settle the matter in accordance with the rule stated. In England this rule is sustained upon the ground that the purchaser should investigate the title before he is justified in taking any other step. *Flureau v. Thornhill*, 2 W. Bl. 1078; *Walker v. Moore*, 10 Barn. & C. 416. In this country, although the expense of investigating the title is not allowed in some of the states, the rule is generally based upon the analogy between this class of cases and actions upon covenants for title, in which the measure of damages where there has been an eviction is in many states the amount of the consideration money, with interest. *Baldwin v. Munn*, 2 Wend. 399; *Peters v. McKeon*, 4 Denio, 546. It has been held that where the seller knew he did not have a good title, but had reason to believe that he would be able to secure it before conveyance was required, there was no bad faith. *Sikes v. Wild*, 4 Best & S. 421, 1 Best. & S. 587.

It is claimed by respondent that inasmuch as the appellant made no objection to the evidence offered by plaintiff as to the increased value of the property, and concurred in submitting to the jury the question, "How much has this land increased in value since November 15, 1884?" he is now bound by the answer of the jury, and the finding of the court based thereon. We think, however, that as there is no allegation in the complaint upon which such a finding can be supported, the defendant is not estopped by his conduct at the trial from claiming the benefit of the objection which he now makes. The cause is remanded, with directions to

the court below to modify the judgment by striking out from the last clause thereof the words and figures following: "\$954 damages, and his costs and disbursements incurred in this action, amounting to the sum of \$65," and inserting in lieu thereof, "\$204 damages, and that each party pay his own costs."

We concur: HARRISON, J.; GAROUTTE, J.

89 Cal. 478

CRIM *et al.* v. KESSING. (No. 13,279.)

(Supreme Court of California. June 18, 1891.)

AMENDMENT OF RECORD—FINAL JUDGMENT—AUTHENTICATION OF JUDGMENT—LIMITATIONS.

1. Where, on foreclosure, the judge made an order substituting in place of plaintiff his successor in interest, but such order was not entered by the clerk, a subsequent order *nunc pro tunc* making the substitution becomes a part of the judgment roll, as provided by Code Civil Proc. Cal. § 670, and binds the judgment debtor in an action by the judgment creditor's executors to collect the same.

2. Section 577 defines a judgment as "the final determination of all the rights of the parties." Section 532 requires the court's decision to be "given in writing and filed with the clerk." Section 726 provides that on foreclosure proceedings the judgment shall direct a sale of the property, and an application of the proceeds to the costs, etc., "and the amount due to the plaintiff." Held, that an entry by the clerk at the end of the trial of the amount for which plaintiff was entitled to recover in a foreclosure suit does not constitute a judgment; and the statute of limitations does not begin to run until the decision has been "given in writing, and filed with the clerk," and recorded.

3. A judgment rendered by one judge is not impaired by his failure to authenticate it, and the authentication thereof after the expiration of his term of office by another judge, since the statute does not require a judgment to be signed.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action to recover a judgment by Maria L. Crim and another against John F. Kessing. From a judgment for plaintiff defendant appeals.

Henry C. Firebaugh, for appellant. Blake, Williams & Harrison, for respondents.

HARRISON, J. April 23, 1877, Carrie A. Beach commenced an action in the late twelfth district court, upon a promissory note executed by the appellant, and to foreclose a mortgage on certain real property given to secure the payment of the same. May 20, 1882, the cause was tried upon the complaint and the answer of the appellant, before Hon. J. M. ALLEN, who on the same day announced his decision, which was thereupon entered in the minutes of the court, but findings were not filed until December 29, 1882. The term of office of Judge ALLEN expired December 31, 1882, and on January 10, 1883, the court made an order *nunc pro tunc*, as of March 20, 1882, that "Samuel Crim, the successor in interest of the plaintiff herein, be, and he is hereby, substituted as the plaintiff in this action, and that this action continue in his name as such plaintiff, in the place and stead of Carrie A. Beach, plaintiff therein." September 28,

1883, a judgment of foreclosure and for the sale of the mortgaged premises, signed by Hon. J. F. SULLIVAN, judge of said court, was entered of record in the cause. On the same day an order of sale was issued upon said judgment, under which the sheriff sold the mortgaged premises, and thereafter, on the 17th day of November, 1883, he made and filed his return of the same, showing a deficiency of \$947.17, for which amount judgment was on that day docketed against the appellant, and in favor of Samuel Crim. September 4, 1888, the respondents, as the executors of the last will and testament of said Crim, commenced this action against the appellant to recover the amount of said judgment. In his answer the defendant denied the rendition of the judgment alleged in the complaint, and alleged that certain proceedings which had been taken in the case of Beach v. Kessing, prior to the entry of the judgment, were unauthorized, and without the jurisdiction of the court, and also pleaded the statute of limitations. The action was tried by the court without a jury, and judgment rendered in accordance with the prayer of the complaint. A motion for a new trial having been made and denied, an appeal has been taken to this court from both the judgment and order denying a new trial. When the plaintiffs offered in evidence the judgment roll in the case of Beach v. Kessing, the defendant made various objections thereto, which were overruled. The admissibility of the judgment was to be determined by the court upon its inspection, and, inasmuch as it was a judgment of the same court, and in terms purported to be the judgment alleged in the complaint in favor of plaintiffs' testator, and against the defendant, in an action against the defendant in which he had appeared, and of which the court had jurisdiction, the court committed no error in admitting it in evidence. The objection that the complaint was upon a judgment in an action wherein Samuel Crim was plaintiff, whereas the one offered in evidence was a judgment in favor of Carrie A. Beach, was answered by the fact that the judgment was entitled "Samuel Crim, substituted in place of Carrie A. Beach, Plaintiff, vs. John F. Kessing et al., Defendants;" and, after directing a sale of the mortgaged premises, adjudged that for any deficiency upon such sale "the clerk of the court docket a judgment for such balance against the defendant John F. Kessing, and that the defendant John F. Kessing pay to the said Samuel Crim the amount of said deficiency and judgment."

The judgment of a domestic court of general jurisdiction is conclusively presumed to be correct, unless the record itself of the judgment shows that the court did not have jurisdiction of the subject-matter of the action, or of the person of the defendant. When the court has such jurisdiction, its record speaks absolute verity, because it is the court's record of its own acts; and such jurisdiction will be conclusively presumed, unless the contrary appears upon the face of the record. Whenever such judgment is received as evidence in another proceeding, it cannot

be impeached; "for it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea or even proof be admitted to the contrary." 3 Bl. Comm. 24. In *Carpentier v. City of Oakland*, 30 Cal. 439, an action of debt was brought upon a judgment that had been previously rendered in an action between the same parties; and it was held in the court below that the defendant could not show that service of the summons had not been made upon it in the original action. In affirming this ruling, the supreme court used the following language: "The maxim of the law is that the judgment of a court of general jurisdiction imports absolute verity, and its truth cannot be questioned, either by showing otherwise than by the record itself that the court had no jurisdiction, or that its jurisdiction was fraudulently procured. Both upon the merits of the cause of action and upon all jurisdictional facts, the record imports absolute verity in law, and is to be tried by the court on inspection of the record only." In *Drake v. Duvenick*, 45 Cal. 455, a judgment in ejectment was offered in evidence, and it was objected to by the defendant upon the ground that no judgment had ever been rendered by the court, and that the clerk had no power to enter the judgment by default. The court said, (page 462:) "Purporting to be a judgment of the court, and found regularly entered in its minutes, the presumption is it was entered in pursuance of an order of the court. The rule is elementary that upon collateral attack all intendments are indulged in support of the judgments of courts of superior jurisdiction. Their records are conclusively presumed to speak the truth, and whatever is upon their records is presumed—the contrary not appearing—to be rightfully there." At the common law the only plea that was allowed to an action upon a judgment was *null tiel record*, and the trial of this issue was by the record alone; "for as Sir Edward Coke observes, a record or enrollment is a monument of so high a nature, and importeth in itself such absolute verity, that, if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself." 3 Bl. Comm. 331. Such answer was in effect pleaded by the defendant in the present case, but the record of the judgment itself, having been produced and received in evidence, established the allegations of the complaint. Under our system of pleading, the defendant could have set up in his answer matter which would constitute an equitable defense to the judgment; but, as was said in *Carpentier v. City of Oakland*, supra, "he must plead such defense as fully as if he were bringing a suit, instead of defending one, \* \* \* and file an answer which in matter of allegation would be a good bill in equity under the old system." An examination of the answer herein shows that it falls far short of this requirement, and, in fact, has not been regarded by the appellant, either at the trial or on this appeal, as an equitable defense to the judgment, within the rule

above mentioned. The appellant maintains, however, that the verity of the judgment is impeached by an inspection of its record, and in his argument maintains that the various proceedings that were had subsequent to the entry in the minutes in March, 1882, were without the jurisdiction of the court, and that the judgment as finally entered was void.

1. The court had jurisdiction to make the order of January 10, 1883, by which Crim was substituted as plaintiff in the place of Beach, and its action in making such order is conclusive against any collateral attack. All courts of record have the inherent power to correct their records so that they shall conform to the actual facts, and speak the truth of the case; and such correction may be made at any time, either upon the motion of the court itself, or at the instance of any party interested in the matter. Ordinarily, a court would require notice of the motion to be given to all parties interested; but it has the power to make the correction without such notice. When made, the record so corrected, as well as the order making the correction, is conclusive upon any other court in which the record is offered in evidence. *Balch v. Shaw*, 7 Cush. 282. It appears by the order made in the present case that proof was made to the satisfaction of the court that at the trial of the cause, March 20, 1882, such order of substitution was in fact made, but had not been entered by the clerk. That court was the sole judge of the sufficiency of the proofs offered in support of the motion, and its action is conclusive, except in direct proceedings to vacate the order. The order making the substitution, being an order "relating to a change of parties," became a part of the judgment roll, (Code Civil Proc. § 670,) and imported the same verity as the other parts of the record.

2. The clerk's entry in the minutes of the trial, March 20, 1882, did not constitute a judgment. It was only a record of a portion of the proceedings in the case. "A judgment is the final determination of the rights of the parties in an action or proceeding." Code Civil Proc. § 577. The complaint prayed for the foreclosure of a mortgage, and the sale of the premises mortgaged to secure the payment of the note. The answer did not deny the execution and existence of the mortgage, but alleged that after the action had been commenced, and while it was pending, the defendant made a payment upon the principal of the note, and also of the costs of the action, and that it was then agreed by the plaintiff that the action should be dismissed. This was the only issue presented by the pleadings to be tried by the court; and the court, having found against the defendant upon this issue, ascertained the amount due upon the note, and ordered judgment for that amount. Both parties had appeared at the trial, and there was no waiver by them of findings of fact. Although the court then ascertained the amount of money for which the plaintiff was entitled to a judgment, yet, inasmuch as the payment of that amount was secured by a

mortgage, it was necessary that the judgment when entered should "direct a sale of the incumbered property, and the application of the proceeds of the sale to the payment of the costs of the court, and the expenses of the sale, and the amount due to the plaintiff." *Id.* § 726. It would have been error for the court to enter a mere money judgment against the defendant for the amount then ascertained to be due on the note. Until after a sale of the mortgaged premises, there could be no personal judgment docketed against him. The court did not, as is claimed by appellant, "refuse" the plaintiff any other relief than the money judgment. Its only action at this time was to determine the amount for which judgment should be entered, leaving the form of the judgment by which this amount should be collected until it should render its "decision" upon the whole case. The statute required its decision to be "given in writing and filed with the clerk," (*Id.* § 632,) and in it the facts found and conclusions of law were to be separately stated, (*Id.* § 633.) The "decision" upon which, by section 633, the judgment is to be entered, is that which by section 632 is to be given in writing and filed with the clerk; and until so given and filed there is no "decision" upon which judgment can be entered, and consequently no authority for entering any judgment. Accordingly, the judge before whom the case was tried made his findings of fact, and they were filed December 29, 1882. This was the rendition of the judgment which the clerk could thereafter at any time enter at length in the records of the court. The entry of a judgment after it has been rendered by the court is but the ministerial act of the clerk. The judgment, when entered, becomes the record of what the court has determined, and then becomes as binding upon the parties as if entered immediately upon its rendition. "The rendition of a judgment is a judicial act; its entry upon the record is merely ministerial." *Freem. Judgm.* § 38. Under the system of practice which prevailed in this state prior to the adoption of the Codes in 1872, findings were not essential to the entry or validity of a judgment, (*Prac. Act.* § 189;) and under that system it was held that the entry in the clerk's minutes of the decision as announced by the court, constituted the "rendition of the judgment," (*Gray v. Palmer*, 28 Cal. 416; *Genella v. Relyea*, 82 Cal. 159.) But under the provisions of the Code of Civil Procedure, whenever findings are required, there can be no "rendition of the judgment" until they are made and filed with the clerk. Findings of fact, however, are required only "upon the trial of a question of fact," and they may in all instances be waived. Whenever they are waived or are not required, the entry of its decision in the minutes of the court constitutes the "rendition of the judgment" in the same manner as it did under the former system. In the case of *Cook v. Cook*, which was under consideration by this court in *Re Cook's Estate*, 77 Cal. 220, 17 Pac. Rep. 923, and 19 Pac. Rep. 431, the defendant, after service of the summons

upon him, made default, and, the referee to whom the matter had been referred to take the necessary proofs having made his report, the court upon the hearing thereof made an order, which was then entered in its minutes, decreeing a divorce between the parties to the action; and this court held that, inasmuch as, in case of a default, findings are not required, the entry in the minutes constituted the "rendition of the judgment."

3. The subsequent authentication to the clerk by Judge SULLIVAN of the judgment to be entered did not impair its effect. The cause had been fully tried before Judge ALLEN, and he had rendered his decision before going out of office. The entry of the judgment upon that decision, being but a ministerial act, could be performed by the clerk after Judge ALLEN's term of office had expired with as much effect as before. *Roberts v. White*, 89 N. Y. Super. Ct. 272. There is no provision in our statute requiring any judgment to be signed by a judge, and it has been held that a judgment which is produced from the original records of the court in which it was rendered needs no signature or exemplification. *Clink v. Thurston*, 47 Cal. 29. The signature by the judge is "merely to give the clerk a surer means of correctly entering what has been adjudged." In *re Cook's Estate*, 77 Cal. 227, 17 Pac. Rep. 923, and 19 Pac. Rep. 431. Whether, if the clerk had, without any authentication from the court, entered the judgment which was subsequently entered, it would have been error, for the reason that in the conclusions of law made by Judge ALLEN there was no direction for a sale of the mortgaged premises, we are not called upon to decide in this case. The court could at any time before entry of judgment change its conclusions of law upon the facts that had been found, (*Condee v. Barton*, 62 Cal. 1;) and such change could be made by another judge than the one who had tried the cause. The complaint contained a prayer for the sale of the mortgaged premises; and the findings of fact, taken in connection with the facts that were admitted by the answer, would have justified the court in giving such relief. If it were necessary for the court to give any notice of such action, we could assume that the form of the judgment as entered was made by the court after notice to the defendant, and upon a proper showing therefor. As was said by this court in *re Cook*, 83 Cal. 418, 23 Pac. Rep. 392, "so long as the decree stands, it is conclusive as to all matters of evidence necessary to its validity." In *Sanford v. Sanford*, 28 Conn. 6, after the defendant had appeared in the action, the court, upon the motion of the plaintiff, had entered an order of nonsuit. Nearly two years thereafter, in the absence of the defendant, and without any proof appearing upon the record that notice had been given to him, the court proceeded to try the cause, and rendered judgment against him. In an action upon that judgment, the supreme court of Connecticut held that the jurisdiction of the court must be presumed to have been properly exercised, and that its action, in the exercise of such

jurisdiction, could not be collaterally impeached; saying: "If it were conceded to be necessary to the validity of the order of the court setting aside the nonsuit in question that notice of the motion for that purpose should have been given to the defendant, the presumption is that such notice was given, and this presumption supersedes the necessity of an express statement to that effect on the record." This principle is not affected by the fact that in the present case the court finds that the judgment in question was entered "without notice to the defendant Kessing, and in his absence from court," since, as we have before seen, the judgment itself cannot be impeached by any evidence outside of its own record. Even an inconsistency between the findings and the judgment will not impair the judgment, "for the question whether the findings support the judgment—in other words, whether the judgment is erroneous—cannot be raised in a collateral action." *Johnston v. Savings Union*, 75 Cal. 139, 16 Pac. Rep. 753. From the time that the court acquires jurisdiction of the defendant until the entry of the judgment, all the steps that are taken by the court are movements within its jurisdiction; and, however irregular such movements may be, they constitute only error, which must be remedied on a direct proceeding for that purpose. It follows from the foregoing considerations that the objections made by the defendant to the sufficiency of the judgment cannot be sustained.

The only remaining question presented by the record is whether the judgment sued upon was barred by the statute of limitations. This, however, we think cannot be considered an open question in this state. In *Trenouth v. Farrington*, 54 Cal. 273, it was expressly held that the statute of limitations does not begin to run until the entry of the judgment, and in *Condee v. Barton*, supra, it was held that a judgment is not final until it is recorded. The evidence of *Crim*, which was objected to, did not tend to vary or contradict the record. It was, in fact, immaterial, and it was not necessary that the plaintiff should have offered it. We do not think, however, that it could by any possibility have prejudiced the defendant. *Hobbs v. Duff*, 43 Cal. 489. The judgment and order denying a new trial are affirmed.

WE CONCUR: GAROUTTE, J.; PATERSON, J.

(89 Cal. 501)

CLAUDIUS V. AGUIRRE. (No. 14,322.)

(*Supreme Court of California*. June 22, 1891.)

FRAUDULENT CONVEYANCE — CHANGE OF POSSESSION—REFLEVIN—JUDGMENT.

1. Though Civil Code Cal. § 3440, declares that transfers of personal property are conclusively presumed to be fraudulent where they are "not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred," it is a question for the court what constitutes immediate delivery and continued change of possession, and its finding thereon, upon conflicting evidence, will not be disturbed on appeal.

2. Though Code Civil Proc. Cal. § 667, pro-

<sup>1</sup>Petition for rehearing pending.

vides that, "in an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof, in case a delivery cannot be had," a judgment for possession alone is sufficient, where delivery was made to plaintiff at the beginning of the action.

Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

*H. W. Latham and M. L. Graff*, for appellant. *Adams & Mitchell*, for respondent.

HARRISON, J. The plaintiff brought this action against the sheriff of the county of Los Angeles, to recover the possession of certain personal property which had been levied on by him under a writ of attachment issued in an action against the plaintiff's vendor, and at the time of issuing the summons made the statutory claim therefor under which the property was taken from the defendant and delivered to him. Upon the trial of the cause the court rendered judgment in favor of the plaintiff for the possession of the property, together with damages for its detention, but made no finding as to its value. From this judgment and an order denying a new trial the defendant has appealed, upon the grounds that the transfer of the personal property to the plaintiff from his vendor was fraudulent, inasmuch as it was not accompanied by an immediate change of possession; and that the judgment as entered is erroneous, for the reason that it does not provide for a recovery of the value of the property in case a delivery cannot be had.

1. Section 3440 of the Civil Code declares that "every transfer of personal property \* \* \* is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession." What constitutes an "immediate delivery" or an "actual and continued change of possession" is, however, a fact to be determined by the court upon the evidence presented in each particular case. *Godchaux v. Mulford*, 26 Cal. 322. The circumstances connected with a transfer of personal property are so varied that it would be impossible to frame a rule applicable to each case, or to determine in advance what acts would be sufficient to meet the requirements of the statute. When the transfer is challenged as fraudulent under this section, all the circumstances connected therewith are essential to a determination of its character, and it can very rarely be the case that there will not be such a conflict of testimony as to preclude this court from re-examining its sufficiency. In the present case the court found upon such conflicting evidence "that on the 15th day of March, 1890, one A. P. Stone, the then owner of the property described in the complaint herein, sold, transferred, and delivered the said property to the plaintiff herein for a valuable considera-

tion;" and also "that plaintiff was the owner, in the possession of, and entitled to the possession of, the said property continuously from March 15, 1890, until the same was taken by the defendant under said writ of attachment on March 18, 1890, without the consent of plaintiff." The evidence upon the subject of these findings is set out in the bill of exceptions, and, although it presents strong characteristics of an attempt to evade the provisions of the section, we cannot say that the conclusion reached by the court is not authorized; and, under well-settled principles, the finding of the trial court is conclusive.

2. Section 667, Code Civil Proc., declares that, "in an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof, in case a delivery cannot be had, and damages for detention." The evident purpose of this provision is that if the plaintiff, after obtaining judgment for its possession, is unable to obtain a delivery of the property, he may, in the same action, have a judgment for its value. The primary object of the action is to recover the possession of the property. *Whetmore v. Rupe*, 65 Cal. 238, 3 Pac. Rep. 851. But, if the plaintiff has already obtained this possession before judgment, there is no occasion for any judgment for its value, as the condition is wanting upon which such clause in the judgment is authorized, viz., "if a delivery cannot be had." The plaintiff need not avail himself of the provisional remedy for obtaining possession prior to judgment, or, if he does, the defendant may have retaken the property, or, without retaking it, may obtain judgment for its return. In either of these cases the judgment must be in the alternative, in order that, in case a delivery cannot be had, the prevailing party may recover its value, (*De Thomas v. Witherby*, 61 Cal. 92,) or in order to determine the amount to be recovered from the sureties upon the undertaking, (*Nickerson v. Stage Co.*, 10 Cal. 520.)

Under the provisions of section 627, Code Civil Proc., in an action for the recovery of specific personal property, the jury are authorized to find the value of the property, if their verdict be in favor of the plaintiff, only "if the property has not been delivered to the plaintiff," and, *e converso*, if the property has been delivered to the plaintiff, they are not required to find the value; and, in the absence of such finding, there is no verdict upon which to base an alternative judgment. In *Waldman v. Broder*, 10 Cal. 379, the plaintiff, under a provisional remedy, had obtained possession of the property prior to the judgment. At the trial a verdict was rendered in favor of the defendant, and judgment thereon entered for a return of the property, without any mention of its value. Upon the objection on appeal that such judgment was erroneous, the court said: "Nor is there anything in the failure to give an alternative judgment for the value of the property. This omission might be complained of by defendants if they had shown the value, but it is no ground of complaint on the part of the plaintiff."

In *Brown v. Johnson*, 45 Cal. 76, the judgment was for the value of the property without the alternative for its return. Upon appeal it was urged that the judgment should be in the alternative, but the court held that if it had been shown that the property had been destroyed, so that a judgment for its delivery would have been necessarily unavailing, "the failure to render judgment for its possession would, at most, be but a technical error or omission,—one for which we would not reverse the judgment." In *Whetmore v. Rupe*, supra, where the alternative judgment for the value of the property was for less than the value as found, the court said: "Appellant cannot complain that the judgment was for less than the value of the property." In *Burke v. Koch*, 75 Cal. 356, 17 Pac. Rep. 228, it was said: "Conceding that this action is, as claimed by appellant, an action of claim and delivery, it does not follow that the judgment is void or erroneous because not in the alternative." We can see no difference in principle between a judgment for the value of the property sued for without the alternative for its delivery, and a judgment for the delivery of the property without an alternative for its value. If the former is free from error, the latter must be equally so. Certainly the defendant against whom a judgment for the possession has been rendered, where a delivery was obtained by the plaintiff before trial, cannot complain or feel aggrieved because the judgment as rendered does not also authorize a recovery from him of the value of the property. We are aware that in *Berson v. Numan*, 63 Cal. 550, under a state of facts similar to those in the present case, this court reversed the judgment, and remanded the cause, with directions to enter a judgment in the alternative form. It will be observed, however, that in that case the judgment as rendered was "for a return of the property or its value and costs," and that the judgment as entered varied from that which was rendered by not including the value of the property. This ruling was afterwards cited with approval in *Brichman v. Ross*, 67 Cal. 601, 8 Pac. Rep. 316, but the judgment in this latter case was reversed upon other grounds. We think, however, that the mere failure to include in the judgment a clause which cannot have any operative effect, or confer any right or protection upon either the plaintiff or the defendant, does not affect the substantial rights of either party, and is not a sufficient ground for the reversal of the judgment, (Code Civil Proc. § 475.) and that the cases last mentioned should not be regarded as authority for such reversal. The judgment and order denying a new trial are affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

(82 Cal. 517)

ETCHEBARNE *et al.* v. ROEDING *et al.* (No. 13,102.)<sup>1</sup>

(Supreme Court of California. June 22, 1891.)

APPEALABLE ORDER—REFERENCE.

An order setting aside as premature an order settling the account of a referee in a suit

<sup>1</sup>Petition for rehearing pending.

to vacate a fraudulent assignment is not appealable, as it is neither a "final judgment" nor a "special order made after final judgment," within the meaning of Code Civil Proc. Cal. § 939.

Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

*William Matthews*, for appellants. *Rosenbaum & Scheeline, Jarboe & Harrison, Neuman & Eickhoff*, and *Edward R. Taylor*, for respondents.

MCFARLAND, J. On February 8, 1877, one Estanislao Hernandez, a defendant herein, being insolvent, made an assignment of his property—consisting of several tracts of land, and a large amount of live-stock and other personal property—to Frederick Roeding, also a defendant, in trust for the payment of his debts and the benefit of his creditors. At the time of the assignment Hernandez made an inventory and statement which purported to set forth his property, his debts, and his creditors. The present action was brought by a large number of creditors of said Hernandez. It is averred in the complaint "that the assignment was fraudulent; that, by collusion between said Hernandez and said Roeding, property of the former of great value was fraudulently omitted from said inventory, and pretended, but not real, debts were set forth in said statement as owing to certain persons, who are also made parties defendant; that after the assignment Roeding allowed Hernandez to remain in possession and receive the profits of a large part of the property; that Roeding for a long time failed to render any account as assignee, and, when pressed to do so by plaintiffs, rendered a simulated and fraudulent account; and that Roeding has no knowledge of agricultural pursuits, is incompetent to manage the trust-estate, and has greatly wasted it. There are other averments not necessary to be mentioned. The prayer is that the assignment be declared void as to all property remaining in the hands of the assignee; that he render a full account to plaintiffs of all his transactions as assignee; that he be removed from his office as assignee; that a receiver be appointed to take possession of all the property; that the property be sold and the proceeds of the sale be paid to plaintiffs 'according to their respective rights'; that the assignee be restrained from doing any further acts in the premises; that said pretended debts be declared fraudulent, and that plaintiff have such other relief as the court may deem just." The answer of defendants denies nearly all the material averments of the complaint, except the assignment itself. It appears from a number of papers printed in the transcript, and not objected to by respondents, and from a short bill of exceptions duly authenticated, that on June 22, 1886, the court made a large number of "findings." In these most of the issues of fraud were determined in favor of defendants; it is declared that Roeding should not be removed from his office; and it is found that a preliminary order restraining him from controlling the property or selling it should be set aside. Certain



other issues are disposed of in these findings. It is ordered that an account be taken, and, further, that, "inasmuch as it is impossible to examine said account in open court, a referee will be ordered and a referee appointed, on application and notice, to take and report such account to the court." It is also further ordered that, "upon the rendition of such account, such order will be made by this court as to the disposition of the moneys in his hands as shall best serve to protect the rights of all parties interested in said fund." Afterwards, on August 9, 1888, a document was signed by the judge of the court and filed, which is called a "decision," but which appears to be an interlocutory decree, and intended to carry out the mandates of the findings. It also appears from other straggling papers printed in the transcript that certain sales of property were made by said assignee on the order of the court, and that the sales were approved. There is also printed in the transcript what purports to be a report of a referee, which sets forth four schedules or balance-sheets, so that the court might adopt either one of the four as a statement of the account of the assignee; and the bill of exceptions states that a referee was appointed in accordance with the directions of the said "findings." The full order of reference does not appear; but the scope of it certainly was not to try the issues of the action and report a judgment, but to ascertain some fact or facts necessary to enable the court to determine the action, as provided in the second subdivision of section 638 of the Code of Civil Procedure. The bill further shows that the report of the referee was set for hearing for a certain day, and was argued and submitted to the court for decision; that on May 23, 1888, the judge rendered an "opinion," (which is given in full,) and in accordance with said opinion caused a minute order to be made, as follows: "In this cause the motion to settle the account of receiver and referee herein having been heretofore duly submitted to the court for consideration and decision, and, the court now being fully advised, it is ordered that balance-sheet No. 1, as submitted by the referee, be adopted and settled as account of referee." (This order read literally means nothing, as it was the account of the assignee, and not of the "referee," that was under consideration; but, as counsel make no objection, we will assume that "assignee" was meant where "receiver and referee" and "referee" were written in the first and last parts of the order.) It further appears from the bill of exceptions that a few days afterwards, May 31, 1888, the court, without notice to plaintiffs, made the following order: "In this cause, on motion of Messrs. Harrison and Rosenbaum, ex parte, and it appearing to the satisfaction of the court that the order made and entered in this cause on the 23d day of May, 1888, settling the account of the referee appointed herein, be, and the same is hereby, vacated and set aside, on the ground that said order was prematurely made; further ordered that order to settle account of referee be placed on calendar for

further argument." From this last order of May 31st, setting aside said order of May 23d, and from said order alone, the plaintiffs in the case at bar appeal. (It may be remarked that the words, "account of referee appointed herein," as used in the last order, are quite confusing; for, if "assignee" was meant, there was no assignee "appointed herein.") We have given the history of the case at some length, so that its character, and the exact situation at the time of the last two orders, can be readily understood.

The said order of May 31st was clearly not appealable. It was not one of the orders mentioned in section 939 of the Code of Civil Procedure, other than an order after final judgment; and it was not a "special order made after final judgment." This negative is specially emphasized by the provision of said section that there may be an appeal from an order affecting the report of referees "in actions for partition of real property." The order set aside was not in any sense a "final judgment," within the meaning of section 939. It does not purport to be a final judgment, and was not such in legal effect. No execution or other writ could have been issued upon it by which either of the parties could have enforced a right against another. It was merely one of the various steps taken by the court at various times in its approach to a final judgment and decree which would settle the rights of all the parties, dispose of all the property, and wind up the administration of the trust. The authorities cited by appellants do not support their contention. The cases referred to by counsel which are nearest in point are *Williams v. Conroy*, 52 Cal. 414, (cited by respondents,) and *Harris v. Refining Co.*, 41 Cal. 393, (cited by appellants;) and they both favor the view above expressed. Whether or not the order appealed from was properly made, or whether there should have been a motion for a new trial, need not be here discussed. That question could be raised only upon an appeal from the final judgment, or, perhaps, upon *certiorari* to test the jurisdiction. The appeal is dismissed.

We concur: SHARPSTEIN, J.; DE HAVEN, J.

(39 Cal. 573)

PEOPLE v. WEBSTER. (No. 20,761.)

(Supreme Court of California. June 24, 1891.)

ASSAULT WITH DEADLY WEAPON—EVIDENCE—IMPEACHMENT.

1. On an indictment for assault with a deadly weapon, while it is competent, as showing the present relation between the parties, to show by the prosecuting witness that he has since the assault instituted proceedings against defendant for a breach of the peace, it is error to allow him to testify further that these proceedings were based on an unprovoked attack on him by plaintiff since the original assault.

2. Where the witness has stated the reputation of another for veracity from what he has heard of it in the neighborhood, it is error for the court to state that he can only testify to what he knows of it of his own personal knowledge.

Commissioners' decision. Department 2. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

*W. P. Butcher*, for appellant. *W. H. H. Hart*, Atty. Gen., and *Walter B. Cope* Dist. Atty., for the People.

FITZGERALD, C. The defendant was convicted in the court below of assault, upon an information charging him with an assault with a deadly weapon. It appears from the record that several exceptions were taken by the defendant to the rulings of the court, but only two of them are urged here, and they are upon questions involving the admission and exclusion of evidence. At the trial one J. N. Marsh, who is the subject of the injury complained of in the information, was called and sworn as a witness for the prosecution. On cross-examination the question was asked him if he, "witness, had not since the arrest of defendant upon this charge had defendant arrested and tried in the justice's court on a charge of disturbing the peace, and if the jury did not acquit him of the charge." This question was answered by the witness in the affirmative, without objection from the prosecution. On redirect examination he was asked by the district attorney to "state the facts of that case." This he was permitted to do by the court, against the defendant's objection, he (the witness) stating, among other things, in this connection, "that the defendant had tried to ride over him with his horse while he was peaceably walking along the public highway," on which occasion defendant called him names, not necessary or fit to be repeated here. While the question asked on cross-examination, and affirmatively answered without objection, was competent for the purpose of showing the relations between the parties, and the state of feeling of the witness towards the defendant, yet under no rule or principle with which we are familiar could such evidence be justified as that which was admitted, against objection, on the redirect examination of the witness Marsh, and through which was injected into the trial of this case the facts involved in and brought out at the trial of the other case, the probable effect, if not the purpose, of which was to put in issue his character, and thereby to excite in the mind of the jury feelings of prejudice against the defendant. *People v. Markham*, 64 Cal. 163; *People v. Dye*, 75 Cal. 108, 16 Pac. Rep. 537, *People v. Taylor*, 36 Cal. 255.

The only other ruling of the court which we propose to notice, and to which exception was taken, was upon a question of evidence involving the general reputation of the prosecuting witness Marsh, for "honesty, truth, and veracity," and which was offered for the purpose of impeachment. It appears from the bill of exceptions that the witness Tallant, who was called for the defense, was asked "whether he knew the general reputation of the prosecuting witness Marsh in the community where he lived for 'honesty, truth, and veracity.'" The witness answered "that he only knew from what he had heard people generally say of him." Here the court interposed and "told the witness he could only testify to what he knew of his reputation of his own personal knowl-

edge.'" This ruling of the court, reversing as it did an old and very familiar common-law rule, of which the plain provisions of section 2051 of the Code of Civil Procedure are but declaratory, was excepted to at the time, and is assigned as error. The question as propounded was perfectly competent to show such general reputation, and while technically it should have been answered directly, "Yes," or "No," still the response was such in effect, and in addition thereto clearly showed the competency of the evidence for the purpose for which it was sought to be introduced. *People v. Methvin*, 53 Cal. 68. For these prejudicial errors we advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: FOOTE, C.; BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

69 Cal. 523

CODY v. MURPHEY. (No. 14,498.)

(Supreme Court of California. June 22, 1891.)

CONSTITUTIONAL LAW—LOCAL ACTS—REDUCTION OF SALARIES—SHERIFF'S COMPENSATION.

1. Act Cal. March 14, 1891, readjusting the salaries of all county officers of counties of the thirty-fifth class, and reducing the salaries of the sheriffs thereof, is not repugnant to Const. Cal. art. 1, § 11, providing that all "laws of a general nature shall have a uniform operation," nor to article 4, § 26, prohibiting the passage of any local or special law "affecting the fees or salary of any officer."

2. Act March 31, 1891, reclassifying the counties for the purpose of regulating the compensation of county officers, but making no provisions as to sheriffs of counties of the thirty-fifth class, and providing that the act, unless otherwise provided, so far as it relates to all officers named, \* \* \* shall not affect the present incumbents, does not affect Act March 14, 1891, so far as the latter relates to the salaries of such sheriffs.

In bank. Original petition for *mandamus* by M. J. Cody against J. D. Murphey. *Fox, Kellogg & King*, for plaintiff. *W. H. H. Hart*, Atty. Gen., for defendant.

GAROUTTE, J. This is an original proceeding for a writ of mandate against the defendant, county auditor of the county of Mono, to compel him, as such auditor, to issue his warrant on the county treasurer of said county in favor of the plaintiff, who is the sheriff of said county, for the sum of \$333.33 as and for his salary as such sheriff for the month of April, 1891. Under the county government act of 1883, Mono county became a county of the thirty-fifth class. Section 197 of the act of 1883, as amended in 1885, fixed the salaries of the county officers of counties of the thirty-fifth class, and by that section the sheriff's salary was fixed at \$4,000 per annum. By an act of the legislature, approved March 14, 1891, (St. 1891, p. 106,) and which was to take effect from April 1, 1891, section 197 of the act of 1885 was amended, readjusting and reducing the salaries of all county officers of counties of the thirty-fifth class, and fixing the compensation of the sheriffs thereof at \$2,000

per annum. Plaintiff contends that this act is local and special, and therefore in conflict with article 1, § 11, of the constitution of the state, which requires that all "laws of a general nature shall have a uniform operation," and also that it is in conflict with article 4, § 25, which prohibits the passage by the legislature of any local or special law "affecting the fees or salary of any officer." Subdivision 29. If the foregoing act is a general law, as contradistinguished from a local or special law, within the meaning of those terms as used in the constitution, then there can be no question as to its being uniform in its operation, for it acts upon all counties and all officers of counties of the thirty-fifth class. The case of *Miller v. Klister*, 68 Cal. 142, 8 Pac. Rep. 813, is not in point. Chief Justice SEARLS, in drawing a distinction between that case and *People v. Henshaw*, 76 Cal. 444, 18 Pac. Rep. 413, said: "The distinction attempted to be made by the statute under consideration in that case is not found here. It dealt with 48 classes of officers, and was to take effect as to all of them, except 3 classes, upon the expiration of the terms of office of the incumbents. It was a general law applying alike to all classes, but took effect at different times upon different classes." "No such distinction is made by the law under consideration here. The statute we are reviewing operates alike upon all the persons to whom it applies, and it applies equally to all persons in the same category. And, again, the chief justice says: 'To so classify them that general laws applicable to these separate classes [referring to the classification of municipal corporations] will meet the necessities of the case was a wise provision; and a law which applies to one or more, but not to all, of these cases, is not for that reason special legislation.'" *People v. Henshaw*, 76 Cal. 444, 18 Pac. Rep. 413. See, also, *Logan v. County of Solano*, 65 Cal. 125, 3 Pac. Rep. 463; *Thomason v. Ashworth*, 73 Cal. 73, 16 Pac. Rep. 615. Justice SCOTT, in *Knickerbocker v. People*, 102 Ill. 229, appears to state the same rule when he says: "General laws are those which relate to or bind all within the jurisdiction of the law-making power, limited as that power may be in its territorial operation, or by constitutional restraints. A law applicable to all the counties of a class as made or authorized by the constitution is neither a local nor special law. If it applies to all the counties of a class authorized by the constitution to be made, it is a general law; and whether there may be few or many counties to which its provisions will apply is a matter of no consequence." It follows that the act of March 14, 1891, was a general law, of uniform operation, and therefore not hostile to the provisions of the constitution heretofore quoted. It becomes a part of the county government act of 1883, as amended by subsequent acts of the legislature, and is in full force and effect unless repealed by later legislation.

Subsequent to the 14th day of March, 1891, the legislature passed "An act to establish a uniform system of county and township governments." It was ap-

proved March 31, 1891, went into effect immediately, and repealed all acts and parts of acts inconsistent with its provisions. St. 1891, p. 295. Among other things it reclassified the counties of the state for the purpose of regulating the compensation of the county officers of the various counties, had fixed the salaries of all such officers. Section 234 of said act reads: "The provisions of this act, unless otherwise herein provided, so far as it relates to the fees and salaries of all officers named, except justices of the peace and constables, shall not affect the present incumbents." There can be but one construction placed on this provision of the act, and that is, the legislature intended, except where it was otherwise provided in the act, that the compensation of all county officers holding office upon the 31st day of March, 1891, should not be affected by the act. There appears to be nothing in the act "otherwise providing;" and it necessarily follows that the compensation provided for county officers by the act of March 31, 1891, does not affect the plaintiff in this case. The act of March 14, 1891, went into effect April 1, 1891, unless repealed by the later act of March 31st; but we have already held, in consonance with the views of plaintiff, that the provisions of the act of March 31st, relative to salaries of county officers, do not affect present incumbents, and consequently do not repeal, until the expiration of the terms of the present officers, the provisions of the act of 1883, with its amendments relating to the compensation of county officers. Therefore the act of March 14, 1891, being an amendment of the act of 1883, and not being repealed, is in full force and effect, and the plaintiff is entitled to his salary thereunder. Let the application for the peremptory writ be denied.

We concur: BEATTY, C. J.; PATTERSON, J.; HARRISON, J.; MCFARLAND, J.; SHARPSTEIN, J.

89 Cal. 492

PEOPLE v. RIBOLSI. (No. 20,785.)

(Supreme Court of California. June 18, 1891.)

RECEIVING STOLEN GOODS—INDICTMENT—ALLEGATION OF OWNERSHIP—INSTRUCTIONS.

1. An information charging defendant with feloniously receiving stolen goods, "the property of the estate of G. H. Tay and O. J. Backus, copartners doing business under the firm name of G. H. Tay & Co.," is sufficiently direct and certain as to the ownership of the stolen property.

2. It is not necessary that the information should state the name of the person who stole the goods.

3. Pen. Code Cal. § 956, provides that when an offense involves the commission of a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured is not material. *Held*, that where the charge was feloniously receiving goods stolen from the estate of G. H. Tay and O. J. Backus, copartners, and the proof showed that one of the partners was dead, and his executors were the legal owners of his property, the variance was not material.

4. A statement in an instruction that if, on full consideration of all the evidence, you are "fairly and clearly satisfied" of defendant's guilt, is equivalent to saying that the jury must be "entirely satisfied."

5. Under Pen. Code Cal. § 1111, providing

that an accused cannot be convicted by the evidence of an accomplice, unless corroborated by other evidence "tending to prove" defendant's complicity, an instruction that a conviction for receiving stolen goods cannot be had on the testimony of the thief, unless corroborated by such evidence as tends to impute to defendant knowledge that the goods were stolen, is not erroneous in using the expression "tends to impute," instead of "imputes."

6. On a trial for feloniously receiving stolen goods, the court charged that "under our statute the following presumptions are to be regarded as satisfactory, if uncontradicted, but may be controverted, viz.: That an unlawful act was done with unlawful intent, and that a person intends the ordinary consequences of his voluntary act. The effect of these rules is that when the doing of an act is proven which, if there be guilty intent, would be a violation of law, the burden of proving the act to have been without such intent is in most cases upon the accused." *Held* erroneous, where the defense was confined to the original transaction on which the accusation was founded, and no special defense, as insanity, was interposed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; F. W. VAN REYNEGOM, Judge.

*Davis Louderback*, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

FOOTE, C. The defendant was convicted of feloniously receiving and buying stolen goods for his own gain and profit, and to prevent the owner thereof from again possessing them, under section 496 of the Penal Code. From the judgment rendered against him, and an order refusing a new trial, he has taken this appeal. He contends that the information on which he was tried was obnoxious to a demurrer he filed thereto, in the respects that it does not give the particular circumstances of the offense charged, and that it is not direct and certain as to such offense; that it does not set forth the names of the persons from whom the goods were received, or the names of those who stole them; that it is not direct and certain as to the ownership of such goods. The information states, among other things, that the stolen goods received by the defendant at the city and county of San Francisco were the "personal property of the estate of Geo. H. Tay and Oscar J. Backus, copartners in business, and doing business in said city and county under the firm name and style of George H. Tay & Co." We do not perceive but what the defendant was thereby informed in ordinary and concise language, without repetition, in such a manner as that he was enabled, being a person of common understanding, to know what property it was intended to charge he had feloniously bought and received, etc. Section 959, subd. 6, Pen. Code. We do not think he was at all in doubt about the matter from the language used. The sufficiency of indictments or informations in this state depends upon whether or not they are in conformity to statutory provisions; and tested by that rule, and in accordance with what has been determined as to similar objections raised to such pleadings in *People v. Ah Sing*, 19 Cal. 598; *People v. Barnes*, 65 Cal. 16, 2 Pac. Rep. 493; *People v. Henry*, 77 Cal. 445, 19 Pac. Rep. 830;

*People v. Goggins*, 80 Cal. 229, 23 Pac. Rep. 206; *People v. Arras*, (Cal.) 26 Pac. Rep. 766,—it would clearly appear that the information in hand is entirely sufficient to save all the defendant's legal rights as to a proper statement of the ownership of the property feloniously received and bought.

"There is nothing in the section defining the crime which by necessary implication requires that the name of the thief shall be alleged in the indictment, and it is therefore unnecessary." *People v. Avila*, 43 Cal. 199. The information was therefore sufficient, as against the demurrer.

It is further claimed that there was a material variance between the proof and the allegations of the information as to the ownership of the property; that the proof showed that Tay, one of the partners, was dead, and that his estate was represented by executors, who were the legal owners of the property; and that such ownership must necessarily have been alleged in the information. Section 956 of the Penal Code, reads: "When an offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material." Here there is, if anything wrong, an erroneous allegation as to one of the owners of the property, who is now dead, but who, when alive, was a partner with the living alleged owner. It would seem, therefore, that there could be no doubt as to the sufficiency of the description in other respects so accurate and satisfactory as to leave no doubt as to the identity of the act charged to have been committed. This is entirely sufficient. *People v. Watson*, 72 Cal. 403, 14 Pac. Rep. 97; *People v. Anderson*, 80 Cal. 204, 22 Pac. Rep. 139; *People v. Arras*, (Cal.) 26 Pac. Rep. 766.

It is further objected that the following portion of the charge of the court is erroneous: "But if, upon a full and fair consideration of all the evidence in the case, you are fairly and clearly satisfied that the defendant committed the crime charged against him, you should find him guilty by your verdict, notwithstanding the proof of his good character." The criticism made by the appellant seems to be that the words "fairly and clearly satisfied" do not convey the idea that the jury must be "entirely satisfied of the defendant's guilt." But the appellate court has said: "A juror would have no excuse for saying that he did not 'feel an abiding conviction to a moral certainty' of the truth of a fact which had been 'clearly established by satisfactory proof.'" *People v. Wreden*, 59 Cal. 395.

Again, it is said that the court erred in not giving instruction No. 3 asked for by defendant, and in giving it after modification. As requested, it read: "In case you should find that the witness Duket [an alleged accomplice,] either alone or with another, stole the goods described in the information, then I instruct you that in this case you cannot convict on the testimony of the thief, unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the

thief, imputes to the defendant a knowledge that the goods were stolen." As given, it read: "In case you find that the witness Duket, either alone or with another, stole the goods described in the information, then I instruct you that in this case you cannot convict on the testimony of the thief, unless he is corroborated by other evidence which in itself, without the aid of the testimony of the thief, tends to impute to the defendant a knowledge that the goods were stolen." The argument of the defendant is that the word "imputes" should not have been changed to "tends to impute." Section 111 of the Penal Code establishes the rule that an accused cannot be convicted by the evidence of an accomplice alone, unless corroborated by "other evidence tending to prove the defendant's complicity in the offense charged." *People v. Clough*, 78 Cal. 353, 15 Pac. Rep. 5. We perceive no merit in the contention as made. As to the other portions of the charge objected to, with the exception of that hereafter noticed, we do not see, considering it as a whole, and giving to it a fair interpretation, that it is subject to the objections made in this behalf.

As a portion of the charge to the jury, the trial court said: "Under our statute the following presumptions are to be regarded as satisfactory if uncontradicted, but they may be controverted by other evidence, namely: That an unlawful act was done with an unlawful intent, and also that a person intends the ordinary consequences of his voluntary act. *The effect of these statutory rules of evidence is that when the doing of an act which, if coupled with a guilty intent, would be a violation of law, is proven, the burden of proving the act to have been done without a guilty intent is in most cases thrown upon the accused.* The portion which we have italicized is assailed as being misleading, and as stating the law erroneously. It is plain that where the court announces a rule of evidence, and states that it is applicable to "most cases," the jury would be justified in accepting it as the rule laid down for their guidance in the case which they were then engaged in considering. In cases like this, the crime is made out if the accused received or bought the stolen goods knowing them to be such, either for his own gain, or to prevent the owner from again possessing his property; the guilty intent consisting either in receiving or buying them for his own gain, or to prevent the owner from again possessing his property. *People v. Avila*, 43 Cal. 199; Pen. Code, § 496. The instruction, then, must have been understood by the jury to mean that in this case, if it was proved that the defendant received or bought the stolen property, knowing it to be such, then it was proved he did an act which, if coupled with the intent to receive or buy it for his own gain, or to prevent the owner thereof from again possessing it, he would be guilty of the offense charged against him; and that when the doing of the act of receiving or buying the property, knowing it to be stolen, was once proved, then the burden of proving the want of guilty intent,

as above stated, is thrown upon the accused. It is plain that the trial court laid down the rule as to the extent of the burden of proofs necessary to rebut the presumption of guilty intent raised by the proof of the acts of receiving or buying the property knowing it to be stolen, as if the case had been one of homicide, under section 1105 of the Penal Code, in which case the rule would be as declared in *People v. Bushton*, 80 Cal. 164, 22 Pac. Rep. 127, 549; for in the transcript it is said: "There is a marked difference in the degree of proof required to establish any fact against the defendant and that sufficient to establish any in his favor. As against the defendant, every fact material to the issue must be proved to a moral certainty, and beyond a reasonable doubt, or the jury should acquit. Any fact necessary to the defense only needs to be established sufficiently to create a reasonable doubt of the defendant's guilt when taken into consideration with all the evidence in the case. And, if the facts proved in favor of the defendant are sufficient to create a reasonable doubt of his guilt, he should be acquitted." But in such cases as this the statutory rule declared in the case last referred to, under section 1105 of the Penal Code, does not apply; and when the defendant relies upon no distinct, separate, or independent fact, such as insanity, but confines his defense to the original transaction on which the charge is founded, with its accompanying circumstances, the burden of proof never shifts, but remains upon the people throughout the whole case to prove the act committed a criminal one beyond a reasonable doubt. *People v. Mize*, 80 Cal. 41, 22 Pac. Rep. 80; *People v. Gordon*, (Cal.) 26 Pac. Rep. 502. To declare otherwise would be to say that the mere proof of the taking away of the horse of another from a pasture, without permission of the owner,—a mere trespass,—would throw upon a party doing that act, if charged with larceny, the burden of proving that he did not take the horse and carry it away with intent to steal, at least to an extent sufficient to raise a reasonable doubt of the existence of such intent. We perceive no other error, but for the reasons given we advise that the judgment and order be reversed.

WE CONCUR: FITZGERALD, C.; BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

(30 Cal. 552)

BAIRD V. MILFORD LAND & LUMBER CO.  
(No. 13,143.)

(Supreme Court of California. June 23, 1891.)

#### LEASE OF TIMBER-LAND—CONSTRUCTION.

A contract leasing certain land, with the privilege of removing timber therefrom, provided that the lessee should remove at least 1,500,000 feet the first year, and 3,000,000 each succeeding year and pay one dollar per thousand feet therefor, in quarterly installments: provided that, if he should not remove such amount in any one year, he should pay therefor, and remove the same in any subsequent year without further charge; the lease to continue 20 years, renewable at the option of the lessee, on certain stated

terms. *Held*, that such contract provided only for the sale of the timber, and not for a continuous rent, and, where the timber is all removed before the end of the lease, the lessor cannot recover rent for the remainder of the term, though the lessee is still entitled to possession.

Department 1. Appeal from superior court, Humboldt county; J. J. DeHAVEN, Judge.

*John A. McQuade, John R. Jarboe and J. H. Henderson*, for appellant. *S. M. Buck*, for respondent.

PATERSON, J. On April 21, 1875, plaintiff and defendant's assignors entered into an agreement by the terms of which the former leased unto the parties of the second part certain lands for general lumbering purposes. The contract provides: "Said parties of the second part hereby agree and bind themselves to cut and remove from said land all of the merchantable timber fit for saw-logs on said land as follows: The first year at least fifteen hundred thousand feet, board measure, and each and every year thereafter two million feet, board measure, and as much more as they may think proper, and pay said party of the first part therefor one dollar in United States gold coin for each and every thousand feet, board measure, of merchantable lumber, so as aforesaid to be by them taken from said land, such payments to be made in equal installments, quarterly, each year: provided, however, that if said parties of the second part do not remove the amount of timber above specified to be taken in any one year, they shall, nevertheless, pay therefor; and they may remove the same in any subsequent year, without further charge or pay. \* \* \* The term of this lease, and the rights hereby granted, shall be and continue twenty years from the date hereof, and, at the expiration of said term, said parties of the second part may, at their option, renew this lease for such length of time as they shall choose, on making a written demand of said party of the first part, and on paying rent, at the rate of ten dollars per year, in addition to the stumpage rent hereby reserved for each year, the same shall be occupied under such renewed lease for lumbering or milling purposes." Plaintiff contends that under this contract he is entitled to recover \$500 quarterly as rent or royalty, so long as the defendant remains in possession of the land under the contract, whether the timber has been removed or not. The court below held that the defendant was liable only for the value of the merchantable timber fit for saw-logs at one dollar per thousand, and gave judgment in favor of the plaintiff for \$3,343, the value at \$1 per thousand of the timber remaining on the land, and not paid for, with interest thereon and costs of suit. Plaintiff moved for a new trial, claiming that the court ought to have given him a judgment for \$5,000, the amount of rent at \$2,000 per annum since the last payment. The motion was denied, and plaintiff appealed from the order and from the judgment. We think the court properly construed the contract, and that the judgment is correct.

Cal. Rep. 26-28 P.—21

Whatever may be the rights or liabilities of either of the parties at the end of the term of 20 years, under the clause providing for a renewal we think it clear that plaintiff sold all the merchantable timber fit for saw-logs at one dollar per thousand feet, and gave the parties of the second part and their assigns 20 years in which to remove the same. There is nothing in the language of the clause which fixes the liability of the defendant, indicating an intention to provide for a dead or sleeping rent. The price of the lumber is the sole consideration named, and to guard against any misunderstanding, apparently, it is expressly provided that timber, which has been paid for in the payment of the quarterly installments, but not removed, may be removed "in any subsequent year, without further charge or pay." It is certain that defendant cannot be deprived of the use of the land "for general lumbering purposes" until the end of the 20 years named, whether the timber is removed or not, and we do not think that the parties intended that any consideration should be paid to plaintiff during that term other than the value of the merchantable timber at the price fixed. Mills had to be built and roads constructed. It was uncertain how fast the timber could be cut, sawed, and marketed. The parties of the second part were given 20 years in which to remove it, but plaintiff protected himself against unnecessary delay by a provision that the timber should be paid for in regular installments, commencing with the first quarter of the first year of the lease, whether it was removed or not. The timber was the basis of his compensation, and he evidently did not care how long the lessee might take to remove it, so long as it was promptly paid for. It might remove it all in a year if they desired, but, in any event, the plaintiff should be paid \$1,500 the first year, and \$2,000 every subsequent year, until all of it should be paid for at one dollar per thousand. Appellant asks: "Suppose the defendant was still in possession, and had never cut a stick of timber, \* \* \* admitted the lease, but said there was not, and never had been, any timber upon the land. \* \* \* What distinction can there be in principle between the cases of the land being originally devoid of timber and having become so during the term?" That is not a supposable case. We are construing the contract, and must consider all the circumstances as they appeared to the parties. There was a large amount of timber on the land, and it was all visible when the contract was made. In this respect, as well as in the terms used, the contract differs from the mining contracts in the cases cited by appellant.

Whether the defendant will be entitled to a renewal of the lease at the end of the 20 years, if at that time all the timber shall have been removed from the land, or if not removed it be made to appear that the failure to remove it was caused by bad faith, negligence, or want of diligence, we are not called upon to determine; but it would seem that, under such circumstances, a fair interpretation of all the terms of the contract would not give the

defendant the right to renew the contract for an additional term at a rental of \$10 per year, whatever may be the meaning of the expression, "stumpage rent hereby reserved." Although appellant does not discuss the matter, and it is therefore unnecessary to notice it, we think that the court did not err in refusing to add 10 per cent. for waste in sawing to the amount of timber found by the jury to be on the land. The judgment and order are affirmed.

We concur: GAROUTTE, J.; SHARPSTEIN, J.

89 Cal. 518

PEOPLE v. DOLLAR. (No. 20,773.)

(Supreme Court of California. June 22, 1891.)

ASSAULT WITH DEADLY WEAPON—SELF-DEFENSE—INSTRUCTIONS.

On a trial for assault with a deadly weapon, an instruction that if the jury find that defendant did make an assault with a knife, which was a deadly weapon, and not in necessary self-defense, it is their duty to find him guilty, but if they find that he made the assault in necessary self-defense, in order to prevent D. O. from committing a violent assault upon him, then he is not guilty, does not exclude the consideration of apparent necessity.

Department 2. Appeal from superior court, Mendocino county; R. MCGARVEY, Judge.

J. A. Cooper, for appellant. W. H. H. Hart, Atty. Gen., for the People.

MCFARLAND, J. The appellant was convicted of an assault with a deadly weapon, and the main point upon which he relies for a reversal is the omission of the court to charge the jury fully enough on the subject of self-defense. Neither party asked any instruction upon any subject. The charge of the court given on its own motion was brief, and what is contained on the subject of self-defense was as follows: "Now, if you find from the evidence that this party did make any assault with a knife, and you find that knife to be a deadly weapon, and he did it not in necessary self-defense, it is your duty to find him guilty as charged. If you find that he made the assault, and that he did it in necessary self-defense, in order to prevent this Dan Olie from committing a violent assault upon him, then he is not guilty." At the conclusion of the charge the court, turning to counsel, said: "Anything further than that?" Counsel made no answer. The point made by appellant is that the charge ignored the doctrine of "apparent necessity," and excluded the jury from considering that defendant, as a reasonable man, might have believed himself in danger, although as a matter of fact there was no real danger. But it is not true that the charge of the court excludes the consideration of apparent necessity. "Necessary self-defense," as explained in the text-books, as defined in our Penal Code, and, indeed, as generally understood by laymen as well as by lawyers, includes every case where "there is reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury," and where the circumstances are "sufficient to excite the fears

of a reasonable man." If a defendant were charged with injuring or killing a man who was apparently about to shoot him, no jury would convict because it turned out afterwards that the fire-arm used was not loaded, whether the court instructed on the subject or not. The cases cited by appellant's counsel are not in point. They were cases where the express language of the instructions excluded the doctrine of apparent necessity. In the main case relied on, (People v. Anderson, 44 Cal. 65,) the trial court, in defining "self-defense" to the jury, told them that the right "cannot be exercised in any case or to any extent not necessary. The party making the defense is permitted to use no instrument and no power beyond what will prove simply effectual." And on appeal this court held that "this definition excludes all that class of cases," etc. In People v. Flanagan, 60 Cal. 2, in the instruction held to be erroneous, the court used the language, "manifestly endeavoring and intending to commit a felony," while in the Code "or" is used instead of "and." In People v. Gonzales, 71 Cal. 569, 12 Pac. Rep. 783, the jury were told in the seventeenth instruction that "the necessity must be apparent, actual, imminent, absolute, and unavoidable;" and this court held the instruction to be contradictory and misleading. It was also said in that case that the eighteenth instruction excluded certain considerations from the jury; but, as the instruction is not given in the report, it does not appear how they were excluded. The sections of Wharton's Criminal Law referred to merely state the general doctrine, nowhere disputed, that apparent danger is sufficient. There are no other citations, and in all the cases cited the error of the instruction was one of commission, and not of omission. No doubt, in a case where the evidence at all warrants it, the court should instruct about apparent necessity when counsel for defendant requests it; and, perhaps, it is possible to imagine a peculiar case where it would be error for the court not to do so on its own motion; certainly it should not use express language which excludes that doctrine. In the case at bar there was no question before the jury as between real and apparent danger. According to the evidence of the prosecution, defendant made an entirely unjustifiable attack on the injured party, and said afterwards that he wanted to kill him. Defendant testified that the injured party first struck him; that he grabbed defendant by a handkerchief which was around his neck, and hit him several times with a rock which he had in his hand; that defendant told him that if he did not let go he would cut him; that he would not let go; that he cut him in the arm to make him let go; that as soon as defendant was released he ran away, and that the other party threw the rock after him. If the jury had believed defendant they would have acquitted him, and would not have been confused by any distinction between real and apparent danger. And it was peculiarly a case where counsel should have asked further instruction on the subject if he desired it, within the



rule stated in *People v. Marks*, 72 Cal. 46, 13 Pac. Rep. 149; *People v. Flynn*, 73 Cal. 511, 15 Pac. Rep. 102; and *People v. Olsen*, 80 Cal. 122, 22 Pac. Rep. 125. The court expressly asked counsel if any further instruction was desired. We think, therefore, that the judgment should not be reversed on account of said charge of the court.

2. The other error assigned is the refusal of the court to strike out the answer of the witness Olle, on his redirect examination, that he had known the defendant "since he was at San Quentin." But this error is not material, because the witness had said the same thing on his cross-examination by defendant's counsel without any objection being made to it. The judgment and order denying a new trial are affirmed.

We concur: SHARPSTEIN, J.; DE HAVEN, J.

(89 Cal. 526)

SMITH v. SCHULTZ *et al.* (No. 12,376.)<sup>1</sup>

(Supreme Court of California. June 23, 1891.)

PARTNERSHIP—FARMING LEASE.

A contract recited that the party of the first part, in consideration of certain agreements by the parties of the second part, "their heirs, executors, and assigns," "granted, demised, and let" a certain ranch for three years, with the privilege to the second parties to keep hogs thereon until a certain date succeeding the expiration "of this lease." The second parties were to plant certain crops and make certain improvements; the first party to furnish farming implements, seed, and materials, and make certain improvements. The increase of certain hogs and fowls belonging to the first party, and certain crops, were to be divided in certain proportions, the sales thereof to be made only upon "mutual consent." The first party could re-enter, etc., in case of default in any of the covenants by the second parties; but, if such covenants were performed, then the second parties might during such term hold the premises without hindrance from the first party, "his heirs and assigns." Held, that such contract is one of lease, and not of partnership.

Department 2. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

Action by J. C. Smith against Henry Schultz, L. E. Caldwell, and A. P. Caldwell to set aside an alleged partnership. From a judgment for plaintiff, defendants appeal.

*E. F. Swortwager* and *Geo. A. Wentworth*, for appellants. *L. B. Mizner* and *Ben Morgan*, for respondent.

MCFARLAND, J. The complaint sets forth a certain written instrument, executed December 10, 1883, by plaintiff, J. C. Smith, as party of the first part, and the defendants Schultz and L. E. Caldwell, parties of the second part, and avers that said instrument created a partnership between said three persons "in the business of raising hogs," to be conducted on a certain tract of land or ranch owned by the plaintiff, and which, by the terms of said instrument, is leased to said Schultz and L. E. Caldwell for the term of three years, from the 1st day of December, 1883. It is also averred that said L. E. Caldwell and Schultz were given and took possession of

said land, and certain live-stock and personal property thereon, and that they failed to perform certain things enumerated in said written instrument, and abandoned said land and stock. It is further averred that the other defendant, A. P. Caldwell, claims to have purchased the interests of said Schultz and said L. E. Caldwell in said instrument, and to have succeeded to their rights under the same. It is also averred that said A. P. Caldwell is incompetent to carry out the agreements of said instrument; that he made said purchase against plaintiff's wishes; that plaintiff has no confidence in his ability or integrity; that he is insolvent; that he is in possession of the ranch, and the live-stock thereon, and refuses to give them up; and that the personal property is in danger of being lost and injured. The prayer is for judgment against Schultz and L. E. Caldwell for a dissolution of the alleged partnership, an accounting and settlement, the appointment of a receiver, etc., and that said A. P. Caldwell be adjudged to have no interest or title to any of the property, and no rights under said written instrument. Schultz answered, admitting the averments of the complaint as against him, but averring that on March 5, 1884, he sold and assigned to the defendant A. P. Caldwell all his right to the partnership land and property described in the complaint, and that he has no interest therein. He prayed to be discharged. Separate answers were filed by the Caldwells, in which all the material averments of the complaint were denied, except the execution of the said written contract, and it was denied that said instrument created a partnership. It was also averred in said answers that said instrument was the result of negotiations between plaintiff and the defendant A. P. Caldwell, who is the father of said L. E. Caldwell; that at plaintiff's request A. P. Caldwell allowed Schultz to be united with him as a party to the instrument; that L. E. Caldwell had advanced, or was to advance, some money to his father, A. P., and that for his security the name L. E. instead of A. P. Caldwell was inserted in the instrument with the consent of plaintiff; that the real contract was between plaintiff on the one part, and A. P. Caldwell and Schultz on the other, and that it was well understood and consented to by plaintiff that L. E. Caldwell would not enter upon the land, or take possession of the personal property, or carry out the contract, but that the same should be done by A. P. Caldwell and Schultz, who, with the knowledge and consent of plaintiff, took possession of the premises and property, and proceeded to comply with the provisions of said instrument; that on March 5th the said Schultz, with the knowledge and consent of plaintiff, sold and assigned all his interest in said instrument and property to said A. P. Caldwell, who afterwards, and until the commencement of this action, (which was December 28, 1884,) remained in possession and continued to comply with the provisions of said instrument, with the knowledge and consent of plaintiff; and that on December 6,

<sup>1</sup>Petition for rehearing pending.

1884, said L. E. Caldwell, for the purpose of putting the legal title in A. P. Caldwell, assigned to the latter all his interest in said instrument.

The court tried the case upon the theory that the written instrument, of its own force, created a partnership between plaintiff, Schultz, and L. E. Caldwell; that plaintiff could at any time, at his own pleasure, dissolve said alleged partnership, put an end to the further operation of the instrument, ignore the term of three years therein provided for, and take immediate possession of the ranch. By the findings the main averments of the complaint are found to be true, and the material averments of the answers of the Caldwells untrue. By the judgment and decrees the partnership was dissolved; a receiver was appointed, who took possession of all the property; a referee took an accounting; judgment was rendered against L. E. Caldwell and Schultz for a large sum of money to be paid out of the assets, and A. P. Caldwell was decreed to have succeeded to their rights in the property, and to be entitled to any surplus remaining out of the assets after payment of the judgment and other charges; and it was decreed that plaintiff "be fully restored to his possession of all the real property described in the complaint, and to all the original stock owned by him on the premises at the date of the agreement of December 10, 1883, or which he may have put thereon at any time since, which has not been sold and accounted for by the receiver." The defendants L. E. and A. P. Caldwell made a motion for a new trial, and from an order denying said motion they appeal.

We do not see how the judgment can be maintained. At the trial the only evidence introduced by the plaintiff was (1) the instrument itself, upon which there was the following indorsement: "March 5, 1884. For value received I hereby sell, assign, transfer, and set over unto A. P. Caldwell, his heirs and assigns, all my right, title, and interest in and to the within indenture of lease and the land therein described. [Signed] HENRY SCHULTZ." (2) A statement by plaintiff, as a witness, as follows: "Subsequent to December 6, 1884, I have not made any contract or agreement to carry on business with A. P. Caldwell. The land is used for pasturage, pasturing stock exclusively. I have no confidence in A. P. Caldwell. I know that he don't pay me his bills. He couldn't pay me; that is all I know about it." And, (3) a statement by A. P. Caldwell, called as a witness by plaintiff, as follows: "I reside on Smith's ranch. I am one of the defendants in this suit. I am not on the tax-roll in this county. I have no money in bank anywhere. I owe some money in this county, and some outside this county." There was a cross-examination of plaintiff by defendants' attorney, and many of his questions were ruled out on objections made by plaintiff. The exceptions to these rulings need not be here examined. Sufficient evidence was admitted on the cross-examination to show that down to the latter part of September, 1884, at

least, the plaintiff recognized and dealt with A. P. Caldwell as rightfully in possession of the land and property and carrying out the contract. Defendants moved for a nonsuit on proper grounds, and the motion was overruled. Defendants then introduced uncontradicted evidence showing that the substantial averments and denials of the answers of the Caldwells were true, and also that valuable permanent improvements had been made on the land by the lessees, which would be lost to them if the term of the lease were shortened. Under these circumstances, we do not think that any finding of the court upon any material issue is supported by the evidence. Moreover, we think that the motion for a nonsuit should have been granted. Plaintiff's case in chief depended entirely upon the proposition that the said instrument in writing constituted a partnership, and we do not think that such proposition can be maintained.

The instrument is in form a lease. The first part of it (omitting immaterial matters) is as follows: "This indenture, made the 10th day of December, 1883, between," (naming Smith as party of the first part, and Schultz and L. E. Caldwell as parties of the second part,) "witnesseth, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, reserved, and contained on the part and behalf of said parties of the second part, their executors, administrators, and assigns, to be kept and performed, has granted, demised, and let, and by these presents doth grant, demise, and let, unto the said parties of the second part, all that farm, ranch, and tract of land," (here follows a description of a certain tract of land in Contra Costa county, containing 485 acres,) "for the term of three years from the first day of December, 1883, with the privilege to the said parties of the second part to keep fattening hogs on said ranch until the first day of January next succeeding the expiration of this lease." Then follow certain covenants and agreement to be performed by each of the parties. The principal agreements by the parties of the second part are that they are at stated times during the term to put certain fields in alfalfa, barley, carrots, etc., and to build certain fences, and make certain improvements,—some in the first year, some in the second year, and some in the third year, of the term,—and to manage the ranch in a farmer-like way. The plaintiff was also to furnish certain farming implements, and seed and feed, to make certain improvements, and to furnish certain materials for fencing, etc. The instrument recites that there are certain hogs belonging to plaintiff on the ranch, and provides that they are to remain the property of plaintiff, but "the increase of hogs and the profits thereon" are to be divided one-half to the party of the first part, and the other half to the parties of the second part,—sales to be made, however, only upon the "mutual consent of the parties hereto." There is also a provision about certain fowls on the ranch, "the increase, yield, and profits"

of which are to be divided, one-third to go to the party of the first part. There is also a provision about alfalfa hay, which is to be baled by the parties of the second part, and put into a warehouse, or delivered at a landing, and divided equally between the parties. Mention is also made about certain horses and cattle, and some provisions made in relation to them. There are other stipulations and agreements not material to the determination of the character of the instrument. It closes with the provisions that "in case default shall be made in any of the covenants herein contained on the part of said parties of the second part, their executors, administrators, and assigns, to be kept and performed," then the party of the first part may re-enter, etc.; but that, if said covenants are so performed, then said parties of the second part "shall and may at all times during said term peaceably and quietly hold and enjoy said premises without any suit, let, trouble, or hindrance of or from said party of the first part, his heirs or assigns."

This instrument certainly created a lease of the land for a term of three years, from December 10, 1883; and we cannot see upon what recognized principle plaintiff, at his own pleasure, could terminate it during the first year. His right to do so could come only from some breach of covenant by the lessees, which by the terms of the lease, or operation of law, worked a forfeiture, and gave a right of re-entry. But plaintiff did not show, or attempt to show, any such breach. The lease on its face was expressly assignable; and plaintiff offered no evidence that either the original lessees named in the instrument, or the assignee, A. P. Caldwell, failed to perform any of the things undertaken to be performed by the parties of the second part. The theory that the instrument created an ordinary partnership between the three persons, Smith, Schultz, and L. E. Caldwell, which gave to either of them the right, at his own pleasure, to end at any time the relation which the instrument created, is erroneous. It was in form and legal effect a lease for a definite term of years, and the relation which it created was that of landlord and tenant. It did not create a partnership. In the first place, neither the word "partnership" nor "partner," nor any other word or phrase ordinarily employed in written contracts of copartnership, was used. The use of such words, of course, is not essential when the whole instrument shows clearly that a partnership was meant; but their absence is significant when such intent is not clear. In the second place, the idea of a permanent lease for a definite term of years is at war with the notion of such an indeterminate and fitful relation as that of a partnership. And in the third place, there is nothing in any of the language of the instrument that expresses or suggests the intention that plaintiff was to be a general partner in business with the defendants, or either of them, and certainly there was no special partnership, within the provision of the Code.) It gives no power to one to bind the others; it contemplates no common

liability; it does not make one the agent for the others in carrying on any business whatever; it contains no agreement, either express or implied, for the division of any losses; and there is no intimation in it that plaintiff was to be "liable to third persons for all the obligations of the partnership jointly with his copartners." Civil Code, §§ 2442, 2443, 2429, 2404.

Nor does it contain any agreement among themselves that the party of the one part should be bound to any extent for the obligations of the party of the other part. They were not to be partners, therefore, either as to third persons or *inter sese*. The instrument was a letting upon shares, and cannot be distinguished in principle from the one considered in *Walls v. Preston*, 25 Cal. 60. In that case the instrument was in form a lease for a certain term, with covenants by the lessee that he would properly cultivate the land and give to the lessor a certain share of the crops. It was there sought to "explain away" the lease by the theory that it was not indeed a partnership, but a cropping contract. The court, after an elaborate consideration of the subject, *Rhodes, J.*, delivering the opinion, concludes as follows: "It clearly appears to us that the parties in this case intended to make a lease, and that the instrument executed by them was a lease; but its effect as such was not destroyed by their having contracted for the payment to the lessor of a portion of the specific crops to be produced, and that that covenant was an agreement to pay the rent of the premises out of the crops." And so in the case at bar the legal effect of the covenant of the lessees is simply that they will deliver as rent certain shares of the increase of certain live-stock, as well as certain shares of crops. A similar contract as to the increase of sheep was held in *Robinson v. Haas*, 40 Cal. 474, not to constitute a partnership. See, also, on the general subject of partnership, *Wheeler v. Farmer*, 38 Cal. 213; *Barber v. Cazalla*, 30 Cal. 98; and *Smith v. Moynihan*, 44 Cal. 57. There being no partnership, the judgment was therefore erroneous. If the lessees, or their assignee, broke the covenants of the lease, the respondent has a clear remedy. The order appealed from is reversed, and the cause remanded for a new trial.

We concur: GAROUTTE, J.; DE HAVEN, J.

89 Cal. 507

HIBERNIA SAV. & LOAN SOC. v. JONES *et al.*  
(No. 12,995.)

(*Supreme Court of California.* June 22, 1891.)

FORECLOSURE—REVERSAL OF DECREE—INCONSISTENT CLAIMS—AMENDMENTS TO PLEADINGS.

1. Where lands were sold under a decree of foreclosure against two persons, and brought in by the mortgagee, and on appeal the decree was reversed as to one, the mortgagee cannot thereafter treat the original decree as valid against the latter for the purpose of retaining title under the foreclosure, and invalid for the purpose of charging interest and taxes.

2. In an action for an accounting, it is not an abuse of discretion to permit defendant to file an amended answer denying certain averments as to taxes paid after the evidence was closed.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

*Tobin & Tobin and Thos. F. Barry, for appellant. Shafter, Parker & Waterman, (Parker & Eells, of counsel,) for respondents.*

McFARLAND, J. This action was brought by plaintiff against Charles Carroll Moore and Mary Adams Moore to foreclose two certain mortgages. The complaint contained two counts, and stated two causes of action. The first was upon a promissory note for \$57,500, and a mortgage upon eight different pieces or lots of land to secure it. The note and mortgage were signed by said Charles Carroll Moore, and purported to have been signed by said Mary Adams Moore, by her attorney in fact, the said Charles. The second cause of action was upon another promissory note for \$7,500, and a mortgage upon the same property to secure it, both of which were signed by said Charles and by said Mary Adams Moore personally. The seven pieces of land first mentioned in said mortgage were the property solely of said Charles; the eighth was the property of said Mary alone. Mary Adams Moore answered, denying all liability on the said first cause of action, and averring that said Charles had no authority to sign her name to the note or mortgage therein named; but she made no defense as to the second cause of action on the note and mortgage for \$7,500. The court rendered judgment on the 29th day of December, 1881, against the said Charles for the principal and interest of the said first note, amounting to \$76,463.35; and against said Charles and said Mary for the principal and interest of said second note, amounting to \$9,055.70; and decreeing a foreclosure of both of said mortgages against both said Charles and said Mary; and providing that the proceeds of the sale of said eight pieces of land should be applied first to the satisfaction of the amount found due on said first note and mortgage set up in the first count of the complaint. Mary Moore appealed, but gave no stay-bond, and plaintiff proceeded to have the property sold under the decree. All of said lots were so sold by the sheriff to plaintiff on February 20, 1882; and, no redemption having been made, they were conveyed by the sheriff to plaintiff on August 24, 1882. The lots were sold separately; the seven lots of Charles for \$53,000, and the lot of Mary Moore for \$20,000. The amount due at the time on the said first note and mortgage was \$78,165.95. Afterwards, on November 30, 1885, this court sustained the appeal of said Mary, and adjudged that "the decree against the defendant Mary A. Moore, and the order denying her motion for a new trial, are reversed, and cause remanded for further proceedings." 68 Cal. 156, 8 Pac. Rep. 824. In this court the case was treated entirely as an appeal from that part of the judgment which decreed her property to be subject to the lien of the said first mortgage for \$57,500. No mention is made in the opinion of the court, or in the report of the case, of the

said second mortgage for \$7,500, to which she had made no defense in the court below. When the case went back to the superior court, the plaintiff filed an "amended and supplemental complaint against Mary Adams Moore," which is of a somewhat anomalous character. It commences as though it were a complaint *de novo* against said Mary alone upon the said second note and mortgage for \$7,500, making no mention of the said first mortgage for \$57,500; but it proceeds afterwards to aver the facts about the former decree of foreclosure, the sale under the decree to plaintiff, and its ownership of the eight lots through the sheriff's deed, as hereinbefore stated. No other or further decree of foreclosure is sought, but "plaintiff therefore prays the aid of the court in the premises; that the amount due to the plaintiff upon said note and mortgage be ascertained and determined; that plaintiff be allowed a reasonable counsel fee, to be fixed by the court, together with its costs and disbursements in this action; that plaintiff be credited with the total amount of such indebtedness, and be charged with \$20,000, the amount for which it purchased the property; that plaintiff have judgment against the defendant Mary Adams Moore for any amount that may remain unpaid," and for such other relief, etc. To this supplemental pleading the said Mary demurred upon various grounds, and the demurrer was overruled. Shortly afterwards the said Mary died, and the defendant Francis H. Jones, having been appointed her administrator, answered, setting up all the previous history of the case. By an amendment to his answer he denied the payment by plaintiff of certain taxes and assessments, pleaded the statute of limitations, and, uniting with plaintiff in a prayer for an accounting, asked that plaintiff be accredited with the amount of the original judgment on said second note and mortgage, viz., \$9,055.70, with interest from the date thereof until the date of plaintiff's said purchase of said eighth lot; that the same be deducted from the \$20,000 for which said lot sold; and that defendant have judgment against plaintiff for the amount due on such accounting. The court took an accounting, and gave judgment for defendant for \$12,971.61. Plaintiff appeals from the judgment, and from an order denying a motion for a new trial.

It is not necessary to inquire whether plaintiff's supplemental complaint was a proper pleading, or whether the relief sought by it could be obtained against an objecting party. That point would arise only upon an appeal by defendant. Plaintiff, having sought that mode of procedure cannot now object to it. If no error has been committed in any other respect, and justice has been done between the parties upon the plan devised by plaintiff, then the judgment should stand. We see no error committed by the court against the plaintiff. Plaintiff was credited with the amount of the original judgment, \$9,055.70, with interest to the date of his purchase of the land, and also with a counsel fee of \$500, and the further sum of

\$1,168.22 for taxes which he is found to have paid. If any error was committed as to the taxes, it was in plaintiff's favor, for there was certainly no greater amount than that proved; and it is doubtful if he was entitled to any allowance for taxes or counsel fees. The amounts thus credited to plaintiff were deducted from the \$20,000 for which defendant's land was sold, and defendant was given judgment for the balance, with legal interest. In this we see no error. Plaintiff's theory seems to be that it can treat the former judgment as intact for one purpose, and as no judgment at all for another purpose; that while retaining the title to defendant's land, which he obtained through the foreclosure sale in 1882, he can also consider the judgment as open for the purpose of charging interest at the conventional rate of the note, compounded monthly, down to the date of the present judgment, which was January 17, 1888. But it is evident that such a position is not tenable. When plaintiff proposed an accounting upon the theory that the foreclosure should stand, and that his title under it should remain undisturbed, the only proper basis for such accounting was the one adopted by the court.

The court allowed defendant, by an amended answer, to plead the statute of limitations, and also to deny certain averments in the complaint of taxes and assessments, after the evidence was closed; and appellant attacks these rulings as erroneous. As to the statute of limitations, it is sufficient to say that its consideration did not enter into the judgment, and that therefore it cuts no figure in the case. In regard to the taxes, we see no abuse of discretion in allowing the amendment. It was in furtherance of justice. Appellant was allowed \$1,168.22 for taxes, which was more than the plaintiff, upon the evidence, and upon the theory of an accounting without a new decree of foreclosure, was entitled to. Plaintiff did not ask to introduce further evidence. There are no other points necessary to be noticed. The judgment and order denying a new trial are affirmed.

We concur: SHARPSTEIN, J.; DE HAVEN, J.

3 Cal. Unrep. 475

THORNTON v. PETERSEN. (No. 13,195.)

(Supreme Court of California. June 22, 1891.)

REVIEW ON APPEAL—WEIGHT OF EVIDENCE.

Where the sole question is one of fact, and the evidence is sufficient to support the findings, the judgment will be affirmed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

J. C. Bates, for appellant. Whittemore & Sears, for respondent.

TEMPLE, C. This appeal is from the judgment, and from an order denying plaintiff's motion for a new trial. The only alleged errors are specifications under the claim that the evidence was insufficient to justify the decision. We have carefully examined the record, and are

satisfied that there is abundant evidence to sustain all the findings. It is really an attempt to have this court weigh the evidence, and decide the case according to the preponderance. The appeal ought not to have been taken. The judgment and order should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

89 Cal. 611

BRYANT *et al.* v. STERNFELD *et al.* (No. 13,053.)

(Supreme Court of California. June 26, 1891.)

STATEMENT FOR NEW TRIAL—TIME TO SERVE—EXTENSION.

Code Civil Proc. Cal. § 659, subd. 3, provides that, if a motion for a new trial is made upon a statement of the case, the moving party must within 10 days after service of the notice, or such further time as the court may allow, prepare a draft of the statement, and serve the same or a copy therefor upon the adverse party. *Held*, that an order allowing 30 days to prepare a "statement on motion for a new trial" carries with it the same extension of time to serve the statement.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Action by George Bryant and Dennis A. Mullin, copartners under the firm name of Bryant & Mullin, against Adolph Herman, and Morris Sternfeld, copartners under the firm name of Sternfeld Bros. & Co. Plaintiffs appeal.

G. E. Harpham and Smith & Murusky, for appellants. M. J. Platshek and M. S. Elsner, for respondents.

FITZGERALD, C. The transcript in this case contains two appeals,—one upon the judgment roll from a judgment rendered in favor of defendants; the other from an order dismissing plaintiffs' motion for a new trial. It appears from the record that the order appealed from was made upon the ground that the order granting to plaintiffs an extension of time for 30 days "to prepare their statement on motion for a new trial," did not extend the time to serve it. Section 1054, Code Civil Proc., under which the court or judge derives the authority to make the order for such extension, provides only for the preparation of statements, and the word "service," as there used, is expressly limited in its application to notices other than appeal. The order here made, extending the time for the purposes therein stated, is in strict compliance with the provisions of this section, and carries with it the same extension of time to serve the statement. *Curtis v. Superior Court*, 70 Cal. 390, 11 Pac. Rep. 652; *Burton v. Todd*, 68 Cal. 485, 9 Pac. Rep. 663. Subdivision 3 of section 659, Code Civil Proc., upon which counsel for respondent mainly rely in support of their contention, that the order referred to did not extend the time to serve the proposed statement, has no application, as we have already shown, to an order granting an extension of time

to prepare such statement, but simply provides that the moving party must within the time therein prescribed, or the time allowed by the court or judge, prepare a draft of the statement, and serve the same or a copy thereof upon the adverse party. And the record shows that the proposed statement was prepared and served upon defendants' counsel within the time fixed by the order. It follows, therefore, that as the court below erred in making the order appealed from, it should be reversed, and the cause remanded for further proceedings on the motion for a new trial. No error appearing on the judgment roll, the judgment should be affirmed, and we so advise.

We concur: FOOTE, C.; BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed, and the cause remanded for further proceedings on the motion for a new trial, and the judgment is affirmed.

89 Cal. 590

HYDE v. BOYLE *et al.* (No. 14,190.)

(Supreme Court of California. June 25, 1891.)

**BILL OF EXCEPTIONS—STRIKING OUT PORTIONS—POWER OF SUPREME COURT.**

1. Under Code Civil Proc. Cal. § 649, which provides that a bill containing the exceptions to any decision may be presented to the court or judge for settlement, and, after having been settled, shall be signed by the judge, and filed with the clerk, the supreme court has no power to strike out part of the bill settled and certified by the trial court.

2. A trial judge may amend a proposed bill of exceptions to conform to the facts, although the opposite party does not propose amendments.

In bank. Appeal from superior court, city and county of San Francisco; J. P. HOGG, Judge.

Action by Hyde against Boyle and others. Defendants appeal. Code Civil Proc. Cal. § 649, provides that a bill containing the exceptions to any decision may be presented to the court or judge for settlement, and after having been settled shall be signed by the judge and filed with the clerk.

Geo. H. Buck and Edward F. Fitzpatrick, for appellants. T. M. Osment, for respondent.

PER CURIAM. The appellants ask to have struck out of the printed transcript filed herein a portion of the bill of exceptions that had been settled and certified by the judge of the superior court, prior to the filing of the transcript, upon the ground "that no part of the said matter was read, referred to, or submitted to the court below upon the hearing of the motion upon which the order appealed from was made and entered;" and have presented certain affidavits in support of their motion, and of the grounds upon which it is made. We think that the subject-matter of this motion was substantially passed upon by this court in its refusal to grant the petition of the appellants "to prove an exception in this case," (Hyde v. Boyle, 86 Cal. 352, 24 Pac. Rep. 1059;) and that the reasons then given

for refusing their petition are applicable to the present motion. The statute provides that a bill of exceptions shall be settled by the judge who heard or tried the cause, and, except in the single instance in which the judge "refuses to allow an exception in accordance with the facts," (Code Civil Proc. § 652,) has provided no other mode of settling the bill, and has made no provision whatever for any review of his action in settling a bill. The settlement of a bill of exceptions is one of the duties imposed upon a judge by virtue of his office, and is to be performed by him under the sanction of his official oath. It is not to be presumed that he will in any instance so far violate his official obligation as either willfully or knowingly to insert in the bill any matter that is not properly there, or exclude therefrom any matter that should be inserted. This court is not the tribunal to determine whether he has in any instance violated his duty in this respect, or from which a litigant is to seek redress for any such violation. When the bill of exceptions has been settled and allowed by the judge before whom the proceedings were had, it must, for all purposes of reviewing the action of the court, be deemed by this court to be a correct statement of what took place. If the judge has refused to allow an exception, the statute has provided a remedy by which a party may prove that exception, but it has given to this court no authority for striking out from a bill matters which are alleged not to have occurred in the court below. It would lead to endless confusion if, after the judge has solemnly settled and signed the bill, his action could be set aside, or a portion of the bill struck out, upon the affidavits of spectators or parties in interest. As was said by this court in *Vance v. Superior Court*, 87 Cal. 393, 25 Pac. Rep. 500: "If it be an evil that a statement of what evidence was introduced, made by a judge who presided over the trial, and who acts in his judicial character, and under his judicial oath, cannot be overcome by the contrary statement of somebody else, it must be put into the large class of evils (real or imaginary) which this court has no jurisdiction to remedy." We do not wish to be understood as holding that everything that is contained in a bill of exceptions is always to be considered by this court in reviewing the action of the court below. It may frequently happen that irrelevant matters are incorporated into the bill, and the bill itself may show upon its face that the matters therein recited were not presented to the court at the time it made its rulings, or could not have any weight in determining the correctness of such rulings. This court will consider only such matters as by the bill of exceptions itself purport to be pertinent, and to have been considered by the court below.

The fact that the respondent did not propose any amendments to the draft of the bill that had been proposed by the appellants did not preclude the judge from making the same conform to the facts. The time within which the judge may settle a bill after it has been presented to him

is not fixed by statute. If no amendments are proposed, the bill is to be presented to the judge for settlement; and it is the duty of the judge, in settling the bill, to make it conform to the facts. He is not precluded from so doing by reason of the failure on the part of the opposite party to propose such amendments to the draft as will cause the same to correctly represent what transpired before him. The provision in the statute that he is "to strike out all redundant and useless matter, so that the exceptions may be presented as briefly as possible," is not a limitation upon his functions in settling the bill, but is more in the nature of a definition of the course which the judge is authorized to adopt "in settling the bill." Motion denied.

89 Cal. 584

SWAIN v. BURNETTE et al. (No. 13,085.)

(Supreme Court of California. June 28, 1891.)

SPECIFIC PERFORMANCE—ORAL AGREEMENT TO EXCHANGE — PART PERFORMANCE — STATUTE OF FRAUDS—MEMORANDUM.

1. In an action for specific performance, the evidence showed that defendant placed the property in the hands of an agent to sell or exchange, and by his efforts met plaintiff, and agreed orally to exchange with him. Plaintiff left a deed with the agent, but defendant refused to accept it. *Held*, that a delivery to the agent was not a delivery to defendant, so as to constitute part performance, and take the agreement out of the statute of frauds.

2. Where one orally agreed to convey property, and made a deed, which was not delivered, such deed cannot be treated as a memorandum of the agreement, in the absence of evidence showing that it contained the terms thereof.

3. An oral agreement for the exchange of land cannot be enforced by one whose title is defective, when the agreement was that the exchange should be made if titles were satisfactory.

Department 2. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Geo. W. Lewis, (Ben. Morgan, of counsel,) for appellant. J. C. Plunkett, (N. B. Malville, of counsel,) for respondents.

DE HAVEN, J. This is an action to enforce the specific performance of an alleged agreement for an exchange of lands. The making of the agreement was denied by defendants. The answer alleges that defendant Nellie C. Burnette, who is the wife of the other defendant, E. T. Burnette, is the owner of the land in controversy. The evidence in the record before us shows that the defendant E. T. Burnette employed one Crane, a real-estate agent, to effect a sale or an exchange of said land, by a writing, the material part of which is as follows: "I will place this property in your hands for sale, and will pay you five per cent. commissions on the amount of sale. Price, \$5,000. You to pay all advertising expenses. Or you can trade this property for property in Oakland that will be satisfactory to me. I will accept the same as cash." It appears that Crane, acting under this employment, brought the plaintiff and the defendants together, and it may be inferred from the testimony of Crane that an oral agreement was made between the parties for an ex-

change of their lands. It was further shown that on July 15, 1884, the plaintiff left with Crane for the defendants a deed properly signed and acknowledged by him in form conveying to Mrs. Burnette the land which he claims he was to give in exchange for that in controversy, but the defendants refused to accept this deed. It also appears that at some time during the negotiations the defendant Mrs. Burnette signed and acknowledged a deed of the land in controversy. In it the plaintiff was named as grantee, but it was never delivered, nor did Mrs. Burnette in any manner part with its possession, and she finally destroyed it. Its contents were not shown further than that it was sufficient in form, if delivered, to convey the land which it described. In addition to this, there was also introduced in evidence the following letters written by defendant Mrs. Burnette to the said Crane, in relation to the proposed contract with plaintiff: "Haywards, Cal., June 26, 1884. A. E. Crane—Dear Sir: My husband has returned, and has ascertained from the records of Alameda county there is a claim against the property you propose exchanging, belonging to Mr. Swain. The claim is known as the 'Dungan Title,' now pending in the superior court of Alameda county, and entered February 9, 1882. Therefore you can consider the trade at an end, as you both told me there was no suit over it. You can take the property off your books, as I will not sell the property through you." "Haywards, July 11, 1884. Albert E. Crane—Dear Sir: The ten days have expired in which Mr. W. B. Swain was to furnish me a good title of his property on Filbert street. There still stands on record a mortgage not released; also the Dungan title, not released. Therefore you can take the property off your books, and I will take up my deposit of \$250.00, as I consider the trade at an end." Upon this evidence the plaintiff was consulted, and on this appeal he contends—*First*, that the evidence shows such a part performance by him of the oral agreement as to entitle him to its specific performance by defendants; *second*, that there was a sufficient memorandum in writing of the agreement to satisfy section 1624 of the Civil Code.

1. There was no part performance by plaintiff of the oral agreement, within the meaning of the rule relating to that subject. It may be conceded that, if he had conveyed his own land in accordance with the terms of such agreement, this would have been such a performance by him that a court of equity would have compelled the defendants to perform their part of the contract. *Caldwell v. Carrington*, 9 Pet. 86; *Pom. Spec. Perf. Cont.* § 134. But the evidence falls far short of showing that he conveyed to the defendant Mrs. Burnette the land which he claims he was to exchange for the land in controversy. She refused to accept the deed; and the delivery to Crane, even if unconditional, was not a delivery to her, as it does not appear that Crane was her agent for the purpose of accepting a delivery of this deed. Certainly, the written authority to effect a satisfactory exchange of her



land signed by her husband, and, we may assume, ratified by her, did not constitute Crane her agent to enter into a binding contract for such exchange, or to accept a deed for her if she afterwards made a contract for the exchange of her land. By this writing there was reserved to the defendant, signing or adopting it, the right to make his or her own contract; and Crane was only authorized, so far as relates to an exchange of lands, to find some one who would make a satisfactory exchange with defendant, and in the event of his success Crane was to be allowed the same commission as on a sale for \$5,000 in money, and its main purpose seems to have been to fix the compensation to which Crane would be entitled under such employment. But, in addition to this, we think the fair inference to be drawn from the evidence is that plaintiff left his deed with Crane, to be delivered to Mrs. Burnette only on condition that she executed her deed to plaintiff, and, as this condition was not performed, plaintiff's deed never took effect as a conveyance. For both of these reasons we think there was no part performance by appellant.

2. The appellant further insists, that the deed signed by the defendant Mrs. Burnette, although not operative as a conveyance because not delivered, may yet be regarded as a sufficient memorandum of the oral agreement within the meaning of section 1624 of the Civil Code. We do not think so. It is unnecessary for us to determine, at this time, whether a deed not delivered, nor intended by the party signing it as a memorandum, if otherwise sufficient, could be treated as a memorandum of an agreement for the sale of land, within the meaning of the statute, because there is nothing in the evidence to show that this writing, which lacked only delivery to constitute a deed, contained a memorandum of the terms of the agreement which plaintiff claims that he made with defendants in reference to an exchange of lands, and, unless it did, it would not satisfy the statute. It may have been sufficient in form to have operated when delivered as a conveyance, and yet have been entirely silent as to the agreement in pursuance of which it was made, and therefore insufficient as a memorandum of such agreement. *Campbell v. Thomas*, 42 Wis. 441; *Cagger v. Lansing*, 43 N. Y. 553.

3. The letters do not purport to state the terms of any completed agreement. The first, of June 26th, is simply a rejection of the proposition to make the exchange. It is apparent from this letter that the matter of an exchange had been submitted to her for consideration, and, upon examination of the records, the proposition was not accepted by her. In regard to the letter of July 11th, it may also be said that it does not state the terms of a completed agreement, such as plaintiff claims was made. It simply states that the title of plaintiff's property is not satisfactory, and that the time within which he was to make a good title had expired, and that she did not intend to pursue the matter further. And it is

very clear from both of these letters that the question of plaintiff's title was under consideration and discussion at all times during the negotiation between the parties, and that until satisfied it was good the defendant did not propose to make an exchange. These letters do not furnish sufficient evidence of the agreement alleged by plaintiff to entitle him to the judgment he seeks to obtain.

4. The order refusing to modify the judgment is not an appealable order. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; McFARLAND, J.

(39 Cal. 613)

BURDELL v. TAYLOR. (No. 13,303.)

(*Supreme Court of California*. June 26, 1891.)

BOUNDARIES—EVIDENCE—INTERLINATIONS—EVIDENCE OF HANDWRITING.

1. In ejectment to recover land claimed by plaintiff to be included in his surveys of swamp and overflowed land, and by defendant as being included in another survey to him, the county surveyor who made all the original surveys, and his successor, testified that the land was in plaintiff's survey, and there was a natural monument still standing at which the surveys were begun. The surveyor employed by defendant commenced at a stake which defendant told him was the section corner, but about which he knew nothing. *Held*, that the evidence warranted a finding for plaintiff.

2. Where the maker and recorder of a survey testifies that interlinations appearing therein were made by him before its execution, the survey is admissible in evidence.

3. The successor of a county surveyor, having charge of the documents in the office, who testifies that he has made frequent examination of documents purporting to be in his predecessor's handwriting, is competent to testify that interlinations appearing in a survey made by his predecessor are in his handwriting.

Commissioners' decision. Department 2. Appeal from superior court, Marin county; E. B. MAHON, Judge.

T. J. Crowley, for appellant. *Hepburn Wilkins*, for respondent.

FOOTE, C. This is an action in ejectment to recover possession of certain parcels of land claimed by the plaintiff. The trial was had before a jury, who returned a verdict for the plaintiff. Judgment was thereupon rendered, from which, and an order refusing a new trial, the defendant appeals. One ground of error claimed is that the evidence does not support the verdict. The plaintiff claimed title through certain state patents to swamp and overflowed land, surveys numbered 56 and 61, and certain mesne conveyances made under those patents. The defendant claimed some of the land in controversy as being within the lines of a Mexican land grant, to which he had title, and by virtue of a certain state patent of swamp and overflowed land, survey No. 55, and by adverse possession for five years. We think the evidence sufficient to show that no such adverse possession ever took place. The real conflict in the matter was as to whether the land in controversy lay within the patents for surveys Nos. 61 and 56, or lay within the Mexican grant and the state patent for survey No. 55. The county surveyor who made all the original

surveys for these patents, Mr. Easkoot, and Mr. Dodge, who succeeded him, testify that the two parcels of land last described in the complaint are within the patent for swamp land survey No. 56; and the defendant, in his original brief, at page 2, concedes as much. This being so, it cannot be said that the jury were wrong in their verdict to that extent, particularly when we come to look at the testimony for the defendant, which falls far short of satisfactorily showing that this land was within the patent for swamp-land survey No. 55. Easkoot seems to have made all the surveys of these swamp lands, and to have commenced at a certain bay tree, a natural monument, still standing, as an initial point. Dodge followed his plan in locating the boundaries on the ground. But the surveyor employed by the defendant commenced at a stake at the southwest corner of section 32, which he was told by the defendant was a section corner, but about the truth of which he knew nothing. Neither he nor the defendant satisfactorily established this as the true corner of that section; and, when Easkoot was recalled to rebut their evidence, he stated that, in making the surveys for these swamp-land patents, he never set any stake at that corner, never made any survey by reference to it, and never saw one there. In fact, the evidence did not show in any satisfactory way that this stake from which the defendant's surveyor commenced his survey to locate the line between the land embraced in patents for survey 55 and survey 56 was the true south-west corner of section 32 at all. This being so, the jury were fully warranted in finding, as they did, for the plaintiff, whose evidence as to the true line between these surveys was virtually uncontradicted. So as to the land claimed by plaintiff as being in survey 61, to which he had title, the evidence is conclusive that it was within the survey on which his patent was based. It is claimed, further, for the appellant, that certain instructions given by the court were erroneous. We have searched the transcript laboriously, and find no such instructions asked for, given, or excepted to.

The further point is made that the court erred in admitting in evidence the record of survey No. 61, because it appeared to be interlined, and no sufficient explanation given thereof. Even conceding that the objection made was sufficient, although not pointing to the particular respect in which the document was inadmissible, by stating that it was because of an interlineation, still it appears that Easkoot, the maker and recorder of the survey, showed that the interlineation was made before execution thereof by him. This was sufficient. Code Civil Proc. § 1982; *Sedgwick v. Sedgwick*, 56 Cal. 213.

We think, also, that the evidence of Dodge, as to the interlineation being in the handwriting of Easkoot, was admissible and proper, under the rule announced in *Sill v. Reese*, 47 Cal. 344; it being shown that Dodge was Easkoot's successor as county surveyor, and had charge of the official documents of that office, and had given frequent examination to numerous

documents therein purporting to be in Easkoot's handwriting, and which Easkoot also testified as being in his handwriting. It is also urged that a certain question, viz., "In running that line in the direction that you did, did it fall north or south of the wharf?" asked by defendant's counsel of defendant, Taylor, as a witness, ought to have been allowed by the court to be answered. The defendant's counsel, in his brief, states that the question is to be found in the transcript. But there is no such question there. On page 79, at the end of what is marked as an answer, this question appears to have been put and not allowed to be answered. This jumbling up of the record is unfortunate, but, after searching through it, we have found that the question was probably asked, and an answer disallowed. But we cannot perceive that this worked any prejudice to the defendant. The defendant, the witness, was not possessed of any knowledge where the true line between surveys 55 and 56 ran, and his statement that the line he was following fell north or south of the wharf could prove nothing as to the accuracy of the line. Again, the evidence of his surveyor and himself, as to the boundaries of the survey, commencing at a stake which was not sufficiently shown to be the southwest corner of section 32, which they claimed it to be, would not have warranted the jury in finding for the defendant, as against the uncontradicted evidence of Easkoot and Dodge, as to the true lines of the surveys, even if the defendant had been allowed to state where the line he and his surveyor were running fell. We perceive no merit whatever in this appeal, and advise that the judgment and order be affirmed.

WE CONCUR: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(39 Cal. 547)

LOUIS v. ELFELT *et al.* (No. 13,036.)<sup>1</sup>

(*Supreme Court of California*. June 28, 1891.)

MASTER AND SERVANT—DISSOLUTION OF PARTNERSHIP—TERMINATION OF CONTRACT OF EMPLOYMENT.

The dissolution of a copartnership by the death of a partner terminates a contract of employment for a year between the firm and a salesman, under Civil Code Cal. § 1996, providing that every employment in which the power of the employe is not coupled with an interest in the subject, is terminated by notice to him of the death of the employer, and, if the surviving partners retain him to assist in winding up the affairs of the partnership without an express agreement, the implied contract is only for such time as his services may be needed, and at such a salary as his services may be reasonably worth.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

*Naphtaly, Freidenrich & Ackerman*, for appellants. *Jos. Rothchild and Morris C. Baum*, for respondent.

<sup>1</sup>Petition for rehearing pending.

**VANCLIFF, C.** This action was brought to recover from the defendants \$500 alleged to be due the plaintiff, as salary for his services as salesman for Elfelt & Co., during the month of December, 1886. The answer of defendants denies that plaintiff was employed by Elfelt & Co. or by the defendants for any part of the month of December, 1886, and denies that he rendered any services to Elfelt & Co. or to defendants during that month. The plaintiff had judgment for the sum demanded, from which, and from an order denying their motion for a new trial, defendants appeal. The material facts are: (1) That on January 1, 1884, and until June 14, 1886, Elfelt & Co., a copartnership composed of A. B. Elfelt, Alfred P. Elfelt, S. Goldsmith, George A. Kohn, and Philip Kohn, were engaged in the wholesale clothing business in San Francisco, generally carrying a stock of merchandise of the value of \$600,000 to \$700,000. (2) That prior to April, 1884, the plaintiff had been employed by the firm as traveling salesman, at a salary of \$350 per month and his expenses. (3) That in April, 1884, he was employed as city salesman, at a salary of \$6,000 a year, he paying his own expenses, and the increased salary to commence from January 1, 1884. (4) No other express agreement was ever made as to salary, or as to the length of time he should be employed; but he continued in the employment by tacit consent of all parties, and was paid the same salary, until June 14, 1886, when Alfred P. Elfelt died. (5) On the death of Alfred P. Elfelt, the surviving partners continued the business for the mere purpose of winding it up, and plaintiff continued in their employment, without any new express agreement, until some time in October, 1886, when they notified him that his services would not be required after November following. Plaintiff continued in the service through the month of November, and on December 1st offered and claimed the right to continue until the end of the year; but defendants then discharged him according to previous notice. After his discharge he reported himself as ready for work from time to time, and was ready and willing to continue his services throughout the month of December; but he was told there was nothing for him to do, and his services were not accepted during any part of that month. (6) On December 1, 1886, the stock of the concern was so much reduced that they could not supply their customers with the assortments ordinarily required, and most of the remnants of stock were sold at auction during that month and January following; and the business was entirely closed out in January, 1887. As conclusions of law the court found—"First, that said contract of employment between plaintiff and the copartnership of A. B. Elfelt & Co. was an entire one, by the year, and not otherwise, to-wit, from January 1, 1884, to January 1, 1885; second, that said contract was renewed by consent of the parties thereto on the 1st day of January, 1885, and again on the first day of January, 1886, and was in full force and effect during the entire month of December, 1886; third, that said defend-

ants, as surviving partners of said copartnership, assumed said contract, and all obligations arising thereunder, and during the month of December, 1886, were guilty of a breach of the terms thereof without cause or right."

This third conclusion of law is also found as a fact; but, as there is no evidence that the surviving partners assumed any obligation not devolved upon them by law, it must have been intended as a mere conclusion of law, and, as such, may be correct as to all obligations not dissolved by the dissolution of the copartnership. There is no finding or evidence of any copartnership agreement as to continuing the business, nor as to the mode of winding up the business, after a dissolution by death of one of the copartners. Appellants contend that the term for which plaintiff's employment was renewed, on the 1st day of January, 1886, (one year,) was terminated by the death of Alfred P. Elfelt, and the consequent dissolution of the copartnership on the 14th day of June, 1886, and I think this point should be sustained. No doubt the contract for a year's service was presumptively renewed on the 1st day of January, 1885, and again on the 1st day of January, 1886, by implied consent of the parties, (Civil Code, § 2012;) but the dissolution of the copartnership by the death of Alfred P. Elfelt (Id. § 2450) dissolved the contract, (Wood, Mast. & S. 165; Whart. Cont. § 322; Civil Code, §§ 1996, 1997;<sup>1</sup> Tasker v. Shepherd, 6 Hurl. & N. 575; Farrow v. Wilson, L. R. 4 C. P. 744.) The death of Alfred P. Elfelt extinguished the copartnership and business of the copartnership in which the plaintiff was employed. Upon the dissolution of the copartnership, the law devolved upon the surviving partners the power and duty to "settle the affairs of the partnership without delay." Code Civil Proc. § 1585. If deemed advisable, and for the interest of the concern, they might have sold the entire partnership stock of goods at auction or otherwise within a month after the dissolution, but it was within their discretionary power to continue to dispose of the stock to the customers of the concern in the ordinary way, if that was deemed more beneficial to the interest of all parties concerned, and for that purpose to employ the necessary salesmen and other agents. So far as the plaintiff served the surviving partners, he was by implication newly employed by them to assist in settling the affairs of the extinct copartnership. For this employment, in the absence of special agreement, he was entitled to such compensation only as his services were reasonably worth. They paid him \$500 per month, and there is no complaint that this was not the full value of his services. It was neither their duty nor within their lawful power to retain and pay him a salary a single day after they considered his services unnecessary and unprofitable

<sup>1</sup> Civil Code Cal. § 1996, provides that every employment in which the power of the employe is not coupled with an interest in the subject shall be terminated by notice to him of the death of the employer

to the business of settling the affairs of the copartnership. Civil Code, §§ 2458, 2462, inclusive. I think the judgment should be reversed, and that the trial court should be directed to enter judgment for the defendants upon the findings.

We concur: FOOTE, C.; FITZGERALD, C.

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment is reversed, and the court below directed to enter judgment for defendants upon the findings.

**PATERSON, J., (concurring.)** I am fully satisfied with the reasons stated by Commissioner VANCLIER, and with his conclusion. It is a general rule that death does not absolve a man from his contracts, but there are exceptions as well settled as the rule itself. Contracts of a purely personal nature do not survive. An executor as such cannot maintain a suit or be sued for breach of promise. The death of a servant within the term of hiring discharges the contract, and no action can be maintained against his executors for its non-performance. The death of the plaintiff within the year would have been a legal excuse from the further performance of his contract, and the effect of death upon the survivor must be mutual. The defendants are prevented by the act of God and the operation of law from continuing the partnership affairs. There are cases which hold that the dissolution of a firm does not discharge the contract, but they are cases in which the dissolution resulted from the act of the parties. The question whether damages can be recovered depends upon the question whether the dissolution resulted from the act of God and the operation of the law, or from the act of the parties.

89 Cal. 535

LEONARD v. FLYNN *et al.* (No. 13,454.)

(Supreme Court of California. June 23, 1891.)

**EJECTMENT—TITLE BY JUDICIAL SALES—ABATEMENT—ANOTHER ACTION PENDING.**

1. One who takes a conveyance, before expiration of the time for redemption, from the purchaser at a sale under execution, and afterwards receives a deed from the sheriff, acquires a perfect title.

2. The pendency of an action of ejectment by one having the equitable title under a conveyance by a purchaser at a judicial sale before expiration of the time for redemption is not a bar to another action by him after acquiring the legal title by a deed from the sheriff.

3. The statute of limitations does not begin to run against a purchaser of land at a sheriff's sale, or his grantees, until delivery of the sheriff's deed.

4. The fact that before the purchaser at a sheriff's sale, or his grantees, has received a deed from the sheriff, a person claiming title through a conveyance from the judgment debtor has entered into possession and made valuable improvements, without objection by the purchaser at the sheriff's sale, or his grantees, is not sufficient to constitute an equitable estoppel against the latter.

**Department 1.** Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Charles B. Younger, for appellant. Julius Lee, for respondents.

**GAROUTTE, J.** This is an action to recover possession of 16.73 acres of land described by metes and bounds, and situate in Santa Cruz county. Defendant Eugene Flynn disclaims all interest and possession. Defendant Patrick Flynn denies the allegations of the complaint; alleges title in himself; alleges that the cause of action is barred by the provisions of sections 312, 318, and 325 of the Code of Civil Procedure; "that another action is pending between the same parties, asking for the same relief; that for a long time prior to November 12, 1884, defendant's grantor was seised in fee and possessed of said tract of land, and upon said day she transferred her interest therein to defendant, who thereupon entered into the actual possession of said land, and ever since that time has had and now has the actual, exclusive, notorious, and adverse possession thereof, against all the world, claiming the same in his own right, and during said time has paid all the taxes assessed thereon." Defendant also sets out facts which he claims constitute an equitable estoppel against plaintiff. As conclusions of law, the court found "that defendant and his grantor had been in the adverse possession of the land for more than five years prior to the commencement of the action; that plaintiff was not the owner, and was not entitled to the possession, thereof; that the action is barred by reason of the pendency of the former action; that plaintiff is estopped," etc. This is an appeal by plaintiff from the judgment and order denying his motion for a new trial. Plaintiff and defendant claimed title from a common source. Plaintiff's title rests upon a sheriff's deed based upon a judgment and execution against Mary J. Roache, who was originally seised of the property in fee.

1. It is conceded that the proceedings of the sheriff in selling the tract of land under execution were valid; that Edward Briody was the purchaser at such sale, and the certificate of sale was issued to him December 13, 1873. Briody conveyed to Margaret Curn, who was a grantor of plaintiff. Defendant claims title by virtue of a quit-claim deed from Mary J. Roache, dated November 13, 1884. The court found that Robert Orton, as ex-sheriff of Santa Cruz county, upon May 28, 1888, made a deed to Edward Leonard, based upon the aforesaid execution and sale of this tract of land. Leonard at that time was the equitable owner of the land, under mesne conveyances from Briody. The court further found that the deed from Briody to Curn was made June 11, 1874, and prior to the expiration of the time for redemption. The fact that the deed was made prior to the expiration of the time for redemption is immaterial, for it operated to transfer Briody's interest in the property, and was equivalent to an assignment of the certificate of sale. In *Page v. Rogers*, 31 Cal. 301, Justice SAWYER, after an exhaustive examination of the law pertaining generally to this matter, held that the estate of a purchaser of realty, at a judicial sale, may be seized and sold under execution, and that, too, prior to the expiration of the time for re-

demption. He says: "If a sale of a purchaser's interest after the time for redemption expires operates as an assignment of the sheriff's certificate of sale, a sale before the time expires must have the same operation." To the same effect is *Green v. Clark*, Id. 591; *Ward v. Dougherty*, 75 Cal. 244, 17 Pac. Rep. 193. Upon May 28, 1888, Edward Leonard, claiming the property through mesne conveyances from Briody, the time for redemption having long since expired, and being the assignee of the certificate of sale by reason of these conveyances, certainly had a perfect equitable title to the realty as against Mary J. Roache, the judgment debtor, and all parties having notice of these matters, and was entitled to a deed of the property from the sheriff.

The deed of the sheriff, dated May 28, 1888, conveyed to him the dry legal title, which, in conjunction with his equity, gave him a perfect title, which he passed by conveyance to his grantee, the plaintiff here.

2. We will now examine the conclusion of the court "that there is another action pending between these parties involving the same subject-matter." In a case such as we have under investigation here, where, in addition to the defense of abatement by reason of the pendency of another action, the defendant relies upon other defenses, which go directly to the merits of the cause, it would seem to be the better practice for the trial court to require the defendant to present his evidence upon his plea in abatement at the opening of his defense; for, if proven to be meritorious, it would in many cases save much useless labor and great expense in litigating other defenses. In addition to finding favorably to the defendant upon his plea in abatement, the court found that the plaintiff had no title, and was not entitled to the possession, that the plaintiff was estopped, and that the defendant had gained title by adverse possession, and proceeded to pass final judgment upon the merits of the action. The defendant, by his answer, asked that this action abate by reason of the pendency of a prior action. The court found that such action was pending, and instead of abating this action, by reason of such fact, for all practical purposes, it proceeded to abate the prior action by adjudicating upon all matters involved therein. It would be an absurdity for the trial court to hold that the action should abate, and then proceed at once to try it upon its merits, and render final judgment. This proposition needs no authority to support it; but *Larco v. Clements*, 36 Cal. 134, and *Coumbrough v. Adams*, 70 Cal. 379, 11 Pac. Rep. 634, are directly in point. In the former action between these parties, after the plaintiff had presented his evidence to the court and rested, upon motion of the defendant he was nonsuited and immediately thereafter filed the complaint in this action. Respondent's contention, that that action is now pending, cannot be sustained in the face of the provisions of section 1049 of the Code of Civil Procedure, and also, if we may be allowed to speak *de hors* the record; in face of the

fact that that case is now pending before us under final submission, and ripe for decision. Conceding that in all other respects these two actions are identical, yet the finding of the court in this regard must be set aside, because appellant acquired the legal title to the land in litigation after the commencement of the first action. A plaintiff may have two suits against the same defendant for the recovery of the possession of the same land, pending at the same time, if the second is brought on a title acquired after the commencement of the first. *Vance v. Olinger*, 27 Cal. 358; *Mann v. Rogers*, 35 Cal. 318; *Larco v. Clements*, 36 Cal. 132; *Murray v. Green*, 64 Cal. 368. The finding of the court, therefore, that another action was pending between these parties, etc., is not supported by the evidence, and is erroneous; but this finding upon the question of abatement, being erroneous, presents the anomalous proposition that for that reason, perchance, the judgment should be affirmed, for we are now compelled to examine respondent's defenses to the merits of the cause.

3. Plaintiff's grantor, as we have already seen, was not possessed of the legal title to this tract of land until he received the deed from the sheriff, May 28, 1888. He had no right of entry until that time, and it was only at that time that his cause of action accrued. The statute of limitations does not begin to run until the cause of action has accrued. *Collins v. Driscoll*, 69 Cal. 550, 11 Pac. Rep. 244. If he had no right of entry until 1888, it would be a harsh rule to hold that a title by adverse possession was undergoing the process of creation against him prior to that time; yet there are some reasons and also authority from other states supporting such rule of law. *Pratt v. Pratt*, 96 U. S. 704. We will not enter into a detailed discussion of this question, owing to the fact that it is essentially a rule of property, and therefore it is of vast importance that the law as heretofore laid down by this court should be deemed unquestioned and conclusive. "The statute of limitations does not commence running against a purchaser of land at a sheriff's sale until the sheriff's deed has been delivered to the purchaser." *Jefferson v. Wendt*, 51 Cal. 573. For the foregoing reasons we deem it unnecessary to enter into a detailed examination of the evidence upon which the defendant relies to create his title by reason of an adverse possession for the period of five years.

4. The facts that defendant relied upon to constitute an estoppel, as shown by his answer, are: "That shortly after his entry upon this tract of land he placed valuable improvements thereon. That at that time plaintiff and his grantors well knew that he was making such improvements, and claimed the land as his own, and they did not object to the making of such improvements; nor did they, or any one of them, make known to him that they claimed any interest in said land." The court found in conformity with the foregoing allegations, and, in addition, found that, at the time, plaintiff and his grantors knew their title, and

that it was the same at the commencement of the action. Neither the facts alleged nor the facts found are sufficient to constitute an equitable estoppel. *Boggs v. Merced Min. Co.*, 14 Cal. 279. Let the judgment and order be reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; PATERSON, J.

(89 Cal. 543)

LEONARD v. FLYNN. (No. 13,490.)

(*Supreme Court of California.* June 23, 1891.)

EJECTMENT—EVIDENCE OF TITLE—POSSESSION.

Prior possession of plaintiff, or parties through whom he claims for many years, is sufficient evidence of title to support ejectment.

Department 1. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Charles B. Younger, for appellant. Julius Lee, for respondent.

GAROUTTE, J. This is an action to recover the possession of a tract of land in Santa Cruz county. Plaintiff appeals to this court from a judgment of nonsuit rendered against him. His complaint was in the ordinary form, and the evidence upon which the trial court acted in granting the motion for nonsuit was as follows: The tract of land which forms the subject of this litigation was a part of the Rancho San Andreas. Upon August 18, 1873, by partition proceedings, the tract in dispute was set apart to Mary J. Roache in fee. Upon December 13, 1873, it was sold by the sheriff of Santa Cruz county under and by virtue of an execution against her to Edward Briody, who received a certificate of sale thereof, containing the usual recitals. Upon June 12, 1874, Edward Briody conveyed it by grant, bargain, and sale deed to Margaret Curn. Upon January 22, 1880, it was conveyed in the same manner by John Curn and Margaret Curn to Edward Leonard. Upon December 19, 1887, it was conveyed by Edward Leonard and Mary E. Leonard to James Joseph C. Leonard. Upon January 13, 1888, it was conveyed by the above-named grantee to the plaintiff in this action. From June 12, 1874, until some time in 1886, plaintiff and his grantors were in the possession of the tract of land in dispute, claiming title to the same. Defendant's answer denied the ownership of plaintiff, and set up title and possession in himself. Defendant's motion for a nonsuit was made and granted upon the grounds that plaintiff had not shown any legal title in himself, either paper title or by adverse possession, or any other title. At the time Edward Briody conveyed the property, he had no title other than a certificate of sale issued by the sheriff under an execution sale of the property. Under such circumstances the legal title remained in the judgment debtor, and Briody had an equitable estate in the lands, conditional, but which would become a perfect equity upon the expiration of the time allowed by law for redemption. *Page v. Rogers*, 31 Cal. 301. Owing to the views we hold upon another branch of the case, it will not be necessary to pass upon the ruling of the court refus-

ing to admit in evidence the deed from the sheriff based upon the certificate of sale.

The possession required by a plaintiff, in order to recover in ejectment, where his documentary evidence is lacking, does not go to the extent demanded in order to ripen an adverse possession into legal title. "It is incumbent on the plaintiff in ejectment to prove the proper conveyances from a party having the title. If the conveyance is from a party in peaceable possession, claiming title at the time it was executed, that is sufficient; for possession is *prima facie* evidence of title." *Tyler, Ej. p. 541.* In *Morton v. Folger*, 15 Cal. 283, Chief Justice FIELD used the following language in the opinion of the court: "But, aside from all considerations of the grant, the evidence was *prima facie* sufficient to go to the jury on the ground of the prior possession shown in Sutter."

"\* \* \* As prior possession in a plaintiff or his grantors is of itself sufficient to warrant a recovery, it would be strange if an unsuccessful attempt to add to it the additional weight of documentary evidence should operate to destroy its original and legitimate effect." The same eminent jurist says in *Nagle v. Macy*, 9 Cal. 427. "It is the settled doctrine of the law, repeatedly affirmed by this court, that the prior possession of the plaintiff, or parties through whom he claims, is sufficient evidence of title to support the action of ejectment." *Foot v. Murphy*, 72 Cal. 104, 13 Pac. Rep. 163. When plaintiff proved that he and his grantors had been in the possession of this tract of land for many years, and up to within a short time prior to the commencement of this action, claiming title thereto, under conveyances from their respective grantors, he established a *prima facie* case which entitled him to the possession, and the motion for a nonsuit should have been denied. Let the judgment be reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; PATERSON, J.

(93 Cal. 253)

FAY v. PACIFIC IMP. CO. (No. 13,350.)<sup>1</sup>

(*Supreme Court of California.* June 23, 1891.)

INNKEEPER'S LIABILITY—LOSS BY FIRE—GUESTS—BOARDERS.

1. Under Civil Code Cal. § 1859, making an innkeeper liable for the loss of personal property placed by his guests under his care, "unless occasioned by an irresistible superhuman cause," a loss occurring by a fire which originated in the battery room of an hotel cannot be considered occasioned by an "irresistible superhuman cause."

2. One who keeps a house for the entertainment of all who choose to visit it, and extends a general invitation to the public to become guests, is an innkeeper, and liable as such, though the house is situated on inclosed grounds.

3. A guest at a public inn may retain personal custody of necessary wearing apparel; and jewelry worn daily by her need not be deposited with the innkeeper, when not in use, to make him liable for its loss by fire.

4. Where one went to a public inn, and was assigned a room, the fact that she inquired as to the price of room and board is not sufficient to show that she was received as a boarder, and not as a guest.

Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

<sup>1</sup>Rehearing granted.

*Gell & Morehouse*, for appellant. *D. M. Delmas*, for respondent.

DE HAVEN, J. The plaintiff recovered judgment against the defendant for damages occasioned by the loss of her jewelry, wearing apparel, and other articles of personal property consumed by fire at the burning of the Hotel Del Monte, April 1, 1887, of which the defendant was at that time the proprietor. The court below found that the Hotel Del Monte was at the date named a public inn, and that plaintiff was a guest therein. On this appeal the defendant claims that the evidence does not sustain these findings; and also that the burning of the hotel was an irresistible superhuman cause for which it is not liable, and that it is not, in any event, liable for plaintiff's diamonds and other jewelry, because not deposited in defendant's safe.

1. An inn is a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation,—an hotel. In *Wintermute v. Clarke*, 5 Sandf. 247, an "inn" is defined as a public house of entertainment for all who choose to visit it, and this definition was quoted with approval by this court in *Pinkerton v. Woodward*, 38 Cal. 596. The fact that the houses are open for the public, that those who patronize it come to it upon the invitation which is extended to the general public, and without any previous agreement for accommodation, or agreement as to the duration of their stay, marks the important distinction between an hotel or inn and a boarding-house. This difference is thus stated in *Schouler on Bailments*: "An inn is a house where the keeper holds himself out as ready to receive all who may choose to resort thither and pay an adequate price for the entertainment, while the keeper of a boarding-house reserves the choice of comers and the terms of accommodation, contracting specially with each customer, and most commonly arranging for long periods and a definite abode." *Schouler, Bailm. p. 253*. We think that the evidence in this case is full and complete to the point that the Hotel Del Monte was a public inn. It not only had a name indicating its character as such, but it was also shown that it was open to all persons who have a right to demand entertainment at a public house; that it solicited public patronage by advertising, and in the distribution of its business cards, and kept a public register in which its guests entered their names upon arrival, and before they were assigned rooms; that the hotel, at its own expense, ran a coach to the railroad station for the purpose of conveying its patrons to and from the hotel; that it had its manager, clerks, waiters, and in its interior management all the ordinary arrangements and appearances of an hotel, and the prices charged were for board and lodging. These facts were certainly sufficient to justify the court in finding, as it did, that the appellant was an innkeeper. *Krohn v. Sweeney*, 2 Daly, 200. Nor was the force of this evidence in anywise modified by the fact that the hotel was

not immediately upon a highway, or that the grounds upon which it stood were inclosed, and the gates closed at night. The location of the hotel, the extent of the grounds surrounding it, and the manner in which these grounds were improved, and reserved for the exclusive use and enjoyment of those who patronized it, doubtless made the hotel more attractive to those who chose to make a transient resort of it, but did not convert it into a mere boarding-house. An hotel is none the less one because in some respects it may be conducted differently or have more attractions than other public hotels, so long as it is held out to the public as a place for the entertainment of all transient persons who may have occasion to patronize it. "Modes of entertainment alter with the fashion of the age, and to preserve a clear definition is not easy. It is not wayfarers alone, or travelers from a distance, that at the present day give character to an inn; the point being rather that people resort to the house habitually, no matter whence coming or whither going, as for transient lodging and entertainment." *Schouler, Bailm. p. 249*.

2. The evidence shows that the plaintiff was a guest, and not a boarder. The fact that upon her arrival, and before being assigned to her room she ascertained what she would have to pay for the room and board, is not sufficient of itself to show that she was not received as a guest. *Pinkerton v. Woodward*, 38 Cal. 597; *Hancock v. Rand*, 84 N. Y. 1; *Jalle v. Cardinal*, 85 Wis. 118; *Hall v. Pike*, 100 Mass. 495, *Woolen Co. v. Proctor*, 7 Cush. 417. The Del Monte being a public hotel, in the absence of evidence showing that plaintiff went there as a boarder, the presumption would be that she went there as a guest. *Hall v. Pike*, supra. Not only does the evidence fail to overthrow this presumption, but the testimony of the plaintiff shows that she was there as a mere temporary sojourner, without any agreement as to the time she should stay, and with only the intention on her part of resting a week or two, and then proceeding to the east. She obtained no reduction of price in consideration of an agreement to remain a definite time, or as a boarder; nor was there anything said from which it could be inferred that there was any understanding between her and the defendant that she was to be received as a boarder, and not as a guest.

3. Under section 1859 of the Civil Code, an innkeeper is liable for the loss of personal property placed by his guests under his care, "unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one he brought into the inn." In this case the loss was occasioned by the burning of the hotel, and the origin of the fire is not shown further than that it broke out in one of the rooms in which there was nothing except the batteries which supplied the bells with electricity. Under this state of facts the defendant is liable. *Hulett v. Swift*, 83 N. Y. 571. A fire thus occurring cannot be considered an "irresistible superhuman cause," within the meaning of section 1859 of the Civil Code.



The words "irresistible superhuman cause" are equivalent in meaning to the phrase "the act of God," and refer to those natural causes the effects of which cannot be prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ. 1 Amer. & Eng. Enc. Law, 174. A loss arising from an accidental fire is not caused by the act of God, unless the fire was started by lightning or some superhuman agency. *Miller v. Navigation Co.*, 10 N. Y. 431; *Railroad Co. v. Sawyer*, 69 Ill. 285.

4. The court finds that the property lost was such as was needed for the present personal use of the plaintiff. We cannot say that the evidence does not support this finding. It certainly cannot be said that jewelry worn by a woman daily must, when not actually upon her person, be deposited with the innkeeper in order to make him responsible for its loss in the inn. If worn daily, it does not cease to be needed for present personal use, when its possessor lays it aside upon retiring for the night. Nor is it necessary, in order to render the innkeeper liable, that the property should have been delivered into his exclusive personal possession. "The guest may retain personal custody of his goods within the inn, as of his trunk and its contents, his wearing apparel and other articles in his room, and any jewelry or valuables carried or worn about his person, without discharging the innkeeper from responsibility." *Jalle v. Cardinal*, 35 Wis. 126. We have examined the other points made by appellant, but do not think they call for special discussion. The rule which makes an innkeeper liable for the value of the property of his guest, in case of its loss by fire, may at first thought be deemed a harsh one; but the loss must fall somewhere, and section 1859 of the Civil Code provides upon whom it should properly fall, and the innkeeper's liability, in this respect, is one of the burdens pertaining to the business in which he is engaged, and in view of which it must be supposed that he regulates his charges. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

(3 Cal. Unrep. 416)

HEWITT v. DEAN et al. (No. 14,011.)

(Supreme Court of California. June 26, 1891.)

JUDGMENT OF DEPARTMENT—REHEARING IN BANK—EFFECT.

A motion before one department of the supreme court, to set aside a sale of real property, will be dismissed, without prejudice to its renewal, where the judgment of that department on which it rests has been set aside, and a hearing in bank ordered.

Department 2. Motion before supreme court.

Victor Montgomery, for appellants. Ray Billingsby, for respondent.

PER CURIAM. This cause is pending before this department upon a motion to set aside the sale of certain real property; but as the judgment in this court upon which

said motion rests has been set aside, and a hearing in bank ordered, the motion is dismissed without prejudice to its renewal, if the circumstances under which it was made again occur.

(39 Cal. 617)

NICHOLSON v. TARPEY et al. (No. 13,177.)

(Supreme Court of California. June 26, 1891.)

CONTRACTS—PAROL EVIDENCE—PRIOR CONVERSATIONS.

Though the written contract on which plaintiff sues may be lost or otherwise inaccessible to him, so that parol evidence is necessary to prove its contents, evidence of conversations between the parties pending the negotiations which resulted in the contract, which conversations were had before its execution, is incompetent.

Commissioners' decision. Department 2. Appeal from superior court, Monterey county; F. E. SPENCER, Judge.

D. M. Delmas, for appellants. Louis Lee and King, Rogers & Lindley, for respondent.

TEMPLE, C. This is the defendant's second appeal. 70 Cal. 608, 12 Pac. Rep. 778. It is from the judgment and an order refusing them a new trial, upon a bill of exceptions, wherein are stated certain rulings, admitting evidence against the defendants, and claimed to be erroneous. The action is for the specific performance of a contract alleged to have been made in writing by Mathew Tarpey, the ancestor of the defendants. It is charged that Tarpey induced plaintiff by fraudulent representations to accept a deed for a portion of the premises, under the belief that it conveyed the whole. This action, in effect, to reform the deed. Defendants admit a parol contract for the premises conveyed by Tarpey, and deny that any other contract was made. The plaintiff claimed that the contract was executed in duplicate, each party retaining one, and that his copy was surrendered to Tarpey, and destroyed when he received the deed. The issue tried was whether there was a written contract, and, if so, as to its contents. The alleged contract was in May, 1867. The deed was delivered and received as performance in October, 1868. Plaintiff built a house and went upon the land to live in 1871, and claims to have had possession of the whole tract ever since. The tract comprised about 400 acres, was evidently much of it unsuitable for cultivation, and was not inclosed. It does not appear whether there was any improvement or cultivation upon the part now in dispute. Mathew Tarpey died in 1873. The line between the part agreed to be conveyed and that retained was not fenced until 1879, shortly before the commencement of this litigation.

The testimony objected to is the same deposition, same objections to which were considered on the last appeal, and respondent claims that that decision has become the law of the case. To this it is sufficient to reply that the objections are not the same. Depositions are taken subject to all legal exceptions, except as to the form of the interrogatory, and when read on the retrial parties were at liberty to interpose new objections. The witness, having

Petition for rehearing pending.

stated that plaintiff and Tarpey went to look at the land while negotiations were in progress, was asked: "Did you hear any conversation between them after they returned that day? and, if so, state fully what it was." It was objected to as irrelevant, immaterial, and incompetent, and that negotiations and conversations preceding the execution of the written contract were merged in it, and that it did not purport to call for the contents of the writing. Plaintiff's counsel then stated that they desired to prove by it the contents of the bond, which was in the possession of the defendants, and beyond their control, and promised to account for its non-production. The objections were renewed and overruled, defendants excepting. The witness then proceeded to detail the conversation between Tarpey and plaintiff, in response to numerous direct questions, explicitly calling for such testimony, all of which were duly objected to and exceptions reserved. For example: That Nicholson said he was to pay \$1,500 in wagons, etc. "That he bought this piece of land from Mr. Tarpey, running from a certain corner of the San Juan road,—corners with Juan Anser,—running down San Juan road to a picket fence; thence up to Castro line, corner of Castro; thence cross to the three stakes; thence back to beginning,—being the land in dispute,—for \$1,500." That Tarpey said there was wood enough on it to pay for it, that the spring was included, and was worth more than all the ranches around there, etc. This evidence was offered and received expressly to prove the contents of the writing, which the witness stated was made at that time, and was all composed of remarks previous to, or at best contemporaneous with, the execution of the writing. It was clearly incompetent.

The question on the former appeal was, apparently, whether, when the deposition was read, the loss of the original had been sufficiently proven. The court evidently misapprehended the facts of the case. It seems to have supposed that Mathew Tarpey was the defendant, and had in his possession a duplicate of the writing. He had been dead about seven years before the action was commenced. There is no evidence which tends to show that the bond was ever in the possession of the defendants, who are the heirs of Mathew Tarpey. Apparently, too, the court overlooked section 1855, Code Civil Proc., which expressly requires reasonable notice to a party, before his failure to produce the writing will justify oral testimony of its contents. In *Goldman v. Davis*, 23 Cal. 256, this court said: "The law deems all such stipulations merged in the writing, which, in the absence of fraud, accident, or mistake, is treated as the exclusive medium of ascertaining the agreement to which the parties bound themselves." To the same effect is section 1625, Civil Code. There is no claim of mistake or fraud in regard to the written agreement. It is assumed that it correctly stated the contract. The final agreement may have differed widely from propositions made during negotiations. The parties may both have been mistaken in

regard to whether the agreed boundaries would include the spring. By-standers were quite likely to have misunderstood the agreement. The material question was as to the language of the written contract. The final agreement and negotiations preceding it throw a very uncertain light upon that issue. Whether lost or not, there can be no evidence, in the absence of mistake or fraud, of the intention of the parties, other than the written instrument itself. The rights of the parties must be ascertained from its terms. Section 1856, Code Civil Proc. The Code expressly provides, in case of lost instruments, for oral evidence of its contents. Sections 1855, 1870, subd. 14. Evidence of the character received in this case imposes upon the court the construction of the contract by the witness. In *U. S. v. Britton*, 2 Mason, 264, Mr. Justice STORY remarked: "If no such copy exists, the contents may be proved by parol evidence, by witnesses who have seen and read it, and can speak pointedly and clearly to its tenor and contents." The precise question was decided in *Taylor v. Riggs*, 1 Pet. 591. Chief Justice MARSHALL said: "This not being an action for deceit and imposition, but on a written contract, the right of the plaintiff to recover is measured precisely by that contract, and the secondary evidence must prove it as laid in the declaration. The conversation which preceded the agreement forms no part of it; nor are the propositions or representations which were made at the time, but not introduced into the written contract, to be taken into view in construing the instrument itself. Had the written paper been produced, neither party could have been permitted to show his inducements to make it, or to substitute his understanding of it, for the agreement itself. If he was drawn into it by misrepresentation, that circumstance might furnish him with a different action, but cannot affect this. \* \* \* "When a written contract is to be proved, not by itself, but by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and, if that cannot be done, the party is in the condition of every other suitor in court who makes a claim which he cannot support. When parties reduce their contract to writing, the obligations and rights of each are described and limited by the instrument itself. The safety which is expected from them would be much impaired if they could be established upon uncertain and vague impressions made by a conversation antecedent to the reduction of the agreement." See, also, *Vincent v. Cole*, *Moody & M.* 258; *Dennis v. Barber*, 6 Serg. & R. 426. We think the judgment and order should be reversed, and a new trial ordered.

WE CONCUR: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered.

89 Cal. 563

**HELM v. WILSON. (No. 13,214.)***(Supreme Court of California. June 26, 1891.)***EJECTMENT—INSTRUCTIONS—AGREED LINE.**

1. In ejectment, where defendant claims by virtue of the statute of limitations, and also by reason of an alleged settlement of the line between him and plaintiff by their respective grantors, failing which defenses there is no question of plaintiff's right to the land, it is not error to instruct that plaintiff is entitled to recover, unless defendant shows title in one of the ways pleaded, and that the fact that he has in good faith made improvements on the land in controversy cannot affect the verdict.

2. An instruction that the agreed line claimed by defendant must have been "distinctly agreed on" is not misleading, as impliedly excluding evidence to prove the agreed line from the acts, situation, acquiescence, and relation of the parties.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. MCGARVEY, Judge.

*Yell & Seawell*, for appellant. *J. A. Cooper* and *T. L. Carothers*, for respondent.

**BELCHER, C.C.** This is the second appeal in this case. The decision on the first appeal is reported in 76 Cal. 476, 18 Pac. Rep. 604, and the facts involved in the case are there very fully stated. The new trial again resulted in a judgment for the plaintiff, from which, and from an order refusing a new trial, defendant appeals. The question in controversy was as to the true location of the line dividing the lands of plaintiff and defendant. The defendant pleaded the statute of limitations, and then alleged that, while the line was uncertain and in dispute, the grantors of plaintiff and defendant agreed upon and established the line claimed by defendant as the true line, and erected and maintained a fence thereon; that they and their successors in interest thereafter, till the commencement of this action, acquiesced in the line so agreed upon and established, and respectively held and claimed possession up to the same. The defendant further, "as a set-off for all damages and rents claimed by the plaintiff, or that may be recovered by him," alleged that he had placed certain permanent improvements upon the disputed strip of land, and that in the erection of the improvements he acted in good faith, and believed he had a good title to the said strip. At the trial the evidence upon most of the issues raised by the answer was conflicting. The court gave to the jury eight instructions at the request of the plaintiff, and six at the request of the defendant. These instructions state the law applicable to each party's theory of the case, and should be read together; when so read, they seem to cover the whole case, and to be clear and explicit. The only points made in support of the appeal are that the court erred in giving the sixth and seventh instructions asked by the plaintiff, and in modifying one of the instructions asked by the defendant. The sixth instruction was to the effect that the plaintiff was entitled to recover, unless the defendant had acquired title to the land in dispute in some one of the ways set up in his answer, "and the fact

that defendant has placed improvements upon the property in dispute should not make any difference with the verdict you should give in the case." We see no error in this instruction. It was not and is not questioned that the plaintiff owned the land, unless the defendant had acquired title to it as against him; and, if he did own it, certainly his action could not be defeated by a showing that defendant had placed improvements upon it. The seventh instruction was, in substance, that the burden was upon the defendant to establish an agreed line by parol testimony, and that, unless the line claimed by defendant was distinctly agreed upon by the adjacent owners, the jury could not find in favor of the defendant, upon the theory of an agreed line. It is claimed that the word "distinctly," as used in the instruction, "was calculated to mislead the jury in this: that they were impliedly told no parol evidence was admissible to prove an agreed line from the facts, situation, acquiescence, and relations of the parties." We do not understand this to be the effect of the instruction. In the eighth instruction asked by the plaintiff, and in the third asked by the defendant, the court very clearly told the jury when and under what circumstances a division line would become established by the acquiescence of the parties. Here the court was speaking of a line claimed to have been established by an oral agreement, and the jury were simply told that, to make such an agreement effective, it must have been distinctly made; that is, the minds of the parties must have fully met. In this we see no error prejudicial to the defendant. Defendant's instruction, which was modified and given, was upon the subject of estoppel. Other instructions upon that subject were given at his request, which very fully stated the law applicable to the case. The instruction complained of did not state all the elements or conditions necessary to constitute an estoppel *in pais*, and it might properly have been refused. As modified, we do not think it misled the jury or prejudiced the defendant. The judgment and order, in our opinion, should be affirmed, and we so advise.

**We concur: VANCLIEF, C.; TEMPLE, C.**

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment and order are affirmed.

89 Cal. 537

**DYER v. BRADLEY. (No. 13,165.)***(Supreme Court of California. June 23, 1891.)***INSOLVENCY—DISCHARGE—OPPOSITION—PREFERENCES.**

1. The insolvent act of California, §§ 49, 55, declare void "fraudulent preferences contrary to provisions of this act," preferences "made in contemplation of becoming insolvent," and preferences "made within one month before filing a petition in insolvency." *Held*, that allegations by a creditor that an insolvent made certain preferences more than a year before the filing of his petition, knowing himself then to be insolvent, do not show valid grounds of opposition to the insolvent's discharge, and hence the insolvent is not required to answer or demur thereto, under section 50.

2. Nor is it a valid ground of opposition that opponent's debt was created by a fraud of the insolvent, and while a fiduciary relation existed between the parties, since under section 52 such debts are not affected by the discharge.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; NOBLE HAMILTON, Judge.

*Campbell & Wright*, for appellant. *Pillsbury & Blanding*, for respondent.

BELCHER, C. C. This is an appeal from an order granting the respondent, Joseph P. Dyer, a discharge from his debts, under the insolvent act of 1880. It appears from the record that Dyer filed his petition in insolvency on the 3d day of August, 1888, and was adjudged to be an insolvent debtor. Subsequently the appellant, Richard Bradley, proved his debt against the insolvent, amounting to \$5,928.50. At the proper time thereafter the respondent applied to the court by petition for a discharge from his debts. The appellant objected to his discharge, and filed specifications in writing of the grounds of his opposition. These specifications were, in substance, as follows: (1) That on December 6, 1886, the respondent paid to the Nevada Bank of San Francisco, one of his creditors, a large sum of money, not less than \$70,000, with the intent to prefer the bank as a creditor, and to pay it in full, and did in paying the said money to said bank prefer the same as a creditor, and pay it in full, and did thereby defraud his other creditors. (2) That on the 2d day of December, 1886, the respondent, knowing that he was insolvent and unable to pay his just debts, paid to M. C. Blake, a creditor, a large sum of money, not less than \$35,000, the same being greatly in excess of any amount due the said Blake from the respondent, and that such payment was made with the intent to prefer him as a creditor, and to pay him in full, and the respondent in paying this money to Blake did prefer him as a creditor, and pay him in excess of the full amount due him, and did thereby defraud his other creditors by reason of such preference. (3) That the relationship existing between the appellant and respondent was a fiduciary one, and the indebtedness of respondent to appellant was created by reason of such fiduciary relationship, and in this way: During the year 1866 the respondent was a stock-broker, engaged in buying, selling, and holding stocks for his patrons. The appellant, reposing special confidence and trust in the honesty and solvency of respondent, deposited with him divers mining stocks of the value of \$5,928.50, to be kept and taken care of for appellant, and to be subject only to his order. These stocks the respondent afterwards sold and converted to his own use, without the knowledge, consent, or order of appellant. (4) That on the 3d day of December, 1886, the respondent, well knowing his insolvency, but contriving and wishing to defraud appellant, in answer to inquiries, assured appellant that he was perfectly solvent, and that the property intrusted to him by appellant, as aforesaid, was perfectly safe and secure, and that by leaving the same with him the appellant could

and would run no risk of losing the same; that appellant, relying on said assurances, took no steps to secure and recover his property as he otherwise could and would have done; and that the indebtedness of respondent to appellant was created by the loss of said property, and that by reason of said deceit appellant was defrauded. (5) That the debt owing by respondent to appellant is a fraudulent debt, and was fraudulently created; that is to say, prior to December 3, 1886, respondent was a stock-broker, and was intrusted by appellant with certain mining stocks, of the value of \$5,928.50, which he wrongfully and fraudulently converted to his own use, and by reason of such conversion became indebted to appellant for the value thereof. Afterwards, pursuant to an order to show cause why the discharge should not be granted, the parties appeared in court, and the attorneys for respondent then orally moved the court to strike out the opposition of appellant, and for an order discharging respondent from his debts, notwithstanding the opposition, on the ground that it did not appear that the appellant was entitled to make the opposition; and that the alleged opposition did not state facts sufficient, and was not in form or substance sufficient, to constitute any valid ground of opposition to the discharge. The attorneys for appellant objected that the respondent had not filed any demurrer or answer to the opposition, and asked the court to require the respondent to file his demurrer or answer before any further proceedings should be taken. The court refused to make the order requested. The application for a discharge was then taken under advisement by the court, and was subsequently granted, and a certificate of discharge given to respondent in the form prescribed by statute. Hence this appeal.

The appellant contends that the court erred in refusing to require the respondent to demur or answer to the specifications of the grounds of his opposition, and in granting the discharge without any trial of the issues tendered thereby. On the other hand, the respondent contends that the specifications tendered no material issues, and that no demurrer or answer was therefore required. The insolvent act (section 50) provides: "Any creditor opposing the discharge of a debtor shall file specifications, in writing, of the grounds of his opposition, and after the debtor has filed and served his answer thereto, which pleadings shall be verified, the court shall try the issue or issues raised, with or without a jury, according to the practice provided by law in civil actions." Under this section, we think the opposing creditor must state in his specifications facts which, if denied, will raise material issues, and, if admitted or established, will constitute valid grounds of opposition to the discharge. If he does not do this, but states only irrelevant and immaterial matters, the specifications may, on motion, be stricken out or disregarded as surplusage. This is a long-settled rule as to immaterial matters stated in pleadings in civil actions, and we think it equally ap-

pliable to proceedings under the insolvent act.

The only question, then, is, did the facts stated by appellant in his specifications, if true, constitute a valid ground of opposition to the discharge? It will be observed that the charges against respondent may be divided into three classes: (1) That, a year and eight months before he filed his petition in insolvency, he, knowing that he was then insolvent, paid two of his creditors in full, with intent to prefer them to other creditors; (2) that the debt to appellant was created while respondent was acting in a fiduciary character; (3) that the debt to appellant was created by fraud on the part of respondent.

The provisions of the insolvent act bearing on the question are as follows: Section 49 provides that no discharge shall be granted, or, if granted, shall be valid, "if, within one month before the commencement of such proceedings, he [the debtor] has procured his lands, goods, money, or chattels to be attached or seized on execution; \* \* \* or if he has given any fraudulent preference contrary to the provisions of this act, or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property; \* \* \* or if he has, in contemplation of becoming insolvent, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts." Section 55 provides that, "if any person being insolvent, or in contemplation of insolvency, within one month before the filing of a petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, \* \* \* makes any payment, assignment, transfer, or conveyance of any part of his property, \* \* \* the person receiving such payment \* \* \* having reasonable cause to believe that such person is insolvent, and that such \* \* \* payment \* \* \* is made \* \* \* with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, \* \* \* such transfer, payment, conveyance, pledge or assignment is void, and the assignee may recover the property, or the value thereof, as assets of such insolvent debtor." And section 52 declares that "no debt created by fraud or embezzlement of the debtor, \* \* \* or while acting in a fiduciary character, shall be discharged under this act, but the debt may be proved, and the dividend thereon shall be a payment on account of said debt."

1. Unless made so by the above-quoted provisions of the statute, the preferences complained of were neither fraudulent nor unlawful. *Dana v. Stanford*, 10 Cal. 269; *Randall v. Buffington*, Id. 491; *Wheaton*

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*v. Neville*, 19 Cal. 46; *Dean v. Grimes*, 72 Cal. 447, 14 Pac. Rep. 178. It is true, it is charged that the payment to Blake was in excess of the amount due him; but that we regard as of no consequence, for, so far as appears, the excess may have been paid by mistake, and may have been returned or properly accounted for before the proceedings in insolvency were commenced. It is also charged that by making the payments respondent "did thereby defraud his other creditors," but that was a mere conclusion of law. No facts were stated from which it can be said that the payments constituted a fraud upon the other creditors, or that the respondent intended thereby to defraud his other creditors. It will be noticed that section 49 speaks of only two kinds of preferences which will prevent or make invalid a discharge, one a "fraudulent preference, contrary to the provisions of this act," and the other a preference made "in contemplation of becoming insolvent;" and section 55 only declares void a preference made "within one month before the filing of a petition" in insolvency. These sections are parts of the same act, and must be read together. When so read, the question is, within what time must the inhibited preferences be made, in order to impose the penalty declared by section 49? It seems to us the answer is found in sections 49 and 55, and that the time there named is controlling. Certainly it could not have been intended that the time might extend back indefinitely, possibly for years. In *Bump's Law and Practice of Bankruptcy* (page 708) it is said: "No preference can be fraudulent under the act, unless it is made within four months [the time named in similar provisions of the bankrupt act] before the filing of the petition in bankruptcy;" citing authorities.

2. The charges that the debt to appellant was created while the relations of the parties were of a fiduciary character, and by the fraud and wrongful conversion of the respondent, are not grounds for opposing a discharge. Under section 52, a debt so created is not affected by the discharge, and such a creditor has therefore nothing to complain of. *Herrlich v. McDonald*, 80 Cal. 472, 22 Pac. Rep. 299; *In re McEachran*, 82 Cal. 224, 23 Pac. Rep. 46. We see no error in the rulings of the court below, and therefore advise that the order appealed from be affirmed.

We concur: FITZGERALD, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

DYER v. MARTIN. (No. 18,166.)

(*Supreme Court of California*. June 23, 1891.)

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; NOBLE HAMILTON, Judge.

*Campbell & Wright*, for appellant. *Pillsbury & Blanding*, for respondent.

BELCHER, C.C. The facts of this case are identically the same as those involved in *Dyer v. Bradley*, 26 Pac. Rep. 1103, (just decided,) except

as to the amount of the debt due from the respondent to the appellant. On the authority of that case, the order here appealed from should be affirmed.

We concur: FITZGERALD, C.; FOOT, C.

**PER CURIAM.** For the reasons given in the foregoing opinion the order appealed from is affirmed.

(89 Cal. 623)

**HARGRO et al. v. HODGDON.** (No. 13,317.)  
(Supreme Court of California. June 26, 1891.)

**DEDICATION OF PUBLIC ALLEYS — NUISANCE — PLEADING.**

1. Where the owners of a block, by mutual agreement, opened an alley, and the same was recognized as an alley for more than 80 years, such dedication is sufficient to maintain an action to abate a private nuisance in obstructing the same.

2. A house built in a public alley so as to partly abut upon plaintiff's lot, and prevent access to the public highway, is a private nuisance, and plaintiff may maintain an action to abate it, although she has suffered no actual pecuniary damage.

3. Where a complaint to abate a nuisance does not explicitly state that plaintiff has sustained an injury different in kind to the general public, it is insufficient on special demurrer; but when such injury appears by inference it is proper to overrule a motion for judgment on the pleadings at the commencement of the trial.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

*John D'Arcy and Otto Tum Suden*, for appellant. *Hutchinson & Campbell*, for respondents.

**TEMPLE, C.** Appeal from judgment and order denying defendant's motion for new trial. This action is brought to abate a nuisance, — to remove an obstruction placed by defendant in what is alleged to be a public alley, extending from Sixteenth street northerly to Fifteenth, through the block bounded by these streets and Mission street and Julian avenue, in the city and county of San Francisco. The alleged alley is known as "Lida Place" or "Court." From the complaint it appears that plaintiff Selina Hargro owns a lot extending from Julian avenue to Lida place, and that defendant has erected a house in the alley, occupying the whole of it for a distance of 30 feet. From the measurements given, it can be ascertained that for the greater part of this distance it abuts upon the property of plaintiff Selina, who is the wife of the other plaintiff, James Hargro, thus shutting her off to that extent from access to the alley. But there is no express allegation of such fact. It is averred that the obstruction greatly damages plaintiff, decreases the value of her real estate, and jeopardizes her right in the alley; "that said house interferes with plaintiff's use and enjoyment of said alley, and plaintiff has already been damaged by said erection and maintenance of said house on said alley-way by the defendant in the sum of two thousand (\$2,000) dollars United States gold coin." The defendant denies all the allegations of the complaint, except that, in regard to the erection and maintenance of the ob-

struction, the denials are qualified by the word "unlawfully," and avers ownership in defendant of the land claimed as an alley.

At the commencement of the trial, defendant moved for judgment on the pleadings, because the complaint states no special damage or injury to plaintiff. The motion was denied. The same point is urged here, in connection with the further point that there was no evidence which tended to show peculiar injury to plaintiff. In regard to the objection to the pleading, it may be noted that it was not made by demurrer, either special or general. It may be admitted that if the complaint does state injury to plaintiff different in kind, and not in amount merely, to that sustained by the general public, it does so by inference only, and not by explicit, positive averment, as the rules of pleading require. In such a case the pleading would fall before a special demurrer, and the pleader would be permitted to amend. But when a party craftily lies by, in presence of such an objection, to spring it when, if sustained, it would be lethal, the sufficiency of the pleading will be tested by a very different rule. Then the pleading will be upheld, if the essential fact appears by plain and necessary implication. The matter will be more fully considered in connection with the objection to the proof and, if our views as there expressed are correct, it will be manifest that, tried by such a test, the complaint is sufficient. In regard to the obstruction, the facts are found as stated in the complaint: expressly stating, however, that the house abuts upon the rear of plaintiff's lot, and cuts off 20 feet and 6 inches, or over two-thirds, of the alley frontage of her lot. The court also found that she suffered special injury thereby, but assessed no damages. It was further found that plaintiff's lot had never been occupied or improved.

It is claimed that this action cannot be maintained unless the plaintiff has suffered actual pecuniary damage; that the failure of the court to find any amount of damage is a finding that she has suffered none, much less damage peculiar or special to her, different in kind from that suffered by other members of the community; and it is asserted that there was no evidence tending to show such damage. The doctrine asserted in *Bigley v. Nunan*, 53 Cal. 403, that it is pecuniary damage which constitutes the basis of the action, is expressly limited to actions at law for damages. As to bills in equity, it is only said that the injury complained of must be special in character, and not merely greater in degree than that of the general public. If a substantial right has been invaded, especially if the wrong be in the nature of a continuing trespass of such a character that its continuance will create a right against the plaintiff's estate, or operate to deprive plaintiff of a substantial right incident to her property, the nuisance will be abated, although the damage is merely nominal. Indeed, the fact that a threatened injury is of such a nature that it is incapable of pecuniary estimation is a well-known ground of equitable

<sup>1</sup>Petition for rehearing pending.

relief. *Webb v. Manufacturing Co.*, 3 Sum. 189; *Wood*, Nuis. pp. 825, 826, and cases there cited. That the plaintiff has suffered injury from the obstruction peculiar to herself, differing in kind from that suffered by others, is clear. The cases in this state seem to hold that to obstruct a public highway so as to completely prevent travel will not constitute a special injury to an individual, such as will enable him to maintain a private action to abate the nuisance, even where such highway constitutes the only means by which the individual can reach his property. *Aram v. Schallenberger*, 41 Cal. 449; *Ranch Co. v. Brooks*, 74 Cal. 463, 16 Pac. Rep. 250. But it has never been held that an individual cannot maintain an action to abate an obstruction which, while obstructing the public highway, also cuts off access from his premises to the public highway. So far as it does this it becomes a private nuisance. His complaint is not that it obstructs the street or road, but that it prevents him from reaching it. Such was the case in *Blanc v. Klumpke*, 29 Cal. 156. The waterfrontage of plaintiff was cut off by piles driven in front of his lot, shutting him out from the common highway,—the navigable waters. The same character of obstruction existed in *Schulte v. Transportation Co.*, 50 Cal. 592, and in *Ford v. Railroad Co.*, 59 Cal. 290. In these cases it was held that special injury resulted to the complainants from a public nuisance. The result is the same as though it had been held that it constituted both a public and a private nuisance, although the latter would seem the more accurate statement; for it is the obstruction of the street which renders it a public nuisance, and that is not the injury to the individual; that is, that it cuts him off from the street.

The only remaining question of importance in the case is, does the evidence justify the decision to the effect that the alley in question is a public alley by dedication? There is a general finding to this effect; and the probative facts, or some of them, are also found. It is not stated that the general finding is based upon the probative facts found, but their correctness is not disputed, and so far as they go they constitute a convenient statement of the evidence conceded to be correct. It appears from these findings that in October, 1853, Joseph H. Moore and Thomas Varney owned all of this block on the westerly side of the center line of the alleged public alley, and Ferdinand Vassault, Lucien Herman, and P. Theodore Brou owned the land on the east side of this line. Vassault and Herman proposed in writing to Moore and Varney as follows: "We \* \* \* agree to give ten feet from off the depth of our lots for the purpose of opening an alley twenty feet wide between our property and the property owned by yourself and others on the rear of ours, provided yourself and others owning said rear property will also give ten feet from the east line of yours, in order that the alley may be made continuous from Center to Tracy streets. \* \* \* Please let us know if you accept the proposition." The next day Moore and Varney accepted this proposition, also in writing. Center and Tracy streets were

afterwards called, respectively, "Sixteenth" and "Fifteenth" streets. Brou did not sign either part of this contract, but it is found that he consented to the dedication. At the trial it was stipulated "that all the deeds, mortgages, and transfers of lots in Mission block 35, between Julian avenue and Mission street, from those of the original owners down to those under which the present owners hold, recognize the alley on the block [in question] \* \* \* by making the depth of the lots fronting on Mission street 182 feet, and those on Julian avenue 84 feet, and most of them recognize the alley by name, and that a number of deeds and mortgages made and recorded from 1865 to January, 1886, executed by defendant, recognize said alley by name." There can be no doubt that there was an offer to dedicate this alley on the part of all the proprietors, and that all of the present owners purchased with the understanding that it was a public alley, and had a right to so conclude from the acts of their vendors in selling the property. As to such owners it is perhaps unnecessary to go further. *Stallard v. Cushing*, 76 Cal. 472, 18 Pac. Rep. 427. But it is found that from the year 1857 the alley has been continuously, and is now, open and accessible to the public, and actually used by the public, 165 feet northerly from Sixteenth street. That portion of the street is the only part involved in this case. It is a strong circumstance in this connection, that if this strip of land was not dedicated it still belongs to the original owners, not one of whom now owns a lot in this block. None of the present lot-owners claim to have purchased any part of this strip. The defendant claims under the statute of limitations. It is plain, therefore, that he and his vendees have regarded it as a public alley.

It is claimed that defendant has for many years had actual possession of the portion of the alley involved in this case. If it were a public alley, no rights could be acquired as against the public by such adverse holding. But the possession was not adverse. Defendant put a gate across the alley near Sixteenth street, with the consent of abutting owners, to prevent the alley from being made a dumping-ground for rubbish; and the gate was opened, and the alley at all times freely used, by all who had occasion to make use of it. So far from tending to show an exclusive claim on the part of Hodgdon, it shows a recognition by him of the rights of others. He testifies that he himself made it an alley, and sidewalked it as such.

There was no error in the admission of the map and the street assessment. If they did not tend to prove an official acceptance of the alley, they were still admissible as tending to show general knowledge of the existence of the alley. There was no objection to the testimony of Center, and we think it could not have been harmful. The judgment and order should be affirmed.

We concur: BELCHER, C. C.; FITZGERALD, C.



**PER CURIAM.** For the reasons given in the foregoing opinion the judgment and order are affirmed.

(89 Cal. 575)

**BUTLER V. HYLAND et al.** (No. 13,162.)

(Supreme Court of California. June 25, 1891.)

**TRUSTS—DEED ABSOLUTE—LIMITATIONS—LACHES.**

1. In an action to recover property claimed to have been conveyed in trust to plaintiff's aunt by deed which was absolute, the plaintiff testified that she signed a paper, and her aunt said, "I will hold the property for you;" that she did not know what the paper was, and did not discover it until her aunt's death; and that she received nothing for the conveyance. *Held* sufficient to establish the trust.

2. Where a trustee voluntarily assumes a trust, with an implied agreement to reconvey upon request, the statute of limitations does not run against the beneficiary.

3. Although plaintiff did not commence suit for 2 years after her trustee's death, 8 years after marriage, 16 years after attaining her majority, and 19 years after executing the deed, the delay will not be considered laches, when it appears that she lived with her trustee most of the time, and that the defendants have expended nothing upon the lands.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAQUIRE, Judge.

*F. J. Castelhun*, for appellant. *T. C. Coogan*, for respondents.

**TEMPLE, C.** Plaintiff appeals from a judgment of nonsuit, and from an order refusing a new trial. Plaintiff's father, as she avers, died June 5, 1858, leaving, as heirs, plaintiff, aged 8 years, and her brother, aged about 14. Her mother had previously died. Her father was the owner, at the time of his death, of the lot in controversy. Just before her father's death, her aunt, who was a widow with three children, the present defendants, came to live with her father on the lot in suit, and plaintiff became at once a member of her aunt's family, and lived with her until her own marriage, in 1879. While she was a minor, living with and in the custody of her aunt, her aunt represented to her that her brother would get her property from her, and said if plaintiff would convey it to her she would hold it in trust for plaintiff. Upon this representation and agreement she conveyed her right to her aunt. That by mistake the deed was made absolute in form, and purported to be made for a consideration of \$500. That she and her aunt were both ignorant of this fact. That she received nothing for the conveyance, and did not discover the mistake until after the death of her aunt, in 1885. She never demanded or received a deed from her aunt, who remained in possession up to her death, and the defendants, who are the only descendants of her aunt, although fully aware of her rights, repudiate and deny them, and claim to be themselves the owners. She sues to recover the property, for a conveyance, and for general relief. The defendants do not deny the ownership of plaintiff's father, or the facts which show that plaintiff was his heir, but they deny the trust, and aver that the deed was in fact an absolute conveyance for a valu-

able consideration. They also plead the statute of limitations, and charge laches in the bringing of the suit.

At the trial the plaintiff was the only witness examined. She testified that her father died June 5, 1858, leaving herself and her brother as the only children, her mother having died before; that shortly before her father's death her aunt came to live with her father upon the lot in suit, and after her father's death they all continued to live there together. She said: "I continued to live with my aunt in the same house. My aunt took care of me, sent me to school, and I had no one else to provide for or look after me; but my uncle sometimes sent money to my aunt for me. I was received in and become a member of her family, and so continued until the time of my marriage, which took place April 30, 1879. \* \* \* After my father's death, when I was about sixteen years old, and while I was still living under my aunt's care, my brother tried to get me to sign a paper while I was visiting him, and I wouldn't sign it; and when I got home I told my aunt what he wanted me to do. My aunt said, 'I will fix it so he can't get your property from you.' The next day a notary called at the house, and I signed a paper. My aunt said, 'I will hold your property for you.' I did not know what the paper was, and never discovered it until my aunt's death, and a short while before this suit was brought, but I suppose it was read over to me before I signed it. My aunt gave me nothing and I received nothing for signing the paper, and I was under age at the time." The witness recognized a deed shown her as the deed she executed, dated October 12, 1866, purporting to be in consideration of \$500, acknowledged and recorded on the same day. She testified that her aunt died September 10, 1885, leaving, her surviving, the defendants, her children; that she never asked her aunt for a deed, and never received one. The rental value was \$7.50 per month. On cross-examination she said that her aunt was in exclusive possession of the property at the time the deed was executed, and had paid all taxes and assessments, and that plaintiff had continued all the time to reside in the city and county of San Francisco, and knew these facts. The plaintiff here rested her case, and the defendants moved for a nonsuit, which was granted. In the motion for a nonsuit the alleged defects in the proof were specifically pointed out, but need not be formally repeated here. Such a motion is in the nature of a demurrer to evidence. The truthfulness of the testimony is admitted, but its sufficiency is challenged. The evidence shows that a confidential relation existed between plaintiff and the mother of defendants, and that at her request plaintiff conveyed to her an undivided half interest in the property, with the understanding that her aunt would hold it for her. The law, under such circumstances, implies an agreement to reconvey upon request, and it is immaterial that there was no proof of a distinct understanding that the trust was to have been set out in express terms in the deed, and

was omitted by mistake. Immediately upon the death of her father, plaintiff became the owner of one undivided half interest in the premises, and it was not necessary for her to show administration and distribution of his estate.

This is not an action to disaffirm plaintiff's deed as the act of a minor, and to recover property thus conveyed. Plaintiff asks no relief which would not have been her due under the same circumstances had she been of mature age. Her minority is material only as tending to establish that the relations between herself and her aunt were confidential. It was not necessary, therefore, for her to disaffirm, under section 35 of the Civil Code. The testimony of plaintiff being taken as true, there can be no doubt that it establishes a trust under the rule laid down in *Brison v. Brison*, 75 Cal. 525, 17 Pac. Rep. 689.

Nor can any plausible claim be made that the action is barred by the statute of limitations. It was not a constructive trust forced upon the conscience of the trustee, but one voluntarily assumed, and which, by the understanding of the parties to it, was to be a continuing one. The trustee—so far as the evidence goes—continued to hold according to the understanding, and never repudiated the relation, or did any act inconsistent with it. *Love v. Watkins*, 40 Cal. 565; *Tiff. & B. Trusts*, 19.

There is more plausibility in the claim that there have been such laches as will prevent the plaintiff obtaining relief. As respondent has succinctly stated, she commenced her suit "two years after her aunt's death; eight years after her marriage; sixteen years after she had attained her majority; nineteen years, eleven months and twenty days after the deed had been executed and recorded." But it must be remembered that, by the terms of the trust, her aunt was to hold the title for her. The conveyance was made for that purpose. For most of the time she was a member of her aunt's family, who stood *in loco parentis* to her. Between four and five years only elapsed after her own marriage before her aunt's death. The rental value of the place was small, and she knew that her aunt was paying the taxes, assessments, and repairs, the amount of which are not shown. The doctrine of laches is not applied so strictly between near relatives. 2 Story, Eq. Jur., §1520. On the other hand, nothing is shown which would make it inequitable to enforce the trust. It does not appear that plaintiff has stood by allowing the trustee to treat the property as her own, and under that belief expending money in improvements. There is nothing tending to show that up to her death Mrs. Hyland ever supposed or claimed that she had any interest in the property. The defendants have expended nothing upon the property. It does not appear, even, that the premises have been included in their mother's estate by any proceedings in probate. If any injury has resulted through the delay, it must be in rendering proofs of the real facts difficult, but there certainly was no culpable delay until after her aunt's death, since which nothing has

occurred to increase the difficulties of the defendants as to the evidence. That the plaintiff waited so long after she ceased to be a member of her aunt's family before asserting her claim to the property may possibly have some bearing upon the probability of her story,—that is, upon her credibility. We have not considered the value of the testimony, weighed against other proofs or circumstances. We think the judgment and order should be reversed, and a new trial awarded.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and a new trial awarded.

STATE v. CENTRAL PAC. R. CO. (No. 1,835.)  
(Supreme Court of Nevada. July 6, 1891.)

TAXATION—BOARD OF EQUALIZATION—REVIEW—FRAUD.

Gen. St. Nev. § 1091, relative to the board of equalization of taxes, makes its action final except in cases of fraud; and fraud on the part of the assessor is no ground for disturbing a valuation where no fraud is alleged on the part of the board which confirmed the valuation.

Response to a petition for rehearing. For statement of facts, see the prior report of this case, 26 Pac. Rep. 225.

BIGELOW, J. A rehearing is asked in this case upon the ground that, instead of judgment being ordered in favor of the plaintiff, a new trial should have been granted, to enable the defendant to show that, notwithstanding the action of the board of equalization fixing the valuation of the road at \$14,000 per mile, it is not worth more than \$12,000. The answer alleges that the assessor, with knowledge that the road was only of the value of \$10,000 per mile, fraudulently assessed it at \$14,000; but there is no charge that the board of equalization acted fraudulently, or otherwise than in good faith, in equalizing the value at the same amount. Under these circumstances, we are of the opinion that this defense is not open to the defendant. It was evidently the intention of the legislature that, in the absence of fraud, the action of the board should be final. No review or appeal from their decision is provided for. That is the tribunal specially charged with the duty of equalizing values. If any tax-payer is aggrieved by the action of the assessor, his remedy is by appeal to this board; and, if the members thereof act fairly and in good faith in the matter, their judgment concerning the valuation of property is not to be revised by a court which has no better opportunity than the board of arriving at a correct conclusion. Fraud in the assessment is one of the defenses allowed the tax-payer by Gen. St. § 1108; but, clearly, this must be such fraud as works the defendant some damage. A fraudulent overvaluation of property, attempted by the assessor, can do him no harm if it is corrected by the board. If the board bring their honest judgment to bear upon the matter, and determine that

the property has not been overvalued, this determination is conclusive that the assessor's attempted fraud has done the defendant no damage. Gen. St. § 1091 in at least one instance, by express language makes the action of the board final; and a review of the whole act shows it was intended to be final in all cases except where fraud intervenes. No further appeal is given, and no more delay contemplated. In other states where statutes similar to ours have been construed, it has been invariably held, so far as we have been able to find the decisions, that the action of the board of equalization fixing values is final and conclusive, where taken honestly and in good faith. This is the rule in Michigan, (*Case v. Dean*, 16 Mich. 12. *McDonald v. City of Escanaba*, 62 Mich. 556, 29 N. W. Rep. 93;) in Indiana, (*Rhoads v. Cushman*, 45 Ind. 85;) in Illinois, (*Insurance Co. v. Pollak*, 75 Ill. 294;) in Wisconsin, (*Lefferts v. Calumet Co.*, 21 Wis. 688;) in Pennsylvania, (*Hughes v. Kline*, 30 Pa. St. 227;) in Maine, (*Gilpatrick v. Saco*, 57 Me. 277;) in Massachusetts, (*Lincoln v. Worcester*, 8 Cush. 55;) in Texas, (*Texas & Pac. Ry. Co. v. Harrison Co.*, 54 Tex. 119;) in Arizona, (*Atlantic & Pac. Ry. Co. v. Yavapai Co.*, 21 Pac. Rep. 768;) and is laid down as correct by the text-writers, (*Cooley, Tax'n*, 528; 1 *Desty, Tax'n*, 498.) The petition for a rehearing is denied.

(21 Or. 67)

#### GALBRAITH v. BARNARD.

(*Supreme Court of Oregon. June 24, 1891.*)

##### JUDGMENTS—EQUITABLE RELIEF.

1. There must always exist some substantial reason to authorize a court of equity to take cognizance of a cause which has already been determined by law.

2. When a party has had full opportunity to be heard and make his defense before a verdict is found and judgment is rendered thereon against him, equity will not assist him, and grant relief, after such verdict and judgment, unless obtained by fraud, accident, or mistake, unmingled with any fault on his part.

3. It is not enough that the judgment at law may be wrong, but some equitable circumstance also must be shown to exist to warrant the interference of equity.

4. The failure to obtain a new trial or to effect an appeal from accident alone is not sufficient to warrant the interference of equity with the judgment, unless injustice or hardship is made to appear, or some other ground of equitable interposition, so that it would be contrary to equity and good conscience to allow the judgment to be enforced.

(*Syllabus by the Court.*)

Appeal from circuit court, Gilliam county; L. R. WEBSTER, Judge.

*Mays, Huntington & Wilson*, for appellant. *A. S. Bennett*, for respondent.

LORD, J. This is a suit in equity to enjoin the enforcement of a judgment rendered in a justice's court in favor of the defendant and against the plaintiff. The facts are these: The plaintiff commenced an action in the court aforesaid to recover from the defendant the value of a helper, alleged to have been converted by him, upon which issue was joined, and the cause tried before a jury, which resulted in a verdict and judgment for the defendant for

his costs and disbursements. The judgment was entered on the 12th day of November, 1888, and it is alleged that on the 30th day of November, 1888, the justice before whom the cause was tried, resigned, and, the said office remaining vacant for some time, he was prevented thereby from perfecting his appeal. It also appears that, within the time allowed by law, the plaintiff prepared and served his notice of appeal, and presented the same, together with a duly-executed and proper undertaking to stay proceedings therein; but the justice having at the time stated resigned his office, and the office being vacant, and no one to act in the premises, he lost his right of appeal, without any fault on his part. Under the Code, an appeal may be taken to the circuit court from a judgment given in a justice's court within 30 days from the date thereof. *Deady's Code*, p. 471, § 68. According to the facts, from the date of the rendition of the judgment and its entry until the resignation of the justice, of the 30 days within which an appeal may be taken, 18 of such days were permitted to elapse before any effort was made to perfect the appeal. Upon this state of facts the plaintiff contends that, having lost his right of appeal from the judgment rendered in the justice's court, without any fault on his part, but by unavoidable accident, he is entitled to the aid of the injunction to prevent the enforcement of such judgment, and to a new trial of the cause. It is to be noted that a complaint for a new trial is watched by equity with extreme jealousy. There must always exist some good and substantial reasons to authorize or justify a court of equity in taking cognizance of a cause which has already been determined at law. "Whenever a party," says Mr. Freeman, "asks a court to grant him a new trial, he must show some reason for not getting it at law." *Freem. Judgm.* § 506. Some ground for equitable relief must be shown, for a court of equity possesses no supervisory powers, and cannot assume to act as an appellate court to correct judgments at law, although manifestly erroneous. If the judgment rendered is not inequitable as between the parties, no matter how irregular the proceedings may be, a court of equity will not interfere. <sup>10</sup> *Amer. & Eng. Enc. Law*, p. 898. The principle is fundamental that, when a party has had full opportunity to be heard and make any defense he may have before verdict and judgment is rendered against him, equity will not aid him, and grant relief, after such verdict and judgment, unless obtained by fraud, accident, or mistake, unmingled with any fault on his part. A judgment at law ought to be conclusive on the matter in dispute, both as settling the rights of the parties and to put an end to litigation, unless it affirmatively appears that such judgment is wrong, and that it would be against equity and good conscience to have it enforced. It is not enough that the judgment may be wrong, but some equitable consideration also must be shown to exist to warrant the interference of equity. The facts alleged show that the justice's court had jurisdiction; that both parties appeared before it

and joined issue; that a trial was had by a jury; and that the verdict and judgment was regularly found and entered. All this tends to show that the judgment was right, and the rights of the parties legally determined. There is no suggestion that the trial was unfair, or that the court erred in the admission or rejection of evidence, or in any of its rulings, or that the verdict or judgment was obtained by fraud, or by any act of the prevailing party, or that the plaintiff was prevented from making any defense to the action, or in any way whatever prevented from fully and fairly presenting his cause to the jury and the court. So far there is nothing to warrant even the inference that there was any failure of justice, or that any injustice had been done by the verdict and judgment. The plaintiff puts himself upon the bare proposition that, having lost the benefit of his appeal by accident, he may properly seek relief inequity, without regard to whether or not the trial already had was fair, or the judgment rendered therein was against equity and good conscience. But accident alone is not sufficient. There must be some failure of justice from the accident—some circumstances of hardship or fraud, as the case may be—to warrant the interference of equity. In *Johnson v. Branch*, 48 Ark. 536, 3 S. W. Rep. 819, it was shown there was no opportunity afforded the party against whom the judgment was rendered to move for a new trial, because the court adjourned and the term lapsed before the motion could be made and disposed of; and the court say: "This was such an accident as would give jurisdiction to a court of equity to grant relief, provided the party complaining was otherwise entitled to it. The accident alone does not warrant the interference of equity. The judgment must appear to give the winning party the advantage which a court of equity would not permit him to hold, in order to warrant the extraordinary interference with the proceeding at law. It grants relief against judgments in aid of justice, not as a recompense for the accident; and although the law court may have committed error upon the trial, if the judgment is not against conscience, it will not meddle with it. The accident, or some other ground of equitable interposition, and the injustice of the judgment must concur." Again, in *Whitehill v. Butler*, 51 Ark. 342, 11 S. W. Rep. 477, when there was a loss of remedy at law without any negligence on the part of the complainant, as well as some inaccurate statements of the law in the charge to the jury, coupled with the objection to the admission of certain evidence, but the merits of the controversy were not disclosed, *Cockrill, C. J.*, said: "But it is not enough to warrant the extraordinary interference of equity with a judgment at law that an accident has prevented the losing party from pressing a motion for a new trial based upon technical errors occurring at the trial, even though they may be sufficient to warrant a reversal of the judgment on appeal. A party who has obtained a judgment, after a full investigation of the controversy by a competent

tribunal, will not be forced by a court of equity to submit to a new trial, unless justice imperatively demands it. It must clearly appear to the court that it would be contrary to equity and good conscience to allow the judgment to be enforced, else it declines to impose terms upon the prevailing party." *Crim v. Handley*, 94 U. S. 652; *Harkey v. Tillman*, 40 Ark. 553. It is thus seen when, by accident from unforeseen circumstances, the term of a court has lapsed, or a special adjourned term was never held, or the adjourned session could not be held, and the term closed by operation of law, so that the judgment became irrevocable at law, and the party lost the benefit of his motion, and was precluded or cut off from his right of appeal, the failure to obtain a new trial or appeal, alone, was not sufficient to warrant the interference of equity with the judgment, nor mere errors or irregularities of the court of law, but injustice or hardship must be made to appear, or some other equitable consideration, so that it would be contrary to equity and good conscience to allow the judgment to be enforced. "A judgment," says Mr. High, "regular on its face, will not be enjoined when it is not shown to be unjust or oppressive, and when it does not appear that the party asking the aid of equity against the enforcement of the judgment has a good defense to the claim upon which it was founded." High, *Inf.* § 126. The complainant alleges no facts, arising out of or connected with the trial, which show that any injustice has been done, or that the winning party has obtained any improper advantage, or any fraud or mistake, or any failure of justice from the trial by accident, or that he has any defense thereto, other than, if he is granted another opportunity, he will prove that the heifer is his property. His reliance for relief rests solely upon the ground that, by accident arising out of the resignation of the justice, he has been cut off or lost his right of appeal, which would have secured a trial *de novo*, and that he would have been able to prove what, it seems, he failed to establish to the satisfaction of the jury at the first trial. In such case it is plain that the jurisdiction of equity cannot be imperatively demanded; the accident and the injustice of the judgment must concur and appear, or its jurisdiction will be denied. Nor is this all. In the case at bar, the plaintiff was not cut off absolutely, as in the other cases cited, from his right of appeal. He had plenty of time to perfect his appeal, and could have done so easily, if he had so desired, so far as this record discloses. Of the 30 days within which an appeal may be taken, 18 of them were allowed to pass before the signature of the justice was sought to perfect the appeal. While the statute fixes the limit at 30 days within which an appeal may be taken, yet there were 18 days in which the opportunity was present for the plaintiff to exercise his right to appeal and secure a retrial, which was not availed, so that he was not absolutely precluded or cut off from his right of appeal. In view of these considerations, and the general doctrine that an injunction will not lie to

restrain a judgment unless it affirmatively appears that the judgment itself was wrong, and that it would be contrary to equity and good conscience to have it enforced, there was no error in dismissing the bill for injunction, and the decree thereof is affirmed.

ABRAHAM V. OWENS.

(Supreme Court of Oregon. April 30, 1891.)

TRESPASS—NOMINAL DAMAGES—RES ADJUDICATA—PLEADING—ADVERSE POSSESSION.

1. Any invasion of another's rights of property entitles the person whose rights are invaded to at least nominal damages.

2. In an action for trespass upon land, where the defendant pleads *liberum tenementum*, and there is a judgment for the plaintiff in another action between the same parties, where said judgment is relied upon as an estoppel, it is for the party setting up said estoppel to show by evidence in what part of the close the trespass was committed, and thus apply the issue and judgment to the premises.

3. A permissive occupancy, no difference how long continued, is never adverse.

(Syllabus by the Court.)

Appeal from circuit court, Douglas county; R. S. BEAN, Judge.

This controversy rises on the cross-bill filed by the respondent to the appellant's complaint in the original action of Nannie L. Owens v. Sol. Abraham, pending in the circuit court of Douglas county, Or. The cross-bill alleges substantially the following facts: "That this plaintiff is the owner in fee-simple, and in the possession, of the following described tract of land, situated in the county of Douglas and state of Oregon, to-wit: Beginning at the north-east corner of block 33 in the town of Roseburg, on Spruce street; running thence south on the line of said street 160 feet; thence west to the South Umpqua river; thence along the bank of said river down to the line of Washington street; thence on the line of Washington street east to the place of beginning. That the said defendant is the owner in fee-simple, and in the possession, of the following described tract of land, situated in the county of Douglas, state of Oregon, to-wit: A tract of land bounded on the north by what was formerly known as 'Hyman Abraham's Land,' adjoining the city of Roseburg; on the west by the west boundary line of Aaron Rose's donation land claim, being claim No. 60, in township 27 south, range 6 west; on the south by Oak street, in the city of Roseburg, on the extended line of said street; on the east by a line drawn parallel with the west boundary line of said town plat from said north boundary line of Oak street to the land formerly owned by Hyman Abraham. That said land owned by this plaintiff hereinbefore described, and the land owned by the defendant hereinbefore described, lie and are adjacent to each other. That there is between this plaintiff and this defendant a controversy and dispute concerning this boundary and dividing line between their said tracts of land. That this plaintiff claims that a certain fence heretofore constructed by him, and now standing between the tract owned by him and the tract owned by

the defendant, is upon and is the true boundary and dividing line between his lands and those of the defendant. That the defendant derived her title to said tract of land owned by her by a deed from Sarah Owens, who was formerly the owner in fee-simple of the same. That on the 21st day of January, 1881, the said Sarah Owens was the owner of the tract aforesaid, and this plaintiff was the owner in fee-simple of the tract hereinbefore described as owned by him. That at said time a controversy existed between this plaintiff and the said Sarah Owens in regard to the true boundary and dividing line between said tracts. That it was then mutually contracted and agreed between this plaintiff and the said Sarah Owens that W. H. Byers, a surveyor, should, on behalf of said parties, run, survey, and establish said boundary line, and that this plaintiff and the said Sarah Owens should and would stand to and abide by the determination of said W. H. Byers in the premises, and that the line that he should run should be forever after taken and held to be the true boundary and dividing line between said tracts." It is then alleged that Byers ran and established the line where the fence now is on the 21st day of January, 1881. The answer denies the material allegations of the complaint and then alleges a further defense, in substance: "That the plaintiff ought not to be admitted to say that the boundary line between the plaintiff's and defendant's land is as claimed by the plaintiff, or that the fence heretofore constructed by him is upon the true boundary and dividing line between his lands and those of the defendant, for the reason that in an action brought by this defendant, who was then plaintiff, and against this plaintiff, who was then defendant, in the circuit court of Douglas county, Or. on the 26th day of August, 1888, which was brought by the plaintiff therein to recover from defendant therein and plaintiff here, and other defendants, damages from trespassing on said premises, and wrongfully taking possession thereof, alleged to have been done by said defendant in the complaint in said cause on the 20th day of December, 1887, which said premises are identical and the same as in dispute here, in which said action, she did in her complaint allege that she was the owner in fee of said strip of land, to which complaint this said plaintiff and defendant therein did file an answer in said court, in which he denied said plaintiff's ownership, in fee or otherwise, to said premises, and did allege that he was the owner thereof, and did set up in said answer, as a further and separate defense, the following matter, to-wit: Then follows substantially the same matter in relation to the Byer's survey that is contained in this complaint. The answer then alleges that Abraham employed the other defendants in that action to remove, and they did remove, said division fence off his land, on the true division line aforesaid, doing no unnecessary damage to the plaintiff's lands, as they might and could lawfully do, which are the acts mentioned and complained of in plaintiff's complaint. It

is then alleged that issue was duly taken on each and every material allegation by the reply, and that the plaintiff in that action recovered a judgment for \$30 damages. Another separate defense is the statute of limitations. The plaintiff's reply denies the new matter in the answer. The evidence having been taken in writing, the cause was duly tried, and a decree rendered in favor of the plaintiff, from which this appeal was taken.

J. W. Hamilton, for appellant. J. C. Fullerton, for respondent.

STRAHAN, C. J., (*after stating the facts as above.*) The parcel of land in controversy in this suit consists of about one acre. It was conceded upon the argument here, and the evidence very satisfactorily establishes the fact, that the tract is included within the calls of the plaintiff's deeds, and that he is entitled to the same, unless his right thereto is defeated by one or both of the defenses pleaded in the defendant's answer. It is to the answer, then, and the facts shown in support thereof, that our attention must be directed.

1. The first question demanding our attention is the judgment pleaded in the answer as an estoppel. In the first place, the defendant has failed to put in evidence the judgment roll in the case of Nannie L. Owens v. Sol. Abraham et al., mentioned in the pleadings. It is true, there are several papers, separately certified, each of which would have constituted a part of the judgment roll as defined by section 272, Hill's Code, if any such document exists in the cause accompanying the transcript. But these papers, if competent in the disjointed and disconnected form in which they appear, are not so certified as to entitle them to be read in evidence. The certificate to each paper recites that the copy has been compared by the certifying officer with the original, on file in his office, and that it is a true and complete transcript therefrom. The statute requires the certificate to show, among other things, that the copy is a correct transcript therefrom, and of the whole of such original. I advert to this condition of the record, not for the purpose of placing the decision of the case on these points, but for the purpose of correcting, if possible, an abuse too common,—of annexing certificates to every paper used in such case, instead of allowing one certificate to authenticate the entire record. Such a course of practice adds enormously to the expense of litigation, and, where a large number of papers are to be examined, very much to the labors of the court. Does the record, then, preclude all inquiry into the state of the title between these parties? That is the question to be determined. All that part of it relating to the agreement between Abraham and Owens in relation to the Byers survey, and that the line ascertained by him should be forever observed by the parties as the true boundary line between them, must be left out of this inquiry, for the reason that those allegations could not, in a court of law, affect the title, no difference which way the fact might be found. If such an agreement, followed by

performance, could have any effect, it could, at most, only create an equity over which a court of law had no jurisdiction in this state at the time of this litigation. It must be further observed that Abraham, by his answer in that action, alleged that after the Byers survey he employed his co-defendants to remove, and they did remove, the division fence off his land on the true division line aforesaid, doing no unnecessary damage, as they could and might lawfully do, which are the acts mentioned and complained of in complaint. This allegation is not denied by the reply. Therefore, upon the face of this record, it stood confessed that Abraham moved the division fence off his land upon the line, and that he did no unnecessary damage. This allegation, properly construed, means that he placed said division fence partially on the lands of Mrs. Owens, and that in doing so he did her some damage, but that the same was necessary. The defendant in that case had no right to place any part of his fence on the lands of Mrs. Owens without her consent, and, if he did so, he was liable to her in damages without any regard whatever to the title to the strip of land now in dispute. In such case it was a violation of her rights of property, and in legal contemplation caused nominal damages, at least.

But, passing this question, we approach the main point upon which the appellant relied upon the appeal, and that is that the plaintiff in this suit is estopped by the record under consideration. In an action to recover damages for a trespass upon lands, and the plea is *liberum tenementum*, the party seeking to avail himself of the estoppel must carry his proof further than simply to introduce the record, and rest. As was said in *Dunckel v. Wiles*, 11 N. Y. 420, per W. F. ALLEN, J.: "The law says that plaintiff in trespass *quare clausum fregit* can recover upon showing title to any part of the close described in the declaration, if the act complained of was done on that part, and the allegation of title is divisible, and the substance of the issue, no matter how comprehensive the claim may be, is as to the title to the precise spot in which the trespass was committed. It follows, then, that the title to the whole close was not actually or presumptively in issue. No legal presumption can exist that the finding of the jury was beyond or more comprehensive than the issue, and certainly no presumption should be indulged in favor of an estoppel which is designed to conclude a party by excluding evidence of the truth. It was for the defendant to show, by evidence, in what part of the close the trespass was committed, and thus apply the issue and judgment to the premises now in controversy." And the learned judge adds: "If, as I think is clear on principle and authority, the judgment is only evidence that the title to some part of the premises in dispute in the trespass suit is in the defendant, it was for him to locate that part by proof, and show that it embraced the premises in dispute in this action." If this reasoning is sound, and I see no reason to doubt it, inasmuch as

no evidence whatever was introduced locating the trespass, we are bound to assume that damages were assessed for the trespass, admitted by the answer, committed in moving the alleged division fence off of plaintiff's land, and that in the doing of that act the plaintiff in that action suffered some damage. This view of the subject disposes of the estoppel.

2. The defense of the statute of limitations must also fail. Mrs. Owens, under whom defendant claims, says she never set up or intended to claim any land not within the calls of her deed; and, further, it very clearly and conclusively appears from the evidence that for a great many years whatever authority she exercised over the premises in dispute was permissive on the part of Mr. Abraham, that she fully recognized his title, and that he agreed with her that he would never disturb her as long as she wished to occupy it. It would be a misnomer and a confusion of all legal distinctions to call such an occupancy adverse, or to suppose that by a continuance for any length of time it might be the source of title by adverse enjoyment. The decree appealed from must therefore be affirmed.

BEAN, J., having presided in the trial of this case in the court below, did not sit here.

Rehearing denied.

#### PEOPLE V. FLYNN.

(*Supreme Court of Utah*. July 1, 1891.)

##### CONVICT—LARCENY—INSTRUCTIONS.

1. A convict who escapes from the penitentiary, and commits a grand larceny, may be convicted and sentenced therefor before he has served out his first sentence.

2. A charge that, "if the defendant was an inmate of the penitentiary at the time of the larceny, serving out a sentence of a competent court, and that he took the horse in question for the purpose of escaping, that would be larceny," is not error, when accompanied by a correct definition of larceny, and an instruction that, in order to convict, the jury "must find beyond reasonable doubt that the defendant feloniously took and rode away the horse in question, with intent to deprive the owner thereof of the ownership and use of the horse, and that there ought to be a union of act and intent in every criminal offense," etc.

3. The affidavits of two jurors, to the effect that they understood the court to have charged that "if the defendant was an inmate of the penitentiary, serving out a sentence, and that he took the horse in question \* \* \* for the purpose of escaping, then he would be guilty, no matter what the intentions were in taking the horse," will not be received to impeach their verdict.

Appeal from district court, third district; T. J. ANDERSON, Justice.

Appeal by John Doe Flynn from a conviction of grand larceny.

H. V. A. Ferguson and Baldwin & Tallock, for appellant. C. S. Varian, U. S. Atty., for the People.

MINER, J. The defendant in this case was indicted in the third district court, October 4, 1890, charged with the crime of grand larceny in stealing a horse of the value of \$50. Several errors are assigned

as having occurred at the trial, but, as there is no testimony embraced in the abstract or record, we cannot review them here. The abstract in this case is so imperfect that it is difficult for the court to consider any of the questions presented, especially as there were no sufficient exceptions taken to the charge of the court as would ordinarily justify the court in making any examination into the record, but, inasmuch as this objection was not urged upon the hearing, we content ourselves with what appears from the charge of the court, and from the motion in arrest of judgment, as showing that, at the time the defendant was indicted on this charge, he was serving out a term of imprisonment previously imposed upon him by the court upon a former conviction, whereon he had been sentenced for two years' imprisonment in the penitentiary, and from which imprisonment he had escaped, and in making his escape took off the horse he is charged with stealing. He was taken with the horse while endeavoring to make his escape, after which he was tried and convicted for the larceny in question, before the expiration of his first term of imprisonment. In reviewing the proceedings, we find no error in the refusal of the court to charge the jury as requested by the defendant's counsel. On motion for a new trial, and also in arrest of judgment, counsel for defendant urged that the court erred in instructing the jury that, "if the defendant was an inmate of the penitentiary at the time of the larceny, serving out a sentence of a competent court, and that he took the horse in question for the purpose of escaping, that would be larceny." This charge, taken by itself, and disconnected from that which followed, might be subject to the objection made; but we find the court charged the jury correctly in defining larceny; and also charged the jury that, before they could convict, "they must find, beyond reasonable doubt, that the defendant feloniously took and rode away the horse in question, with intent to deprive the owner thereof of the ownership and use of the horse; and that there ought to be a union of act and intent in every criminal offense. \* \* \* That the taking must have been with intent to convert the horse to his own use, and take him away from the possession of the owner, and without any intent of returning the same," etc. Taking the charge as given, as a whole, we find no error in the instructions given.

The next question presented by counsel for the defendant is that the defendant had been attainted of felony, and was serving a two-years sentence in the penitentiary, previously imposed by the court, and that such period had not yet expired when this indictment was found and trial had; and that the court had no jurisdiction over the subject-matter, or the person of the defendant. Section 4749, Comp. Laws 1888, provides that "A sentence of imprisonment in the penitentiary for any term less than life suspends all civil rights of the person so sentenced, and forfeits all public offices, and all private trusts, authority, or power during such imprison-



ment." In California, under a similar statute, it is held (*In re Nerac*, 35 Cal. 392) that a creditor whose debtor is imprisoned in the penitentiary for a term less than life may sue and subject the property of such debtor to the satisfaction of his debt during the term of his imprisonment, and that the person so sentenced is not dead in law; that his civil rights in some matters are merely suspended, but that the rights of his creditors to sue and recover judgment against him are not suspended, (*Phelps v. Phelps*, 7 Paige, 150); and that the forfeitures and disabilities imposed by the common law upon persons attainted of felony are not known in this country; that no consequences follow a conviction of felony, except those declared by statute. It was early held in England that persons convicted of felony, and thereby attainted, might plead the same in bar to a subsequent prosecution for any other felony, whether committed before or after the first conviction, for the reason that by his first attainder his possessions were forfeited, his blood corrupted, and he became dead in law; therefore any further conviction or attainder would be fruitless. 4 Bl. Comm. 336; 2 Hale, P. C. 250; 1 Chit. Crim. Law, 464. This same doctrine was carried out in the case of *Crenshaw v. State*, 1 Mart. & Y. 122, wherein it is held that a conviction, judgment, and execution upon one indictment for a felony not capital is a bar to all other indictments for felonies not capital, committed previous to such conviction. This doctrine, however, has seldom been followed in the United States, and the above case, though not expressly overruled, seems to be the only adjudication in this country, recognizing this doctrine. Bishop, in his *Criminal Law*, (volume 1, § 898,) says: "It was a doctrine of the English law, at the time when this country was settled, that, as a general rule, to which there were few exceptions, a person attainted for one felony could not be prosecuted criminally for another. But this doctrine, though recognized in one or two American cases, is not usually followed in this country. In England it was long ago abolished by an act of parliament." In *Hawkins v. State*, 1 Port. (Ala.) 475, the court holds that neither a conviction nor pardon for any particular offense can, in that state, operate as a bar or discharge of any other distinct offense; and it is now generally conceded throughout the United States that the doctrine that a conviction for another distinct felony, committed either before or after the first conviction, or while the criminal is serving out his sentence thereon, does not prevail in this country, and is as repugnant to the established principle of modern criminal law as it is unsupported by reason. *Rex v. Vandercomb*, 1 Lead. Crim. Cas. 528; Archb. Crim. Pr. (Pom. Notes,) 350; *State v. Commissioners*, 2 Murph. 371; *State v. McCarty*, 1 Bay, 334; 1 Bish. Crim. Law, §§ 731-834, 898, 953. Again, referring to Bishop's *Criminal Law*, the writer lays down the rule to be that, "when a prisoner, under an unexpired sentence of imprisonment, is convicted of a second offense, or when there are two or more convictions on

which sentence remains to be pronounced, the judgment may direct that each succeeding period of imprisonment shall commence on the termination of the period next preceding." 1 Bish. Crim. Law, §§ 731, 834; Comp. Laws Utah, 1888, §§ 4746, 4749, 4750; *In re Nerac*, 35 Cal. 393; *People v. Forbes*, 22 Cal. 136; *McQuoid v. People*, 3 Gilman, 76; *Bryan v. Atwater*, 5 Amer. Dec. 136, 142; *Com. v. Goodenough*, Thatcher, Crim. Cas. 132; *Kite v. Com.*, 11 Metc. (Mass.) 581; *Reg. v. Bird*, 2 Eng. Law & Eq. 439; *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. Rep. 1204; *Ker v. People*, 119 U. S. 437, 7 Sup. Ct. Rep. 225. In the case of *People v. Majors*, reported in 65 Cal. 188, 3 Pac. Rep. 597, it is held that a person may be tried and convicted for the crime of murder, notwithstanding he is at the time of the trial and sentence serving out a previous sentence of life imprisonment for another murder, committed at the same time, and imposed by another court. So in the case of *People v. Hong Ah Duck*, 61 Cal. 387, it was held that, on a trial for murder, it was competent for the prosecution to show that at the time of the homicide the defendant was a convict in the penitentiary, serving out a life sentence, and that the homicide was committed while so imprisoned; the object being to give the jury to understand that if they found the defendant guilty of murder in the first degree, with a recommendation to imprisonment for life, and by said verdict fixed the imprisonment for life, the punishment would be no more than the defendant was then undergoing under a former conviction, and that such a verdict would be no punishment whatever, unless the jury made it punishable with death. In this territory there is no statute exempting a convict from punishment for an offense committed by him while serving out his term of imprisonment. Our general penal laws include all persons within their scope. The criminal is protected by the law, and is made amenable to it, while in prison, for any term of imprisonment. The statute of limitations requires prosecution for all felonies, other than for murder, to be commenced within four years after the commission of the offense, (Comp. Laws 1888, § 4830,) and, if not so commenced, the prosecution is barred. It is true an indictment may be found before the expiration of the statutory limit, and the prisoner may be arrested and tried thereon after the expiration of his term of imprisonment; but it is not difficult to discover that this practice, if inaugurated, would not only greatly delay the execution of public justice, but in many instances would prevent a speedy trial that is guaranteed to all accused persons. It would impair the necessary discipline required in public prisons, and, in a measure, become a shield and protection to the criminals therein confined.

On motion for a new trial, counsel for the appellant presented the affidavits of two jurors, who testified, in substance, that they understood the court to have charged the jury that, "if defendant was an inmate of the penitentiary, serving out a sentence, and that he took the horse in

question and rode it away for the purpose of escaping, he would be guilty, no matter what the intentions were in taking the horse," and also stated their conclusions drawn from the charge, etc. It does not appear from the abstract whether the court received and acted upon the affidavits or not, but we are clearly satisfied that the affidavits should not have been received by the court nor considered upon this motion. It is well settled that affidavits of jurors will not be received to impeach or question their verdict, nor to show the grounds upon which it was rendered, nor to show their misunderstanding of fact or law, nor that they misunderstood the charge of the court, or the effect of their verdict, nor their opinions, surmises, and processes of reasoning in arriving at a verdict. 2 Thomp. Trials, § 2618; 1 Bish. Crim. Proc. §§ 874, 1270; Woodward v. Leavitt, 107 Mass. 471; Bridge v. Eggleston, 14 Mass. 245; People v. Columbia C. P., 1 Wend. 297; People v. Doyell, 48 Cal. 85; Wilson v. Berryman, 5 Cal. 46; Dana v. Tucker, 4 Johns. 487; Polhemus v. Helman, 50 Cal. 488; Clark v. Creditors, 57 Cal. 637. We discover no error in the record as presented. The motions for new trial and arrest of judgment were properly denied, and the judgment and conviction are affirmed.

**BLACKBURN, J., concurs.**

(7 Utah, 385)

**ROHWER v. CHADWICK et al.**

(Supreme Court of Utah. July 1, 1891.)

**ACTION ON INJUNCTION BOND—DAMAGES.**

1. In an action upon an injunction bond by a riparian proprietor, who had been enjoined from using the water of a stream adjoining her land for either irrigating or domestic purposes, evidence that the water was needed upon her meadow, that her stock were forced to roam for water, and that she had to carry water half a mile for domestic use, was competent, under a general allegation of damages.

2. Where no estimate of the amount of damages suffered is given in evidence, only nominal damages can be assessed.

Appeal from district court, first district; **JAMES A. MINER, Justice.**

Action upon an injunction bond by A. C. Rohwer against Abraham Chadwick and another. From a verdict and judgment for plaintiff, defendants appeal.

*Kimball & Allison*, for appellants. *Smith & Smith*, for respondent.

**BLACKBURN, J.** This suit is brought on an injunction bond. The injunction was issued and served 23d October, 1889, and dissolved April 6, 1890. Trial before a jury and verdict and judgment for plaintiff for \$208. Defendants moved for a new trial, which was overruled, and they excepted, and appealed both from the judgment and the overruling the motion for a new trial, and assigned many errors, but they may all be condensed into two,—that plaintiff was allowed to give evidence of and recover for special damages, when the complaint only alleged general damages; and that the evidence does not support the verdict. The evidence tended to prove that plaintiff lived on Fisher creek; had a

farm there; used the water of the same for irrigating purposes on her farm, to irrigate her meadow land and her crops and garden and orchard and shade-trees, also for domestic purposes, and to water her stock; that the water was needed on the meadow during the winter season; that she had no other supply of water for her domestic use; that she had to carry water for her home use a half a mile from October 23, 1889, to April 6, 1890, and go to her neighbors to wash her clothes, because of said injunction; that her trees had to do without water, and her stock to roam for water; that she had chickens and cows and horses and young cattle that had been accustomed to get water from Fisher creek during the winter season, and she had also to haul water on account of the prohibition of said injunction,—to all of which testimony the defendants objected, because it only tended to prove special damages. The objection was overruled, and exception taken. No estimate of the amount of damages was made by the testimony in the case. This testimony was given substantially by several witnesses, and all objected to. The contention of the defendants is: (1) This testimony only tends to show special damages; and, (2) as no estimate of the damages was given by any of the witnesses, the judgment should have been for nominal damages only. The court instructed the jury that they could only render a verdict for general damages, and that general damages were those that naturally resulted from the injury. The first inquiry therefore is, is this evidence admissible?

Sutherland on Damages (volume 2, p. 69) says (on injunction bonds) these damages are ascertained and measured on the principle of giving just and adequate compensation for actual loss which is the natural and proximate result of the injunction. The rule is that, "under a general allegation of damages, the plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of." 1 Suth. Dam. p. 763. This rule seems to be the general rule, and in reference to it there is no conflict of authority. Applying this rule, this testimony was proper, for it tended to show that the trouble and labor of getting water by the plaintiff was the natural and necessary consequence of being deprived by the injunction of using the waters of Fisher creek for the purpose of irrigation and domestic use.

We think the court committed no error in allowing this evidence to go to the jury; but the sole contention of the appellants is that on this evidence the plaintiff was entitled to recover only nominal damages, because the compensation for the injury done was not estimated, and no basis in the evidence was given upon which the jury could estimate such compensation, but it was left entirely to guess at such damages as would compensate the plaintiff. The evidence shows the meadow needed irrigating, but that it was injured without it does not appear. The cattle were deprived of water at home, and had to hunt it; that they were

damaged for want of it there is no proof. The trees were without water; that they were injured, or how much, the jury were left wholly in the dark. The proof shows the plaintiff and her family were put to great inconvenience and extra labor to procure water for domestic uses; what would compensate for that inconvenience and extra labor, no basis is furnished the jury by which they could form an estimate. On these questions the evidence is wholly silent, and without such evidence the verdict of the jury should have been for only nominal damages. This suit is not in tort. It is for breach of covenant, and, in such case, the money value of the injury must be proven in order to justify the jury in finding more than nominal damages. They are not left to guess at the damages. We think these views are fully sustained by the authorities. Sutherland on Damages (volume 1, p. 17) says: "The universal and cardinal principle is that the person injured shall receive a compensation commensurate with his loss or injury, and no more." From the evidence in this case it is impossible to tell whether the plaintiff received a verdict for more or less than will compensate her for her loss and injury. The amount of compensation due her should have been shown by the evidence. That was not done. The pecuniary injury, if any, was capable of estimation. The same author says on page 111, same volume: "The cardinal rule in relation to the damages to be compensated, on the breach of a contract, that the plaintiff must establish the quantum of his loss by evidence by which the jury will be able to estimate the extent of his injury, will exclude all such elements of injury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty." We find no authority for the assumption that the jury may estimate damages not proven, and this is true of the amount of damages. We cite, in support of these views, 1 Suth. Dam. p. 125; Griffin v. Colver, 16 N. Y. 494; U. S. v. Smith, 94 U. S. 214. We think that the damages in this case were a mere guess, and have no basis of proof; and the court ought to have instructed the jury that the evidence justified nominal damages only. The judgment ought to be reversed, and a new trial awarded. The judgment is reversed, and the case remanded for a new trial.

ZANE, C. J., and ANDERSON, J., concur.

#### UNITED STATES v. ELLIOT.

(Supreme Court of Utah. July 1, 1891.)

#### PUBLIC LANDS—SCHOOL LANDS—UNLAWFUL FENCING.

1. Organic Act Utah (Act Cong. Sept. 9, 1850) provides "that, when the lands in said territory shall be surveyed under the direction of the government of the United States, \* \* \* sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory," etc. *Held*, that the grant was absolute, and the lands reserved ceased to be public domain, open to settlement, as soon as surveyed.

2. Act Cong. Feb. 25, 1885, § 1, provides that

all inclosures of any public lands in any state or territory of the United States, heretofore or to be hereinafter made \* \* \* by any person not having claim or color of title, etc., are hereby declared unlawful, etc. Section 2 makes it the duty of United States district attorneys to institute suits in the United States territorial district court to have such inclosures destroyed. *Held*, that the act did not apply to land granted by the organic act of Utah for school purposes after survey had been made.

Appeal from district court, first district; J. W. BLACKBURN, Justice.

*Graham F. Putnam and Thurman & King*, for appellant. *C. S. Varian*, U. S. Atty., and *George Sutherland*, for the United States.

ANDERSON, J. This is an action against the defendant for unlawfully inclosing public lands. The lands in question are what are called "school lands," being a part of section 16, in township 15 S., of range 13 E., of the Salt Lake meridian, and have been surveyed by the government. The defendant owns land on two sides of the section, and in fencing his own land constructed his fence diagonally across the section, inclosing about 400 acres of it. He averred in his answer that he inclosed the land in good faith, intending to acquire the title to it as soon as it came into the market. The cause was tried to the court without a jury, and the court found the inclosure unlawful, and judgment was rendered against the defendant, and the fence was ordered to be destroyed unless the defendant should remove it within five days. There was a motion for a new trial, which was overruled, and the defendant brings this appeal from the order overruling this motion and from the judgment. The sole question for our determination is whether sections 16 and 36 in each township, and known as "school lands," after the same have been surveyed by the government, are "public lands," within the meaning of the act of congress of February 25, 1885, (23 St. at Large, 321,) prohibiting the fencing of public lands. By the organic act of Utah territory approved September 9, 1850, it is provided "that, when the lands in said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same." By section 1 of the act of congress approved February 25, 1885, it is provided "that all inclosures of any public lands in any state or territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, \* \* \* to any of which land included within the inclosure the person \* \* \* making or constructing the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith, with a view to entry thereof at the proper land-office under the general land laws of the United States at the time any such inclos-

ure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any of the states or territories of the United States, without claim, color of title, or asserted right, as above specified, as to inclosure, is likewise declared unlawful, and hereby prohibited." Section 2 of this act provides "that it shall be the duty of the district attorney of the United States for the proper district, on affidavit filed with him by any citizen of the United States that section one of this act is being violated, \* \* \* to institute a civil suit in the proper United States district or circuit court or territorial district court, in the name of the United States, and against the parties named or described, who shall be in charge of or controlling the inclosure complained of as defendants. \* \* \* In any case, if the inclosure shall be found unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court."

By the organic act for Utah, sections 16 and 36 in each township were reserved for the purpose of being applied to schools in the territory, and they thereby became segregated from the public domain as soon as surveyed, and were no longer open to settlement under the general statutes regulating this subject. It was held in *Wilcox v. Jackson*, 13 Pet. 498, that, "whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or proclamation or sale would be construed to embrace it, although no reservation were made of it." This rule was afterwards approved by the same court in *University v. Indiana*, 14 How. 268. A reservation of lands for school purposes for the use of the people of a territory or state is, in effect, a grant, and the title passes as soon as the lands are surveyed, and patents for school sections are not necessary and are not issued, (*Gaines v. Nicholson*, 9 How. 361;) and the act reserving them is irrevocable, without the consent of the people of the territory, (*Minnesota v. Bachelder*, 1 Wall. 109.) In *Ferry v. Street*, 4 Utah, 521, 7 Pac. Rep. 712, and 11 Pac. Rep. 571, this court, speaking of school lands, said that, by the decisions of the supreme court of the United States, "the various acts of congress mentioned, reserving portions of the public lands of the United States to the territories or states, vest the title to such lands so reserved in the territories or states when the lands are surveyed, or when they are bounded or ascertained. Until such time, the obligation is executory, and the title remains in the federal government." In the case of *Newhall v. Sanger*, 92 U. S. 761, the supreme court of the United States, by DAVIS, J., said: "The words 'public lands' are habitually used

in our legislation to describe such as are subject to sale or other disposal under general laws." This decision was rendered nearly 10 years before the law under which the present case is brought was passed, and it cannot be presumed that congress was ignorant of it. It is a rule in the construction of statutes that, where the legislative branch of the government has reproduced language in statutory enactments which has been judicially construed, it must be taken as using the words in accordance with the judicial construction previously given them, unless a contrary reason plainly appears from the other language used. The *Abbotsford*, 98 U. S. 440. But in the present instance no language is used in the statute under which this case is brought indicating that the words "public lands" are used in a different sense from the definition of them given in *Newhall v. Sanger*, but, on the contrary, the meaning given seems to have been in the minds of those who drafted the law. Section 3 is as follows: "Sec. 3. That no person, by force, threats, intimidation, or by any fencing or inclosing, or by any other unlawful means, shall prevent or obstruct, or shall combine or confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: provided, this section shall not be held to affect the right or title of persons who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto in good faith." It will be observed that, in the foregoing section, congress used the words, "public lands subject to settlement or entry under the public land laws," and the words "public lands," interchangeably, and in the sense given to them by the court in *Newhall v. Sanger*.

The statute against fencing "public lands" includes by its terms public lands within the states as well as those within the territories, and yet, whatever difference of opinion there may be as to school lands in the territories, it must be conceded that the government does not own the school lands in the states, and congress has no control over them, and can make no law respecting their control or disposition. Our attention has been called to the cases of *Barkley v. U. S.*, 19 Pac. Rep. 37, in the supreme court of Washington Territory, and *U. S. v. Bisel*, Id. 251, in the supreme court of Montana Territory, in each of which it is held that school lands are public lands, within the meaning of the act of congress of February 25, 1885. We cannot assent to the conclusion reached in those cases, in view of the decisions of the supreme court of the United States, above referred to, and the evident purpose of the statute in question. And, in this connection, it is a fact worthy of note that in 1869 the legislature of the territory of Washington passed an act providing for the leasing of

the school lands in that territory, under which a portion of the school lands in Washington Territory were leased to parties who settled on, fenced, and improved them. On the 6th day of August, 1888, more than three years after the fencing law was passed, congress passed an act (25 St. at Large, 358) reciting the fact of these leases having been made, that the lessees had incurred large expense in reducing these lands to cultivation, and that doubts had been raised as to the validity of the leases, and validating the act of the territorial legislature and the leases made under it. The object congress had in view in passing the act in question is well understood. Vast tracts of public lands in the western states and territories had been fenced with barbed wire by wealthy cattle owners, and persons wishing to settle on these lands, and acquire title thereto under the land laws of the United States, were prevented, often by violence, from doing so, and the government was thus prevented from disposing of its lands, and settlers from acquiring homes. But we think the law was not intended to apply to sections 16 and 36 in the several townships, because, as before stated, the school lands in the states were not subject to the control of congress, and those in the territories were reserved to the territories wherein they are situated, and were not open to settlement under the general land laws of the United States, and hence were not included in the term "public lands," as used in the statute. The judgment of the district court is therefore reversed.

ZANE, C. J., and MINER, J., concur.

(7 Utah, 396)

ANDRESON v. OGDEN UNION RAILWAY & DEPOT CO.

(Supreme Court of Utah. July 1, 1891.)

**COSTS—REPORTER'S FEES.**

Under Comp. Laws Utah 1888, p. 213, § 8099, providing that the official reporter shall receive as compensation for taking notes a sum to be fixed by the court, not exceeding \$10 per day, and that where more than one case is tried in a day the court shall apportion the *per diem* among them, an order allowing \$20 as reporter's fees in a case called for trial at 11 o'clock A. M. of one day and submitted to the jury at 1:15 P. M. the following day, will not be disturbed, when it is not shown that there was no evening session, and that a case which was before the court on the morning of the first day occupied any considerable length of time.

Appeal from district court, first district; JAMES A. MINER, Justice.

*Williams & Van Cott* and *Marshall & Royle*, for appellant. *David Evans*, for respondent.

ANDERSON, J. This is an appeal from an order of the court refusing to tax costs on appellant's motion. Upon a verdict of the jury in the above-entitled case, the court gave judgment against the defendant for the amount found by the jury, and costs taxed at \$83.85. In the memorandum of costs filed and verified by plaintiff's attorney was \$20 for reporter's fees.

The defendant moved the court to tax the cost bill, and to disallow all above \$10 taxed as reporter's fees. In support of this motion, appellant filed and presented the affidavit of Waldemar Van Cott, one of appellant's attorneys, to the effect that the case was called for trial a little after 11 o'clock February 27, 1891, and the case was submitted to the jury, and the reporter rendered no services in said case after about 1:15 P. M. of February 28, 1891; that another case occupied the attention of the court all the morning of February 27th until this case was called, and the reporter was engaged in reporting the other case, and that no other case was heard February 28th after this one was concluded. Section 8099, p. 213, Comp. Laws 1888, provides that "the official reporter shall receive as compensation for his services in civil actions and proceedings, for taking notes, a sum to be fixed by the court or a judge thereof, not exceeding ten dollars per day: \* \* \* provided, that when said reporter performs services in taking notes in more than one case on the same day the court or judge thereof shall apportion the *per diem* allowed between the several actions or proceedings in which such notes are taken. \* \* \*". This appeal is based on the claim that there was an abuse of the discretion of the court or judge, as given by the statute, in refusing to tax the costs. But, in order to justify this court in reversing the decision of the lower court, this abuse of discretion must be established in a clear and satisfactory manner, showing not only a violation of the statute, but negating every legal presumption under the law and the ordinary practice of the courts in favor of the action of the court or judge complained of. This has not been done in this case. The usual time for the sessions of the courts of this territory to open each day is at 10 o'clock A. M. Yet it is often later than that; and in this case the time actually occupied by the reporter in the other case before the trial of the present one began may have been so insignificant that the court might justly consider that no part of the reporter's *per diem* should be charged to that case. Again, the usual time for closing each day's session is from 5 to 5:30 P. M., and yet evening sessions are sometimes held, but whether there was in this case or not does not appear, but, if there was, it may be that in two days during which the case was on trial, together with an evening session, the reporter may have been compelled to serve as many hours as is usual in a two-days trial when an evening session is not held. Every presumption must be taken in favor of the proper exercise of the discretion of the court, in the absence of a showing to the contrary; and in this case, upon the showing made, we are unable to say there has been such an abuse of the court, or in fact any abuse, which would justify the interference of this court. Affirmed.

ZANE, C. J., and BLACKBURN, J., concur.











